of the Act on which this application is based is applicable to the case before us.

The case before us is this—Trustees were sued for what was alleged to be a trust debt, and after lodging defences intimated to the beneficiaries that they would not maintain their defences unless the beneficiaries desired this to be done, but would protect themselves by raising a multiplepoinding. The beneficiaries thereupon asked to be sisted, and were sisted as defenders. They maintained the defence originally stated by the trustees successfully. They say that in doing so they have "preserved" the estate. They have no doubt been successful in preventing the pursuer obtaining decree for his claim, but that is nothing more than saying that for their own benefit they have successfully resisted a claim which was unfounded. In these circumstances I do not think any estate has been "preserved" to the trust by the beneficiaries. The estate, and consequently the beneficiaries, have not been made liable for the pursuer's claim—that is all.

LORD MONCREIFF — I was not present when this case was decided, and I am not sure that I quite apprehend the facts, but as I understand them the beneficiaries' agents are not entitled to the benefits of the statute.

If a claim is made against trustees which if successful would take away part of the estate which they hold, but which they succeed in defeating, and if the law-agent who has been employed by them claims a charge upon that part of the estate which has been "preserved on behalf of his clients" by him, I think that would be a case falling under the 6th section of the statute.

In the present case, as far as I can see from the papers, the trustees defended an action, and continued to do so separately to the end. They had separate pleas, all combating the pursuer's claim, and they were successful. But the beneficiaries do not seem to have had confidence in the trustees' defence, and chose to appear to see the action fought out. They entered separate appearance and lodged separate defences with separate pleas. I think the estate which they were defending could have been preserved by a single defence by the trustees, and that a double charge should not be sanctioned.

The Court refused the prayer of the minute.

Counsel for the Minuters — Hunter. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for the Trustees—A. S. D. Thomson. Agents—Party.

Saturday, December 13.

FIRST DIVISION.

STEEL'S TRUSTEES *v.* STEEDMAN'S EXECUTOR.

Succession—Vesting—Share held for Mother in Alimentary Liferent and Children in Fee—Vesting in Children at Birth—Destination-over in event of Mother "dying without issue."

A testator directed his trustees to hold the residue of his estate for behoof of the whole of his children equally, share and share alike, and to retain the daughters' shares invested for their liferent alimentary use only, and for their children equally *per stirpes* in fee. In a subsequent clause he further directed—"And should any of my daughters die without issue, such deceaser's share shall be paid and held respectively for the behoof of my surviving children."

One of the testator's daughters died leaving issue, but predeceased by one daughter.

Held that under the will a share of the share liferented by the testator's daughter vested in each of her children at its birth, and that such a share had vested in the predeceased daughter, the words "dying without issue" being equivalent to "dying without having had issue."

Succession—Heritable or Moveable—Conversion.

A testator whose estate consisted of moveable property to the gross value of £3352, and heritable property which afterwards sold for £22,590, directed his trustees to hold the residue of his estate for behoof of the whole of his children equally, share and share alike, and to pay the sons their shares on their successively attaining twenty-five, and to retain the daughters' shares invested for their liferent alimentary use only, and for their children equally *per stirpes* in fee. The deed contained a power but no direction to sell the heritage.

Held that the scheme of the settlement necessitated the sale of the heritage, and consequently that the shares of residue were moveable.

Playfair's Trustees v. *Playfair*, June 1, 1894, 21 R. 836, 31 S.L.R. 671, *followed.*

By trust-disposition and settlement dated 5th April 1867, with two codicils dated 11th March 1868 and 31st May 1869, the deceased Robert Steel, of Browncastle and Burnhouse, conveyed his whole estate, heritable and moveable, to trustees. After making provision for debts and expenses, a liferent provision for his widow, and certain small annuities and bequests, he directed his trustees—"(Fifthly) I appoint my trustees after my death to pay to or disburse on account of my children equally, the interest of the residue of my estate for their education and after maintenance, or should my

trustees, in the exercise of the powers after given, think it proper, they may sell and convert into money the whole residue of my estate, and apply and pay the free annual interest or proceeds thereof to or for my children equally for the foresaid purpose, and that till my sons attain the age of twenty-five years, and during the lifetime of my daughters for their liferent alimentary use only. (Sixthly) I appoint my trustees to hold the whole residue and remainder of my estate, both heritable and moveable, for the use and behoof of the whole of my children equally, share and share alike, and to pay and convey their shares to my sons on their respectively reaching twenty-five years of age, and to hold and retain invested in their own names, and in such securities as they think proper, the shares of my daughters for their liferent alimentary use only, and for their children equally *per stirpes* in fee, with power to my trustees to advance to or for any of my sons, even before reaching the foresaid age, such part of their prospective share as my trustees think proper for putting them or advancing them in business, and on the marriage of any of my daughters I appoint my trustees to pay to such daughter out of the fee of the share held for her behoof the sum of £200 for necessary furnishings: Should any of my sons die without issue before being twenty-five years old, I appoint my trustees to divide his share among my children equally, the surviving sons getting payment when reaching the foresaid age, and the proportion effeiring to my daughters being held by my trustees for their liferent alimentary use only and their children equally in fee, all as aforesaid; and should any of my daughters die without issue, such deceaser's share shall be paid and held respectively for the behalf of my surviving children as above provided for the case of a son deceasing without issue before being twenty-five years old."

The deed further contained a clause in the following terms—"And to enable my trustees to carry out the purposes of this settlement I confer upon them all requisite powers, and particularly (but without prejudice to said generality) I empower them to uplift, receive, assign, and discharge the whole debts and effects belonging to me, and realise and convert into money the whole of my estate, and specially to sell and dispose of, either by public roup or private bargain, my whole heritable and moveable estate, in such lots, at such prices, and on such terms as they may think proper, with the application of the proceeds of all which purchasers, debtors, or others, shall have no concern or right to interfere, and also to execute and deliver all writings necessary for divesting themselves of the premises binding me and my estate in absolute warrandice."

The testator, who died on 23rd October 1869, was survived by four children, all of whom attained the age of twenty-five, viz., (1) Elizabeth Steel or Steedman, (2) Thomas Steel, (3) Robert Steel, and (4) Alexander Steel.

Mrs Elizabeth Steel or Steedman died on 22nd November 1900 survived by her husband the Reverend William Steedman, who died on 7th June 1901, and by four sons and two daughters, but predeceased by one daughter, Catherine Steedman, who was born on 24th May 1893 and died on 5th June 1894.

At the date of the testator's death, his estate consisted of moveable property to the nett value of £3352, and certain heritable property, a small portion of which the trustees sold in 1870 for £1050. The rest of the heritage they continued to hold till 1901, subsequent to the death of Mrs Steedman and her daughter Catherine, when it was sold for £21,540.

Questions having arisen (1) as to whether Catherine Steedman took a vested interest in any part of the one-fourth of the residue of the testator's estate destined to the issue of the said Elizabeth Steel or Steedman her mother; (2) in the event of its being held that she did acquire a vested right, as to whether her interest was wholly moveable or partly heritable; this special case was presented for the opinion and judgment of the Court.

The parties to the special case were (1) the trustees under Robert Steel's trust-disposition and settlement; (2) the executor-dative of the Rev. William Steedman, who contended that one-seventh of one-fourth of the residue of the estate had vested in Catherine Steedman, that the share was wholly moveable, and on her death passed to the extent of a-half to her father, and consequently to his executor-dative; (3) Catherine Steedman's heir-at-law, her brother Thomas Steedman, who agreed that a-seventh of a-fourth of the residue had vested in her, but contended that it was, with the exception of what represented the heritage sold in 1870, heritable, and fell to him; (4) Catherine Steedman's other brothers and sisters, who contended (*a*) that no share had vested in her, but (*b*) if a share had vested in her that it was moveable.

The following questions were, *inter alia*, submitted to the Court:—"1. Was a right to a share of the residue of the estate of the testator vested in the said Catherine Steedman at the time of her death? 2. In the event of the first question being answered in the affirmative, was the share which vested in Catherine Steedman wholly moveable; or 3. Was said share, so far as derived from the heritable properties of the testator other than Westcraigs (the heritage sold in 1870) heritable succession of the said Catherine Steedman?"

Argued for the third party—A gift to a mother in liferent and to her children as a class gave a vested interest to each member of the class as it came into existence, and this interest did not accresce on its death to the other members of the class—*Hickling* v. *Garland's Trustees*, August 1, 1898, 1 F., H.L. 7, 35 S.L.R. 975; *Hunter's Trustees* v. *Carleton*, February 11, 1865, 3 Macph. 514; *Carleton* v. *Thomson*, July 30, 1867, 5 Macph. (H.L.) 151, 4 S.L.R. 226; *Cunningham* v. *Cunningham*, November 30, 1889, 17 R. 218, 27 S.L.R. 106. A share

had therefore vested in Catherine, and this share was heritable, because the testator's intention was that the estate should be held as it was at his death, and this the trustees had done—*Buchanan and Angus* v. *Angus*, May 15, 1862, 4 Macq. 374; *Sheppard's Trustees* v. *Sheppard*, July 2, 1885, 12 R. 1193, 22 S.L.R. 801; *Duncan's Trustees* v. *Thomas*, March 16, 1882, 9 R. 731, 19 S.L.R. 502.

Argued for the second party—The share was moveable succession, for conversion of the heritage was implied as being necessary to carry out the purposes of the trust. Successive *pro indiviso* conveyances of the heritage were impossible—*Playfair's Trustees* v. *Playfair*, June 1, 1894, 21 R. 836, 31 S.L.R. 671. All the requisite powers were given—*Baird* v. *Watson*, December 8, 1880, 8 R. 233, 18 S.L.R. 171.

Argued for the fourth party—No share had vested in the deceased grandchild. The gift was merely to those nearest, and without any destination to children *nominatim*, the intention being to fully regulate the division of the estate when division took place, and to exclude outsiders. This intention would be frustrated by supposing a share had vested in a granddaughter who had predeceased division. *Carleton's* case and *Cunningham's* case were to be distinguished, inasmuch as a conveyance in terms of the deed could have been executed by the trustees at any time when an interest had vested, but that was not so here. The facts in *Hickling's* case were quite different.

LORD ADAM — Three questions were argued in this case—(1) Whether there was vesting in Catherine Steedman, (2) whether there was conversion of the heritable estate left by the truster, (3) whether certain annuities granted by the will are payable out of the truster's heritable or moveable estate. Of course the first question depends on the construction of the will, and I think entirely on that, and in particular on the construction of the sixth purpose. The facts are these, that the truster died leaving a widow, Mrs Steel, three sons, and one daughter. Mrs Steedman died on 22nd November 1900 leaving four sons and two daughters, and predeceased by one daughter, Catherine, who died 5th June 1894. Now, by the fifth purpose the truster appointed his trustees to pay or disburse on account of his children equally for their education, &c., the interest of the residue of his estate, or should they think it proper they might sell and convert into money the whole residue of the estate, and pay the free annual interest for the same purposes, and that until the sons attained twenty-five years of age, and during the lifetime of the daughters for their liferent alimentary use only. That is, that the estate was to be held until the sons attained twenty-five, and as regards the daughters during their lifetime. Then by the sixth purpose he appointed his trustees "to hold the whole residue and remainder of my estate, both heritable and moveable, for the use and behoof of the whole of my children, equally share and share alike, and to pay and convey their shares to my sons on their respectively reaching twenty-five years of age, and to hold and retain invested in their own names, and in such securities as they think proper, the shares of my daughters for their liferent alimentary use only and for their children equally *per stirpes* in fee." What is the meaning in law of that clause if the deed had stopped there? There is no doubt that the trustees are to hold for the alimentary liferent of the daughters and for their children as a class in fee. If there was no child existing at the death of the truster the trustees would hold for any child who might come into existence, and the moment a child came into existence they would hold for that child, and the fee would be vested in that child subject to division if other children were born. Supposing, therefore, that the deed stopped there, there would be no reason to doubt that Catherine Steedman took a vested interest as soon as she was born. But it is said that this is not so, because in a subsequent part of the deed there is a destination-over which suspends vesting. What is called a destination-over is in these terms—"And should any of my daughters die without issue, such deceaser's share shall be paid and held respectively for the behoof of my surviving children as above provided for the case of a son deceasing without issue before being twenty-five years old." Whether the contingency here provided for ever occurred depends on the construction of the words "should any of my daughters die without issue." What do these words mean? Do they mean without having had issue or without having issue? I have no doubt that the meaning is "without having had issue," and that being so, the condition upon which this clause was to come into effect was never purified. I go back therefore to the original clause according to which the share vested in the daughter's children at the testator's death or their subsequent birth as the case might be.

The second question was, whether the testator's estate was to remain partly heritable and partly moveable, or was there conversion? I do not think it necessary to say much on that point. There are many reasons in favour of conversion, but to me the conclusive reason is that given in the case of *Playfair*, 21 R. 836. Here, as there, the shares are made payable when the sons successively reach the age of twenty-five, and I agree with the reasoning of Lord Rutherfurd Clark that when that occurs it is impossible that conversion is not necessary for the distribution of the estate. Each son's right is to a separate share of the estate, and not to a conveyance *pro indiviso*, and it is idle to suppose that as each son reaches twenty-five there are to be successive *pro indiviso* conveyances. I think therefore that there was necessarily conversion. If this is so, we need not consider the third question dealing with the annuities, as it does not arise.

I therefore move that we answer the questions by saying that there was vesting and that there was conversion.

LORD M'LAREN—1. In regard to the effect on vesting of a survivorship clause, it is a well-known rule of law that if a testator does not indicate the event to which the survivorship clause refers it is presumed to refer to the period of distribution. Here the testator does indicate the event which determines survivorship in the words, "should any of my daughters die without issue." The normal meaning of these words is "die without ever having had issue," for the words being general must include all possible cases classed under that head.

If we give this normal meaning to the words the will is perfectly intelligible and consistent. What the testator instructed was that each child of a daughter should take a vested interest as he or she comes into existence; nothing remained to be provided for except the event of no child coming into existence, and this is sufficiently provided for by the survivorship clause.

I find nothing in the context of this settlement to give another meaning to the clause or to modify the presumption in favour of early vesting.

2. As regards the second point, I agree with Lord Adam for two reasons. In the first place, there is a great deal to be said for this being a discretionary power conferred on the trustees to sell or not to sell the estate as they should deem advisable, and not merely a power of sale for the purpose of administration. That this is the nature of the clause appears from its terms—"should my trustees . . . think it proper they may sell and convert into money the whole residue of my estate." But in the second place there is also the consideration that this is a case in which the administration of the trust necessitates successive divisions of the estate, namely, to the testator's sons at twenty-five and to the issue of the daughters at the death of their mother, these periods naturally occurring at considerable intervals of time. The only way in which these divisions could take place consistently with the property remaining heritable would be by the trustees conveying the property jointly to themselves and to the child who was to be paid out. I agree with Lord Rutherfurd Clark's observations in the case of *Playfair* that such a method would be inconvenient, and would not satisfy the idea of payment of a share of the estate. The construction which would have this effect is not a construction to be accepted in preference to the construction which implies constructive conversion of the estate and payment in money.

In a case dealt with in this Division this year—*Watson's Trustees* v. *Watson*, May 17, 1902, 4 F. 798, 39 S.L.R. 628, we held that a beneficiary ought not to be put to the disadvantage of holding his share of the estate *pro indiviso* along with the trustees, but was entitled to have his share separated.

The result at which we arrive in this case does not conflict with the doctrine laid down in the case of *Buchanan*, that the presumption is that the estate remains, as regards the question of heritable and moveable, in the same state as at the testator's death. This presumption would prevail if the division of the trust estate in the manner directed could be carried out by *pro indiviso* conveyances. This would be the case when the whole division was to be at one and the same time. In cases of successive division there is great difficulty in carrying out the testator's directions by specific conveyances of the heritable estate. Where there is a discretionary power of sale, with a scheme of division and powers of sale such as we find in this will, I have no doubt that the case presents all the elements which have been considered sufficient to infer constructive conversion.

The LORD PRESIDENT and LORD KINNEAR concurred.

The Court answered the first and second questions in the affirmative and found it unnecessary to answer the other questions.

Counsel for the First and Fourth Parties—Cooper. Agent—R. Ainslie Brown, S.S.C.

Counsel for the Second Party—Steedman. Agents—Gordon, Falconer, & Fairweather, W.S.

Counsel for the Third Party—Sandeman. Agent—C. W. Bruce, Solicitor.

Tuesday, December 16.

SECOND DIVISION.

[Sheriff Court at Edinburgh.

STEEL *v.* OAKBANK OIL COMPANY, LIMITED.

Master and Servant — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *Sched. I. sec.* 12—*Review of Weekly Payment—Date from which Weekly Payment may be Ended, Diminished, or Increased.*

Held that under section 12 of Schedule 1 of the Workmen's Compensation Act the Sheriff as arbitrator has no jurisdiction to review the amount of the weekly payment either (1) as from the date upon which the workman in fact ceased to be totally incapacitated and began to earn wages, or (2) (*diss.* Lord Justice Clerk) as from the date upon which the application for review was presented, or any subsequent date prior to the date of the judgment.

Morton & Company, Limited v. *Woodward* [1902], 2 K.B. 276, *not followed.*

Observations as to the summary nature of the procedure which ought to be followed in applications for review of weekly payments.

This was an appeal in an arbitration in the Sheriff Court at Edinburgh, under the Workmen's Compensation Act 1897, between James Steel, miner, Midcalder, claimant and respondent, and the Oakbank Oil Company, Limited, appellants.

The Sheriff - Substitute (HENDERSON) stated the following case for appeal:—"By agreement between the parties—a special