to the pursuer if upon a trial he could satisfy a jury that the doctors had given a wrong opinion upon his case. But such a contention would lead to this, that every headmaster would be subjected to claims for damages by boys who had been dismissed in an action in which the question at issue was whether a medical opinion was correct or not. I cannot take that as a relevant ground of action at all, even although there may have been a serious mistake on the part of the medical men. I think it would be a mere farce to send this case to a jury upon the issue for the pursuer whether the doctors of Fettes College had given a wrong medical opinion or not. I think the Headmaster acted according to the contract made with the pursuer. He kept him for a short time, and when he was found to be suffering from a highly infectious disorder he dismissed the boy in the interests of the school, and laid a report of what he had done before the Governors, who approved of his proceedings. There is no ground of action here.

Lord Rutherfurd Clark and Lord Lee concurred.

The Court adhered.

Counsel for the Appellant—Jameson—Orr. Agent—J. D. Macaulay, S.S.C.

Counsel for Respondents—Gloag—Maconochie. Agents—J. & F. Anderson, W.S.

Wednesday, December 12.

FIRST DIVISION.

STEEL'S TRUSTEES *v.* STEEL AND OTHERS.

Succession—Vesting—Fee and Liferent—Clause of Survivorship.

A testator in his trust-disposition and settlement, after providing an annuity to his wife, directed his trustees to hold the fee of the subjects liferented by his wife, and the whole residue of his estate, for behoof of his children in certain proportions. The provisions in favour of his sons he directed should be payable to them as follows—£2000 to each twelve months after his death, and the remainder twelve months after the death of his wife. The provisions to his daughters were to be held for them in liferent, and for their children in fee, and failing any of his daughters without issue, the share of such deceaser was to form part of the residue of his estate. He further provided that "in case of the decease of any of my sons before receiving payment of their provisions, without lawful issue, then the provisions of such deceasers, so far as unpaid, shall fall back into and make part of the residue of my estate divisible as aforesaid." The testator died in 1841, and his wife in 1852. A son died without issue in 1861, and three daughters died thereafter without issue. *Held* that the testamentary trustees of the said son had no claim to any part of the fee of the shares liferented by the three daughters whom he predeceased, in respect that the fee of the shares liferented by the daughters did not vest in the sons till the death of the liferentrices.

Observations per Lord President on *Haldane's Trustees* v. *Murphy*, 9 R. 269.

By his trust-disposition and settlement, dated 25th December 1833, Robert Steel, merchant in Port-Glasgow, conveyed his whole estate, heritable and moveable, to trustees for certain purposes. After providing for payment of his debts, and bequeathing a liferent of his house and furniture, and an annuity of £400 to his wife and some small legacies, the testator in the sixth place appointed his trustees to hold the fee of the subjects liferented by his wife, and the whole residue of his estates, heritable and moveable, for behoof of the lawful children procreated of his body, in the following proportions, and subject, *inter alia*, to the following declarations and provisions:—"For and on account of each of my sons four shares or portions, and for and on account of each of my daughters three shares or portions of said residue—that is to say, for every sum of four pounds sterling set apart for a son, a sum of three pounds sterling shall be set apart for a daughter, . . . and I provide and appoint that the provisions hereby made in favour of my sons shall be payable to them as follows, viz., the sum of two thousand pounds sterling, subject to the eventual deduction after mentioned, to each of my said sons upon the expiry of twelve months after my death, and the remainder upon the expiry of twelve months after their mother's decease . . . and I provide and appoint that the provisions hereby made on account of my daughters shall be held by my said trustees for behoof of my said daughters respectively in liferent for their liferent alimentary use allenarly of the annual proceeds of the capital of the said provisions, . . . and for behoof of the heirs of the bodies of each of my said daughters respectively, but still subject to the said powers and faculties conferred on my trustees afterwritten, in such proportions and under such conditions and restrictions as they, my said daughters respectively, shall appoint by a writing under their hands, which failing, equally among them in fee, and failing any of my said daughters without heirs of her body, then the share of such deceaser or the residue thereof, so far as not disposed of under or by virtue of these presents, shall form part of the residue of my estate . . . and I provide and appoint that in case of the decease of any of my sons before receiving payment of their provisions, leaving heirs of their bodies, the provisions of such deceasers, so far as unpaid to them, shall fall and devolve to the heirs of their bodies respectively in place of their parents, and in case of the decease of any of my sons before receiving payment of their provisions without lawful issue, then the provisions of such deceasers, so far as unpaid, shall fall back into and make part of the residue of my estate divisible as aforesaid."

By a codicil dated 28th July 1840 the testator recalled the provisions made by him to his son Robert in his trust-disposition and settlement, and directed his trustees to hold and pay the same to his other children proportionally according to the other shares or portions of the residue of his estate before destined to them, and under the same conditions. The codicil also contained the following provisions—"Further, I declare that

my son William shall only be entitled to call up one thousand pounds upon the expiry of twelve months after my death, and the remainder shall lie with my trustees until his whole provisions are payable . . . Further, should any of my children interested die upwards of twelve months after the death of my wife without leaving lawful issue, and any part of the shares of my estates before destined to them and their issue in that event devolve upon my sons, I direct my trustees to pay the same to my two sons interested as soon after the death of the persons so dying as may be convenient."

After the testator's death the children of the testator other than his son Robert, by deed of declaration and renunciation renounced the provisions to which they became entitled in respect of the recal and direction contained in the codicil, and gave full power to the testator's trustees to carry the whole directions of the trust-disposition and settlement, as regarded the provisions of his son Robert Steel, into full and complete effect.

The testator died in 1841, and his wife in 1852. They were survived by the following children—(1) James Steel, (2) Robert Steel, (3) William Steel, (4) Mrs Elizabeth Steel or Johnstone, (5) Mrs Jane Steel or Willan, (6) Catherine Steel, (7) Margaret Steel.

William Steel died unmarried on 27th April 1861, leaving a trust-disposition and settlement by which he directed the residue of his estate to be divided equally among his sisters and their respective heirs, executors, and representatives whomsoever.

Mrs Johnstone died without issue on 23rd October 1875.

Mrs Willan died on 8th June 1878 survived by her husband and several children. She left a settlement under which her husband was sole executor, and her children were entitled to equal shares of her estate.

Catherine Steel died unmarried on 24th March 1885, and Margaret Steel died unmarried on 12th April 1884. On Mrs Johnstone's death in 1875 the share which had been retained for her was dealt with by her father's testamentary trustees upon the assumption that no part thereof had vested in the deceased William Steel, and was therefore divided by them in the following manner, viz., 4-17ths each thereof were paid to her two surviving brothers, who granted a formal discharge therefor, dated 1st and 3rd June, and registered in the Books of Council and Session 7th June 1876, and 3-17ths each thereof were added to the shares of her three surviving sisters. On Miss Catherine Steel's death in 1883 a partial division of her share was made on the same assumption, but no discharges were granted.

A question having arisen with regard to the right to the fee of the shares of the residue which were liferented by Mrs Johnstone and Mrs Catherine and Margaret Steel, which with accrued income amounted to upwards of £18,000, including what had already been paid, a Special Case was presented for the judgment of the Court. The first parties to the case were the testamentary trustees of Robert Steel; the second parties were his surviving children James Steel and Robert Steel; and the third parties were the husband and children of the deceased Mrs Willan, and the testamentary trustees of William Steel.

It was contended by the second parties that the division of the fee of Mrs Johnstone's share was rightly made, and that the said William Steel had not a vested right in any part of the fee of the shares of the testator's estate liferented by his said three sisters; that no part of the fee of said shares vested until the death of the liferentrices, and that accordingly the capital set free by their death should be divided among themselves and the family of the said Mrs Willan in the following proportions:— (*a*) James Steel, 4-11ths; (*b*) Robert Steel, 4-11ths; (*c*) The Rev. Robert Willan, the Rev. William Willan junior, and Miss Willan, 3-11ths equally between them.

It was contended by the third parties that the fee of the said shares liferented by the testator's said three daughters vested *a morte testatoris*, or at all events on the expiration of twelve months after the date of the death of the testator's widow, subject to defeasance in the event of the liferentrices leaving issue; that therefore the said William Steel at the date of his death had a vested interest in a part of the fee of the shares of the testator's estate liferented by his said three daughters, subject to defeasance in the event of the said liferentrices leaving issue, which event never occurred; and that the capital of said shares should be divided as follows—(*a*) James Steel, 4-15ths; (*b*) Robert Steel, 4-15ths; (*c*) the testamentary trustees of William Steel, 4-15ths; (*d*) Mrs Willan's family equally between them, 3-15ths.

The question submitted to the Court was—"Did a part of the fee of the shares of the testator's estate liferented by Mrs Johnstone, Miss Catherine Steel, and Miss Margaret Steel vest in the said William Steel at the testator's death, or otherwise at a period prior to the death of the said William Steel, subject to defeasance in the event of the said liferentrices leaving issue, or was vesting postponed till the death of the said liferentrices respectively?"

Argued for the second parties—1. There was no vesting of the fee of the shares liferented by the daughters in the sons till the death of the liferentrices without issue. That was clearly the result of the clause, which provided that the share of a son who died without issue before receiving payment of his provisions should, so far as unpaid, fall back into residue. That was equivalent to a clause of survivorship, and provided for a destination-over of the fee of the shares liferented to the residuary legatees who might survive any of the liferentrices dying without issue. "Provisions" in that clause must mean all provisions to sons, not merely the original or primary provisions to which they were entitled. Otherwise, on the argument of the other side, there would be nothing to postpone vesting as regarded the eventual provisions till twelve months after the testator's death. This would lead to the strange result that if a son died after the testator, but before the periods of payment specified in the deed, there would be no vesting in him of any part of the primary provisions, but there would be vesting of the eventual provisions, though these might not be payable till long after the periods of payment mentioned in the deed. The natural view was, that the fee of the shares liferented did not vest in the sons till the death of the liferentrices

without issue. 2. It might further be maintained, apart from the clause of survivorship, that the effect of a destination to A in liferent, and his issue in fee, whom failing to B in fee, was to suspend vesting in B till the death of A without issue. If that were sound there was no vesting in the sons of the shares in question till the death of the liferentrices—*Macalpine* v. *Studholme, &c.*, March 20, 1883, 10 R. 837; *Murray* v. *Gregory's Trustees*, January 21, 1887, 14 R. 368; *Haldane's Trustees* v. *Murphy*, December 15, 1881, 9 R. 269, *per* Lord President, p. 278.

Argued for the third parties—1. The clause relied on by the second parties, rightly read, did not suspend vesting as to the shares liferented by the daughters. The question really turned on the meaning of "provisions" in that clause. It meant original provisions. That reading was supported by the manner in which the word was used in the previous clauses of the deed. "Before receiving payment" meant before the terms of payment mentioned in the deed. The testator contemplated that those of his sons who survived the periods of payment should have a vested right in the shares destined to them. If the clause of the deed referred to were read in the light of the codicil that view was strengthened. 2. The second proposition of the second parties was unsound. It was not necessary to say anything against the decision in *Bell* v. *Cheape*, 7 D. 614, or enter into the difficult questions in the case of *Haldane's Trustees*. There was nothing here at all analogous to *Bell* v. *Cheape*. There was no gift over to anyone by name. The effect of the provision here was no more than to bar intestacy. There was no question of invoking or calling in anyone at all. If a daughter died without issue her share was to form part of residue. The gift to a daughter was a contingent gift. The only thing to lift her share out of residue was her having children. That view is strengthened by the clause of giving, which contained a universal gift to children as a class in manner thereafter mentioned. In *Bell* v. *Cheape* there was a fresh gift *nominatim*. In *Taylor* v. *Gilbert* the gift was to certain members of a family, certain of whom failing, to certain persons who had got the original provisions. That was *a fortiori* of the present case, because here there was no gift *nominatim*, but the shares of the daughters were left in the residue, and therefore vested in the sons subject to defeasance—*Taylor* v. *Gilbert's Trustees*, November 3, 1887, 5 R. 49, and July 12, 1878 (H. of L.), 217; *Chalmer's Trustees*, March 16, 1882, 9 R. 743; *Snell's Trustees* v. *Morrison, &c.*, March 20, 1877, 4 R. 709.

At advising—

Lord President—The settlement of the late Robert Steel of Port-Glasgow disposed of the residue of his estate as follows:—(1) The whole fee of residue, including subjects liferented by his widow, is to be held by his trustees for behoof of his children in the proportions of four shares to each son and three shares to each daughter—that is to say, for every sum of £4 set apart for a son, a sum of £3 shall be set apart for a daughter. (2) The sons' provisions are to be payable to each of them to the extent of £2000 twelve months after the testator's death, and the remainder twelve months after the widow's death. (3) The daughters' shares are to be held by the trustees for the liferent alimentary use allenarly of the daughters, and for behoof of the heirs of the bodies of each of them respectively in fee, and failing any daughter without heirs of her body, the share of such deceaser shall form part of the residue of the testator's estate.

There were three sons and four daughters, all of whom seem to have been of full age at the date of the settlement in 1833. But one of the sons having incurred his father's displeasure is cut off from his share of the succession by a codicil in 1841, which also contains this provision—"Should any of my children interested die upwards of twelve months after the death of my wife without leaving lawful issue, and any part of the shares of my estates before destined to them and their issue in that event devolve upon my sons, I direct my trustees to pay the same to my two sons interested as soon after the death of the persons so dying as may be convenient." It is obvious that "children" at the outset of this clause must mean "daughters," and that the phrase "two sons interested" is explained by the exclusion of one of the three sons by a previous clause of the same codicil.

The testator died in 1841 and the widow in 1852. The son William died in 1861 leaving no issue, and was survived by all his brothers and sisters. The other two sons still survive. The daughters are all dead, and only one of them, Jane (Mrs Willan), left issue.

In these circumstances, and but for the effect of a clause in the settlement to which I have not yet adverted, I should have little difficulty in holding that though William Steel died before any of his sisters, his testamentary disponees would be entitled, along with his surviving brothers or brother, to a share of the part of the residue set free by the death of those of his sisters who died without issue, on the ground that the whole residue vested in the sons on the death of the testator, or at all events twelve months after the death of the widow, subject only to defeasance in so far as the daughters left issue.

I think the result of all the cases on this subject may be summarised thus—Where a fund is settled on daughters of the testator for their liferent use allenarly, and their children, if any, in fee, whom failing to another person or other persons in absolute property, with no further destination, the vesting of the fee in the last named person or persons will depend on these considerations, whether the person so called to the succession, if only one, was a known and existing individual at the death of the testator, or, if more than one, whether the persons so called were all of them known and existing at that date, or if the destination is to a class called by description, whether the individuals who constitute the class are ascertained at that date, or whether he or they cannot be known or ascertained till the death of the liferenters or the occurrence of some other event. If the person or persons are not known, or the individuals who are to constitute the class are not ascertained at that date, the fee will not vest until the occurrence of the event, which will determine who are the persons called, or the individuals composing the class are ascertained. But when the person or persons called are known, or the individuals composing the class are ascertained at the death of the tes-

tator, then the fee will vest in them *a morte testatoris*, subject to defeasance in whole or in part in the event of the liferenters or any of them leaving issue.

There was a great division of opinion in the case of *Haldane's Trustees*, 9 R. 269, as to the construction of the settlement. But it appears to me that all the Judges, or almost all of them, assumed the soundness of the rule I have endeavoured to formulate. This is clearly shown in the opinion of Lord Moncreiff (Justice-Clerk), who was one of the majority. His Lordship puts the question thus—"Does the testatrix mean by 'my own nearest heirs,' those who are or may be 'my own nearest heirs' at her death, or those whom the trustees shall find to be 'my own nearest heirs in moveables,' when the obligation comes to be fulfilled. If the first of these interpretations is the sound one, it would raise a very strong probably a conclusive, presumption of the testator's intention that vesting was to take place at her own death, and if, on the other hand, the persons to whom the trustees are to pay the residue are those whom they shall find to be at the time of payment the nearest heirs of the testatrix, in moveables, it is equally clear that the right cannot vest till the period of payment comes."

I am anxious to make it clear that the cause of the dispute in *Haldane's Trustees*, and of the difference of opinion among the Judges, was not any doubt as to the legal principle applicable to such cases, but turned entirely on the words of the particular deed which fell to be construed, because I think there was in the arguments in this case some evidence that the import and effect of that previous case has not been thoroughly appreciated or understood.

In connection with the report of the same case I am desirous of correcting what appears to be a serious blunder in a paragraph of my own opinion, on p. 278. My words as reported are—"It cannot be disputed that if the residue of an estate is destined to A in liferent and his issue in fee, and failing his having issue, then on the expiry of the liferent to B no right vests in B till the death of the liferenter without issue. This was authoritatively settled in the case of *Bell* v. *Cheape*." Now, this as it stands is not sound law, and nothing of this kind was settled in *Bell* v. *Cheape*. But the blunder consists in this, that after the words "on the expiry of the liferent to B" there ought to be added, "and his heirs, executors, and assignees," which makes the proposition good law, and truly represents the judgment in *Bell* v. *Cheape*, for that judgment proceeded on the ground that B's heirs and executors were called as conditional institutes after B, and were entitled to succeed in place of B if he predeceased the death of the liferenter and the term of payment. I am not at all prepared to ascribe the occurrence of this blunder to the reporters, for my opinion was in writing, and I do not doubt that the omission of the words occurred in the transcription of the manuscript.

The provisions of Mr Steel's deed of settlement, so far as I have hitherto considered them, point to one conclusion only, that the sons took a vested interest in the whole residue of the estate *a morte testatoris*, subject only to defeasance in the event of the daughters leaving issue. But there is a clause in a later part of the deed which throws a new light altogether on the intentions of the testator. It provides and appoints "that in case of the decease of any of my sons before receiving payment of their provisions leaving heirs of their bodies, the provisions of such deceasers, so far as unpaid to them, shall fall and devolve to the heirs of their bodies respectively in place of their parents, and in case of the decease of any of my sons before receiving payment of their provisions without lawful issue, then the provisions of such deceasers, so far as unpaid, shall fall back into and make part of the residue of my estate, divisible as aforesaid."

Both of the branches of this clause seem to me to be inconsistent with any vesting in the sons prior to the terms of payment of the different parts of their provisions, *i.e.*, of the residue. I do not of course construe the words "before receiving payment" as referring to the fact of payment being made, but only to the time when payment ought to be made, or, in other words, to the term or terms of payment specified in the deed.

But the plain meaning of the clause is, that if a son dies before the arrival of the term of payment of any part of his provision, that part falls to his issue, if he any has, as conditional institutes, and if he has no issue, then it falls back into the general residue of the testator's estate, and belongs to the residuary legatees who survive the term of payment.

The result, in my opinion, is that William Steel's testamentary disponees are entitled to take all that became payable to him twelve months after the testator's death, and all that became payable to him twelve months after the death of his mother, because he survived these terms, but they have no right or interest in any part of the residue, which became payable to the sons only after the said William Steel's death.

LORD MURE concurred.

LORD SHAND—It seems to me that this case is not attended with any serious difficulty.

Several clauses of the deed of settlement and of the codicil have been referred to in the argument. So far as regards those contained in the codicil, they do not seem to me to have any bearing upon the question we have to determine. The question, I think, depends entirely upon the terms of the settlement itself. The provisions of that deed are as follows—In the first place, the testator provides a liferent of a part of his estate to his widow if she should survive him, and the fee of the subjects so liferented, and "the whole rest, residue, and remainder" of his estates he appointed his trustees to hold for behoof of his children in certain proportions, which have been already mentioned by your Lordship. There is therefore a provision of a liferent of a part of the estate, and a clear destination of the fee to the children in certain proportions.

In regard to the shares of the residue destined to daughters, it is provided that they shall have a mere liferent of them, but that in the event of their leaving children, the children shall take the fee of the shares liferented by their mothers respectively, and failing children, then that the share of each daughter shall fall back into residue—that is, shall belong to the sons, who accordingly have right in that case to an enlarged amount of the fee of the testator's estate. The only other provision which need be noticed is