

Friday, November 29.

FIRST DIVISION.

BOYD AND OTHERS (CUNNINGHAM'S TRUSTEES) v. CUNNINGHAM AND OTHERS.

Succession—Vesting—Liferent and Fee—“Failing Issue.”

A testator directed his trustees to make a division of his whole remaining means and estate among his children *nominatim*, share and share alike, and provided that in the event of the death of any of his said children without leaving lawful issue, “the deceiver’s share . . . shall be equally divided among my surviving children, and applied and secured as immediately to be provided for.” After making certain provisions as to his sons’ shares, he then directed and appointed his trustees “to lend out on unquestionable real security the share coming to each of my said daughters, and to take the bonds and securities to be granted therefor in such a way as that the interest or annual rent of such share shall be paid to them during all the days of their lifetime, and the principal sum or share itself after their death to be paid or divided equally, and share alike, among the deceiver’s lawful issue, and failing issue equally among my own children surviving at the time.”

One of the testator’s daughters married after his death and had eleven children, five of whom predeceased her leaving no issue.

Held (following *Carleton v. Thomson*, 3 Macph. 514, 5 Macph. (H. of L.) 151) that a share of the provision liferented by this daughter vested in each of her children at its birth, the words “failing issue” being equivalent to “failing the deceiver having had issue.”

Succession—Heritable and Moveable—Direction to Lend out on Real Security—Conversion.

A testator, after providing that his trustees should make a general division of the residue of his means and estate, heritable and moveable, among his children, directed his trustees “to lend out on unquestionable real security the share coming to each of my said daughters, and to take the bonds and securities to be granted therefor in such a way as that the interest or annual rent of such share shall be paid to them during all the days of their lifetime, and the principal sum or share itself after their death to be paid or divided equally, and share alike, among the deceiver’s lawful issue.”

Held that the right to a share of their grandfather’s estate vested in the children of a daughter who had predeceased her and died intestate, passed to their heirs in heritage or in moveables accord-

ing to the law of intestate succession at the date of the death of each of such children respectively, and consequently that in the case of these children who had died intestate prior to 31st December 1868, the date at which the Lands Clauses Consolidation (Scotland) Act 1868 came into operation, the right passed to the heirs in heritage, but that in the case of a child who had died intestate subsequent to 31st December 1868, the right passed, in terms of sec. 117 of the said Act, to the heirs in moveables.

Succession—Testament—Appropriate and Reprobate.

A testator, after directing his trustees to give effect to the division and apportionment of his estate in manner expressed by him, further directed and declared “that the portion or portions to which my children or any of them may have right of the estate of their grandfather, the deceased John Denniston, shall be imputed and reckoned throughout the whole of the foresaid divisions and apportionments, so that no one shall be preferred before another.”

Held that the testator’s children were not entitled to the portion of the estate of their grandfather to which they had right, in addition to their provisions under the testator’s settlement, but only to equal shares, one with another, of the provisions in their favour under both settlements taken together and treated as one fund.

Mr John Denniston died on 27th April 1833 leaving a trust-disposition and settlement dated 9th March 1829. By this settlement he conveyed his whole estate, heritable and moveable, to trustees for these among other purposes—First, for payment of debts, sickbed and funeral expenses, and the expenses of the trust; second, for conveyance of a certain landed estate to his eldest son, in consideration of which £700 was to be deducted from his share of the residue of the testator’s estate. In the third place, he directed that his trustees should, “as soon as practicable, make a division of my whole remaining means and estate, heritable and moveable, equally, and share and share alike, among the said John Denniston, my eldest son (deducting always, however, from his share the said sum of £700 sterling), James Denniston, Hugh Denniston, Archibald Denniston, and Thomas Denniston, my other sons; Janet Denniston, Elizabeth Denniston, and Jean Denniston, my daughters, but in the event of the death of any of my said children without leaving lawful issue, it is hereby provided and declared that the deceiver’s share of my said means and estate shall be equally divided among my surviving children, and applied and secured as immediately to be provided for: And it is hereby further provided and declared that the share coming to either of my said sons shall not be paid to them until it appears to a majority of my said trustees to be pru-

dent and advisable to pay the same to enable them to enter into business, or until they arrive at majority, and until either of these occur, the share coming to each son shall be laid out in undoubted personal or real security, and the interest or annual rent arising therefrom applied to their maintenance, education, and clothing: And it is also hereby expressly provided and declared, and I direct and appoint my said trustees to lend out on unquestionable real security the share coming to each of my said daughters, and to take the bonds or securities to be granted therefor in such a way as that the interest or annual rent of such share shall be paid to them during all the days of their lifetime, and the principal sum or share itself after their death to be paid or divided equally, and share alike, among the deceiver's lawful issue, and failing issue equally among my own children surviving at the time; and I expressly appoint and direct that the security shall be taken in terms so as to exclude the *jus mariti* and right of administration of any husband or husbands they may marry, and that the liferent of my said daughters shall not be affectable by their debts or deeds, nor the same liable to any claim of their husbands, and that the receipts and discharges granted by my daughters alone shall be perfectly sufficient to the receivers: And I hereby further direct that if any of my children express a willingness or desire to have part of my heritage (saving always the lands of Killochries, which are to be conveyed as before provided for), my said trustees shall cause the same to be valued by two competent judges, one to be appointed by themselves, and one appointed on the other side, and the value thereof shall form a charge against the share of such child, and be deducted therefrom, and if the value exceeds the said share it shall be paid so soon as it is ascertained, and the conveyance to such heritage, if to any of my daughters, shall be taken in liferent and fee, and exclusive of the husband's *jus mariti*, as before specially appointed and directed."

One of the testator's daughters, Janet, married the Rev. Dr Cunningham in 1834. The contract of marriage entered into between them contained a declaration that if there were more than one child of the marriage it should be in Dr Cunningham's power, and failing him in the power of his widow, to apportion among the children the provisions in their favour therein contained.

Under a deed of trust dated 3rd, 5th, and 6th January 1859, a sum of £6500 was placed in the hands of certain trustees for behoof of Dr and Mrs Cunningham in liferent, and their children in fee, "in such shares and under such conditions and interests as shall be appointed by the said William Cunningham in any writings under his hand, and failing such appointment, for the said children in equal shares."

Dr Cunningham died on 14th December 1861 leaving a trust disposition and settlement dated 13th December 1861, by which he disposed to certain trustees his whole means and estate. The trust purposes were

—"First, For payment of debts; second, for payment of the whole annual proceeds of the estate to Mrs Janet Denniston or Cunningham, his widow, now deceased. The third purpose of the trust is as follows —'Third, After the death of the said Janet Denniston or Cunningham, in case she shall survive me, or after my death in case I shall survive her, and in exercise of the powers and faculties given to me, and contained in contract of marriage betwixt the said Janet Denniston or Cunningham and me, dated the 14th day of July 1834, and in deed of trust by the said Thomas Guthrie and others in favour of the said Thomas Guthrie and others, for behoof of me and my wife and children, dated the 3rd, 5th, and 6th days of January 1859, and of all rights competent to me in any other way, I hereby direct and appoint my said trustees, and the trustees in whom the charge of any other estate or estates to which my children may have right, to co-operate with my said trustees, and to give effect to the apportionment or division of my said estate, and such other estate, in manner hereinafter expressed, *videlicet*—In the first place, for payment of the sum of £1000 at the first term of Whitsunday or Martinmas after the death of the survivor of us to each of my said children who shall then be married, with the interest thereof from the date of the death of the said survivor, and thereafter at the term of Whitsunday and Martinmas, payable half-yearly, during non-payment: In the second place, for setting apart at the said term, with the like interest, a like sum of £1000 sterling for each of my other children then surviving; and in the third place, for setting apart and paying the annual proceeds of the residue or residues for the liferent use of my unmarried daughters or daughter; and in the event of all my surviving daughters being married, the whole residue or residues shall be divisible betwixt my surviving children: Declaring that the issue of any of my children who shall have married shall have the same right therein, or in any provisions herein contained which may lapse, as his or her parent would have had if he or she had survived; and it is hereby expressly provided and declared that the portion or portions to which my children or any of them may have right of the estate of their grandfather the deceased John Denniston, merchant, Greenock, shall be imputed and reckoned throughout the whole of the foresaid divisions or apportionments, so that no one shall be preferred before another, except as before provided. Providing also that no principal sum payable or divisible in virtue hereof shall vest or be payable in virtue hereof to any of my sons until he arrive at the age of twenty-five years complete, or if a daughter, unless she has arrived at that age, or been married, whichever of these events shall first happen."

Mrs Cunningham died on 2nd March 1888. Dr and Mrs Cunningham had eleven children, viz. (1) Janet, born on the 6th June 1835, married on 11th June 1856 George Carphin, banker, Dunkeld, who predeceased

her. (2) Helen, born on 14th April 1837, married on 14th October 1862 Robert Mackenzie, merchant, Dundee, was predeceased by her husband, and died on 15th November 1865 leaving two children. (3) William, born 15th September 1839, died 16th October 1843. (4) Jane Fairrie, born 4th May 1841. (5) John Denniston, born 11th December 1842, died unmarried and intestate on 20th August 1871. (6) Charles Gordon, born 9th July 1845. (7) Andrew Blackadder, born 1st August 1846, died 14th September 1852. (8) William Robertson, born 9th September 1848, died 18th June 1849. (9) Archibald, born 26th December 1849. (10) Elizabeth, born 3rd April 1851, died 6th September 1852. (11) And Mary Anne, born 7th January 1853.

Certain questions having arisen among the beneficiaries under the deeds above mentioned, this case was presented for the purpose of obtaining the opinion of the Court, *inter alia*, upon the following questions—"Did right to a share of the fee of their grandfather the said John Denniston's estate vest in the children of Mrs Cunningham, who predeceased her; and if so, did the same pass to their heirs in heritage or in moveables? If not, is the seventh party entitled to £1000 under it, in addition to the amount payable to him out of his grandfather the said John Denniston's estate?"

The net amounts of the various funds to which the case had reference were admitted approximately to be—"1. Marriage-contract fund, £1560; 2. deed of trust fund, £6500; 3. Dr Cunningham's own estate, £500; 4. the Denniston fund, £3150."

The following were the parties to the case—1. The testamentary trustees of Dr Cunningham; 2. the testamentary trustees of Mr Denniston; 3. the marriage-contract trustees of Dr and Mrs Cunningham; 4. the trustees under the deed of trust; 5. (a) Mrs Janet Cunningham or Carphin, (b) the children of the deceased Mrs Helen Cunningham or Mackenzie, (c) the marriage-contract trustees of Mr and Mrs Mackenzie; 6. Jane Fairrie Cunningham and Mary Anne Cunningham; 7. Charles Gordon Cunningham; 8. Archibald Cunningham; 9. the executors of Mrs Janet Denniston or Cunningham.

In regard to the first of these questions, the fifth parties maintained that Mrs Cunningham had only a *lifereit* in the capital sum which John Denniston's trustees were directed to invest for her and her issue; that each of her children acquired a vested right at birth to a share of said capital sum, and that the shares of children who died before Mrs Cunningham intestate and without issue fell to be equally divided among their next-of-kin, *viz.*, the brothers and sisters who were in existence at their deaths, the issue of Mrs Mackenzie coming in right of her for her share. The sixth parties maintained that the share of Mr Denniston's estate *lifereit*ed by his daughter Mrs Cunningham did not vest until her death, and that no share of the said estate vested in the predeceasing children of Mrs Cunningham. They admitted that the issue of Mrs Mackenzie took their mother's share in their

own right under the *conditio si sine liberis*. On the other hand, the seventh party maintained that a share of the said estate vested in Mrs Cunningham's deceased children, and that the same being heritable *quoad* succession, the result was that the seventh party was entitled to three-elevenths of the share of the Denniston estate which was *lifereit*ed by Mrs Cunningham. The ninth parties also maintained that if a share of the said estate vested in John Denniston Cunningham, then by virtue of the Moveable Succession Act 1855 one-third thereof passed to his mother, the said Mrs Cunningham, and was now payable to them as her executors.

In regard to the third question, the seventh party also maintained that he was entitled to his share of his grandfather's estate, and in addition thereto, to the sum of £1000 bequeathed to him under the second purpose of his father's trust-disposition and settlement. He further maintained that, in any event, the clause of his father's settlement quoted in this article did not apply to the shares of the Denniston estate to which he was entitled as heir of deceased children. On the other hand, the fifth and sixth parties maintained that the seventh party's right under his father's settlement was restricted to payment of such a sum out of his father's estate, and the estates over which he had a power of apportionment, as might be necessary, along with the share of his grandfather's estate to which he was entitled, to secure him in payment of a sum of £1000, under deduction of the advances he had already received, and the fifth parties maintained that a share of Dr Cunningham's estate equal to what the seventh party was entitled to fell to each of (1) Mrs Carphin, (2) the other parties of the fifth part, and in any event, that the said clause above quoted in this article applied only to the portion or portions to which Mrs Cunningham's children might have right directly and immediately under John Denniston's settlement, and not to what they might succeed to as next-of-kin of children dying intestate and without issue.

Argued for the sixth, eighth, and ninth parties—1. *On question of vesting*—There was no vesting of the fee of the share destined by Mr Denniston to Mrs Cunningham in *lifereit* and her children in fee till the death of the *lifereitrix*. That was the period of distribution, and the intention of the deed was to postpone vesting till then. Prior to that event there was a fiduciary fee in Mrs Cunningham or the trustees—*Young v. Robertson*, February 14, 1862, 4 Macq. 314; *Marshall v. King*, October 30, 1888, 16 R. 40. "Failing issue" meant "failing there being issue," and the failure was referred to the date of the death of the *lifereitrix*. With one exception—the case of *Carleton v. Thomson*—the cases in which such words had been under the consideration of the Court had been cases of marriage-contracts, such as *Byers v.* The construction to be put on such words in marriage-contracts was different from that to be put upon them in testaments. In *Carleton v. Thomson* the words of the

destination differed from those used in the present case. 2. *On the question of heritable and moveable*—Assuming that there was vesting a morte, the shares were moveable estate, and passed to the heirs in moveables of the children of Mrs Cunningham who had predeceased her and died intestate. There was certainly no doubt that this was the case with regard to John Denniston, who died in 1871, under section 117 of the Lands Clauses Consolidation (Scotland) Act 1868 (31 and 32 Vict. cap. 101). With regard to the shares of children who had died before that Act came into operation, the direction to invest in real security did not operate conversion of moveable into heritable estate, as the direction was given merely for the purposes of trust administration. The words "pay over" were clearly applicable to moveable estate only, and the direction to divide equally among the issue could only be carried out if the shares were moveable estate. In the view of the testator these shares were to be moveable estate—*Nairn's Trustees v. Melville*, November 10, 1877, 5 R. 128; *Duncan's Trustees v. Munro*, March 18, 1882, 9 R. 731; *Aitken, &c. v. Munro, &c.*, July 6, 1883, 10 R. 1097; *Sheppard's Trustee v. Sheppard*, July 2, 1885, 12 R. 1193; *M'Laren on Wills*, i. 215. 3. *On the question of election*—Dr Cunningham clearly intended that, taking the shares of Mr Denniston's estate and his own together, his children's shares should be equal. If they elected to take under his will they were bound to submit to the condition imposed. The doctrine of approbate and reprobate distinctly applied—*Bonholes v. Mitchell's Trustees*, May 27, 1885, 12 R. 984; *Ker v. Wauchope*, 1819, 1 Bligh, 1, opinion per Lord Chancellor, pp. 21-23.

Argued for the fifth parties—1. There was vesting in Mr Denniston's grandchildren as they came into existence. "Failing issue" was equivalent to "failing there having been issue," just as "without issue" had been held to be "without having had issue"—*Carleton v. Thomson*, February 11, 1865, 3 Macph. 514, and July 30, 1867, 5 Macph. (H. of L.) 151; *Byers*, , 10 R. 1034. There was here an absolute conveyance at the outset to the children, and the fact that there was no clause of survivorship distinguished the case from *Young v. Robertson*, and *Marshall v. King*. 2. *On the question of heritable and moveable*—These parties adopted the argument submitted for the sixth, eighth, and ninth parties.

Argued for the seventh party—1. *On the question of vesting*—This party adopted the argument submitted for the fifth party. 2. The shares destined by Mr Denniston were rendered heritable by the distinct direction of the testator to lend them out on real security. It was intended by the testator that the securities should be taken in names of his daughters and their children—*Bell's Prin.* 1492; *Dick v. Gillies*, July 4, 1828, 6 S. 1065; *Romanes v. Riddell*, January 13, 1865, 3 Macph. 348. The words "pay over" were merely equivalent to "transfer."

At advising—

LORD PRESIDENT—The first question in

this case is with regard to the construction and effect of the will of Mr John Denniston, the father of Mrs Cunningham. The facts necessary to furnish an answer to that question are very simple. The will is dated in 1829, and Mr Denniston died in 1833. Mrs Cunningham was married to Dr Cunningham in 1834. They had eleven children, some of whom predeceased their mother, and some are still alive. The clause on which the question depends is to this effect—"In the third place, they (the trustees under the settlement) shall, as soon as practicable, make a division of my whole remaining means and estate, heritable and moveable, equally, and share and share alike, among the said John Denniston, my eldest son (deducting always, however, from his share the said sum of £700 sterling), James Denniston, Hugh Denniston, Archibald Denniston, and Thomas Denniston, my other sons; Janet Denniston, Elizabeth Denniston, and Jean Denniston, my daughters, but in the event of the death of any of my said children without leaving lawful issue, it is hereby provided and declared that the deceiver's share of my said means and estate shall be equally divided among my surviving children, and applied and secured as immediately to be provided for: And it is hereby further provided and declared that the share coming to either of my said sons shall not be paid to them until it appears to a majority of my said trustees to be prudent and advisable to pay the same to enable them to enter into business, or until they arrive at majority, and until either of these occur, the share coming to each son shall be laid out in undoubted personal or real security, and the interest or annual rent arising therefrom applied to their maintenance, education, and clothing: And it is also hereby expressly provided and declared, and I direct and appoint my said trustees to lend out on unquestionable real security the share coming to each of my said daughters, and to take the bonds or securities to be granted therefor in such a way as the interest or annual rent of such share shall be paid to them during all the days of their lifetime, and the principal sum or share itself after their death to be paid or divided equally, and share alike, among the deceiver's lawful issue, and failing issue equally among my own children surviving at the time."

Now, it appears to me that this case cannot be distinguished in principle from the case of *Carleton v. Thomson*. In that case the provision was—"For behoof of my said daughter, the said Mrs Isabella Sarah Hunter, alias O'Reily, in liferent, exclusive of the *jus mariti* of her husband, and her children in fee, to be kept in trust by them till they in their discretion shall see proper to settle it in the most safe and secure manner upon her and her children." And then the testator provides—"In the event of her decease without issue of her body," that the said residue of his estate was to be conveyed to his nieces, whom he named, equally among them, and in the event of any of them dying without lawful

issue, her share was to go equally among the testator's other nieces and their issue.

Now, at the date of the truster's death his daughter was married and had two children, and she subsequently had five other children, all of whom predeceased their mother, only one leaving issue. In these circumstances the Court held that a share of the residue had vested in each child at its birth, and at its death passed to its representatives. In that case the destination beyond the daughter and her children was to the nieces of the testator, but it was held not to be a substitution, but a conditional institution.

Now, the circumstances here seem to me to be precisely similar, except that there are here a number of daughters who have this money settled on themselves and their children. There is no other difference. The effect of there being vesting *a morte testatoris* is explained in a single passage of the opinion delivered by Lord Colonsay in the House of Lords. He says—"For the reasons I have stated my opinion is that the right vested *a morte testatoris* in the class, some of whom were in existence at that time, and that a *jus crediti* vested in each child at its birth, although the amount of the benefit was subject to the contingency of there being more children born."

I therefore think we should answer the first part of the first question in the affirmative.

The second branch of that question is, if the right did so vest, did it pass to the heirs in heritage or the heirs in moveables of the children of Mrs Cunningham? Now, that is a question which depends on principles of common law, for it concerns the right of succession to children who have died intestate, and the answer depends on the nature of the subject in the will which is to be succeeded to. The trustees are directed to invest the shares of the daughters in real security, and that being the provision, we must of course take it that the direction was carried out. Prior to the year 1868 heritable bonds passed to heirs, not executors, but subsequent to the passing of the Lands Clauses Consolidation (Scotland) Act 1868 the succession to heritable bonds *ab intestato* was altered, and it was decided that except in the case of specially expressed bonds the succession should go to executors. This question must therefore be answered in such a way as to distinguish between children who died before and children who died after the Act of 1868 came into operation. In the case of those who died before that time the succession will pass to heirs, and in the case of those who died after the succession will go to the personal representatives of the deceased.

The third question arises on a clause of Dr Cunningham's settlement, and is this—"If not, is the seventh party entitled to £1000 under it in addition to the amount payable to him out of his grandfather the said John Denniston's estate?"

The settlement of Dr Cunningham, it may be mentioned, is so expressed as to postpone vesting. There is no vesting under it *a morte testatoris*. That, however, matters

very little to the present question, which really turns on this provision—"And it is hereby expressly provided and declared that the portion or portions to which my children or any of them may have right of the estate of their grandfather, the deceased John Denniston, merchant, Greenock, shall be imputed and reckoned throughout the whole of the foresaid divisions or apportionments, so that no one shall be preferred before another, except as before provided." In the words "except as before provided" the testator refers to a distinction made between the case of married and unmarried daughters. With the exception of that provision what is provided by Dr Cunningham is, that taking the share of Mr Denniston's estate left to his (Dr Cunningham's) children and the estate left by himself as one fund, it shall be so divided that no one of his children is to have a greater share than another, or, as he himself expresses it, the shares received from Mr Denniston's estate "shall be imputed and reckoned throughout the whole of the foresaid divisions or apportionments, so that no one shall be preferred before another."

Now, no doubt Dr Cunningham is not entitled to alter the settlement of Mr Denniston, nor divert any gift or bequest contained in Mr Denniston's will for the benefit of others than those favoured by Mr Denniston. But he is quite entitled to say that anyone taking under Mr Denniston's will shall not have any part of his own estate unless he bring into contribution what he has received from Mr Denniston. That is what Dr Cunningham has done, and if so, no child can reprobate what he has done by refusing to contribute and at the same time appropriate it by taking his share under Dr Cunningham's testament. The seventh party is therefore not entitled to the sum of £1000 given him by Dr Cunningham's will in addition to his share of his grandfather's estate.

LORD SHAND—I am of the same opinion, and confess that from the beginning to the end of the argument I never thought there was any doubt about the answer to any of the questions.

The first question relates to the vesting of the fee of a share of Mr Denniston's estate in his grandchildren, the children of Mrs Cunningham, and the contention maintained by the sixth parties is in these terms—"That the share of Mr Denniston's estate liferented by his daughter Mrs Cunningham did not vest until her death, and that no share of the said estate vested in the predeceasing children of Mrs Cunningham." The question turns, I think, upon the terms of a simple and ordinary destination. The words of the clause contain a direction to the trustees of Mr Denniston to invest the daughters' shares in real security for behoof of the daughters in liferent, and their children in fee. Previous to that direction there is a general direction contained in the deed to divide the estate equally among the members of the truster's family. The deed then continues—"But in the event of the death of any of my said children with-

out leaving lawful issue, it is hereby expressly provided and declared that the deceiver's share of my said means and estate shall be equally divided among my surviving children, and applied and secured as immediately to be provided for." So far, that clause effects nothing more than the law itself would do. The testator merely says, "If any child dies before me that child is not to be counted, but the shares of the others are just to be enlarged." The words "without leaving issue" are also unnecessary, for in the event of there being issue, such issue would have taken under the *conditio si sine liberis*.

When we come to the succeeding clause we find a direction to the trustees to carve out the daughters' shares and invest them under a destination to the daughters in liferent, and their children in fee, or as it is in the deed—"To take the bonds or securities to be granted therefore in such a way as that the interest or annual rent of such share shall be paid to them during all the days of their lifetime, and the principal sum or share itself after their death to be paid or divided equally, and share alike, among the deceiver's lawful issue." Now, the only distinction between this case and the case of *Carleton v. Thomson*—which is in my opinion perhaps the leading case on vesting in our law—is that in that case the words were "without lawful issue," while here they are "failing issue." The words "among the deceiver's lawful issue" I take as a mere declaration of the term of payment. In the case of a simple destination in liferent and fee, the fee vests *a morte testatoris*. Lord Colonsay, in a single sentence of his opinion delivered in the House of Lords in *Carleton v. Thomson*, puts the case which might have let in such a claim as is here contended for by the sixth parties. After stating the general considerations which go strongly to vesting *a morte testatoris*, he continues—"So also, in reference to that 'suspension,' may be deduced from an express clause of substitution or survivorship applicable to the members *inter se* of a class to whom the fee is destined." The argument of the sixth parties is that without such a clause of survivorship there shall be suspension of vesting. The deed bears that the shares are to be paid among the deceiver's lawful issue. That argument would modify these words by the introduction of some such expression as "among such of the deceiver's lawful issue as shall survive her," which is the very case figured by Lord Colonsay. There is no such clause here. I see from Lord Colonsay's opinion that he said that the words "failing issue" admitted of interpretation in two ways. That may very fairly be taken to have been the case at the date of Lord Colonsay's opinion, but now, by the decision in the case of *Carleton v. Thomson*, these words have had a meaning imposed on them. Accordingly, both on the ground that *Carleton v. Thomson* decided this point, and also for the reasons which prompted that decision, taking the language alone, I am clearly of opinion that there was vesting in each child *a morte*

testatoris, that there was a fiduciary fee in the mother or the trustees for the children who might be afterwards born, and that each child subsequently born took the fee at its birth.

On the other questions I have little to add to what your Lordship has said. With regard to the second branch of the first question it is to be observed that the daughters' shares are only set aside, but there is a direct order to the trustees to invest them in heritable securities. I should read the clause to mean that the investment is to be in the names of the daughters themselves in liferent, and their issue in fee. But whether the securities are to be so taken, or whether they are to be invested in the names of the trustees for behoof of each daughter in liferent, and her issue in fee, the result is the same. The securities being heritable the succession must be heritable, and would have continued to be so but for the Act of 1868. So far, then, as regards the children who died before that Act came into operation, the succession is heritable; to those who died after that date it is clearly moveable.

On the third question I agree. It is, I think, clear that the clause of Dr Cunningham's will quoted in article nine means that any child who takes benefit from the apportionment contained in Dr Cunningham's will must bring into the common fund the share he or she receives from Mr Denniston's estate.

LORD ADAM—The answer to the first part of the first question depends on whether the right to the fee vested *a morte testatoris* or on the death of the liferentrix, and the answer to that question depends on the meaning of the words "failing issue" in Mr Denniston's will. No one disputes that these words are capable of two meanings. They may mean "without having issue" or "without having had issue." In the first case, it rather appears that vesting might be postponed. In the second case, there is vesting *a morte testatoris* in the children as a class, each taking a share as he or she came into existence, and I think that the case of *Carleton v. Thomson* settled that unless something is said to the contrary the latter is the proper interpretation of these words. I can find nothing in this case to suggest that these words do not mean "without having had issue." Consequently, I think the first branch of this question must be answered in the affirmative.

With regard to the second branch, had there been no direction to divide the shares of the separate children, and take the securities to the daughters in liferent, and their children in fee, but if the securities were to be taken in name of the trustees the shares might or might not be heritable as regards succession. The latter, however, is not the direction we have here. As I read the deed there is a direction by the truster that the share of each daughter shall be settled on her as set forth in the deed, and I think this is pretty clear from the clause at the end of the destination, directing that the securities shall be taken in terms to exclude

the *jus mariti* and right of administration of husbands, provisions which were quite unnecessary if the estate was to remain undivided in the hands of the trustees. Securities so taken in the particular terms expressing the direction of the testator must fall under the common rules of law. Before the Act of 1868 they were heritable, and after that Act they became moveable *quoad* the succession of children.

I concur in thinking that the third question must be answered in the negative. Dr Cunningham had a perfect right to deal with his own estate as he liked, and he might quite well say, "If you choose to take a share of Mr Denniston's estate, you shall have no share of mine, or such share only as I give you." Therefore, if the seventh party prefers to take his share of Mr Denniston's estate he may do so, but he is not then entitled in addition thereto to get the £1000 left him under Dr Cunningham's settlement. It is a simple case of approbate and reprobate.

LORD M'LAREN—The question of vesting is the leading question in this case, and I do not think it is attended with much difficulty.

I have often thought when consulted about these cases at the bar, and I still think, that it is very difficult to find any certain method for solving questions of vesting. The law on the subject is confined to three or four elementary principles, and beyond these there is very little to be extracted from the numerous decisions which can be usefully applied to the construction of a will which is not identical with that in the particular case. Most of our law on the subject of vesting may be summed up in a few rules derived from the Roman Jurisprudence. One of these distinguishes between the effect of the postponement of a legacy or gift to an event certain, and the case of its postponement to an event which is contingent or uncertain. Now, as it was held that there was nothing more certain than death, the postponement of the enjoyment of a gift to the death of a person who had the usufruct was not regarded as introducing an element of uncertainty into the destination, and therefore the right to the legacy, though not vested in immediate possession, was regarded as vested in title. The rule is different when the survivorship of the legatee is part of the scheme of the testament, because it never can be known whether the legatee will survive the event, and there is the same uncertainty where a legacy is left to the last survivor of a plurality of persons, or to those who should be surviving at the time when the gift was intended to take effect. That seems to me to be the one perfectly general fixed principle on this branch of the law.

The case of *Young v. Robertson* settled that where there are words of survivorship capable of being applied to the period at which the gift is to take effect vesting is till that time postponed. This, however, is only a rule of construction, and consequently if it appears from the language of the will or deed that the survivorship was referred

to some other period, the vesting, in my apprehension, would not be postponed.

In the present case there is no general provision of a liferent to anyone, but the share of each daughter is directed to be invested, in terms which I need not repeat, for the daughters' liferent interest, and "after their death to be paid or divided equally, share and share alike, among the deceased's lawful issue, and failing issue among my own children surviving at the time." I cannot read this clause as implying that the survivance of the grandchildren at the expiry of the parent's liferent was to be a condition of the bequest, and I agree that effect must be given to another well-known rule of construction, viz., that such words as "failing issue" do not suspend the vesting of the right in the persons designated, but only have relation to the possibility of no issue being born to a particular child. The fee would accordingly vest in these issue—that is, in the testator's grandchildren at his death. If there were no fiars in existence at the testator's death the fee of the estate was meantime in the trustees, and a right to a share would vest in each of the children as he or she came into existence. My conclusion is that the rights of all the grandchildren under Mr Denniston's settlement vested either *a morte* or as each child came into existence.

With regard to the second branch of this question, I am of opinion that the succession is heritable in its nature. There is a direction to invest in heritable securities, not for the purposes of administration only, but with express reference to the destination of the particular shares directed to be so invested.

I have only to remark on the question of election that I think when a will contains a direction with regard to the money or moveable estate of some other person that it should be divided along with the testator's own estate, the true meaning is that the testator only gives so much money as, when added to the sum given by the other, will make the shares of the legatees equal. He does not there interfere with what is already given, but he gives to each of the legatees the difference between what he has already received and what he would have received if the estates were massed together and equally divided.

The Court pronounced this interlocutor:—

"Find and declare (1) that the right to a share of the fee of their grandfather John Denniston's estate vested in the children of Mrs Cunningham who predeceased her, and the same passed to their heirs in heritage or in moveables according to the law of intestate succession at the date of the death of each of such children respectively; . . . (3) that the seventh party is not entitled to £1000 under his father's settlement in addition to the amount payable to him out of his grandfather John Denniston's estate."

Counsel for the First, Third, and Fourth Parties—Guthrie. Agents—Graham, Johnston, & Fleming, W.S.

Counsel for the Second Parties—M'Lure.
Agent—Bruce Cowan, W.S.

Counsel for the Fifth Parties—Asher—C. S.
Dickson. Agents—Miller & Murray, S.S.C.

Counsel for the Sixth, Eighth, and Ninth
Parties—H. Johnston—J. P. Grant. Agents
—Murray, Beith, & Murray, W.S.

Counsel for the Seventh Party—Rhind—
C. N. Johnston. Agent—John C. Junner,
W.S.

Saturday, November 30.

SECOND DIVISION.

GRAY v. THOMSONS.

Reparation—Master and Servant—Employers Liability Act 1880 (43 and 44 Vict. cap. 42), sec. 1, sub-secs. 1 and 3—Clyde Navigation Harbour Regulations—Byelaw Regulating Watching and Lighting of Opening in Vessel's Deck.

A workman was injured by falling in the dark into an opening in the deck of a vessel which was lying at a quay for the purpose of being supplied with new boilers. There was a lantern at the distance of a few feet, but the opening was unfenced. There was one watchman on board the vessel, but he was absent from the opening at the time. Byelaw 59 of the harbour regulations required that "every vessel in the harbour having any large opening in deck for the reception of machinery... shall after dark have such opening either securely covered or properly lighted, and under the charge of a special watchman."

Held that the employers had sufficiently complied with the byelaw by providing a competent watchman for the ship, and were not responsible for the accident, which was due to the watchman deserting his post.

Diss. Lord Lee, who thought the accident was due to the neglect of the foreman, for whom the employers were responsible, not having the opening under the charge of a special watchman, or at least of a watchman with special instructions.

Thomas Gray, a workman in the employment of Messrs John & James Thomson, engineers and shipbuilders, Glasgow, upon the morning of the 2nd November 1888, while on his way to deposit his check or ticket in the check-box on board the steamship "Pretoria," fell into a hole in the deck and was severely injured.

He brought an action in the Sheriff Court at Glasgow against his employers for reparation—damages £500, or if found due under the Employers Liability Act, £150.

He averred—"The accident was caused through the fault and negligence of the defenders or of their manager or foreman carrying on the works on board the steamship 'Pretoria,' for each of whom they are responsible in terms of The Employers

Liability Act 1880, in neglecting to take the necessary precautions for the safety of their workmen. The opening in the deck ought to have been covered, or a barricade erected from the side of the vessel right across the front of the opening to prevent anyone passing up that side, or otherwise, there ought to have been lights to indicate and show the opening, and a watchman. The only light, which was a common ship lantern, was at the end of the gangway on board the vessel, and that was some 30 or 40 feet from said opening. In ordinary circumstances they were bound to take necessary precautions to properly secure all openings on the deck during night, and specially they were also bound to do so under byelaw 59 of the byelaws and regulations enacted by the Trustees of the Clyde Navigation at Glasgow, on 3rd January 1860, in virtue of the power conferred on them by the Clyde Navigation Consolidation Act 1858, and the Acts incorporated therewith."

The pursuer pleaded—"(1) The pursuer having suffered loss, injury, and damage through the fault or negligence of the defenders, or of those for whom they are responsible, is entitled to reparation therefor. (2) The defenders being bound under the byelaw referred to in the condescendence to properly secure the opening in question, and having failed in their duty, are liable to pursuer in reparation. (3) Or otherwise, the pursuer having been injured when in the employment of the defenders, through the fault or negligence of the defenders, or of those for whom they are responsible, he is entitled under the Employers Liability Act 1880, sections 1, sub-sections 1, 2, and 3, to decree in terms of the second conclusion of the petition."

Byelaw 59 referred to was in the following terms—"Every vessel in the harbour having any large opening in the deck for the reception of machinery or other purpose shall after dark have such opening either securely covered or properly lighted, and under the charge of a special watchman."

A proof was allowed which established the following facts—Until the day before the accident the "Pretoria" had been lying with her port side to the quay. The check-box was on the starboard side, and could be approached either by going along the port side and crossing over (the easier way), or by crossing first and going along the starboard side over some piled iron plates. At the time of the accident the "Pretoria" was lying with her starboard to the quay. New boilers were being put in which necessitated the lifting of a portion of the deck, but the hole was usually covered with planks during the night. Before the accident the men had for the first time been working all night, and the planks were up. The night-watchman went away at 5:30 leaving the donkey-boiler-house door open against the hole, and a lamp resting upon a plate of iron at the after-part of the boiler space, but 3 feet from it. The day-watchman came on duty at 5:30, but shortly afterwards went forward to get a cup of coffee. In his absence the pursuer, who