have been presented to the Junior Lord Ordinary.

LORD ADAM concurred.

The Court pronounced this interlocutor:—

"Recal the whole interlocutors pronounced in the petition: Dismiss the petition, and decern: Find the petitioner William Wallace liable to the said Thomas Whitelaw in expenses," &c.

Counsel for Petitioner—C. K. Mackenzie. Agents—J. & J. Ross, W.S.

Counsel for Respondent—Salvesen, Q.C. —Cook. Agents — Dove, Lockhart, & Smart, S.S.C.

Tuesday, February 27.

FIRST DIVISION.

GARDNER (THOMSON'S JUDICIAL FACTOR) *v.* HAMBLIN AND OTHERS.

Succession — Vesting — Vesting subject to Defeasance.

By an *inter vivos* declaration of trust executed by two unmarried sisters and their three brothers, on the narrative that certain shares had been purchased to be held in trust, it was provided that the annual dividends and profits of the shares were to be paid to the parents of the parties during their lives, and on the death of the survivor they were to be held for behoof of the two sisters jointly during their lives and for the survivor. In the event of the sisters having issue, the fee of the stock, subject to the liferents, was to belong, one half to the issue of each sister, and failing their having issue "the fee of said stock shall fall and belong to you, our brothers, equally, or the survivor of you." Each sister and brother contributed one-fifth of the purchase price of the stock. The sisters died unmarried; they were predeceased by all the brothers. *Held* (Lord Adam *diss.*, Lord Kinnear *absent*) that on the death of the second of the brothers the fee of the stock vested in the last surviving brother, subject to defeasance in the event of either of the sisters leaving issue.

Opinion contra per Lord Adam that the purposes of the trust had lapsed, and that on the death of the last sister the stock fell to be divided among the representatives of all the brothers and sisters.

Steel's Trustees v. *Steel*, December 12, 1888, 16 R. 204, *commented on.*

The following declaration of trust was, on 10th May 1854, addressed by Miss Janet Thomson and Miss Marion Thomson to their three brothers William, Peter, and Richard Thomson:—"DEAR BROTHERS,—We, Janet and Marion Thomson, residing in Forres, considering that you have purchased, partly with your own funds, 235 shares of the capital stock of the Caledonian Banking Company of Inverness, and registered in the said Company's books, Nos. 932, 933, 935, and 941, and that although you have entered and vested the said stock in our names jointly, and the survivor of us, and the executors, administrators, and assignees of us, excluding the *jus mariti* of any husband we or either of us may marry, we nevertheless hereby declare that the said stock is so vested in our names, and held by us in trust, for the following purposes:—In the first place, to apply and pay the dividends and profits arising from said stock annually to our father and mother, and the survivor of them, in liferent, during all the days of their, his, or her lifetime, but for their, his, or her liferent use allenarly. Secondly, after the death of our father and mother, to hold the dividends and profits for our own behoof, jointly, during our joint lives, and for the survivor of us while we remain unmarried, but in the event of either of us marrying, the other shall be entitled to the liferent of the whole, and in the event of both of us marrying, then we shall again be entitled to a joint liferent, and to the survivor of us, as aforesaid; subject to which liferents the fee of said stock shall fall and belong, one-half to the lawful children of me the said Janet Thomson, and the other half to the children of me the said Marion Thomson, share and share alike, but with a power of apportionment among our children respectively, as we may think proper; and failing our having children, the fee of said stock shall fall and belong to you, our brothers, equally, or the survivor of you, but it is expressly declared that the *jus mariti* and right of administration of any husband we may marry is expressly excluded, and that the liferents in our favour are purely alimentary; and it is further expressly provided and declared that neither we jointly, nor the survivor of us, shall have any right or title to sell or otherwise dispose of said stock during our lives, unless with the written consent of you, our brothers, or the survivors or survivor or the majority of you which all survive, previously obtained," &c.

The number of shares actually bought and registered in the name of the Misses Thomson was 230. The trust came into operation at the date of the declaration, and the dividends on the shares were paid to Mr and Mrs Thomson, the parents of the parties, during their lives. On the death of the survivor, Janet and Marion Thomson liferented the shares jointly, and on the death of Marion on June 8, 1891, Janet obtained a transfer of the shares into her own name, and enjoyed the liferent till her death on June 18, 1897.

Both sisters died unmarried. They left settlements dated April 15, 1899, in which they directed their executors to convey the shares to the person or persons legally entitled thereto, in accordance with the terms of the declaration of trust.

William Thomson died in August 1855 intestate. He was survived by a widow but left no children.

Richard Thomson died on 12th March 1873 without issue, leaving a widow to whom he bequeathed his whole estate.

Peter Thomson died on 3rd June 1875, leaving a last will and testament executed in 1852, by which he provided that in the event, which happened, of his leaving no family, one-third of his estate was to go to his widow, and the remaining two-thirds should be liferented by his unmarried sisters Janet and Marion Thomson, and that after their death the capital should be divided as follows — one-seventh to his brother William, whom failing to his lawful issue or their descendants; one-seventh to his married sister Mrs Hamblin, whom failing to her lawful issue or their descendants; and the residue to his brother Richard, whom failing to his issue. In consequence of the failure of the executors named in this will Mr Peter Gardner, W.S., was appointed judicial factor on his estate. Mrs Hamblin died leaving three children, one of whom assigned his interest in Peter Thomson's estate.

The widow of Peter Thomson on his death claimed her legal rights, and the judicial factor made over to her her one-half of the estate, and received her discharge, from which she excepted such portions of the estate as were not then realised. After her death her sister Mrs Bain, as surviving residuary legatee, became entitled to the sole interest in Mrs Peter Thomson's estate.

After the death of Miss Janet Thomson, the last survivor of the sisters and brothers who had executed the declaration of trust, a special case was presented to the Court by (1) the judicial factor on Peter Thomson's trust estate; (2) two of the children and the assignee of the third child of Mrs Hamblin; (3) the executors of Janet and Marion Thomson; (4) Mrs Bain, the residuary legatee of Mrs Peter Thomson; (5) the widow of Richard Thomson; (6) The widow of William Thomson; and (7) the executors of William Thomson. The parties agreed that for the purposes of the case each of the parties to the declaration of trust should be held to have contributed one-fifth of the purchase price of the shares.

The following were the contentions of the parties as set out in the case — "(7) . . . The judicial factor on Peter Thomson's estate, the party of the first part, claims the shares on the ground that Peter Thomson was the last survivor of the three brothers, and that by the terms of the declaration of trust the fee of the stock was vested in him and forms part of his estate falling to be administered by the judicial factor. The second parties concur in this claim, and Mrs Bain, the party of the fourth part, also concurs in it. (8) Mrs Richard Thomson, the party of the fifth part, maintains that she is entitled to one-fifth of the value of the bank shares in right of her husband, the late Richard Thomson, on the ground that although no interest in the shares vested in her husband, yet as the purposes of the trust failed, the radical right in the trusters revived, and that accordingly to the extent of one-fifth of said shares it falls into the estate of her husband and is carried to her by his settlement. (9) Mrs William Thomson, the sixth party, claims as the widow of William Thomson to the extent of one-half of one-fifth share of the value of the said bank shares, on the same grounds as the party of the fifth part. By the law of Jamaica the widow of a husband dying intestate is entitled to one-half of his moveable estate. (10) The executors of Janet and Marion Thomson, parties of the third part, claim that they are entitled to the whole fund equally between them on the ground that it must be held that the shares were purchased for the two sisters, and became their absolute property, that the sisters, as absolute fiars, created the said trust, and that the trust having failed, the shares reverted to the sisters as the original fiars and trusters, and were carried by their settlements to their executors, to the exclusion of their brothers' representatives. Alternatively, the executors maintain that they are entitled to two-fifths of the value of the bank shares on the same grounds as the party of the fifth part."

The parties submitted the following questions of law:— "(1) Whether the said 230 shares of the Caledonian Banking Company now belong to the first party as judicial factor on the estate of the late Peter Thomson? or (2) Whether the said shares belong to the first party, the fifth party, and the sixth and seventh parties, each to the extent of one-fifth thereof, and to the third parties to the extent of two-fifths thereof? or "(3) Whether the said shares belong to the third parties?"

The following cases were cited in support of the contentions of the parties—*Begg's Trustees* v. *Reid*, January 31, 1899, 1 F. 498; *Cumming's Trustees* v. *Anderson*, November 15, 1895, 23 R. 94; *Steel's Trustees* v. *Steel*, December 12, 1886, 16 R. 204; *Taylor* v. *Gilbert's Trustees*, July 12, 1878, 5 R. (H.L.) 217; *Duncan's Trustees and Others*, July 17, 1877, 4 R. 1093; *Maitland's Trustees* v. *Macdermaid*, March 15, 1861, 23 D. 732; *Newton* v. *Thomson*, January 27, 1849, 11 D. 452: *White* v. *Baker*, 29 L.J. Ch. 477.

LORD PRESIDENT—The question in this case arises under a declaration of trust dated 10th May 1854, addressed by two unmarried sisters, the now deceased Janet and Marion Thomson, to their brothers William, Peter, and Richard Thomson, by which they, on the narrative that their brothers had purchased, partly with their own funds, 235 shares of the Caledonian Banking Company, declared that although the stock had been entered and vested in their names by their brothers, it was held by them in trust for the following purposes —(1) to pay the annual dividends to their father and mother and the survivor of them in liferent for their and the survivor's liferent allenarly; (2) on the death of their parents, to hold the dividends and profits for their own behoof jointly during their joint lives, and for the survivor of them while they remained unmarried; and they

further declared that the fee of the stock should fall and belong, one-half to the lawful children of Janet Thomson and the other half to the lawful children of Marion Thomson, share and share alike, and that in the event of their not having children the fee of the stock should fall and belong to their brothers William, Peter, and Richard Thomson equally, or the survivor of them.

The number of shares actually bought and registered in the names of the Misses Thomson was 230, and beyond the statement in the declaration of trust nothing was known as to the source from which the purchase price was obtained. The parties, however, were agreed that, for the purposes of the case, each brother and sister should be held to have contributed one-fifth of the purchase price.

The Misses Thomson survived their parents, but neither of them was married, and the last survivor of them, Janet, died on 18th June 1897. The last survivor of the brothers, Peter, died on 3rd June 1875. Neither Andrew nor Richard Thomson left any children.

Three contentions are maintained with respect to the right to the shares of the Caledonian Banking Company—(1) that the right to the fee of them vested in Peter as the last survivor of the brothers under the declaration of trust, although he did not survive either of the sisters; (2) that no right to the fee vested in any of the brothers or sisters under the declaration of trust, that consequently the trust lapsed, and that the representatives of the brothers and sisters are entitled each to a one-fifth of the shares as intestate succession; and (3) that the two sisters must be held to have been the true owners of the shares, and that the purposes of the trust having failed, the right to the shares resulted to or remained in them so as to pass to their representatives.

I am of opinion that the first of these contentions is well founded, as it appears to me that upon the predecease of Andrew and Richard the fee vested in Peter, subject to defeasance, in the event of the sisters or either of them leaving lawful children—an event which did not occur. It appears to me that the doctrine of vesting subject to defeasance, established in the law of Scotland in *Taylor* v. *Gilbert's Trustees*, 5 R. (H.L.) 217, and expounded by Lord President Inglis in *Steel's Trustees* v. *Steel*, 16 R. 204, applies to the case. The exposition of that doctrine given by Lord President Inglis deals with the case of rights arising under a testamentary settlement, but it seems to me that the doctrine is equally applicable to rights conferred by such an *inter vivos* trust as that now in question. The only persons who ever came into existence upon whom any right of fee was conferred by the declaration of trust were the three brothers, but I do not think that the fee vested in them when the declaration of trust came into operation, because the fee is declared to belong (failing lawful children of the sisters) to them "or the survivor of them." This is, in my judgment, a proper clause of survivorship as between the brothers, which suspended vesting of the fee until both William and Richard had died and Peter was ascertained to be the survivor of the three. There was no further gift of the fee in favour of anyone except the possible children of the sisters, who never came into existence. As William, Peter, and Richard Thomson were all in existence when the declaration of trust came into operation (an event which appears to me to be equivalent to the death of the testator in the case of a testamentary settlement), it appears to me that they in effect satisfy the requirement stated by Lord President Inglis in the case of *Steel's Trustees*, that the individual or the class in whom the vesting subject to defeasance takes place, shall have been known and existed at the death of the testator, and although there was, in my view, a suspension of vesting as between the brothers until the survivor of them was ascertained, I do not think that there is ground for holding that there was any further suspension of the vesting subject to defeasance.

For these reasons I consider that the first question should be answered in the affirmative.

Lord Adam—I am disposed to take a different view. It seems to me that this is a case of lapsed trust, and the fund falls to be divided into five portions among the representatives of the two sisters and the three brothers, who we are bound to assume were the contributors of the trust fund.

The deed is a declaration of trust, but it is expressed as if it were a joint-settlement of this particular sum of money, just exactly as if the parties to it were making a trust-disposition and settlement. That is the form of it, and in construing the deed we are perhaps entitled to apply to it the rules, so far as they go, which are applied in the construction of the trust-settlements.

The following are the provisions of this settlement — [*His Lordship quoted them*]. Now, I do not find there any substitution of the children of the one sister to the children of the other, and accordingly it was possible to have a division of the fee into two.

Then failing children of the two sisters the fee is to go to the three brothers or the survivor of them. The difficulty in the matter is that under that clause there could be no vesting of the fee in the brothers, because of the condition of survivance of the date of the sisters' deaths, and there is no-one who answers the description of survivor, because Peter Thomson, the last surviving brother, predeceased both the sisters; the language of the gift is not therefore applicable to the circumstances. But it is said that if we apply the doctrine of the case of *Steel* that makes it possible to give the fee to the actual survivor of the brothers. It is said that being a gift to children *nascituri*, with a gift-over to certain persons in the event of the failure of

children, it therefore vested in these persons subject to divestiture. I quite understand that the doctrine applies to the case where the persons are known and ascertained at the date of the testator's death. In this case, however, at the date of the deed nobody could possibly know who the survivor of the three brothers would be, and therefore *Steel's* case is not applicable.

But it is said that the principle of *Steel's* case may be applied in this way, that while it is quite true that at the date of the deed it could not be certain who the survivor of the three brothers would be, still in the course of events two of the brothers died leaving the the third sole survivor, and that therefore that contingency was then purified, and the destination then came to be to a person known and ascertained just as if it had been in favour of Peter by name. As I have said, this is the first time that we have been asked to go so far as that, or to carry the principle of *Steel* any further than it was allowed to go in that case. It is said that it is just the same principle. I am not sure of that. If we are to go beyond the words of the deed, why should we not give a share of this fund to all the brothers, Peter not being, in the language or sense of the deed, a survivor any more than the other two. That would be an extension of the principle further than we can carry it.

On the ground that there is no favoured person who survives, and no-one therefore to take under the deed, I think that we have here a lapsed trust, and that the fund falls to be divided in the way I stated at the commencement of my opinion.

LORD M'LAREN—I agree with your Lordship in the chair. I think we are all agreed that this deed must be taken as the joint trust-deed of the brothers and sisters who made contributions for the purchase and settlement of shares. I also assent to Lord Adam's opening observation that if the trust entirely fails the stock must revert to the heirs of the five parties in equal shares. But in my view there is no such failure, because the right to the stock vested in Peter the last surviving brother, subject to defeasance in the event of any of his sisters marrying and leaving issue. I am not in favour of the extension of the principle of vesting subject to defeasance to cases of a different character from that to which it has been applied. It is not a mode of construction which can ever be legitimately applied to a destination which is subject to a condition of survivorship or of attaining a certain age. The application of the principle is limited to cases where there is no existing object between a claimant and his right, but where there is only a possibility of some-one coming into existence. Whatever be the merits of the doctrine, it is a clear and intelligible distinction to hold that there is vesting in a person when there is no-one in existence to challenge his right—a right which can only be defeated in the event of the birth of a nearer heir. It is not immaterial to notice that while the application of this principle to moveable and mixed succession is of comparatively recent origin, having been first authoritatively stated by Lord Moncreiff in the case of *Taylor* v. *Gilbert's Trustees*, it has long been known in the case of heritable estates subject to destinations. It has been decided in cases which go back at least 100 years that a destination of heritage subject to devolution in the event of the birth of a nearer heir is effectual, and heirs of entail in possession have been dispossessed by the Court on the birth of nearer heirs.

As has been pointed out by Lord Adam, the peculiarity of this case—its *differentia* from former cases—is the condition of survivance as between the three brothers coupled with the contingent right given to the children of the sisters. In *Steel's* case, where there was a formal statement of the limits of the doctrine of vesting subject to defeasance, it is not difficult to see that Lord President Inglis wished to guard against its possible extension to contingencies which were not within the scope of the existing authorities, but at the same time I think that he considered there might be cases in which the gift was affected by an original condition as to survivance which had become inoperative in consequence of failure by death. But the observation of the Lord President is, not that the estate in such cases will remain unvested till the date of distribution, but that until the class is ascertained it cannot vest in anyone subject to defeasance. So, as I read the opinion, that great lawyer, while guarding against the extension of the doctrine to cases to which it was inapplicable, had foreseen that it was impossible to stop short of recognising a case where the interest was unvested at the testator's death, but might become vested by the ascertainment of the class through its being reduced by death to one member. I agree with your Lordship that we have the authority of Lord President Inglis' opinion, not for the extension, but for the application of the rule of vesting subject to defeasance to the present case, which after all presents only a casual modification of a state of circumstances in which the rule has been admittedly and legitimately applied.

With reference to the recent case of *Lord Hawke and Others* (37 S.L.R. 346), in which I gave an opinion on this point, my view is that the point did not really arise for decision, though it would have done so had the Court come to a different decision as to the class of persons in whom the legacy vested.

LORD KINNEAR was absent.

The Court answered the first question in the affirmative.

Counsel for First and Fourth Parties—Cullen. Agents—Carment, Wedderburn, & Watson, W.S.

Counsel for Second Parties — Craigie. Agent—Robert Stewart, S.S.C.

Counsel for Third Parties — A. S. D. Thomson. Agents—Stuart & Stuart, W.S.

Counsel for Fifth and Sixth Parties—Baxter. Agents — A. J. & J. Dickson, W.S.