

had a title to grant such a security, and to whom in the event of a sale under the bond the appellants would have been bound to account, any deduction from their claim in respect of such security must be made in ranking on his estate as the appellants have done in this case, and not on the estate of the company, although the company might have a radical right to the subjects."

This interlocutor was acquiesced in.

Counsel for Royal Bank (Appellants)—Mackay. Agents—Dundas & Wilson, C.S.

Counsel for Trustee (Respondent)—Maclean—A. J. Young. Agents—Fyfe, Miller, Fyfe, & Ireland, S.S.C.

Friday, October 26.*

OUTER HOUSE.

[Lord Young.]

BOYD V. DENNY'S TRUSTEES AND OTHERS.

Succession—Vesting—Destination of a Contingent Fee to "Heirs whomsoever."

By a *mortis causa* trust-deed a testator, after providing a liferent of his moveable estate to A and B, his nephew and niece, and a fee to their issue, directed his trustees, in the event of the death of A and B without issue, to pay and divide the estate to and among "his own lawful heirs whomsoever." A and B both survived the testator, and were his next-of-kin at his death. A predeceased B, but both died without issue. B's residuary legatee then claimed the estate against the testator's next-of-kin as at the date of B's death. *Held* (by Lord Young, Ordinary, (1) that there was no intestacy; (2) that the gift of the fee being contingent, no right to it vested while the contingency remained in suspense, viz., till B's death; and (3) that the estate therefore fell to those who at the date of B's death answered the description of the testator's lawful heirs.

Observations upon the cases of Lord v. Colvin, December 7, 1860, 23 D. 111, and July 15, 1865, 3 Macph. 1083; Calderston v. Fulton, January 23, 1857, 19 D. 293; Blackwood v. Dykes, February 26, 1833, 11 S. 445, and June 11, 1833, 11 S. 699.

By trust-disposition and settlement, dated 26th December 1851, Peter Denny, merchant, Dumbar-ton, disposed his whole estate, heritable and moveable, to trustees for certain purposes. The purposes of the trust were, *inter alia*, as follows—"Second, I direct my said trustees to hold the free residue of my said means and estate in trust for and on behalf of the said Elizabeth Denny and James Denny, both lawful children of my brother David Denny, now deceased, in equal proportions, in liferent for their liferent alimentary use alienarily, and for their respective lawful issue, equally among them, share and share alike, in fee . . . declaring that in the event of either of the said Elizabeth Denny or James Denny de-

ceasing without leaving lawful issue, the survivor of them shall be entitled to his or her liferent alimentary use for liferent alienarily of the whole of said residue: Third, At the first of said terms that shall occur after the death of the said Elizabeth Denny and James Denny respectively, said trustees or trustee shall pay and divide the fee of the portion of the residue that may have been so liferented, to and among the lawful issue, if any, of the deceiver, equally among them, share and share alike; whom failing, the same shall be paid (but subject always to the liferent foresaid) to the lawful children, equally among them, of the survivor; whom failing, to and among my own lawful heirs whomsoever."

Peter Denny, the truster, died on 19th February 1856, leaving both heritable and moveable property of considerable value, and was survived by James Denny and Elizabeth Denny, the two liferenters under the settlement. After the truster's death the free income of the whole estate was paid to the two liferenters during their joint lives, and after James Denny's death, in 1858, to Elizabeth Denny, till her death on 4th January 1872.

In October 1872 Peter Denny's trustees raised a process of multiplepointing and exoneration for the distribution of his estate, and called as defenders his heir-at-law and next-of-kin and their whole representatives, who were the truster's lawful heirs *in mobilibus*. By an interlocutor, dated 18th July 1874, the Lord Ordinary (Young) found the parties therein named entitled to participate in it in the proportions therein mentioned. One finding was—"Finds that, according to said destination, the truster's moveable estate pertains to the representatives of Elizabeth Denny and James Denny, his niece and nephew, the liferenters under said settlement, the said Elizabeth Denny and James Denny having been the truster's next-of-kin, and the lawful heirs *in mobilibus* at the date of his death." A reclaiming note, which was presented by one of the parties, was of consent refused by the Second Division of the Court, and the Lord Ordinary thereafter approved of a scheme of division of the moveable estate among the parties preferred by his first interlocutor, and granted warrant for payment in their favour.

This was an action of reduction of these interlocutors, at the instance of Mrs Isabella Boyd, the cousin and sole residuary legatee of Elizabeth Denny under her trust-disposition and settlement, dated 16th June 1864, against Peter Denny's trustees and the parties found entitled to participate in his estate as above narrated. Neither she nor the trustee and executor of Elizabeth Denny had been called as defenders in the multiplepointing, and no intimation was made to her. She stated that she did not know of the existence of the action until some time after the decrees were pronounced, and that she believed the Court was not made aware that Elizabeth Denny had left a settlement.

She further averred—"The said estate of the said deceased Peter Denny vested, under the said settlement of the said Peter Denny, in the lawful heirs of the testator *ab intestato* as at the date of his death. At that date the said James Denny was his heir in heritage, and the said Miss Elizabeth Denny his heir in moveables. The said James Denny died unmarried and intestate,

* Decided January 19, 1877

as above set forth, and the said Elizabeth Denny was his nearest of kin. The whole moveable estate of the said Peter Denny fell and belonged to the said Elizabeth Denny at the date of her death, and was carried by her said settlement.

It was pleaded *inter alia* for the pursuer—“(2) The interlocutors sought to be reduced having been pronounced in the absence of the pursuer, and in a process to which she was not called as party, she is entitled to decree of reduction of the same in so far as they are prejudicial to her interests. (3) The whole moveable estate left by Mr Peter Denny having, according to the true construction of his settlement, vested at his death in his niece Miss Elizabeth Denny, and having belonged to her at the time of her death, was carried by her trust settlement, and the pursuer has now right thereto as residuary legatee under that settlement. (4) Assuming that the whole of the said moveable estate did not vest in Elizabeth Denny alone at the testator's death, it vested equally in her and her brother James Denny, and upon the death of the said James Denny his share vested in the said Elizabeth Denny as his sole next-of-kin, and the whole was carried by her said trust-disposition and settlement.”

The question raised in the case, and the argument of the parties, appear fully from the opinions delivered by the Lord Ordinary in the case. The first of these was dated 19th January 1876.

“*Note.*—The case is so novel and important that I venture to request the assistance of further argument before coming to any decision upon it. For this purpose, I shall state the questions which the case seems to me to present, and the *prima facie* impressions and difficulties which I at present entertain regarding them.

“The estate, heritable and moveable, of Peter Denny, who died in 1856, was distributed by this Court among the parties found to have right thereto under his trust settlement, as construed by the Court in the process of multiplepointing instituted by his trustees, and referred to in the present record. The purpose of this action is to reduce the interlocutors by which that distribution was effected; to declare that the pursuer is entitled to the whole moveable estate of the trust; and to ordain the trustees to account and pay to her accordingly.

“The pursuer was not called, and did not appear, in the multiplepointing; and if she shall instruct that she was excusably ignorant of it and of her alleged right, I assume that, in some form of action or proceeding (and it is undesirable to raise any question of mere form), she is entitled to an opportunity of trying her right, and, if she shall establish it, to such remedy as may be practicable with reference to what may have already been duly, orderly, and in good faith done in the multiplepointing in pursuance of the interlocutors pronounced therein, and taking care that others are not unduly prejudiced by the tardiness of her appearance, even though that may not be imputable to any blame on her part.

“The trustor's directions to his trustees were to hold the estate for his nephew and niece (James and Elizabeth Denny), and the survivor in life-tenant, and their issue in fee. They both survived the trustor, and thereafter died without issue, James in 1858 and Elizabeth in 1872. The direction of the settlement applicable to that event is,

to pay and divide the estate ‘to and among my own lawful heirs whomsoever.’

“At the trustor's death, James and Elizabeth (the life-tenants) were his next-of-kin. At the death of Elizabeth (the survivor of the two) in 1872, the defenders were (it may be assumed provisionally) the trustor's next-of-kin, and, as such, the persons who then answered the description of his heirs whomsoever, the competition being limited to the personal estate. The pursuer (it may be assumed also provisionally) is Elizabeth Denny's residuary legatee, and as such in right of any personal estate or right which was vested in her at the time of her death and passed by her will.

“The competition is thus between the defenders as Peter Denny's heirs whomsoever *in mobilibus* in 1872, when Elizabeth died, and when the event occurred in which he directed his estate to be paid to his ‘own lawful heirs whomsoever,’ and the pursuer as Elizabeth Denny's residuary legatee, and as such entitled to whatever had vested in her in her lifetime as the heir *ab intestato* of her uncle or brother, or in any other manner. On this record she claims, not on the footing that the uncle died intestate—though that may be hereafter open to her—but that the effect of his settlement was to vest his personal estate in Elizabeth, through whom she claims, or one moiety in her and the other in James, to whom she succeeded *ab intestato* on his death in 1858. The defenders, on the other hand, maintain that there was no intestacy on the part of Peter Denny, and that the property must pass according to the direction of the settlement, which, being contingent, conferred no vested right transmissible by will or *ab intestato* till the contingency happened on Elizabeth's death in 1872.

“The first question to be settled is—Did Peter Denny, with reference to the event that happened, viz., the death of both life-tenants without issue, die testate or intestate with respect to his moveable property?

“The objection to intestacy of course is, that the settlement contains an express direction with reference to that event. Is this well answered by observing that the direction being to pay to his lawful heirs, imports no more than the law would have implied without it, and so leaves the case as one of virtual intestacy? If the term ‘lawful heirs,’ as used in the direction, imports lawful heirs *ab intestato* and none others, the answer is probably good; otherwise I should think it is bad.

“The following points appear to be settled by authority—1st, That a will whereby intestacy will be prevented and the heirs *ab intestato* disappointed in a specified event of uncertain occurrence, does not suspend vesting in the heirs *ab intestato*—*Lord v. Colvin*, December 7, 1860, 23 D. 111, and July 15, 1865, 3 Maeph. 1083. A right by intestacy is thus pointedly distinguished from a right by bequest, or *provisione hominis*, and on grounds which are quite intelligible. Under a contingent bequest no right vests whilst the contingency is uncertain, but a similar uncertainty regarding intestacy, on which the right of the heir *ab intestato* necessarily depends, for its worth at least, does not suspend the vesting of the right or hinder its transmission to his representative, legal or voluntary, subject to the risk of the right proving worthless in the result. 2d, It appears to be settled by the cases of *Maxwell v. Wyllie*,

May 25, 1837, 15 S. 1005, and *Balderston v. Fulton*, Jan. 23, 1857, 19 D. 293, that a bequest or direction in favour of the testator's own heirs, provided there is no contingency, is to be construed in favour of his heirs *ab intestato*, and vests a *morte testatoris*, notwithstanding that the term appointed for payment is the death of some or all of such heirs. By heirs *ab intestato*, I mean, of course, the heirs as ascertained by law at the party's death, that being the only period to which the law of intestate succession looks. It would, however, be an error to suppose that a man has no other lawful heirs. However long a person may be dead, so long as there are kindred of his on the earth, he is represented in right of blood by those who are esteemed his heirs, and who, should occasion arise, may take benefit as such accordingly—not by intestate succession to him, but as answering the description occurring in a destination or bequest. In such cases—and they are familiar in practice—those who answer the description at the time the succession opens or the benefit vests are preferred, and are not excluded by the deeds or wills of those who would have answered it at a former period, and through whom they derive the blood in right of which alone they take.

“The proposition on which Lord Neaves founds his judgment in the case of *Balderston v. Fulton* (19 D. 295, Lord Ordinary's note) is therefore generally true, although the Court held that it did not affect the decision in that case, where the party who successfully claimed the fee undoubtedly answered the description at the time of vesting, and was not, as the Court held, excluded by implied intention. But between that case and the present there is this distinction, that there the direction of the will, although originally contingent, had become absolute by the occurrence of the contingency in the lifetime of the heir who was preferred, whereas here the contingency remained in suspense while the pursuer's author lived. The distinction is material to the question when the succession opened or vested, which may be found the most important question in the case. A fee given by will or other settlement in immediate sequence to a liferent vests a *morte testatoris*, while it is otherwise if given on condition that the liferenter shall die without issue, for although the death of the liferenter is a certainty, his death without issue is a contingency. It had been settled long before the cases of *Maxwell v. Wyllie* and *Balderston v. Fulton* that the gift of a fee vests a *morte testatoris* notwithstanding the existence of an antecedent liferent, which must determine before the gift can be satisfied, and these cases only applied the established rule notwithstanding the circumstance that the liferenter was one of the class to whom the fee was given, which the Court held did not imply an intention to exclude him from the benefit of the gift to which, but for that circumstance, he was clearly entitled.

“But the rule itself is different in the case of a contingent gift. For, as I have observed, a fee given contingently in case the liferenter shall die without issue does not vest a *morte testatoris* if the liferenter survive, or so long as he survives; and, on the assumption of testacy, the question here seems to be, how this rule, and not the other, operates in the circumstances? If it shall be held that the succession did not open, in the sense of the gift vesting, till the death of the liferenter, it

would seem to follow that *they* shall take who *then* answer the description by which the objects of it are specified or designed. It would be already so, in principle, and according to the authorities, in the case of such a contingent gift by a stranger to the heirs of another. If the case of a contingent gift by a man to his own heirs is to be differently dealt with, it must be on some principle which has not yet been argued or stated to me, or on some authority which has not yet been cited. The two cases chiefly relied on by the pursuer (*viz.*, *Maxwell v. Wyllie* and *Balderston v. Fulton*), if I rightly apprehend them, give no direct countenance to such a distinction. These must, I think, have been decided as they were, and on the same grounds, although the testators in both had been strangers to the objects of their bounty. The question in both was whether the liferenter was by implied will excluded from participating in the gift of the fee? and this question, which the Court decided in the negative, would, so far as I can see, have been the same, had the testator been a stranger. Negating this question, the Court simply applied the rule of vesting, established as applicable to every case of a fee given absolutely and unconditionally, to take effect on the termination of a liferent or on the purification of a contingency.

“If the direction immediately in question be construed as contingent, to the effect of operating in favour of those who should answer the description of the giver's heirs when the contingency happened, there is of course no room for the argument of virtual intestacy.

“It is impossible to overlook the circumstance that the language of the interlocutor of 18th July 1874 is favourable to the pursuer's argument, and at variance with that now maintained by the defenders, for the parties thereby preferred are so as ‘the representatives of Elizabeth and James Denny,’ who were ‘the truster's next-of-kin and the lawful heirs in *mobiliis* at the date of his death.’ If this be the true ground of preference, the argument seems irresistible, that it must have been allowed, in ignorance of the fact that Elizabeth Denny, who survived James for fourteen years, and as his representative took whatever was capable of transmission on intestacy from him, left a will which excluded her legal representatives in favour of the pursuer.

“But if the pursuer is to take no prejudice from that interlocutor, neither, on the other hand, can she take any benefit, and it will only be common justice to the defenders to allow them to revise and remodel their pleadings in the competition with reference to the case which she now presents. A reduction of the interlocutor in the multipointing would necessarily have the effect of completely reviving it as a process of distribution and exoneration. Upon what terms it may be revised, and the pleadings in the competition remodelled, is for consideration, and I must invite the attention of the parties to the matter as practically important. For my own part, I have to say that my judgment, which I delivered with the grounds of it fully stated, was only intended to decide that for the purposes of the question of conversion the case was virtually undistinguishable from intestacy. As to the propinquity and ranking of the several claimants, the parties were agreed, except only as regards the relationship of a Mrs Croall, which was argued after I

had delivered judgment on the question of conversion. The circumstances of that dispute have escaped my memory. But I need not further dwell on the terms of the interlocutor of 18th July, from which the pursuer can clearly take no benefit."

The Lord Ordinary, after a further hearing, pronounced an interlocutor finding that the pursuer had no right to Peter Denny's estate, which formed the subject and fund *in medio* of the process of multiplepoinding, repelling the reasons of reduction, and assoilzieing the defenders from the conclusions of the action. His Lordship delivered the following judgment:—

"*Note.*—By this action the pursuer seeks to set aside by reduction certain interlocutors of this Court whereby in a proper administrative suit the estate of Peter Denny, who died in 1856, was distributed among those who established their right thereto to the satisfaction of the Court. The ground of action, generally stated, is that the distribution was made in ignorance of the right of the pursuer, who was not called and did not appear in the suit; and I assume that, if she has a right, she must have a remedy whereby she may be restored, so far as now possible, against the distribution made in her absence. The mode of the remedy, and the terms which ought in the circumstances to be attached to it, need not be considered, unless it shall be held that the facts as averred raised the right itself, or, in other words, that according to these facts, if established, the pursuer is entitled to the estate which she claims. Nor is this question, which is one of proper relevancy, affected by the consideration whether or not the distribution was rightly made, and on proper grounds, as among the parties to the competition. I assume, as I have stated, that the pursuer is entitled to be restored against it, to the effect of having her right allowed if it shall appear that she has any. But the question solely regards the validity of her right, which accordingly she must maintain without prejudice on the one hand, but without benefit on the other, from the terms of the interlocutors making the distribution which she challenges.

"I make this observation because the language of the interlocutors, and particularly that of 18th July 1874, is open to criticism, as I observed when the case was formerly before me, and is not such as it probably would have been had the claim now put forward by the pursuer been in view. The criticism may even extend beyond mere language, and affect the substance of the matter adjudicated as among the parties then before the Court. But with this the pursuer has no concern, unless it shall appear that she has a right, and the question whether she has or not must be decided on this record, and without reference to the language or the soundness, as in a question among other parties, of the interlocutors which she seeks to set aside.

"Now, the foundation of the pursuer's claim is, that she is the residuary legatee of Elizabeth Denny, and I assume that she is so, and entitled to sue directly in that capacity. The claim is for the whole moveable estate of Peter Denny, and the steps of the argument on which the claim is rested are these:—(1) That by virtue of Peter Denny's settlement his moveable estate was on his death immediately vested in James and

Elizabeth Denny, as his heirs *in mobilibus*, in equal moieties; (2) That James dying intestate in 1858, his moiety passed to Elizabeth, his sister; and (3) That the whole being thus vested in Elizabeth, passed to the pursuer as her residuary legatee.

"It is manifest from this statement that the question on which the pursuer's claim turns is, whether or not, under the settlement of Peter Denny, his moveable estate vested on his death in James and Elizabeth, as being then his lawful heirs *in mobilibus*, which they undoubtedly were? This accordingly is the question for decision.

"The claim being to the moveable estate only, my observations will be understood with reference to it, although they would probably apply to the heritage also, were it in dispute.

"The import of Peter Denny's settlement, so far as material, may be stated in a sentence. After providing a liferent to James and Elizabeth Denny (his nephew and niece), and, as it happened, his next-of-kin at his death, and a fee to their issue, he directed his trustees, in the event (which happened) of the death of both without issue, to pay and divide the estate to and among his 'own lawful heirs whomsoever.'

"I. The first observation that occurs, is, that there was no intestacy. The gift being to persons not named, but only described as the giver's 'own lawful heirs whomsoever,' it is made a question, which I shall of course deal with, whether the giver's heirs at the time of his death, or his heirs when the gift vested, are the persons who answer the description; or (if it be thought preferable to put it in that way) it is made a question whether the gift vested *a morte testatoris*, or on the death of both James and Elizabeth without issue. But however both or either of these questions may be answered, the gift was by will, and must be taken under the will as it shall be construed, which necessarily excludes the notion of intestacy. The pursuer accordingly by her pleas rests the right of her author Elizabeth Denny on the will.

"But there being no intestacy, the case of *Lord v. Colvin*, December 7, 1860, 23 D. 111, and July 15, 1865, 3 Macph. 1083, on which the pursuer greatly relied, is clearly inapplicable. The same result may be otherwise reached, and I shall endeavour to consider whether it can or not; but if it can, it must be otherwise,—that is, on other grounds than those that prevailed in *Lord v. Colvin*, which was a case of intestacy. It is almost superfluous to point out that a title by intestacy is of a different legal character from a title by will, the former being by act of law and the latter by act of party. When a person dies, the law forthwith casts his estate on those, who are esteemed his heirs, except in so far as he shall have validly given it to others, and this law, which is familiarly known as the law of intestate succession, operates *a morte*, and then vests in those whom it favours whatever is, immediately or remotely, absolutely or contingently, transferred from the dead to the living by virtue of it. In the case of an absolute gift, there is of course no difficulty, for it vests *a morte testatoris*, and, with respect to the subject of it, excludes from the first the operation of the law of intestate succession. But a contingent gift is another matter, for there, as pointed out by Lord Curriehill in the case of *Lord v. Colvin*, the gift—having no effect so long as the contingency is in suspense, and

none at all, if it shall become impossible—has, while the uncertainty lasts, no other effect on the legal succession, and those entitled under it, than to expose the right, which that law has vested in those persons, to the risk of being defeated, or rather of becoming worthless or less valuable by the withdrawal of all or some of the ancestor's estate from under its operation. The risk of the legal heirs is necessarily commensurate with the chance or respect of the object of the contingent gift, but their legal position is very different. The former have a right from the first, standing on the law itself, which operates in their favour from the death of the ancestor, while the latter has no right at all except in the uncertain event of the contingency on which the gift depends happening. In the one case (that of the donee) the contingency operates as a condition precedent, and in the latter (that of the heirs) as a condition subsequent.

“All this is implied in the judgment in the case of *Lord v. Colvin*, and in the opinions of the Judges it expressed and illustrated. But indeed the law, as I have now stated it, was well settled long before that case, and was not then disputed. The argument of the unsuccessful party in that case was directed exclusively to the question whether there was not room, according to the precedent of *Dick v. Gillies*, July 4, 1828, 6 S. 1065, on which he relied, for holding that there was testacy by necessary or reasonable implication—a question which is of course quite uninteresting with reference to the present case, where there is testacy by expression. In that case the Court negated the contention for implied testacy, and, there being clearly none by expression, judgment on the footing of intestacy necessarily followed, and on that footing could not be, and in fact was not, resisted, although the Judges were at pains to show how strongly it was founded on principle and reason.

“II. Laying aside the doctrine of intestacy, and the authorities illustrative of it, as inapplicable, the material question seems to regard the character and construction of the gift, bequest, or direction (and which for brevity I shall speak of as a gift) on which the pursuer rests the right of her author Elizabeth Denny. And I think I may, without dwelling on the subject, assume—1st, That it is a contingent gift under which no vested or transmissible right or interest could be taken while the contingency was in suspense; and 2d, That the contingency continued in suspense till the death of Elizabeth Denny in 1872. Indeed the death without issue of a person alive at the date of the gift, (or the decease of the giver), is the most common and familiar example or illustration of a condition or contingency suspensive of vesting. Again, the doctrine that the object of such a gift who dies, while the contingency is in suspense, takes nothing by it which will transmit to his heirs or pass by his will, even where it is to him and his assignees, is so trite and familiar that it would be a mere waste of words to argue the matter or refer to authorities. The doctrine indeed is commendably expressed, when it is said that contingency suspends vesting. Taking the character of the gift and the law applicable to it to be as I have now stated, it follows clearly—(1) That James Denny, who died in 1858, took nothing under the gift to pass to his sister Elizabeth, as his next-of-kin; and (2) that Elizabeth,

who survived him till 1872, took nothing under it to pass to the pursuer by her will. That this would have followed equally, although James and Elizabeth had been named as the objects of the gift, is too clear for argument. In that case (of naming), had the gift been to them and their respective heirs in the event of another party (also named) dying without issue, their heirs would no doubt have taken in the event of their failure before vesting; but they would have done so directly and in their own right as conditional institutes under the gift, and not through them or in their right, and that so distinctly that the wills of the institutes would have been ineffectual to exclude them, even though assignees had been mentioned in the words of gift—See *Bell v. Cheape*, May 21, 1845, 7 D. 614; and *Maxwell v. Maxwell*, December 24, 1864, 3 Macph. 318.

“But the pursuer contends that the words by which the objects of the gift are described, viz., ‘my own lawful heirs whomsoever,’ can only refer to heirs *ab intestato*, and that they having failed before vesting, and there being no ulterior destination, the case is thus brought to intestacy; and that so the property must necessarily go according to the law of intestate succession, viz., to those who now lawfully represent the heirs *ab intestato*. This—which, although inconsistent with the pleas stated on record, is probably the pursuer's strongest argument—depends on the proposition that ‘my own lawful heirs whomsoever’ necessarily mean, or, as here used, do on a just construction mean, ‘my own heirs *ab intestato*.’ If that be so, I assent to the argument that the case results in intestacy, and must be dealt with on that footing.

“III. But is this the meaning of the words? Or rather is this the meaning to be attached to them on the purification of the contingency in 1872 after the death of the heirs *ab intestato*? The question resolves into this—With reference to what period are these or similar words, descriptive of a class, occurring in a bequest or destination, to be interpreted? Now, the rule, as it has hitherto been established and acted on is, that such words shall be interpreted and have effect as at the date of vesting, and it is unnecessary to cite any authorities prior to *Maxwell v. Maxwell*, December 24, 1864, 3 Macph. 318; and *Stoddart's Trustees v. Stoddart*, March 5, 1870, 3 Macph. 667. It is true that these cases differed from the present in two respects, viz.—(1) that there the bequests were by strangers in favour of the heirs of a third party; and (2) that the bequests, having regard to their terms, vested *a morte testatoris*. But is either circumstance, or are both circumstances taken together, material to the question? I venture to think not. With respect to the first, no ground was stated, and none occurs to my mind, for regarding it as material. It would indeed be very strange to hold that a bequest by Peter Denny to his lawful heirs in a specified uncertain event, and a precisely similar bequest to them in the same event by a stranger, operated in favour of different persons. No doubt any will may afford grounds for putting a special construction on particular words occurring in it, but the mere question whether a benefit to heirs is conferred by their ancestor or by a stranger is, I think, quite immaterial to the construction. The rule is not confined to legacies or similar gifts, but extends to destinations of heritage under which

the heirs of a person named, whether special as heirs-male, or general as heirs whomsoever, succeed generations after his death. In all such cases the heirs, who answer the description on the opening of the succession, take, without reference to the circumstance, whether the destination was made by their ancestor or by a stranger. Nor do they take in right of their progenitors, through whom they derive their blood and character of heirs, but in their own right by force of the destination. This is familiar law, and in daily observance, without question or dispute so far as I know. With respect to the second suggested ground of distinction, viz., that the date of vesting happened to coincide with that of the testator's death, I can see as little reason for any. The vesting, not the death, is the material circumstance in the application of the rule.

"The pursuer greatly relied on the case of *Balderston v. Fulton*, 19 D. 293. But although some expressions may be picked out of the opinions of the Judges which seem at first sight to favour the view that the heirs are to be looked for as at the death of the testator, I venture to think that it was not intended to cast any doubt on the rule as I have stated it. If vesting was held to have taken place at the testator's death, which there are also some expressions to countenance, there was clearly no infringement of the rule. But although there was in truth, (or as I think), a contingency which suspended vesting till the death of the testator's wife, who survived him for four years, the circumstance was, as it happened, quite immaterial, so that no one was interested to raise, or in fact did raise, the question whether the vesting took place *a morte testatoris*, or only on the subsequent purification of the contingency. For the wife died without exercising the power of disposal conferred on her (which constituted the contingency), and at her death the testator's heir *ab intestato* still survived, and was the party preferred by the judgment as answering the description of the testator's heir, which she undoubtedly did at that time as well as at his death. Accordingly, the plea stated for her, and which the Court sustained, was that the contingency of the destination 'having been purified' by the death of the widow, without making any disposal, the fee vested in her under the destination. I am therefore unable to regard this case as an authority for the pursuer.

"The pursuer also relied on the case of *Blackwood v. Dykes*, February 26, 1833, 11 S. 445, and June 11, 1833, 11 S. 699. I have carefully read the report of this case in both its stages, but have been unable to deduce from it any principle or rule to guide or aid me in the decision of this. In that case the truster, (who had two sons), directed his trustees, to whom he conveyed his whole estate, to denude in favour of his youngest son on his attaining twenty-five; in case of his death before that age to hold for behoof of his issue, and, failing them, for behoof of the issue of his eldest son; and failing issue of either son, then for behoof of 'my nearest heirs and assignees whomsoever.' The truster was survived by both sons. The youngest having died without issue, the eldest, who was unmarried, claimed the estates as the truster's heir whomsoever, either (1) on the footing, that the only contingency, on which the destination to heirs whomsoever depended, was purified by the death of his brother

without issue; or (2) on the footing, that the possibility of his having issue being, (as he assumed), the only risk to which his succession was exposed, he was entitled to possession on caution against that event, on the principle of the cases of *Scheneman v. Wilson's Trustees*, June 25, 1828, 6 S. 1019, and *Shaw v. Shaw*, 6 S. 1149. The first ground depended on the construction of the destination to the issue of the eldest son—whether it was confined to his issue, if he had any, at the time of the death of his brother, so that, if he was then childless, the destination to the truster's heirs whomsoever would have immediate effect. A minority of the Judges were of this opinion, but the majority thought otherwise, on grounds which I should myself have thought irresistible. In the result the Court gave the eldest son the income of the estate on caution 'to repeat the same if any other party should establish right thereto,' varying the interlocutor of the Lord Ordinary 'so as not to find any right on the part of the pursuer.' I quote from the opinion of the Lord Justice-Clerk, for the interlocutor itself is not quoted in the report. I cannot regard this decision as an authority for the present case, or for any other which does not exactly resemble it in its facts; and should such a case hereafter occur, I venture to suggest that it is deserving of reconsideration whether the cases of *Scheneman* and *Shaw*, on which apparently the majority of the Court proceeded, are at all applicable. For my own part, I think they are not; but there being no such question here I need not pursue the subject.

"I have abstained from any observations about the probable intention of the testator—whether it is likely or not that, had the question been put to him, he would have preferred that his niece's legatee should have his estate, rather than his own surviving kindred. Such a topic is generally unprofitable, and in the present case certainly is so. The truster meant that his trustees should hold till the death of both James and Elizabeth; that they should then denude in favour of their issue, if they or either of them had any, and, if not, in favour of his lawful heirs. But the term lawful heirs must be construed according to what shall be held to be the rule of law applicable to the case without the aid of any special indication of intention on the part of the testator, for he has given none, and might not, and not unlikely would not, have been prepared with a ready answer as to his will and intention, had the case been put to him of a competition between Elizabeth's legatee and his own kindred who survived her.

"I must, as the result of a careful consideration of the whole case, hold not only that James and Elizabeth Denny took nothing under the gift, which did not vest till the death of both; but that, there being then in existence persons who answered the description of Peter Denny's 'lawful heirs,' viz., the persons who would confessedly have answered it had the gift been from a stranger, there was no intestacy, and consequently that Elizabeth's will is ineffectual to pass to the pursuer any right or interest in Peter Denny's estate.

"It follows necessarily from the opinion which I have expressed that the pursuer has no claim to the estate which formed the subject of the multiplepointing, and no title or interest to dis-

turb the distribution, which was made of it in that process, by the interlocutors which she seeks to reduce. I so find accordingly, and assoilzie the defenders from the action, with expenses."

The pursuer reclaimed, and after a debate before the Second Division, (to which the cause had been transferred from the First), the cause was appointed to be heard before seven Judges.

A settlement was thereupon adjusted between the parties, and the cause was taken out of Court.

Counsel for Pursuer—Adam—Kinnear. Agents—H. & H. Tod, W.S.

Counsel for Peter Denny's Trustees—M'Laren. Agents—Murray, Beith, & Murray, W.S.

Counsel for James Donald and Others—R. V. Campbell. Agent—A. Kirk Mackie, S.S.C.

Tuesday, October 30.

FIRST DIVISION.

[Sheriff of Lanarkshire.

EADIE v. HUNT.

Sheriff—Process—Taking of Proofs by Short-hand.

Observed (per the Lord President) that where proofs are taken by a short-hand writer under the Sheriff Court Act 1853 (16 and 17 Vic. cap. 80), sec. 10, and the Act 37 and 38 Vic. cap. 64, sec. 4, it is the duty of the Sheriff to dictate the evidence, and that the practice of having it taken down at length, in the form of question and answer, is not sanctioned by the statutes, and is highly inconvenient in its results.

Wednesday, October 31.

FIRST DIVISION.

[Bill Chamber, Lord Shand.

LAING'S PATENT SEWING MACHINE
COMPANY v. NORRIE & SONS.

Process—Suspension and Interdict—Title to be sisted as Defender.

Where the respondent in a note of suspension and interdict for breach of patent had failed to appear, the Court *refused* to allow third parties—who averred that the machine, the breach of patent of which was complained of, was patented by them, and was in fact being worked by the respondent under arrangement with them—to sist themselves as defenders in the case—*diss.* Lord Shand, who held that as they had the direct interest in the question, they had a title to compare and prevent interdict being granted.

This was a note of suspension and interdict brought by Laing's Patent Overhead Hand-stitch Sewing Machine Company, Dundee, against Charles Norrie & Sons, calenderers, Dundee, for using a sewing machine said to be in violation of the letters-patent obtained by James Laing (whose assignees the pursuers were) in 1874 for improvements in Overhead Sewing Machines.

The respondents failed to appear, but appearance was made for Mr Abbot Glenday, of Dundee, who asked permission to sist himself as defender, stating that he was agent for Messrs Detrick and Webster, proprietors of a patent for "improvements in sewing machines for stitching sacks, &c.," under letters-patent dated subsequently to those of Mr Laing. Mr Glenday, (Detrick and Webster were then absent from Scotland) further stated that Messrs Norrie & Sons were working a machine made in terms of said (Detrick and Webster's) letters-patent, and that the machine they worked was in no way an infringement of Laing's patent; and on these grounds craved to be sisted as respondent in the action.

The Lord Ordinary (SHAND) considered that sufficient interest had been shown to entitle Mr Glenday to be sisted, and on 3d August 1877 pronounced an interlocutor sisting Glenday as a respondent and passing the note, but refusing interdict *in hoc statu*.

The complainers reclaimed.

When the case was heard, it was stated for Mr Glenday and his constituents, and they were allowed to put in a minute to the effect, that the machine complained of was made under their direction, and that they had placed it in the hands of Messrs Norrie, under an arrangement that it should be worked by them for the proprietors of the patent in order that it might be exhibited in operation; that it was so wrought for about six months, and was being so wrought when the note was presented. That Messrs Norrie had no interest in the machine, and that they stopped working it when the note of suspension and interdict was served.

Authorities quoted—*Bontine v. Dunlop*, January 15, 1823, 2 S. 115; *Marquis of Douglas v. Earl of Dalhousie*, Nov. 15, 1811, F.C.; *Chanter v. Thoms*, February 20, 1845, 7 D. 465.; *Shand's Practice*, vol. i. 489, and cases-cited therein.

At advising—

LORD PRESIDENT—This is a note of suspension and interdict presented by a limited company, said to be assignees of a patent for an improvement in sewing machines, first sealed in December 1874, and afterwards altered by disclaimer in 1877. It alleges that Messrs Norrie & Sons, who are calenderers in Dundee, have been using a machine in contravention of these letters-patent, and it craves for interdict against them for infringing the patent. Now, Messrs Norrie & Sons, the only respondents called, have not appeared in the Bill Chamber, and but for what has taken place interim interdict would have been granted in terms of the prayer. But another party appeared—a Mr Glenday—and said he was agent in this country for two gentlemen in California, who aver that they have a patent subsequent in date to Laing's, but nevertheless a good patent, and further that the machine used by Norrie & Sons is constructed according to their patent, and that there was no infringement of Laing's. Mr Glenday has asked to be sisted as representative of these two gentlemen in California, and the Lord Ordinary sisted him. When the case came here it appeared that if any one was to be sisted, the parties themselves should be. The statement made now in the compeerer's minute is, that the machine complained of was made under the directions of