Friday, June 9.

SECOND DIVISION.

COULSON'S TRUSTEES *v.* COULSON AND OTHERS.

Succession — Vesting — Vesting Subject to Defeasance—Defeasance on Either of Two Contingencies — Conditional Institution of Children of Predeceasing Beneficiary —Liferent to Widow of Beneficiary Predeceasing without Children, and Direction to Pay on her Death among Surviving Beneficiaries and Issue of Predeceasers.

A testator directed his trustees to allow his widow a liferent of his estate, and on her death legated and bequeathed and directed his trustees to make payment to his sons *nominatim* of certain specified sums, and legated and bequeathed and directed and appointed his trustees to divide and pay and make over the residue to and among his whole children *nominatim*, "declaring that in the event of the death of any of my said sons before the time of payment . . . leaving lawful children, I direct and appoint my said trustees to hold and apply the interest or annual produce of said legacies or shares of residue bequeathed to such deceasing son or sons for" behoof of the children, and to pay to them equally on the youngest attaining twenty-one years, "and should any of my said sons die without leaving lawful issue survived by any wife he or they may marry, I direct and appoint my said trustees to pay over the interest or annual produce of said legacies or shares of residue to such deceasing son's widow during her lifetime as an alimentary provision allenarly, and upon her death I direct and appoint my said trustees to divide and pay over the fee of said legacies bequeathed to such deceasing son or sons to and among my surviving children and the issue of deceasers, share and share alike, *per stirpes*.

Held that the legacy and share of residue destined to each son vested in him *a morte testatoris*, but subject to defeasance in the event of his predeceasing the liferentrix either leaving issue or survived by a widow.

John Laurie Coulson, brewer in Glasgow, and others, testamentary trustees of George Francis Coulson, brewer in Glasgow, hereinafter called the *testator*, *first parties*; (2) (*a*) the said John Laurie Coulson, who was a son of the testator, and (*b*) Frank William Coulson and others, the testamentary trustees of Frank Coulson, another son of the testator, *second parties*; (3) Edwin George Coulson and others, the children of the said Frank William Coulson, *third parties*; (4) George Francis Laurie Coulson and another, the pupil children of the deceased George Francis Coulson junior, another son of the testator, *fourth parties*; (5) the said John Laurie Coulson and another, the testamentary trustees of the deceased Alfred Henry Coulson, another son of the testator, *fifth parties*; (6) Charles Callam Coulson, another son of the testator, *sixth party*; (7) William Arthur Coulson, another son of the testator, *seventh party*; and (8) Janetta Isabella Laurie Coulson, the testator's daughter, *eighth party*; presented a Special Case dealing with the testator's trust-disposition and settlement.

The testator's trust-disposition and settlement provided—"(*Eighth*) Upon the death of the said Mrs Janet Isabella Laurie or Coulson, and when sufficient funds shall have been realised from my estate and be available, I legate and bequeath and direct and appoint my said trustees to make payment to each of my sons, the said George Francis Coulson, Alfred Henry Coulson, and William Arthur Coulson, of a further legacy of £1500 sterling: (*Ninth*) On the further realisation of my said estate after the death of the said Mrs Janet Isabella Laurie or Coulson, I legate and bequeath and direct and appoint my said trustees to make payment to the said John Laurie Coulson of the sum of £1500; to the said Frank Coulson of the sum of £1500; and to the said Charles Callam Coulson of the sum of £2000; Declaring, however, that should my said estate not yield sufficient funds for payment in full of the legacies by this article bequeathed, the same shall be proportionally diminished to the extent of the deficiency: (*Tenth*) In the event of the foregoing legacies not exhausting the whole residue of my estate, I legate and bequeath and direct and appoint my said trustees to divide and pay and make over whatever balance may remain to and among my children, the said John Laurie Coulson, Frank Coulson, Charles Callam Coulson, George Francis Coulson, Alfred Henry Coulson, William Arthur Coulson, and Janetta Coulson; Declaring that in the event of the death of any of my said sons before the time of payment of any of the foresaid legacies or shares of residue above provided to them respectively leaving lawful children, I direct and appoint my said trustees to hold and apply the interest or annual produce of said legacies and shares of residue bequeathed to such deceasing son or sons for the maintenance, education, and upbringing of his or their lawful children until the youngest shall attain the age of twenty-one years complete, when I direct and appoint my said trustees to divide and pay over the fee of said legacies or shares of residue hereby bequeathed to such deceasing son or sons, equally among his or their lawful children or their issue, share and share alike, *per stirpes*; and should any of my said sons die without leaving lawful issue, survived by any wife he or they may marry, I direct and appoint my said trustees to pay over the interest or annual produce of said legacies or shares of residue to such deceasing son's widow during her lifetime as an alimentary provision allenarly, and upon her death I direct and appoint my said trustees to divide and pay over the fee of said legacies bequeathed to such deceasing son or sons to and among my surviving children and

the issue of deceasers, share and share alike, *per stirpes*."

The *question of law*, upon which the case is reported, was—"1. (*a*) Did the legacies and shares of residue bequeathed to the testator's sons by the eighth, ninth, and tenth purposes of his trust-disposition and settlement vest in them *a morte testatoris*? Or (*b*) did these legacies and shares of residue vest in the testator's sons *a morte testatoris*, subject to defeasance in the case of such of them as might predecease the time of payment leaving lawful children? Or (*c*) was vesting postponed until the time of payment of the said legacies and shares of residue"?

The following narrative is taken from the opinion of Lord Dundas:—"The late Mr Coulson, brewer in Glasgow, died in 1883, leaving a trust-disposition and settlement dated in 1876. This Special Case has been brought for the determination of various questions as to the construction of certain clauses in the settlement. Mr Coulson was survived by his widow, who died in 1909, and by their whole family, which consisted of six sons and a daughter, named respectively (I shall use throughout, for the sake of brevity, the first name only in each case) John, Frank, Charles, George, Alfred, William, and Janetta. Three of the sons—Frank, George, and Alfred—predeceased their mother. The other three sons and the daughter are still alive. Frank and George left issue, who survive. Alfred was never married. The daughter is now fifty-nine years of age, and parties are agreed in stating as a fact that she is incapable of ever having a child. George had prior to his death granted a bond and assignation in security for £2000 in favour of his brother John over his whole share and interest, present, future, or contingent, in his father's estate; and Alfred had granted a similar bond in favour of John for £2030 (now reduced to £554). Each of the deceasing sons—Frank, George, and Alfred—left a settlement conveying his estate to testamentary trustees or executors. . . . I need not refer to the first five purposes of Mr Coulson's settlement, which have been duly implemented. By the sixth purpose he directed his trustees to hold the whole residue of his estate and pay the free annual produce thereof to his widow for her alimentary use allenarly; and Mrs Coulson enjoyed this liferent until her death. I do not here advert to the seventh purpose, which will require to be separately noticed at a later stage. By the eighth purpose, upon the death of Mrs Coulson, and when sufficient funds should have been realised from the estate and be available, the truster legated and bequeathed and directed and appointed his trustees to make payment to each of his sons George, Alfred, and William of a further legacy of £1500 in addition to legacies which he had left them by an earlier clause in the settlement. By the ninth purpose the truster directed that on the further realisation of his estate after the death of his widow, his trustees should pay to John £1500, to Frank £1500, and to Charles £2000, declaring, however, that should his estate not yield sufficient funds for payment in full of the legacies by this article bequeathed, the same should be proportionately diminished to the extent of the deficiency. It is stated in the case that the truster's estate, after setting aside the sums required to meet the legacies provided by the eighth purpose, and a provision of £3000 (to which I shall refer later) for behoof of his daughter under the seventh purpose, is insufficient to meet in full the legacies provided by the ninth purpose. The tenth purpose (which is the only other clause of the settlement requiring notice at present) is so important that I shall quote it at length (*v. sup.*)."

The *contentions* of parties were thus stated:—"13. The second parties contend that vesting took place *a morte testatoris* of the legacies bequeathed by the eighth and ninth purposes and the shares of residue bequeathed by the tenth purpose. . . . The fourth parties contend that vesting took place *a morte testatoris* but subject to defeasance in the case of those children who predeceased the liferentrix (Mrs Coulson) leaving issue, and that their shares pass to their issue as conditional institutes unaffected by their parents' acts and deeds, or alternatively that vesting was postponed until the death of the said liferentrix. The fifth parties contend . . . that vesting of the fee of said legacies and shares of residue took place absolutely in the testator's sons *a morte testatoris*, or alternatively *a morte testatoris*, but subject to defeasance only in the case of those children who predeceased the time of payment leaving issue. . . . The third, sixth, and seventh parties contend that vesting was postponed until the time of payment."

Argued for the fourth parties—The legacies bequeathed by the eighth and ninth purposes, and the shares of residue bequeathed by the tenth, vested in the sons *a morte testatoris*, subject to defeasance in the case of a son predeceasing the liferentrix leaving issue. The provision with regard to a son dying leaving a widow had reference to the case of a son dying before the testator. There could be no vesting absolutely *a morte*, and on the ratio of *Cairns' Trustees* v. *Cairns*, 1907 S.C. 117, 44 S.L.R. 96; *Wylie's Trustees* v. *Wylie*, December 10, 1902, 8 F. 617, 43 S.L.R. 383, vesting was subject to defeasance. Alternatively, if vesting were not *a morte* subject to defeasance, then it must be postponed to the death of the liferentrix.

Argued for the fifth parties—The said legacies and shares of residue vested absolutely *a morte*. There was, to begin with, an absolute gift in favour of the sons, and unless the subsequent declaration carried that gift elsewhere, vesting took place *a morte* — *Greenlees' Trustees* v. *Greenlees*, December 4, 1894, 22 R. 136, 32 S.L.R. 106; and if the subsequent declaration were repugnant, it would not receive effect — *Miller's Trustees* v. *Miller*, December 19, 1890, 18 R. 301, 28 S.L.R. 236. In the foregoing respect the case was distinguishable

from cases like *Bryson's Trustees* v. *Clark*, November 26, 1880, 8 R. 142, 18 S.L.R. 103. Alternatively counsel adopted the argument in favour of vesting *a morte* subject to defeasance. Counsel also referred, on the question of disposal of lapsed shares, in the event of vesting being held to be postponed, to M'Laren's Wills and Succession (3rd ed.), i. pp. 591, 594; Theobald's Law of Wills (7th ed.), pp. 229, 232, 235,

The second parties adopted the argument of the fifth parties, that vesting took place *a morte* absolutely, and alternatively argued that vesting was postponed till the death of the liferentrix. There could not be vesting subject to defeasance. The gifts from clause 7 onwards all began with the words "upon the death" of the liferentrix. The last words of the tenth clause, constituting as they did a survivorship clause, effectually postponed vesting. A contingency was there contemplated which affected each son's share, and it could not be determined till the death of the liferentrix whether that contingency had arisen or not. If it did arise, then in virtue of the survivorship clause the objects of the gifts could not be ascertained until some subsequent date — the death of the widow of a son who had predeceased the liferentrix without leaving issue. That alone was enough to distinguish the case from *Penny's Trustees* v. *Adam*, 1908, S.C. 662, 45 S.L.R. 481, and *Cairns' Trustees* v. *Cairns* (*cit.*). In any event, the doctrine of vesting subject to defeasance had never received effect where defeasance would be operated by more than one contemplated contingency, and here there were two.

The third parties adopted the argument that vesting was postponed, and also cited *Muir's Trustees* v. *Muir*, July 12, 1889, 16 R. 954, 26 S.L.R. 672; and *Young* v. *Robertson*, 1862, 4 Macq. 314.

The sixth party also adopted the argument in favour of postponed vesting, and cited *Burnets* v. *Forbes*, 1783, M. 8105.

The seventh party adopted the argument in favour of postponed vesting.

At advising—

LORD DUNDAS—. . . [*After narrating the facts*] . . . The first matter for our determination is as to the vesting of the legacies and shares of residue bequeathed to the testator's sons by the eighth, ninth, and tenth purposes of the settlement. Three alternative views were argued to us, viz. (1) vesting *a morte testatoris* absolutely and indefeasibly; (2) vesting *a morte* subject to defeasance on the occurrence of the events contemplated by the declarations in the tenth purpose; and (3) vesting postponed till the time of payment. I do not propose to say more about the first of these three views than that, although it was courageously maintained in argument it seems to me to be utterly untenable, looking to the terms of the declarations in the tenth purpose already referred to. The well-known cases of *Miller's Trustees*, 1890, 18 R. 301, and *Greenlees' Trustees*, 1894, 22 R. 136, which were cited, have, I think, obviously no application to the present case. But I have had some difficulty in deciding between the two remaining views, and I confess it is not without hesitation that I have come to prefer the second, viz., vesting subject to defeasance as the true solution of the problem.

The question must, of course, depend primarily upon the testator's intention as it is to be gathered from the language used, for if his intention is once ascertained, and there is no legal obstacle to prevent it being carried out, there is an end of the matter. What, then, are we to hold Mr Coulson's intention to have been upon a sound and reasonable construction of his settlement. I gather that the truster meant to give each son his legacy and share of residue out and out, though, of course, there could be no payment before their mother's liferent came to an end — unless any son should have died before the time of payment leaving children (in which case the legacy and share were to go for the benefit of such children or their issue), or should have died before the said time — for I think, notwithstanding an argument to the contrary, that these words are clearly implied —without leaving children but survived by a wife (in which case, after that wife had enjoyed a liferent, the fee of such legacy and share was to go to the truster's own children then surviving, and the issue of predeceasers). This seems to be a reasonable and simple enough conception, and I think, for reasons I shall develop presently, that no legal impediment exists in the way of its execution. In favour of postponed vesting, it was pointed out that the purposes referred to from the seventh onwards contemplate payment or distribution only after Mrs Coulson's death; but this is natural, and indeed necessary, for she was to have a liferent enjoyment of the whole estate. There being an amply sufficient reason for postponing payment, I do not think survivance by the sons until the time of payment was of the essence of the gift in their favour, or a condition of their taking a vested right. The considerations generally to be regarded in such a question are clearly summarised by Lord Justice-Clerk Moncreiff in *Jackson* v. *M'Millan*, 1876, 3 R. 627, at p. 629. A more formidable argument for postponed vesting was based upon the words of the declaration in the tenth purpose, and particularly upon the latter part of them. The first part of the declaration, relating to predecease of a son leaving children, would not, I think, standing by itself, be sufficient to postpone the vesting of all the legacies and shares of residue till the time of payment. The result would rather be (and I do not think the contrary view was very strongly maintained) that vesting took place in the sons *a morte* subject only to defeasance or divestiture on the occurrence of the particular event contemplated. This view, I think, gives reasonable effect to distinct words of gift followed by such a

declaration, and is in harmony with the rules expressed in recent cases, of which *Cairns' Trustees*, 1907 S.C. 117, seems to resemble the present most closely. But then the declaration does not stop at this point; and it was strenuously urged that what follows—relative to a son's predecease without issue but leaving a widow—must involve postponement of vesting of all the legacies and shares till the time of payment. The ultimate survivorship clause—"among my surviving children and the issue of predeceasers, share and share alike, *per stirpes*"—was, it was urged, in itself conclusive to this effect. In my opinion this argument is unsound. The survivorship clause would no doubt have prevailed to postpone vesting among the ultimate beneficiaries in a particular legacy or share of residue if at the death of the truster's widow it had turned out, as might have happened, though in fact it did not, that a son had died leaving a widow but no issue; for until the death of that widow no one could tell which of the truster's own children or their issue would be alive at her death. But it does not, in my judgment, follow that vesting in all the sons was from the beginning postponed, notwithstanding the clear words of original gift to them. On the contrary, I think the latter portion of the declaration, taken by itself, is quite compatible with the theory of vesting *a morte*, defeasible only in the event of any son predeceasing the time of payment, leaving a widow but no issue. But it was further argued that vesting subject to defeasance has never been recognised, and ought not to be recognised, where more than one contingency is contemplated, which might defeat the right of the original beneficiary. I should agree with this view if the second contingency is one contemplated as arising only in the case of the failure of the first—that is, if there is truly a destination-over in the case of such failure. But that is not the position of matters here. Divestiture is contemplated only in one or other of two alternative events, *i.e.*, death survived by issue, or death without issue, a widow surviving. I see no reason in principle or good sense why the doctrine of vesting subject to defeasance should not be applied. Each of the contemplated events is a simple and single occurrence—surviving children or a surviving widow. The events are alternative, not successive or cumulative. Nor do I find anything in the decided cases that conflicts with the view I have expressed. The theory of the doctrine or principle in question was thus stated by Lord Blackburn in the leading case of *Taylor* v. *Gilbert's Trs.* (1878, 5 R. (H.L.) 217, at p. 221)—"It is in general for the benefit of the objects of the testator's bounty that they should be able to deal with their expectant interests at once, which they can do if their interest is vested though subject to be divested by the happening of a subsequent event, but which they cannot do if their interests are kept in suspense and contingency until that event has happened. And therefore it is to be presumed that a testator intends the gift he gives to be vested subject to being divested rather than to remain in suspense." The circumstances of the present case seem to me to bring it within the scope of the general doctrine thus expressed. I called attention towards the close of the debate to a very recent decision by the Extra Division to which I was a party—*Johnston's Trustees* (10th March 1911, 48 S.L.R. 582)—where the Court declined to apply the doctrine of vesting subject to defeasance, holding that to do so would involve an extension of the doctrine much beyond the point to which it has been already carried. I think the circumstances of that case differentiate it widely from the present, and make it useful here only by way of contrast. In *Johnston's Trs.* the argument in favour of vesting subject to defeasance was put forward by persons claiming to represent the truster's "nearest in kin," who had been conditionally instituted as beneficiaries under the ultimate branch of a somewhat complicated destination; and it was maintained that the fee of the fund had vested in the "nearest of kin" *a morte testatoris*, subject only to defeasance if the original liferentrix had had issue. The Court had no difficulty in refusing in these circumstances to admit the doctrine in question, Lord Kinnear observing that it is "excluded when you find that the gift to be construed is subject first to the contingency of the liferentrix leaving issue, and failing such issue to a further destination as regards one-half to a particular individual and then to her issue, and as regards the other half to a second individual and her issue, before it can take effect in favour of the persons to whom it is ultimately destined." But where, as in the present case, the doctrine is appealed to and founded on by those originally instituted to the gift, the conditions are manifestly and widely different. It is true that Lord Kinnear (in whose opinion Lord Mackenzie and I concurred) pointed out that the doctrine of vesting subject to defeasance has hitherto been held to apply only in cases where there was no other contingency which could defeat the gift except the simple one of the possible birth of issue to a particular person; and I am aware that similar opinions have been expressed in recent cases, *e.g.*, by Lord M'Laren in *Gardner* v. *Hamblin* (1900, 2 F. 679, at p. 685). But the opinions must, of course, be read *secundum subjectam materiam;* and I am satisfied that the language used was intended rather to describe the circumstances of previous cases which had actually occurred than to limit absolutely the application of the doctrine or rule of vesting subject to defeasance for all time to cases where the contemplated contingency is the possibility of the birth of issue to a particular person. I am unable to see any sufficient reason in principle or good sense or upon authority why the doctrine should not be applied in a case where (as here) the gift is qualified only by possible defeasance in one or other of two simple alternative events, viz., death of the donee before the time of payment,

either survived by children or survived by a widow but no children. I doubt if such application can fairly be regarded as an extension of the doctrine of vesting subject to defeasance; but if it is, then I think it is a necessary one. For the reasons now stated I think that heads (*a*) and (*c*) of the first question should be answered in the negative; and it will probably be sufficient for practical purposes to answer head (*b*) in the affirmative, though, for the sake of theoretical completeness, such words as "or leaving no children but a widow" might perhaps have been added at the end of that head of the question.

[*His Lordship here dealt with questions not reported.*]

LORD SALVESEN—I have had the advantage of reading Lord Dundas' opinion, in which I entirely concur. I confess that I have never been enamoured of the doctrine of vesting subject to defeasance. But it is now firmly fixed in the law of Scotland by a series of decisions, and has been approved by the House of Lords. I see no difficulty in applying that doctrine to the present case. On the contrary, I think it is a logical necessity that we should do so. The mere fact that there are alternative events, on the occurrence of either of which the gift which has vested subject to divestiture may be divested, does not seem to me to afford any sufficient reason for not applying the rules laid down in the cases cited by your Lordship.

The LORD JUSTICE-CLERK concurred.

LORD ARDWALL was absent.

The Court answered heads (*a*) and (*c*) of the question in the negative, and head (*b*) in the affirmative.

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Counsel for Second Parties—Murray, K.C.—Macmillan. Agents—Fyfe, Ireland, & Company, W.S.

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Counsel for Fifth Parties—Moncrieff. Agents—Mackenzie, Innes, & Logan, W.S.

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Counsel for Seventh Party—T. G. Robertson. Agents—T. & R. B. Ranken, W.S.

Counsel for Eighth Party—Lord Kinross. Agents—Guild & Shepherd, W.S.

Tuesday, June 13.

FIRST DIVISION.

BOYD (LIQUIDATOR OF WEIR & WILSON, LIMITED) *v.* TURNBULL AND FINDLAY.

Agent and Client—Hypothec—Law Agents' Lien over Title-deeds—Company—Winding-up — Retention of Title-deeds by Creditor's Law Agents—Companies Consolidation Act 1908 (8 *Edw. VII, c.* 69), *sec.* 174.

The liquidator of a company who had sold the subjects to a bondholder demanded production of the title-deeds from the latter's law agents, to whom they had been sent in connection with the preparation of the bond, in order that he might deliver them to the purchaser. The bond contained the usual clause of assignation of writs, and also a clause under which the writs were expressly delivered to the bondholder. The agents having refused to deliver them on the ground that they would thereby lose their right of lien as against their own client, the liquidator presented a petition to the Court under section 174 of the Companies Consolidation Act 1908 for their delivery.

Held that as the titles had been given to the bondholder for a limited purpose, viz., for the purpose of making good his security they could not be retained by his agents in security of all accounts between them *hinc inde*, and application *granted*.

The Companies (Consolidation) Act 1908 (8 Edw. VII, c. 69) enacts, sec. 174—"(1) The Court may, after it has made a winding-up order, summon before it any officer of the company or person known . . . to have in his possession any property of the company. . . . (3) The Court may require him to produce any books and papers in his custody or power relating to the company; but where he claims any lien on books or papers produced by him, the production shall be without prejudice to that lien, and the Court shall have jurisdiction in the winding-up to determine all questions relating to that lien." Sec. 193 (1)—"Where a company is being wound up voluntarily the liquidator . . . may apply to the Court to determine any question arising in the winding-up. . . ."

On 10th May 1911 John Boyd, C.A., Glasgow, liquidator of Weir & Wilson, Limited, manufacturers, Douglas Park Bolt Works, Hamilton, presented a petition to the First Division in terms of sections 164, 174, and 193 of the Companies Consolidation Act 1908 (8 Edw. VII, c. 69), for delivery of the titles to the property belonging to the company, then in the hands of Turnbull & Findlay, writers, Glasgow. From the facts stated in the petition it appeared that Weir & Wilson, Limited, having resolved on a voluntary winding-up, the petitioner was appointed liquidator; that on entering upon his duties he dis-