There were successive periods of vesting for each share, as it was in point of fact divided by the trustees. It was by no means an impossible conclusion to hold that a truster intended his trustees to have a discretion in saying whether, and if so, when, rights were to vest in beneficiaries.—*White's Trs.* v. *White, supra; Adam's Trs.* v. *Carrick*, June 18, 1896, 23 R. 828. There was here a survivorship clause, which in the vast majority of cases had been held to refer not to the death of the testator but to the period of payment. The direction was to divide "after" certain purposes—among which was the payment of certain annuities—had been served; and further, there was a conditional institution. A consideration of these points, coupled with the discretion given to the trustees, made the theory of vesting *a morte* quite untenable. That being so, the only other period for vesting was that contended for, viz., of each share as it was in fact divided and paid over.

At advising—

LORD M'LAREN—The question raised in this case is one which it was very proper to bring under the consideration of the Court in this form, because there are cases where the distribution or division of the estate upon which vesting depends may in certain circumstances be affected by the acts of trustees. In a case like the present, where the truster evidently contemplated a trust of long duration, and gave the trustees power to realise the heritage at successive times, it is quite possible that he might have intended that the right to the estates successively realised should belong to his sons and daughters surviving at these times. A slight variation of the language used might possibly have led to this result. In such cases it is safe to begin with the proposition that it is not to be presumed that the period of vesting is referred to the discretion of the trustees, though I am far from saying that this is impossible or that if the truster says so in plain terms his expressed intention is not to receive effect.

If we hold vesting to be postponed our decision must proceed on some definite expression of intention on the part of the testator. Now, I find nothing in the clauses under consideration except directions in regard to the administration and distribution of the estate. The direction is that the residue is to be divided among children named and the issue of a deceased daughter, and the survivors, and then follows a general substitution of issue to their parents in terms which I do not need to read. It is agreed that in the great majority of cases where the Court has had to construe clauses directing estate to be divided among persons named and the survivors it has been held that the survivorship is referable to a period subsequent to the death of the testator. If that is so, I think the reason is not difficult to divine. It is that where there is no postponement of the division, no one would think of coming to the Court, because if the direction is to divide a residue amongst the members of a class and the survivors, and there is no postponement of the distribution, survivors can only mean survivors at the testator's death. Now, when we come to consider the period to which survivorship is referable in this case, the terms of the clause point only to the period of the testator's death, because the division is to be made "after the foregoing purposes are served." There might have been purposes so conceived as to make it impossible to proceed to a division of the estate, but the purposes referred to are merely the provision of certain annuities, and annuities which the testator himself has said may be provided for by the purchase of securities. I think that in directing the residue to be divided the testator means only what remains after this has been done—the word "after," while primarily referable to time, referring here not to time but to the amount remaining when the annuities have been provided for. When we come to the discretionary part of the will, where the trustees are directed to sell with the view of obtaining as large a sum as possible, I find no expressions referring back to the previous part of the will so as to affect the vesting under the residuary clause. It therefore appears to me to be clear that a division of the estate is to be made at the testator's death for the purpose of ascertaining the persons entitled to succeed, though it may be that the sale and payment of the proceeds would not take place till long after, and only upon the realisation of successive portions of the estate. In my opinion Charles M'Lean took a vested interest, and was entitled to grant an assignation which was effectual to carry his share of what had been divided as well as what remained to be divided.

LORD ADAM and LORD KINNEAR concurred.

The LORD PRESIDENT was absent.

The Court answered the first question in the affirmative.

Counsel for the First Parties—Craigie Agents—Millar, Robson, & M'Lean, W.S.

Counsel for the Second and Third Parties—Constable. Agents—J. A. Campbell & Lamond, C.S.

Counsel for the Fourth Parties—Younger. Agents—Webster, Will, & Ritchie, S.S.C.

Wednesday, June 30.

SECOND DIVISION.

[Sheriff-Substitute at Glasgow.

EARL OF LEITRIM'S TRUSTEES (OWNERS OF "ROSSGULL") *v.* G. & J. BURNS (OWNERS OF "SPANIEL").

Shipping Law — Collision — Fog — Regulations for Preventing Collisions at Sea, Articles 13 *and* 18.

Article 13 of the Regulations for Preventing Collisions at Sea under Order of Council 11th August 1884 provides—

"Every ship, whether a sailing ship or steamship, shall in a fog, mist, or falling snow, go at a moderate speed." Article 18 provides—"Every steamship when approaching another ship so as to involve risk of collision, shall slacken her speed or stop and reverse if necessary."

The steamer "Spaniel" was going at "dead slow" through a dense fog when those in charge of her heard the whistles of a vessel approaching on the port bow. They ported the "Spaniel" a little, but still continued to advance at "dead slow." While so advancing, the "Spaniel" collided with the approaching steamer "Rossgull." The "Rossgull" at the time when she came in sight of the "Spaniel" was going at full speed, and was admittedly in fault.

Held that the "Spaniel" was also in fault as she had violated article 18 of the regulations through having failed to stop and reverse on hearing the repeated whistles of the "Rossgull" approaching her.

On 2nd January 1896, in a thick bank of fog off Arran, the steamship "Rossgull" sailing southwards came into collision with the steamship "Spaniel" sailing northwards. The collision resulted in damage to both vessels.

The Earl of Leitrim's trustees, the owners of the "Rossgull," and G. & J. Burns, steamship owners, Glasgow, owners of the "Spaniel," raised cross actions of damages in the Sheriff Court at Glasgow. The pursuers in each action pleaded that the collision was solely due to the fault of the defenders.

The following narrative of the facts as established at the proof is taken from the note of the Sheriff-Substitute (ERSKINE-MURRAY):—"The steamship 'Rossgull,' 90 tons register, 130 feet long, belonging to the parties Leitrim and others. was, during the night and early morning of 2nd January last, on a voyage from Greenock to Portrush. The captain went below about 11·25 p.m. off Wemyss Bay. At that time the night was dark but clear. The 'Rossgull' was left by him in charge of the mate, Archibald Campbell, a certificated master. No other person remained with the mate on deck except the steersman John M'Connell, A.B. It began to be a little hazy near the Cumbraes, and the 'Rossgull's' whistle was blown occasionally. From the Cumbraes her course had been S.W. by S. ¾ S. Catching a glimpse of Holy Island as they passed the north end of Lamlash Bay, the mate altered his course a ¼ of a point to S.W. by S. ½ S. Immediately thereafter she ran into a bank of very thick fog at the back of the Holy Island. This was about ten minutes or a quarter of an hour before the collision. Several steam whistles in different directions were heard by the mate or the steersman; more especially two whistles were heard pretty nearly ahead, which must have been from the 'Spaniel.' But the 'Rossgull' continued to go at her full speed, which is about 10 knots, for the purpose, apparently, of picking up the light at the south end of Holy Island at her correct time.

"Meantime the steamship 'Spaniel,' 250 feet long, belonging to the parties G. & J. Burns, on a voyage from Belfast to Glasgow, and under the command of Captain Horner, entered the same bank of fog, also about a quarter of an hour before the collision. From Dippen Point, in Arran, her course had been N.E. by N. magnetic. When she entered the fog, the captain had the engines slowed from full speed to dead slow, so that, in Captain Horner's opinion, she was going 3½ to 4 knots an hour at the time of the collision. Several whistles were heard from the 'Spaniel,' notably two right ahead, or a little on the port bow, which must have been from the 'Rossgull.' To avoid the vessel thus whistling, the 'Spaniel's' course was altered to east by south, which she was steering at the time of the collision.

"About two o'clock those in the 'Rossgull' first noticed the red port light of the 'Spaniel' within 200 feet off. The helm of the 'Rossgull' was immediately put hard to port, and the engines immediately stopped and reversed, but it is clear that the way was not all off her at the time of the collision. The 'Spaniel,' about the same instant, or soon thereafter, noticed the mast-head of the 'Rossgull'; no change was made on her course or engines. The 'Rossgull' struck the 'Spaniel' at an acute angle. She got entangled with the 'Spaniel,' and being much lighter was pulled round by the 'Spaniel' as she surged forward. Both vessels were injured by the collision."

The Regulations for Preventing Collisions at Sea under Order of Council, 11th August 1884, provide as follows (article 18):—"Every ship, whether a sailing ship or steamship, shall in a fog, mist, or falling snow, go at a moderate speed." (Article 18) "Every steamship, when approaching another ship so as to involve risk of collifion, shall slacken her speed, or stop and reverse if necessary."

On 2nd December 1896 the Sheriff-Substitute (ERSKINE MURRAY) pronounced the following interlocutor:—"Finds (1) that the steamship 'Rossgull,' belonging to the parties Leitrim and others, on 2nd January last, at 2 a.m., in a dense fog, collided off Holy Island with the steamship 'Spaniel' belonging to the parties Burns & Company, and both vessels were injured, and actions of damages have been raised by both parties, which have been conjoined: Finds (2) for the reasons assigned in the note annexed hereto, that the said collision occurred through faults on the part of those in charge of both vessels, and that therefore the rule as to the allocation of the loss in such cases comes into play.

Note.—[*After stating the facts as above narrated*]—"Which vessel was in fault, or were both? It is clear, in the first place, that the 'Rossgull' was in fault. She had no business to be going at full speed through a dense fog, which a number of whistles showed concealed a number of vessels, in

breach clearly of articles 13 and 18 of the Regulations for Preventing Collisions at Sea, especially as from the whistles she knew she was approaching another ship, and this fault contributed to the collision.

"The case of the 'Spaniel' is not quite so clear. She had no business to alter her course in the fog so seriously as to run E. by S. She might thereby have well deceived as to her position any vessel that had heard her previous whistles. Rule 15 does not apply except in cases where vessels or their lights are seen. Still the Sheriff-Substitute is not convinced that the error of the 'Spaniel' was one of the causes of the collision.

"But rules 13 and 18 apply in the case of the 'Spaniel' as well as in the case of the 'Rossgull' though in a minor degree. Rule 13, that in a fog a vessel must go at moderate speed, applies whether or not there is reason to believe that another vessel is being approached. Had there been no such reason, however, it might fairly be said that 3½ to 4 knots was only 'a moderate speed.' But from the 'Rossgull's' whistles the 'Spaniel' must have known that she was approaching another ship so as to involve risk of collision.

"In these circumstances in such a dense fog—so dense that clearly the whole length of the 'Spaniel' could hardly be visible from her own deck—even 3½ to 4 knots was too great a speed. This also contributed to the collision.

"The Sheriff-Substitute is therefore of opinion that the collision was caused by the faults of those in charge of both vessels. The rule as to allocation of damages in such cases must therefore apply. Both parties have agreed in deferring the questions of the amount of damage till the decision of the question of liability. It will therefore be for the parties either to come to some arrangement as to the amount of damage, or to have another diet of proof fixed for the determination of these questions.

"A number of cases have been referred to on both sides, specially those of the '*Nerano*,' 22 R. 237, and the English cases of the '*Kirby Hall*,' 8 Prob. Div. 71; the '*Zadok*,' and the '*John M'Intyre*,' 9 Prob. Div. pp. 114 and 135 respectively; the '*Ceto*,' 14 App. Cas. 670; the '*Dordoque*,' 10 Prob. Div. 6; the '*Lancashire*,' App. Cas. 1894, p. 1, and Prob. Div. 1893, p. 47; the '*Resolution*,' 6 Aspinall 362; '*Vindomora*,' 14 Prob. Div. 172; and Appeal Cases 1891, p. 1, may be referred to as bearing more or less on the present case.

"The case of the '*Zadok*' was referred to by the parties Burns as showing that a vessel under article 13 has only to reduce her speed so far as she can consistently with keeping steerage-way.

'The '*Zadok*,' a sailing vessel, was going about 5 knots, which was held in the circumstances to be too fast. But the point raised was simply under rule 13, as rule 18, about stopping and reversing, only applies to steamers. The rule about stopping and reversing must necessarily to some extent interfere with steerage-way in certain circumstances.

"The '*John M'Intyre*' was the case of a steamer in similar circumstances, and it was held that her duty was to stop and reverse; and the '*Kirby Hall*' was another of a very similar nature. Really, in a fog, the question is more one of common sense and reasonable care than of law."

Thereafter on 18th March 1897 the Sheriff-Substitute found that the damage sustained by the "Rossgull" through the collision amounted to £840, and the damage sustained by the "Spaniel" amounted to £548, and on 30th March, in the action by the Earl of Leitrim's trustees against G. & J. Burns, he decerned against the defenders for £146, and in the action by G. & J. Burns against the Earl of Leitrim's trustees he assoilzied the defenders.

Against this interlocutor the owners of the "Spaniel" appealed, and argued—Each case of this kind depended upon its own circumstances. No hard-and-fast rule could be laid down applying to all such cases—The "*Vindomora*," 1891, App. Cas. 1. Here the "Rossgull" was admittedly to blame; she was going at full speed through a dense fog. The *onus* was therefore on her to show that the "Spaniel" was in fault. The "Spaniel" was entitled to assume that the vessel approaching her was not flagrantly breaking the regulations by going at the reckless speed at which the "Rossgull" was steaming — opinion of Lord Justice-Clerk Kingsburgh in the "*Thorsa*," June 23, 1893, 20 R. 884. Before the "Spaniel" could be found in fault it must be shown that the circumstances were such as to make it reasonably apparent that there was a risk of collision if the ship went on its course — The "*Lancashire*," 1894, App. Cas. 1. "The Spaniel" was proceeding at "dead slow" against the tide, and there was no reason to apprehend that the "Rossgull" was approaching her so as to cause a risk of a collision and necessitate her stopping and reversing. The "Spaniel" had therefore not violated the regulations — The "*Nerano*" v. The "*Dromedary*," January 10, 1895, 22 R. 237.

Argued for the owners of the "Rossgull"—Although the "Rossgull" was admittedly in fault, if it was shown that the "Spaniel" was also in fault, the owners of the latter must be held to be also responsible for the accident. Although "dead slow" might be a reasonable speed at which to move through a fog, it ceased to be so when the whistle of another vessel was heard approaching. In such circumstances the duty of the vessel under article 18 was to stop and reverse—The "*Kirkby Hall*," 1883, L.R., 8 P.D. 71; The "*Ebor*," 1886, L.R., 11 P.D. 25. A ship proved to have infringed any of the regulations was deemed to be in fault—The "*Duke of Buccleuch*," 1891, App. Cas. 310. All that they had to show was that the regulation was applicable in the circumstances, and that it had been broken by the "Spaniel." If it was applicable and had been broken, and the breach of it might possibly assist in causing the accident, it was not competent for the "Spaniel" to attempt to show that in fact it did not contribute to

the accident. The only defence was that the "Spaniel" was entitled to put forward was that the regulation 18 was not applicable in the present circumstances. The udgment of the Sheriff-Substitute should be affirmed.

At advising—

LORD JUSTICE-CLERK—This case turns on the question whether one of two vessels which came into collision in the Firth of Clyde was in fault, the other being admittedly in fault. The "Rossgull" entered the fog and proceeded on her course at full speed, which was quite contrary to the regulations. Accordingly it is not disputed that the "Rossgull" is to blame. The question is, whether the "Spaniel," which was coming in the opposite direction, was also to blame. The conduct of those in command of the "Spaniel" was this, that hearing the whistle of another vessel almost directly ahead, they continued on their course at the same speed as they were then running at, viz., "dead slow," and on hearing the whistle repeated they still continued at "dead slow," and at the same time altered the course of their vessel to a small extent. In the circumstances I think that the "Spaniel" ought to have stopped and reversed, when it was known that a vessel was approaching, and was nearly directly ahead. In any case she should have stopped and reversed when after an interval it was ascertained that she was still nearly directly ahead. This was not done until the other vessel was seen, though it was then too late to avoid collision. The conclusion that I have come to is that the "Spaniel" is also to blame.

LORD YOUNG—I concur in the judgment that both vessels were in fault, and must be held responsible for the collision.

LORD TRAYNER—These conjoined actions arise out of a collision which occurred between the "Rossgull" and the "Spaniel" n the Firth of Clyde in January 1895. Both vessels were damaged, and each blames the other as being the sole cause of the collision. The Sheriff-Substitute has found that both vessels were in fault, and has dealt with the joint damages according to the usual rule. The owners of the "Rossgull" admit the fault alleged against their vessel, and acquiesce in the judgment of the Sheriff-Substitute, but the owners of the "Spaniel" maintain that their vessel was not in fault, and claim absolvitor. After a careful consideration of the case and the proof adduced, I have come to be of opinion that the Sheriff-Substitute is right. I think it quite clear that the "Spaniel" was not so much to blame for what happened as the "Rossgull," but more or less fault does not affect the result in cases of this class. The facts which appear to me to establish fault on the part of the "Spaniel" are to be found in the evidence of the master of that vessel, and the seaman who was on the look-out when the collision occurred. The vessels were both in a dense fog, and the "Spaniel" was proceeding, as I think, at a moderate rate of speed as required by article 13. But the master says that he "heard a whistle right ahead, a little on the port bow if anything" —that to give the vessel whistling a wider berth he ported a little, and that notwithstanding of this the whistle did not become much broader on the port bow. The man on the look-out gives evidence to the same effect. He heard and reported a whistle "sharp on the port bow"—heard the whistle several times coming more aft on the port-bow, but "nearer to us all the time." This whistle ahead, "coming nearer all the time," gave the master of the "Spaniel" warning that there was a vessel ahead of him, and coming in his direction, and being "sharp on the port-bow," involved a risk of collision undoubtedly. In these circumstances it was the duty of the "Spaniel" to stop and reverse according to rule 18, as it has been interpreted and applied in many cases, of which the case of the "*Ceto*" may be taken as an example. Not having complied with the provisions of that rule the "Spaniel" must be deemed to have been in fault, and therefore jointly liable with the "Rossgull" for the damage done. I think, therefore, that this appeal should be dismissed.

LORD MONCREIFF—On full consideration of the evidence and the authorities cited I am satisfied that the Sheriff-Substitute's judgment is right, and for the reasons which he gives. In his note he says—"But rules 13 and 18 apply in the case of the 'Spaniel' as well as in the case of the 'Rossgull,' though in a minor degree. Rule 13, that in a fog a vessel must go at moderate speed, applies whether or not there is reason to believe that another vessel is being approached. Had there been no such reason, however, it might fairly well be said that 3½ to 4 knots was only a 'moderate speed.' But from the 'Rossgull's' whistles the 'Spaniel' must have known that she was approaching another ship so as to involve risk of collision. In these circumstances, in such a dense fog, so dense that clearly the whole length of the 'Spaniel' could hardly be visible from her own deck, even 3½ to 4 knots was too great a speed. This also contributed to the collision."

This passage states concisely and accurately the import of the evidence, and the conclusions to be drawn from it. What at first gave some colour to the appellants' argument was that while the "Rossgull" was proved to be flagrantly in fault, going at a speed of 10 knots an hour in a dense fog, the "Spaniel" was going "dead slow." But as it is proved that those in charge of the "Spaniel" must have known from repeated whistles on the port-bow that a vessel was approaching nearly right ahead, and as the fog was so dense that a vessel could not be seen beyond 50 feet, I think the "Spaniel" was bound to stop and reverse.

The Court dismissed the appeal.

Counsel for the Owners of the "Spaniel"—Salvesen—Burns. Agents—J. & J. Ross, W.S.

Counsel for the Owners of the "Rossgull"—Sol.-Gen. Dickson, Q.C.—Younger. Agents—Webster, Will, & Ritchie, S.S.C.

Wednesday, June 30.

SECOND DIVISION.

MACASKILL *v.* MACLEOD.

Poor's Roll—Admission.

A man who is earning 31s. 6d. a-week, with a wife and two children dependent on him, is not entitled to the benefit of the poor's roll.

This was an application for admission to the poor's roll presented on behalf of Alexander Macaskill, joiner, Fort William, with a view to enabling him to bring an action against Macleod of Macleod, and John Macaskill, Kilmuir, Skye, the applicant's brother.

The proposed action was for reduction of a lease bearing to be dated 31st January 1885, granted by Macleod of Macleod in favour of the applicant's father Ewen Macaskill, and for declarator that the applicant was tenant of the subjects leased, for decree of removing against John Macaskill, for an accounting against him, and for damages.

On 14th May the application was remitted to the reporters on *probabilis causa litigandi*, who on 4th June reported that counsel for the parties admitted that the applicant was earning 31s. 6d. a-week, and that out of this he had to support his wife and two children, and to pay £16 of rent for a house, and with the exception of his household furniture he had no other property, and that on the merits, in their opinion, the applicant had a *probabilis causa litigandi*.

Counsel for the applicant moved for admission.

Counsel for Macleod of Macleod objected, and argued—No applicant earning as much as 31s. per week and with only two children to support had ever been admitted to the poor's roll. The strongest case for the applicant was *Paterson* v. *Linlithgow Police Commissioners*, July 4, 1888, 15 R. 826; he had a wife and four children dependent on him, and the proposed action was for damages for personal injury, whereas this was for reduction of a lease granted in favour of the applicant's own father, which had been allowed to stand unchallenged since 1885. In that case it was also to be noted that Lord Rutherfurd Clark dissented. In the case of *Robertson*, July 8, 1880, 7 R. 1092, it was laid down *per* L.P. Inglis that in ordinary circumstances a man earning 23s. a-week is not entitled to admission. In *Stevens* v. *Stevens*, January 23, 1885, 12 R. 548, the applicant's nett income was only £53 per annum.

Argued for the applicant—It was conceded that no applicant earning more than 27s. per week had ever been admitted, but on the principle laid down by Lord Young in *Stevens* v. *Stevens, cit.*, at p. 549; and in *Anderson* v. *Blackwood*, July 11, 1885, 12 R. 1263, at p. 1264, which was that the criterion must be whether a man can pay for counsel and agents in the Court of Session—a man with 31s. 6d. a-week was entitled to admission. In the latter case the applicant, though only earning 15s. a-week himself, had a son living with him who earned £1 per week. In *Wright* v. *Kerr*, February 27, 1890, 17 R. 516, where the applicant could earn 30s. a week, the Court refused the application, not in respect of the applicant's high wages, but on the ground that the action should have been brought in the Small Debt Court. See *per* the Lord Justice-Clerk at p. 517.

LORD JUSTICE-CLERK—If this application had come before us as a new thing, for my own part I should consider it absolutely necessary to give it the most careful consideration, and consider whether such an application should be refused, because I think that not only the nature of the case but the circumstances and time require to be taken into consideration. But I do not myself feel at liberty to go against what has been apparently an established rule of the Court for some time, and what has been practically acted upon in recent times, and therefore I am for refusing this application.

LORD YOUNG—It is perhaps altogether superfluous for me to repeat what I have had an opportunity of saying, and have said on former occasions, but I may take the liberty of saying now that I consider this matter had better be considered and put upon a right footing—that is, a reasonable footing—either by statute or by Act of Sederunt. The sense and reason for admission to the poor's roll is to aid poor people who are not in worldly circumstances to enable them to carry on a litigation in this Court, if they have a *probabilis causa litigandi*. There is no other reason or sense in it. I think that will be admitted by everybody. The professional bodies have with great generosity appointed members of their own professions, both law-agents and counsel, to conduct such cases, and they also appoint members of their own profession to consider the circumstances of individual cases—whether it is fitting that they should give their professional services upon those exceptional terms—without pay—in the individual cases. Every case in which such an application is made upon a report of *probabilis causa litigandi* made by the professional bodies, who give their services gratuitously in cases in which they are satisfied, is of that character. Well, as I have said before, when a party is really in poverty, which a man with a family and 25s. or 30s. a-week really is, and the professional bodies—whether Writers to the Signet or counsel—are ready and willing to give their services in the individual case, having looked into it, we can hardly say (it is not reasonable or sensible)—"Oh! but he has