There is no right of liferent certainly claimable at present by the fourth parties, because if the liferent ever opens up to the testator's mother's relatives, the fourth parties may not then possess the character which would alone entitle them to succeed. But as regards the fee of the testator's estate, I have formed a clear opinion that it is not disposed of by the will before us. The fee is not referred to at all, except in so far as the testator enjoins that it, which he describes as "the capital" of his estate, is not to be parted with by the trustee (now represented by the judicial factor) under any circumstances so long as his brothers and sisters are alive. He gives no direction as to where it is to go, or how it is to be disposed of, after their death. I cannot adopt the view that there is a fee conferred by implication on the four relatives of the testator's mother. What is directed to be given to them is "the interest" only, and this word is used in a clause in which the capital of the estate is mentioned, showing, as I think, that the testator had fully before him the distinction between capital and interest—that is, between fee and liferent.

The result of my opinion is, that as the testator died intestate as regards the fee of his estate, the same vested *a morte* in the brothers and sisters of the testator as his next-of-kin. No part of it however can be paid over to them, because whether the brothers are entitled to a liferent or not, there may be a claim for the liferent on the part of the four relatives of the testator on the mother's side. Nothing, however, can be decided with regard to such a claim until the death of both sisters and brothers, as it is only then that it can be ascertained who are the nearest and most needy relatives of the testator on the mother's side.

LORD MONCREIFF was absent.

The Court answered the first question in the negative, and the third question in the affirmative, and found that the second, fourth, and fifth questions could not be answered at present.

Counsel for First Party—Hunter. Agents—Patrick & James, S.S.C.

Counsel for Second Parties — Kincaid Mackenzie — R. Scott Brown. Agents — Macpherson & Mackay, S.S.C.

Counsel for Third Parties—Kemp. Agents—J. Stewart Gellatly, S.S.C.

Counsel for Fourth Parties — Chree. Agent—R. J. Calver, S.S.C.

Friday, March 2.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

WEBSTER'S TRUSTEES *v.* WEBSTER.

Succession—Vesting—Survivorship Clause.

A testator directed his trustees to pay the income of the residue to his wife so long as she remained his widow, and on her death or re-marriage, under deduction of a certain legacy, "to pay the whole residue and remainder of his estate to A, B, and C (children of his brother) *nominatim*, and the survivors and survivor of them equally between them, share and share alike, and should the said three children of my said brother all predecease me," then to dispose of it for certain other purposes detailed by him. A, B, and C all survived the testator, but A predeceased the period of payment. *Held* that the survivorship clause was controlled by the words which followed it indicating an intention against postponement of vesting, and that one-third of the residue had vested in A *a morte testatoris.*

Succession — Legacy — Interest—Postponed Payment—Residue.

A testator directed his trustees to pay the income of the residue to his wife so long as she remained his widow, and on her death or re-marriage, "in the event of a new church for St David's Parish having been erected before or within one year after" his "wife's death, and on condition that the whole of the debt incurred in erecting the said church shall have been cleared off at or before his wife's death, or within one year after her death," to pay to the Presbytery of Edinburgh £2500 for a certain purpose, and in case the above conditions were not complied with to dispose of this sum of £2500 for other purposes detailed by him, and to pay the residue to certain persons named by him. The widow married again, and the residue consequently became payable to the residuary legatees. But the trust had to be continued and the sum of £2500 retained by the trustees until it could be seen whether the church should be built and cleared of debt within one year after the widow's death. *Held* (by the Lord Ordinary, Stormonth Darling, and acquiesced in) that the income accruing upon this sum of £2500 from and after the date of the widow's re-marriage until it should be payable fell into residue.

Playfair's Trustees v. *Hunter*, July 18, 1890, 17 R. 1241, *followed.*

The Rev. Alexander Webster, sometime minister of the parish of St David's, Edinburgh, died on 30th May 1896 leaving a trust-disposition and settlement dated 13th September 1895, whereby he gave, granted, assigned, and disponed his whole means

and estate, heritable and moveable, to the trustees, and for the trust-purposes therein mentioned. The testator directed his trustees, *inter alia,* to divide the residue of his estate into two equal parts or shares, and to pay and convey one equal part or share to his wife Mrs Margaret Husband MacRitchie or Webster as her absolute property; to pay certain legacies out of the other equal part or share; to hold the residue and remainder, and to pay his wife the income thereof during all the days of her life, and so long as she remained his widow, and after her death or second marriage to realise the whole investments, and to convert the same into cash, with regard to the disposal of which he directed as follows:—"*First,* In the event of a new church for Saint David's Parish having been erected within or without the boundaries of the parish, before or within one year after my wife's death, and on condition that the whole of the debt incurred in erecting the said church shall have been cleared off at or before my said wife's death, I direct my trustees to give and pay to the Reverend the Presbytery of Edinburgh the sum of Two thousand five hundred pounds, to be by them invested for the purpose of providing an augmentation for all time coming to the legal stipend or endowment for the minister of Saint David's Parish." The testator then provided that in the event of these conditions not being complied with his trustees should cancel the bequest, and use the said sum of £2500 for other purposes detailed by him. Finally he provided as follows:—"*Lastly,* I direct my trustees to pay the whole residue and remainder of my means and estate to the before-mentioned three children of my said brother John Webster, *videlicet*—Margaret Webster, John Webster, and William Webster, and the survivors and survivor of them, equally between them, share and share alike, and should the said three children of my said brother all predecease me, then I direct my trustees to pay the said residue and remainder of my means and estate to the Reverend the Presbytery of Edinburgh for the purpose of being by them invested so as to still further increase in all time coming the legal stipend or endowment of St David's Parish," this last bequest being made subject to the same conditions as the bequest of £2500 above mentioned, failing compliance with which the residue and remainder was to go to such one or more of the charitable institutions in Edinburgh as might be selected by the trustees.

The testator was survived by his wife and by Margaret Webster, John Webster, and William Webster, the residuary legatees above mentioned. Margaret Webster married Duncan Neil, doctor of medicine, Acton, Middlesex. She died on 2nd February 1898 without issue, domiciled in England, and intestate. She was survived by her husband, to whom letters of administration were granted on 26th March 1898 by the High Court of Justice in England.

On 30th June 1898 Mrs Webster, the widow of the testator, married again, and consequently the share of the residue of the trust-estate destined, as before mentioned, to Margaret Webster, John Webster, and William Webster and the survivors and survivor of them became divisible in terms of the settlement. Questions having arisen as to the respective rights of Dr Neil as administrator of his deceased wife, and of John Webster and William Webster, who had survived the re-marriage of the widow, the present action of multiplepoinding was brought by Dr Neil, in his representative capacity, as real raiser, in name of the trustees as pursuers and nominal raisers.

The fund *in medio* amounted to the sum of £6313, 19s. 1d., being the whole funds still in the hands of the trustees after carrying out all the purposes of the trust except payment of the legacy of £2500 to St David's parish, and the payment of the residue under the last clause in the settlement.

Claims were lodged (1) by Dr Duncan Neil as administrator for his deceased wife; (2) by the trustees; and (3) by John Webster and William Webster.

Dr Neil, as administrator foresaid, claimed to be ranked and preferred to one-third part of the residue of the trust estate in the hands of the trustees. He pleaded—"(2) The share of residue claimed having vested in the deceased Margaret Watson Webster or Neil *a morte testatoris,* this claimant, as her administrator foresaid, ought to be ranked and preferred in terms of his claim."

The trustees claimed to be ranked and preferred upon the fund *in medio* to the extent of £2700 (being the legacy of £2500 to St David's parish and £200 to cover expenses of administration) with the interest accruing and which had accrued on the said sum of £2500 since 30th June 1898, in order that they might administer the trust for the benefit of the parties justly entitled thereto.

The claimants John Webster and William Webster claimed to be ranked and preferred equally for the whole residue, under deduction of the sum of £2500, but including the interest accruing and which had accrued upon that sum since 30th June 1898.

They pleaded—"(2) The claimants the said John Webster junior and William Webster, being the only residuary legatees who survived the period of vesting, are entitled to be ranked and preferred equally on the whole fund *in medio.*"

On 18th July 1899 the Lord Ordinary (STORMONTH-DARLING) pronounced the following interlocutor:—"Finds that on a sound construction of the trust-disposition of the Rev. Alexander Webster—(1) That the sum of £2500, but without interest, falls to be retained by his trustees for disposal in accordance with the fifth purpose of said trust-disposition and settlement; (2) That the interest on said sum of £2500, so long as it remains in the hands of the trustees until it falls to be applied by them in accordance with said provisions, but under deduction of the current and future expenses of the administration of the trust, falls into residue; (3) That the whole residue, after deducting the said £2500, and including the

free balance accruing from time to time of the said interest, vested in Margaret Webster or Neil, John Webster and William Webster, the children of John Webster, one of the trustees, at the death of the testator, viz., 30th May 1896; (4) That the said Margaret Webster or Neil died on 2nd February 1898, and that the claimant Dr Duncan Neil is the administrator of her estate, conform to letters of administration granted by Her Majesty's High Court of Justice, dated 26th March 1898: And in accordance with these findings, sustains the claim of the nominal raisers, the trustees of the deceased Rev. Alex. Webster, to the extent of the above-mentioned sum of £2500, and to the sum of £200 or as much thereof as may be required for the expenses of administering the trust, and ranks and prefers them accordingly, and repels said claim so far as regards the interest on said £2500: Sustains the claim of the said Dr Duncan Neil to one-third of the residue remaining after deducting the said £2500, and ranks and prefers him accordingly; sustains the claim of John Webster junior and William Webster to two-thirds of said residue remaining after deducting said £2500, and ranks and prefers them accordingly: *Quoad ultra* repels said claim: Finds the claimants entitled to expenses out of the trust-estate," &c.

Opinion.—"The points at issue in this case are I think capable of solution by reading the will itself without much aid from decided cases.

"The first question is, whether the trustees are entitled to accumulate interest on the bequest of £2500 to the Presbytery of Edinburgh, or whether the interest falls into residue. The bequest is to be paid only on the death of the testator's widow, and she is still alive. It is also subject to a number of conditions which may or may not be fulfilled, and there is a destination-over, so that it cannot be maintained that vesting has yet taken place. There being thus no one *in titulo* to represent the interests of the eventual legatees except the trustees of the testator, they have quite properly put forward a claim to hold the legacy, with interest. But I am of opinion that this claim is not well founded. The will itself is quite explicit in directing what is to be done at the death of the wife. Payment is to be made of £2500, and no more. There is no direction to set apart this sum and administer it as a separate fund for behoof of anybody. If the widow had remained unmarried, this sum would simply have formed part of the residue, the income of which was to be paid to her. The effect of her second marriage has been to liberate the whole of the residue except this sum, and accordingly it is the only sum now left in the trustees' hands. The testator has not expressly dealt with this contingency, but there is no indication of any wish on his part that it should have the effect of increasing the amount payable to the legatee, and in these circumstances the ruling direction is that the sum to be paid should be £2500. Therefore I think that the case, if authority be required, is ruled by the decision in *Playfair's Trustees*, 17 R. 1241.

"The second question is, whether a share of residue vested *a morte testatoris* in Margaret Webster, who became Mrs Neil. She survived the testator, but died before the second marriage of the testator's widow, and it was after the second marriage or death of the testator's widow that the residue was to be divided. The residuary clause undoubtedly contains a clause of survivorship, and the question is whether those words are referable to the period of division or to the death of the testator. I think it may be conceded to the claimants John and William Webster that where you have a postponed period of division, as here, and words of survivorship, as here, the presumption is in favour of the words of survivorship being referable to the period of division. But that presumption, like all presumptions, must always yield to a clear indication of intention to the contrary, and it seems to me that there is such an indication in this very clause. The words are—'I direct my trustees to pay the whole residue and remainder of my means and estate to the before-mentioned three children of my said brother John Webster, viz., Margaret Webster, John Webster, and William Webster, and the survivors and survivor of them, equally between them, share and share alike, and should the said three children of my said brother all predecease me, then I direct my trustees to pay the said residue and remainder of my means and estate to the Reverend the Presbytery of Edinburgh.' Therefore the period which the testator had in view when he ordered that clause to be inserted was his own death. If that be so, he has quite distinctly and fully provided for the case, first of one of his residuary legatees, then of two, and then of all three, dying before him. To read the clause otherwise would be to suppose that he had one period in view when he spoke of the death of one or of two, and another period when he spoke of the death of three.

"That being so, I must hold that vesting took place *a morte*, repel the claim of the trustees so far as interest is concerned, and sustain the claim of Dr Neil. The claim of John and William Webster will also be sustained to the extent of two-thirds of the residue."

The claimants, the trustees, acquiesced in the judgment of the Lord Ordinary.

The claimants John Webster and William Webster reclaimed, and argued—There was here a survivorship clause, and the presumption was that it referred to the period of distribution—*Young* v. *Robertson*, February 14, 1862, 4 Macq. 314. It was argued, however, that the presumption was overcome in this case. It was said that the testator had made no provision for the contingency of all or some or one of the Websters surviving himself, but all predeceasing the period of distribution, and that consequently if the presumption were to be applied intestacy would have resulted in that event, which could not readily be supposed to have been the inten-

tion of the testator; that on the other hand he had provided for the event of all the Websters predeceasing himself; and that therefore he intended the survivorship clause to refer to the date of his own death. But this argument was based upon a misconception. No intestacy could have resulted here. If all the Websters had predeceased the testator, then the presbytery would have taken. If only one had survived the testator, then he or she would have taken an immediate vested right of fee as at the date of the testator's death. If more than one had survived the testator, but all had predeceased the period of distribution except one, then the whole residue would have vested in him immediately upon his becoming the sole survivor. The rule was that as soon as there was only one survivor the residue immediately vested in him; because in that event the survivorship clause ceased to have any application, and there was nothing to postpone vesting further; but that, on the other hand, as long as two or more survived, although they took as a class, and so as to exclude all others immediately upon the death of the testator, yet *inter se* vesting was postponed until the period of distribution in respect of the survivorship clause — M'Laren on Wills and Succession (3rd ed.) 648—*Maitland's Trustees* v. *M'Dermaid*, March 15, 1861, 23 D. 732. See also *Begg's Trustees* v. *Reid*, Jan. 31, 1899, 1 F. 498. The result was that Margaret having predeceased the period of distribution took nothing, and the whole residue fell to her two brothers the claimants and reclaimers.

Argued for the claimant Neil — The survivorship clause referred to the date of the testator's death, and a share in the residue vested in each of the beneficiaries who survived that period. Reading the will as a whole this was evidently the intention of the testator. In this particular clause "survive" and "predecease" must have been meant to refer to the same period, viz., the date of the testator's death. The tendency of the most recent decisions was to the effect that wills ought to be interpreted according to the fair meaning of the particular deed, rather than in obedience to general rules of interpretation or previous decisions upon other settlements — *Bowman* v. *Bowman*, July 25, 1899, 1. F. (H.L.) 69; *Thompson's Trustees* v. *Jamieson*, January 26, 1900, 37 S.L.R. 346. The case of *Maitland's Trustees* v. *M'Dermaid*, *cit.*, was old, and, moreover, it was really a decision upon the subject of vesting subject to defeasance, and had no application here.

LORD JUSTICE-CLERK—The question upon which our judgment is asked relates to a share in the estate of Rev. Alexander Webster, viz., whether it vested in Margaret Neil, a niece of the testator. That lady survived him but died before his widow had entered into a second marriage. It is contended that as there was a postponed period of division, and a survivorship clause, that it is to the period of division that the application of the words of survivorship must be made, and to that as a general proposition no exception can be taken. But the true question here is whether the testator has not indicated by the words he has used that his own death and not the period of division was what he had in his mind in drawing up his settlement. I think with the Lord Ordinary that it was so from the form of expression which he uses. For he in express words disposes of his residue otherwise in the event of all his nephews and nieces predeceasing him. He refers to one period, and one period only, viz., his own death.

I do not say that it is impossible, consistently with the words the testator uses, to put upon them the construction which is contended for by the reclaimers, although I do not think it is a natural construction to put upon them. But even if two constructions were reasonably possible, then that which favours immediate vesting is preferable. Here there is no apparent purpose for postponement of benefit except the protection of a widow's liferent, and reading the clause as a whole, I come to the conclusion that the decision of the Lord Ordinary is right, and would move your Lordships to adhere to it.

LORD YOUNG—I concur in the judgment of the Lord Ordinary.

LORD TRAYNER—I also agree with the Lord Ordinary.

LORD MONCREIFF—The second question decided by the Lord Ordinary, which is the only one on which our judgment is desired, is whether a share of residue vested in the testator's niece Margaret Webster (Mrs Neil), who survived the testator but died before the second marriage of the testator's widow. This question is not so simple as at first sight appears. The Lord Ordinary has decided that the share vested in Mrs Neil, because reading the clause as a whole it is in his opinion clear that the testator had in view one period of vesting, viz., his own death. In short, he reads the clause as if it ran—"I direct my trustees to pay the residue of my estate to such of the three children of my brother John as survive me, and should the said three children all predecease me, then I direct my said trustees to pay the said residue to the Presbytery of Edinburgh."

But another and quite intelligible meaning can be put upon the clause. The reclaimers maintain that its true meaning is that while the gift-over to the Presbytery of Edinburgh depended upon all three children predeceasing the testator, the testator desired that as among the three children their right to take should depend upon their surviving the period of division, subject to this explanation, that as the legacy vested *a morte* in them as a class, in the event of all or any of them surviving him it would vest absolutely in the last survivor even in the event of all of them predeceasing the period of division, there being no ulterior destination.

While I fully appreciate the force of this argument, I think that as the clause admits

of two interpretations the Court should lean to the one which favours immediate vesting; the more especially as there was no apparent reason for postponing vesting, payment being only postponed for the purpose of securing the provision to the testator's widow, which would terminate either on her death or second marriage. I observe that exactly the same form of expression is used in a bequest which undoubtedly vested *a morte*—"Two hundred pounds to Mr Gordon Watt and his wife Mrs Watt, equally between them, and to the survivor of them, but declaring that if the survivor of them should predecease me, then to their children," &c.

Of course our judgment proceeds on the ground that the earlier words of the clause which undoubtedly would involve postponement of vesting if they stood alone, are controlled by the part of the clause, which follows.

I am therefore for adhering.

The Court adhered.

Counsel for the Pursuers and Nominal Raisers and Claimants, the Trustees--Gloag. Agents—P. Morison & Son, S.S.C.

Counsel for the Claimants and Reclaimers John Webster and William Webster—W. Campbell, Q.C.—T. B. Morison. Agents—P. Morison & Son, S.S.C.

Counsel for the Claimant and Respondent Neil—Ure, Q.C.—Guy. Agents—Gordon Petrie & Shand, S.S.C.

Friday, March 2.

SECOND DIVISION.

[Sheriff of Argyleshire.

ALLAN *v.* MACLACHLAN.

Servitude — Road — Obligation to Repair Servitude Road—Real Burden.

An obligation to keep in repair a servitude road imposed upon the servient owner does not transmit against singular successors in whose titles the obligation is not repeated.

A sold certain lands to B. In the disposition it was declared that A and his heirs and successors or assignees should have right of ingress and egress to and from his other lands by the existing road through the lands disponed, and that the expense of the repair and upkeep thereof should be borne by B and A mutually. This declaration was not constituted a real burden on the subjects.

B sold the lands to C. In the conveyance to C there was no mention made of any obligation to repair and upkeep the servitude road.

In an action brought by A against C *held* that C was under no obligation to contribute towards the repair and upkeep of the servitude road.

By disposition dated 1st and recorded 15th May 1879, Alexander Allan of Aros, Mull, disponed to William Lang of Glengorm certain parts of the estate of Aros called Arrois and Kilmalen. This disposition contained a clause in the following terms: "Declaring that I and my heirs and successors or assignees shall have a right of ingress and egress to and from my other lands by the existing road through the lands hereby disponed, and that the expense of the repair and upkeep thereof shall be borne by my said disponee and me and my foresaids mutually." This declaration was not however constituted a real burden on the subjects. Thereafter William Lang granted various bonds and dispositions in security over the lands. The bondholders sold the lands by public roup on 15th December 1897 to Dugald Cameron MacLachlan and granted him a disposition dated in January and February and recorded 12th March 1898. The obligation as regards the expense of repairing and upkeeping the road did not appear and was not referred to in the disposition to MacLachlan.

In December 1897, Allan, on the ground that the road had fallen into disrepair, requested MacLachlan to concur with him in having the road put into repair. MacLachlan maintained that he was not bound to co-operate with Allan in having the road put into a better state of repair. The parties being unable to come to any arrangement, Allan raised against MacLachlan in the Sheriff Court at Oban an action for decree authorising the pursuer to execute all repairs necessary upon the road in question, and to put the road into a state of thorough repair, the work to be executed, should the defender so require, at the sight of a man of skill to be appointed by the Court, and thereafter, upon completion of the said necessary repairs, to ordain the defender to pay to the pursuer £100, or such other sum as should be ascertained to be one-half of the cost of the repairs.

The pursuer pleaded—"(1) The defender is, in terms of the title upon which he holds his said property, liable in one-half of the cost of repairing the said road. (2) The said road being in a state of disrepair, the pursuer is, in the circumstances condescended on, entitled to have decree as craved, authorising him to proceed with the necessary repairs at the joint expense of the parties."

The defender averred "that the road in question belongs to the defender. He is the sole judge of what, if any, repairs should be executed upon it. Neither in his title nor otherwise has the pursuer any right in or control over said road except a right of ingress and egress."

He pleaded—"(1) The action is irrelevant. (2) It is incompetent to authorise the pursuer at the defender's expense to execute repairs upon a road belonging to the defender. (3) The defender being owner of the road in question, and his title containing no clause authorising the pursuer to execute any operations thereon, the present action ought to be dismissed. (4) The defender being the judge of what, if any,