

[31st August 1835.]

JAMES THOMSON, Appellant.—*Attorney General*
(*Campbell*)—*Dr. Lushington*.

JOHN, RICHARD TOD, GEORGE, WALTER, JANET,
and MARGARET SCOUGALL, Respondents.—*Serjeant*
Spankie—Forbes.

Testament—Trust—Fee and Liferent—Condition.—A testator conveyed his property to trustees, to be held in part for a married daughter for her liferent use allenary and in fee for her children, and failing of children for her other heirs and assignees whatsoever. She had four children, who all predeceased her,—two of them only having issue, and two having assigned their interest to their husbands:—Held (affirming the judgment of the Court of Session), on the death of the liferentrix, that no right of fee had previously vested in any of the children so as to be transmissible by them.

JOHN FRASER, writer to the signet in Edinburgh, married Jean Brown, and had four children,—Margaret, Jean, Ann, and Simon: Margaret was never married; Jean was married to the Rev. Mr. Walker, and Ann to Mr. Rae; Simon was in a state of imbecility. On the 7th of May 1788 Mr. Fraser executed a disposition and deed of settlement, by which he conveyed to trustees “all lands and heritable and real estate whatsoever which now does or shall at my death belong to me, and to which I am or shall be anywise entitled; and the whole writings, rights, and securities of and

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“ concerning my said lands and heritable and real
 “ estate, and whole clauses therein contained ; and also
 “ all debts and sums of money, and all other moveable
 “ and personal estate now addebted and belonging to
 “ me, or which shall be addebted and belong to me at
 “ my death, and whole vouchers and instructions of the
 “ said debts, and all following thereon,” &c. And after
 certain exceptions he directed, “ that the said trustees
 “ do apply the same, in the first place, to satisfy
 “ and pay the expense of management and the whole
 “ debts which shall be resting by me at my death.
 “ In the next place, that the said trustees lay out and
 “ employ such a capital sum from the trust estate as
 “ shall yield an yearly free income of 120*l.* sterling,
 “ and that they take the rights and securities thereof to
 “ and in favour of the said Jean Brown my wife, in
 “ case she shall survive me, in liferent, for her liferent
 “ use of the annual rent or interest of the said capital
 “ sum yearly during all the days of her lifetime, and
 “ to themselves and their foresaids as trustees under
 “ this present deed in fee, but which life rent is to be
 “ restricted to 60*l.* sterling in case my said wife shall
 “ marry again : And with regard to the residue of the
 “ said trust estate, and also the fee of the said capital
 “ sum after the death of my wife, I hereby appoint and
 “ ordain the said trustees to divide the same into four
 “ equal parts, and to pay or convey one just and equal
 “ fourth part thereof to Margaret Fraser my eldest
 “ daughter, and her heirs and assignees ; and to settle
 “ and secure another just and equal fourth part thereof
 “ in favour of Jean Fraser my second daughter, spouse
 “ to Mr. Robert Walker, minister of the Gospel in
 “ Canongate, and her said husband, and longest liver

“ of them two, in liferent, for their liferent use of the
 “ interest thereof only during all the days of their life-
 “ time, and to the said trustees themselves in fee, as
 “ trustees for the children of the said Jean Fraser of
 “ her present or any subsequent marriage, equally
 “ among them, and, failing of children, to and for the
 “ behoof of the said Jean Fraser’s other heirs or
 “ assignees; and in like manner to settle and secure
 “ another fourth part thereof in favour of Ann Fraser
 “ my third daughter, spouse to John Rae, dentist and
 “ surgeon in Edinburgh, and her said husband, and
 “ longest liver of them two, in liferent, for their life-
 “ rent use of the interest thereof only during all the
 “ days of their lifetime, and to the said trustees in fee,
 “ as trustees for the children of the said Ann Fraser of
 “ her present or any subsequent marriage, equally
 “ among them, and, failing children, to and for the
 “ behoof of the said Ann Fraser and her heirs and
 “ assignees; and as to the remaining fourth part, I
 “ hereby, in respect of the particular situation of Simon
 “ Fraser my son, which renders him unfit for the
 “ management of what I intend for him, direct and
 “ appoint the said trustees to lay out the same on pro-
 “ per security, conceived in favour of themselves, as
 “ trustees for the said Simon Fraser and the heirs law-
 “ fully to be procreated of his body, whom failing, to
 “ my said three daughters equally, and their issue, the
 “ shares falling to the said Jean and Ann Fraser being
 “ to be laid out and employed in the same manner as is
 “ above directed as to the fourth part of my estate pro-
 “ vided to them: and the said trustees are hereby
 “ empowered to apply the interest or yearly income of
 “ the said fourth part of my effects, provided for the

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“ said Simon Fraser, or so much thereof as they shall
 “ think proper, not being less than 60%. sterling yearly,
 “ to and for his use and behoof in aliment and clothing,
 “ and otherwise as his situation shall require, as they in
 “ their own judgment and discretion shall seem proper ;
 “ and in case the said Simon Fraser shall, in the
 “ opinion of the said accepting trustees or survivors or
 “ survivor of them, or such as they may assume as
 “ aforesaid, so far reconvalesce as to be fit to take the
 “ management of his own affairs, the said trustees are
 “ hereby directed to pay to the said Simon Fraser his
 “ share of the trust estate ; but until such opinion is
 “ declared, the said Simon Fraser shall not have any
 “ farther right or interest in the said fourth part of my
 “ estate than the annual sum to be allowed by the
 “ trustees as aforesaid, nor shall he have any right to
 “ dispose of any part of the said fourth or interest
 “ thereof ; and all savings on the interest of the said
 “ fourth shall belong to my said daughters, in the same
 “ proportions and subject to the same settlement as the
 “ principal sum of the said fourth. And whereas, in
 “ consequence of the marriage of the said Jean Fraser,
 “ I paid to the said Mr. Robert Walker a marriage
 “ portion of 500%. sterling, and that I also paid to the
 “ said John Rae the sum of 200%. 18s. sterling, and as
 “ it is my meaning and intention to preserve an equality
 “ among all my children, therefore, in the division of
 “ my estate to be made among them as aforesaid, the
 “ foresaid sums so paid to the said Mr. Robert Walker
 “ and John Rae shall be added to the trust estate
 “ divisible as aforesaid, and the said sum of 500%. ster-
 “ ling shall be deducted from the fourth part thereof
 “ settled on the said Jean Fraser, and the said sum of

“ 200*l.* 18*s.* sterling shall be deducted from the fourth
 “ part thereof settled on the said Ann Fraser, whereby
 “ the shares falling to the said Margaret Fraser and the
 “ trustees for the said Simon Fraser will be equal to
 “ what these would have been had I made no such pay-
 “ ments to the said Mr. Robert Walker and John Rae.
 “ And it is hereby provided and declared, that the
 “ foresaid settlements made by me on my wife and
 “ children are and shall be accepted of by them in full
 “ of all rights and claim competent to them to or out of
 “ my estate, real and personal, by virtue of the said
 “ contract of marriage or any other deed on any ground
 “ whatever. And in order to enable the said trustees
 “ effectually to execute the trust hereby committed to
 “ them, they shall and are hereby authorized and em-
 “ powered to sell and dispose of my whole lands and
 “ heritable estate hereby conveyed, and that by public
 “ or private sale, and at such prices as they shall judge
 “ proper, and to grant heritable and irredeemable rights
 “ and dispositions thereof in favour of the purchaser or
 “ purchasers, with such warrandice and such other
 “ clauses and conditions as they shall think proper,” &c.
 After the usual clauses as to purchasers having no con-
 cern with the application of the price, and as to the exo-
 neration of the trustees, he “ provided and declared, that
 “ in case, by insolvency or any other cause, my said wife
 “ shall not receive the foresaid full sum of 120*l.* sterling
 “ yearly provided to her, the deficiency shall be made
 “ up by the said trustees out of the funds to be vested
 “ in them for the behoof of the said Simon, Jean, and
 “ Ann Fraser, to the extent of three fourths, and of the
 “ said Margaret Fraser to the extent of the other

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“ fourth. And whereas the trust hereby created, so far
 “ as respects the shares of my estate provided for the
 “ said Simon, Jean, and Ann Fraser, may continue for
 “ a considerable time, during which losses on the trust
 “ funds may be sustained by insolvency or otherwise;
 “ therefore, in case any such loss shall be sustained after
 “ the said Margaret Fraser shall have drawn her share,
 “ the same shall affect the shares of the said Simon,
 “ Jean, and Ann Fraser equally, notwithstanding the
 “ said trustees may have appropriated and secured the
 “ funds for the use of the said Simon, Jean, and Ann
 “ Fraser as before directed, and relief is hereby reserved
 “ accordingly.”

Mr. Fraser died in 1795, and was survived by all his children. Simon died first without issue and Margaret soon after him. She and her executors drew her fourth share, and also a share of the fourth provided to Simon. The widow (Mrs. Fraser) died a few years after her husband. Jean (Mrs. Walker) had four children, viz., Magdalene, who married Richard Scougall, merchant, Leith; Jane, who married James Thomson; John, who married, and died in 1808, leaving a daughter; and Robert, who died in 1811 unmarried. Magdalene (Mrs. Scougall) had six children, and died in 1826. Her sister Anne (Mrs. Thomson) died without issue in 1830.

Their mother (Mrs. Jean Fraser or Walker) survived all her children, and when she died she left a deed of settlement in favour of trustees. The appellant was James Thomson the husband of her daughter Jane. The respondents in this appeal were Mrs. Walker's grandchildren, viz., the six children of Magdalene

Walker or Mrs. Scougall, and John Walker's daughter, who had married a Mr. Birch.¹

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On the death of Mrs. Walker a dispute arose as to the rights of parties under Mr. Fraser's deed of settlement, and in order to have it settled his trustees brought an action of multiplepinding in the Court of Session. Claims were lodged:—1. By Mrs. Walker's trustees, who alleged that the funds had vested in her, and were conveyed by her deed of settlement to them. 2. By the appellant, James Thomson, the husband of Jane the daughter of Mrs. Walker, founding on his *jus mariti* and a contract of marriage; and he maintained that a share of the funds had vested in his wife, and that although she had predeceased her mother, the *lifentrix*, yet it had been transferred to and vested in her. 3. By Richard Scougall, who maintained a similar plea. 4. By her children, who alleged that no part of the funds vested in their mother, or in their aunt Mrs. Thomson, so as to be transferred to their husbands, seeing that they did not survive Mrs. Walker the *lifentrix*, and that on the principle of the *conditio si sine liberis*, they were entitled to the fund as substituted for the mother. 5. By Mrs. Birch a similar claim was made, as substituted for her father; and she separately pleaded, that, as the funds had been invested in heritable subjects at the death of Mr. Fraser, and had continued to be so, she had right as heir at law both to her father's share and the share of her uncle Robert.

The Lord Ordinary reported the question on Cases, and on the 11th March 1834 the Court pronounced

¹ Ann Fraser (Mrs. Rae) was not a party to any of the proceedings, as her children had settled with Mr. Fraser's trustees.

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this interlocutor :—“ The Lords, on the report of Lord
 “ Medwyn, Ordinary, having advised the state of this
 “ process of multiplepointing with the Cases and addi-
 “ tional Cases for the several claimants, and heard
 “ counsel thereon, repel the claim upon the fund in
 “ medio on behalf of the trustees of the late Mrs. Jean
 “ Fraser or Walker, as the same is stated on the
 “ record, and decern ; and before farther answer, allow
 “ the other claimants to be farther heard by their
 “ counsel at the bar, in the course of the next session ;
 “ and reserve consideration of all claims and questions
 “ as to expenses.”

Parties were accordingly heard, and on the 9th of
 July 1834 the Court pronounced this interlocutor :—
 “ The Lords having heard counsel in præsentia on the
 “ remaining points of this cause, and having resumed
 “ consideration thereof, repel the claims on the fund in
 “ medio for James Thomson, and Richard Scougall the
 “ father, and decern ; and remit to the Lord Ordinary
 “ to proceed accordingly ; and find no expenses due.”¹

Mr. Thomson appealed.

Appellant.—The appellant’s wife had a vested interest
 under the trust settlement of her grandfather John
 Fraser, which admitted of being conveyed by her during
 the lifetime of her mother, and was effectually conveyed
 to the appellant by his marriage contract.

That she had such an interest is clear, whether regard
 be had to the voluntas testatoris, or to the legal import of
 the terms employed in framing the trust settlement.

¹ 12 S., D., & B., p. 910. No appeal was made by Mrs. Walker’s Trustees or by Mr. Scougall.

It was the obvious intention of Mr. Fraser that the beneficial interest in one fourth share of the trust funds should belong to the children of his daughter; that this interest should belong to the children in equal proportions; and that their right should not depend on the contingency of their surviving their mother, or be suspended until her death, but that it should vest immediately on the death of Mr. Fraser's widow. His words are, "And with regard to the residue of the said trust estate, and also the fee of the said capital sum, after the death of my wife, I hereby appoint and ordain the said trustees to divide the same into four equal parts," &c.; "and to settle and secure another just and equal fourth part thereof in favour of Jean Fraser my second daughter, spouse to Mr. Robert Walker, minister of the Gospel in Canongate, and her husband, and longest liver of them two, in life-rent, for their life-rent use of the interest thereof only during all the days of their lifetime, and to the said trustees themselves in fee, as trustees for the children of the said Jean Fraser of her present or any subsequent marriage, equally among them." Not only is there nothing in the legal import of the terms used by Mr. Fraser to prevent these intentions from being given effect to, but the import of these terms is so firmly established by a long train of decisions, that, even had the actual intention of the testator been a matter of doubt, it would have been imperative on a court of law to have construed them in the manner contended for by the appellant.¹ The circumstance that, owing to the existence of their

¹ Newlands, July 9, 1794 (Mor. 4,289, Bell, 54); Harvey, May 26, 1815 (Fac. Col.); Bushby, June 23, 1825, (4 S. & D., p. 110. p. 112, New Ed.).

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mother's liferent, no beneficial interest emerged to the children until after her death, did not prevent the fee from vesting in them, to the effect of being capable of being transmitted by them during her life. Their mother's right of liferent, though a burden on the fee, did not prevent the fee from being disposed of.¹ Neither was the right of the children to convey the fee affected by the circumstance that, failing children, their mother was called to the succession of the fee by the clause, "and, failing of children, to and for the behoof of the said Jean Fraser's other heirs and assignees," &c. This clause constituted either a conditional institution in favour of their mother, or a substitution of her to her children. If a conditional institution (which it truly was), it fell by the existence of children of her body at the death of the testator.² If a substitution, it was defeated, in so far as regarded the share of the appellant's wife, by the conveyance in favour of the appellant, it being undoubted, that a clause of substitution is defeasible by the act of the institute.³ In the case of *Duncan v. Beath*, June 1809, founded on by the respondents, nothing was done to defeat the substitution. That case merely establishes that there may be a valid substitution in moveables, which will be available so long as nothing is done by the institute to defeat it,—a proposition which the appellant has no interest to contest. The case of *Glendinning and Ghaunt*, November 30, 1825, was not a case of substitu-

¹ *Turnbull v. Turnbull*, July 28, 1778 (*Mor.* 4,248); *Stevenson v. Bar*, June 24, 1784 (14,862); *Siewwright v. Dallas*, Jan. 27, 1824 (2 *S. & D.*, 643, p. 543, New Ed.); *M'Dowal v. Russell*, Feb. 6, 1824 (*ib.* 682, New Ed. 574); *Leitch's Trustees v. Leitch*, June 2, 1826, affirmed in the House of Lords, Feb. 17, 1829 (3 *W. & S.*, 366).

² *Stevenson v. Bar*, June 24, 1784 (14,862). ³ *Ersk. b. iii., tit. 8. sect. 44.*

tion, but of a clause of return to trustees in very special circumstances, and on a contingency which depended on the state of certain matters at the death of Margaret Muter, and which therefore prevented the fee from vesting until that event took place. Neither does it affect the question as to the vesting of the fee and the power of transmitting that the fee was given to the children of Jean Walker generally. It is no doubt true that so long as she was alive, and capable of child-bearing, the quantum of the beneficial interest of each of the children could not be fixed. But there is nothing in principle to prevent a right from vesting and being assigned *valeat quantum*, merely because its extent may be subject to contingencies which may have the effect either to increase or diminish its amount or value.¹ The legal import of the terms used by Mr. Fraser is quite in harmony with his obvious intention as to the rights of the children *inter se*. The trustees were appointed to hold for the children equally, and there is not a word to induce a belief of any intention to prefer one of those children to another, or to prevent the right of any of them to a share of the fund *in medio* from vesting, for the purpose of increasing the shares of Mr. Fraser's great-grandchildren. On the contrary, the interests of the great-grandchildren do not appear to have entered into his view at all; and it has been only on the force of the legal implication *si sine liberis decesserint*, that they have been able to substantiate a claim to the shares of their respective parents. There is no foundation for the respondents' plea, that these rules as to the vesting of rights, and the power of transmitting them, are confined to the case of direct

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¹ *Siewewright v. Dallas*; *Scheniman v. Wilson*, June 25, 1828, 6 S. & D., 1019; *Shaw v. Shaw*, 6 S. & D., (*supra*) p. 1149.

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conveyances, and are inapplicable to deeds to be carried into effect through the intervention of trustees. They are not only equally applicable to trusts, but, in so far as the points at issue in the present case are concerned, have received their strongest illustrations in that very class of cases. The case of *Leitch's Trustees v. Leitch*, June 2, 1826, affirmed February 17, 1829, is so precisely analogous to the present in every essential feature, as to render it impossible for the judgment appealed against to stand without impeaching the authority of that precedent.

Respondents.—The claim of the appellant depends entirely upon this position in point of law,—that during the lifetime of Mrs. Walker each of her children held a vested right in a share of the funds liferented by her, capable of being assigned to a stranger, and which, in case of death without issue or assignation, would go to collateral representatives. The respondents maintain the negative of this proposition.

It is admitted on both sides, that this is purely a question of intention. The intervention of a trust in the present case relieves the discussion of all those difficulties which arise from the maxim in the law of Scotland, that a fee cannot be in pendente,—a maxim which, in many cases where its application could not be avoided, has tended to defeat rather than to support the true intentions of the testator. By the deed of Mr. Fraser the whole of his property was conveyed to trustees, with directions to them to settle and secure one fourth of the residue to Mr. and Mrs. Walker in liferent, “and to the said trustees themselves in fee.” It is clear, therefore, that none of the cases referred to by the appellant can be admitted as authorities in the

present discussion, except those in which the immediate fee of the subjects was vested in trustees in the first instance.

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Where a trust is constituted for uses and purposes, by which the final payment of funds, or the ultimate conveyance of a landed estate, is delayed, (whether with a view to provide for a primary though temporary interest,—such as a life interest, or for other reasons,) the question, whether there exists, in the meantime, any vested interest in individuals, with reference to the ultimate disposal of the funds or the estate, is often attended with difficulty. The intentions of the testator in this respect are sometimes ascertained by special clauses or expressions. But where such do not occur the law has adopted certain general rules of interpretation applicable to the subject.

The first and most obvious consideration calculated to afford a rule of interpretation in such cases, arises from the character and designation of the ultimate beneficiaries. If these are persons known and ascertained at the death of the testator, when the trust commences,—more particularly if they are specially named and designed by the testator, the presumption may be in favour of a vested interest. On the other hand, if the beneficiaries are described merely as a class of persons,—capable of being increased by births, or of being diminished by deaths, subsequent to the commencement of the trust,—the presumption is against a vested interest.

A second consideration arises from the nature of the subject. In the law of Scotland a marked distinction is observed in the interpretation of trusts, according

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as the subject of the eventual interest is a special landed estate, or a mere personal claim, or residue of a pecuniary nature. The law will presume a vested interest much more readily in the former than in the latter case,—it being held, that a beneficial interest in a landed estate is much more capable of immediate appropriation than a mere eventual interest of a pecuniary nature.

A third consideration is, that the very constitution of a trust implies (if there is nothing in the terms of the deed inconsistent with such implication,) that the testator's object was, that the trustees should hold the estate until the period specified by himself, for the parties then capable of taking the intended benefit.

Mr. Fraser, in reference to the residue of his estate, directed his trustees “ to settle and secure another just
 “ and equal fourth part thereof in favour of Jean Fraser
 “ my second daughter, spouse of Mr. Robert Walker,
 “ minister of the Gospel in Canongate, and her said
 “ husband, and longest liver of them two, in liferent,
 “ for their liferent use of the interest thereof only
 “ during all the days of their lifetime, and to the said
 “ trustees themselves in fee, as trustees for the children
 “ of the said Jean Fraser of her present or any sub-
 “ sequent marriage, equally among them, and, failing
 “ of children, to and for behoof of the said Jean Fraser's
 “ other heirs or assignees.” Until the death, therefore, of Jean Fraser or Walker, the capital sum so settled and secured could not be paid or distributed, and no beneficial interest could be taken or enjoyed except by herself; and that beneficial enjoyment was limited to the interest. Farther, the ultimate beneficiaries were described as the

children of her present or any subsequent marriage,—a description which does not ascertain either the persons or the number of the beneficiaries, and does not afford the means of knowing who they were to be, either at the commencement of the trust, or, indeed, at any period antecedent to her death. It is a fixed point in the law of Scotland, that in questions of succession and settlement the term “children” includes, not only immediate offspring, but also grandchildren by a deceasing child. The term is, however, never extended either to the assignees or to the collateral heirs of a deceasing child.

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Independent of these peculiarities there is a specialty, which is conclusive of the present question, namely, that, failing of Mrs. Walker’s children, there is a destination in favour of her other heirs or assignees. By the words “failing of children,” upon which Mr. Fraser makes the ultimate destination to depend, he must have had in view some contingency,—some event which was possible although contingent at the time of his death. Now, it is admitted that the four children of Mrs. Walker were born at the date of the trust deed. If the failure of children meant the non-existence of them at all, the ultimate destination in favour of Mrs. Walker’s other heirs or assignees was absurd. Mr. Fraser anticipated the possibility that the children of Mrs. Walker might all die without issue previous to the termination of her life. In this event the necessity or utility of a provision for them was superseded. The failure would then take place, and Mrs. Walker was in that case, not only to enjoy the interest during her life, but to dispose of the capital at her death.

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This specialty occurred nearly in the same shape in the case of Clavering v. Clavering.¹ The only

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¹ The case referred to was decided by Lord Mackenzie, and his judgment was acquiesced in. It was thus stated by the respondents:— Mrs. Catherine Clavering, or Fletcher, raised an action against the two children of her deceased brother, Rawdon John Clavering, to ascertain the rights and interests of these parties in a bond of provision for 3,000*l.* granted by John Duke of Argyle, the grandfather of the pursuer and great-grandfather of the defenders. The circumstances were these: John Duke of Argyle, on the 8th of June 1801, executed a bond of provision payable to trustees, for behoof of his daughter, Lady Augusta Clavering, and her children. The bond was made payable to these trustees, “in trust for behoof of the said Lady Augusta Clavering in liferent for her liferent use only, and of the child or children procreated or to be procreated of her body, equally amongst them if more than one, whom failing, my own nearest lawful heirs in fee, the sum of 3,000*l.* sterling money, and that at the first term of Whitsunday or Martinmas that shall happen after my death,” &c. On 12th June 1804 the Duke of Argyle granted an heritable bond of corroboration in similar terms, in favour of the trustees. At the date of the original bond in 1801, as well as at the death of John Duke of Argyle, which took place on the 26th of May 1806, Lady Augusta had four children in life, viz., three sons and a daughter, and her ladyship had no children born subsequent to 1801. Lady Augusta Clavering, the liferentrix, died on the 22d of June 1831, having been predeceased by her three sons, and survived by her daughter, Mrs. Fletcher, the pursuer. Two of Lady Augusta’s sons had died unmarried. The other son, who died shortly before his mother, had left two sons, viz., Ernest Frederick Gascoyne Clavering and Henry Clavering, the defenders in the action. None of the sons of Lady Augusta Clavering left any settlement of heritage. In these circumstances Mrs. Fletcher maintained the following pleas: first, the beneficial right of fee in the provision of 3,000*l.* did not vest in the children of Lady Augusta until after the period of her death; secondly, even supposing the fee did vest in all the four children during their mother’s life, still as the fee was of a moveable subject, the succession of the predeceasing children went to their executors, and thus the pursuer was equally entitled with the father of the defenders to succeed to the shares of the two predeceasing and unmarried children. The pleas of the defenders were, first, that there was vested, upon the death of the Duke of Argyle and during the liferentrix’s life, a joint right of fee in each of his four grandchildren; secondly, this interest being of an heritable kind, the share of the two grandsons who died first fell by succession to the last surviving son, and, in his right, the defender, Ernest Clavering, claimed three fourths of the fee. Thirdly, upon the supposition that the fee should not be held to vest until the death of the liferentrix, it was alternatively maintained for the defenders, that under the maxim and condition si sine

difference is, that in that case the ultimate destination was in favour of the testator's own heirs, instead of being, as in the present case, in favour of the heirs or assignees

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liberis decesserit, they must be entitled to take up their father's share of the fee, just as if he had survived the liferentrix. This last plea was not seriously disputed by the pursuer. Lord Mackenzie, on 12th November 1833, decerned in terms of the original conclusions of the libel, and added this "Note.—The Lord Ordinary considers that the right constituted in " the children of Lady Augusta Clavering was heritable, and on this " point thinks the argument of the defenders superior. But he is not " able to adopt their argument on the other points of the case, viz., " respecting the vesting of the fee of the provision made on the children " of Lady Augusta, as at the date of the death of the granter, the Duke " of Argyle, and the descent of that fee to the heirs at law of each child. " It seems to the Lord Ordinary that the great principle is the voluntas " testatoris, and he thinks that the intention of the Duke was to provide " at his own death for Lady Augusta his daughter, and the children she " should leave behind her, not her children alive at the date of the deed " or at the date of his (the granter's) death, or her children by any par- " ticular marriage, but the children who should be left by her. Accord- " ingly he conveys the jus crediti to the money, and afterwards the " heritable security for it, by a deed to take effect at his own death, " revocable and dispensing with delivery. He conveys these to trustees, " so that there was no necessity for any immediate vesting of any right " in the parties favoured. He conveys the whole sum to be held for " behoof of Lady Augusta during her life, so that the children could be " nowise provided for thereby till her death. He directs his trustees to " hold the fee for behoof, not of her existing children nominatim, or her " four children, or her children by her existing marriage, but, abstracting " from all knowledge of the situation of her family, they are directed to " hold in trust for behoof of ' the said Lady Augusta Clavering in life- " rent, for her liferent use only, and of the child or children procreated " or to be procreated of her body, equally amongst them if more than " one.' Who these children were to be could not possibly be contem- " plated as known at the death of the testator, and could not well be " contemplated as capable of being known till the death of Lady Augusta " herself. It was evident too, that they might happen not to be heirs to " one another at all, in case she had families by more husbands than one, " (brothers and sisters uterine not being heirs to one another,) and at " any rate that if they all died, their heirs must be relations solely by the " father, not at all relations by the mother, i. e., not heirs or relations of " the duke himself. The duke accordingly not only does not call the " heirs of the children, but adds to the provision for the children a clause, " 'whom failing, my own nearest lawful heirs in fee,' by which he " excludes these heirs of the children, and provides that, on failure of the " children of his daughter, the trustees shall hold for his own heirs.

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of the liferentrix. This difference docs. not appear materially to affect the argument.

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“ The Lord Ordinary finds it impossible to believe that the duke,
 “ making and leaving such a provision as this, intended that the fee
 “ should vest in the children immediately on his death, and not continue
 “ until the death of their mother. There was no legal necessity that it
 “ should so vest; the trust obviated any such legal necessity. There
 “ was, on the contrary, a legal necessity the other way, i. e., of waiting
 “ till it could be known who the child or children of Lady Augusta
 “ should be, i. e., till her death. It is plain that a fee of one fourth
 “ could not vest in each of four children so as to be alienable, and to pass
 “ away to mortis causa disponees or heirs, while it remained perfectly
 “ probable that there might be more children, and that the division would
 “ not be among four, but among five or twelve. Suppose Lady Augusta
 “ had renounced her liferent, these four children could not have
 “ demanded payment or assignation of the money or heritable bond to
 “ them. Then if the heirs of any of the children are to take, in case of
 “ their dying before their mother, how could the equality of the provision
 “ be observed, or how could the provision be prevented, in case of their
 “ all dying before her, from being payable to their father or remoter
 “ relations on the father’s side. Then how is the difficulty got over, that
 “ there are not only no words in favour of the heirs of the children, as
 “ objects of the trust, but there are words directing the trustees, on
 “ failure of the children, to hold for the heirs of the duke himself. It
 “ is said that the destination to the heirs of the granter is only a con-
 “ ditional institution, because the bond was originally moveable. But it
 “ was made heritable before it came to have effect; and besides, this is not
 “ an ordinary case of substitution or conditional institution, but of a
 “ clause of return to the granter’s own heirs, a clause limiting and
 “ modifying a gift, which must be favourably construed for the granter.
 “ He directs his own trustees to hold a sum for his daughter in liferent,
 “ and the children she should have, equally among them in fee, but
 “ failing those, to pay the money back to his own heirs. Is that not just
 “ substantially saying, that they are not to hold the money for the heirs
 “ of the children, but for the class of children, and for his own heirs
 “ only? How then can the trustees be bound to hold for other heirs,
 “ excluding his own heirs? The case of a competition between the heirs
 “ of the duke and the relations on the father’s side, the children all dying
 “ after the trust had commenced, but before it ended, is fairly put.
 “ Could it be found and declared that the trustees were to hold for the
 “ heirs of the children on the father’s side, and not for the duke’s heirs?
 “ After the trust ended, no doubt matters came into a different situation.
 “ On the whole, the Lord Ordinary is satisfied that the granter intended
 “ the fee not to go to the heirs of the children during the trust, and
 “ the trust to continue till the death of Lady Augusta. The child of a
 “ deceased son is admitted on the maxim, *si sine liberis decesserit.*”

It is plain, that had there been a dozen of children of the marriage between Mr. and Mrs. Walker existing at the death of Mr. Fraser no fee and no assignable interest whatever would have been vested in any one of these children; and it will be kept in view that the event which was to ascertain the parties for whose behoof the trustees held the fee, was the termination of the liferent, and especially the death of Mrs. Walker. The parties for whose behoof the fee was to be held were her children, who survived that event. It is impossible to select any period antecedent to her death at which the trustees would have been warranted in saying for whose behoof they held the fee.

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Hence survivance of Mrs. Walker was the event on which the vesting of the interests of her children depended. But quoad the children of Mrs. Walker, that was an uncertain event; for, although Mrs. Walker's death was certain at sometime, it did not follow that she might not survive all her children and therefore, in virtue of the maxim, *dies incertus pro conditione habetur*, the vesting of the interests was conditional, depending on survivance of their mother. This view of the case is strengthened by the fact that the trustees are farther specially directed to hold the fee for behoof of Mrs. Walker's own heirs or assignees in the event of her dying without children. Now as Mrs. Walker survived her daughter, the wife of the appellant, the latter never could acquire any interest through his wife, seeing that the fee did not vest in her.

The distinction between the cases, where the fee has been vested in trustees, and where it has been conveyed to the legatee nominatim, is preserved throughout all

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the decisions.¹ The cases founded on by the appellant are either inapplicable or over-ruled by the more recent decisions. Thus, in the early case of Dickson and Maitland against Richardson², there was a direct provision of the fee in favour of the children of a marriage. This provision was contained in a contract of marriage; and a son of the marriage having been served heir and infest in the fee, it was held on his death, that a substitution in favour of his mother was evacuated, and that she being merely a conditional institute, the fee descended, on the son's death, to his own heirs. The case of Stevenson against Barr³ is of precisely the same description. Turnbull against Turnbull⁴ was the case of a legacy bequeathed to the testator's niece in liferent, and to her children in fee. There was no trust-deed, and, on the well-known principle that the legatee (to whom the fee was provided) had survived the testator, the legacy was held not to have lapsed. In the case of Wallace against Wallace⁵, a legacy of 1,000*l.* was bequeathed to a party nominatim; the term of payment, of which alone, and not the vesting, was contingent on an event (the death of a liferentrix), which was certain to arrive. In the case of Seivewright against Dallas⁶ the only point of difficulty related, not to the vesting of the fee, but to the question whether or not the parents of the fiars had duly exercised the faculty of allocation.

¹ Duncan, Gardner, and Balnain against Myles, Beath, and others, June 27, 1809, Fac. Col.; Brown against Coventry, June 2, 1792, Bell's 8vo. Cases, p. 310; Glendinning and Ghaunt against Walker and others, Nov. 30, 1825, Fac. Col., Shaw and Dunlop, vol. iv. p. 237, New Ed. p. 241.

² Feb. 23, 1697, Morr. p. 14,851. ³ June 24, 1784, Morr. p. 14,862.

⁴ July 28, 1788, Mor. p. 4248.

⁵ Jan. 28, 1807, Morr. App. Clause No. 6.

⁶ Jan. 27, 1824, Shaw and Dunlop, vol. ii. p. 643, New Ed. p. 543.

Macdowall and Selkirk against Russell¹ related almost exclusively to the question, whether or not the jus crediti created in favour of a party beneficially interested under a trust deed, relative to heritable property could be validly transferred by intimated assignation. The only other case cited is that of Leitch's trustees against Leitch², and in so far as it has any bearing on the present case it makes directly against the appellant's argument. The subject of the trust in Leitch's case was a landed estate, held for behoof of a certain series of substitutes specially named, and their heirs and assignees "in fee," burdened with a liferent in favour of the testator's widow. For one of the substitutes the trustees were directed to hold the fee absolutely, without mention of his heirs or assignees; and although that substitute predeceased the liferentrix, the court by a majority held that the fee had vested in him. But the judges in the majority grounded their opinion upon the fact, that the widow was a mere liferentrix, and had no claim beyond her liferent; and that the estate was expressly declared to be in the trustees for behoof of the substitutes, in their order, "in fee;" whereas here the fee is specially vested in the trustees themselves; and in addition to all the children that might be born of the liferentrix, she herself had an interest in the money so held by the trustees, contingent upon facts which could not be ascertained until the expiration of her liferent.

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The law of Scotland has established a material difference of interpretation in regard to the vesting or not vesting of fees, under trusts beneficiary, according as the

¹ Feb. 6, 1824, Shaw and Dunlop, vol. ii. p. 682, New Ed. 574.

² June 2, 1826, Fac. Coll., Shaw and Dunlop, vol. iv. p. 659, New Ed. p. 665. Wilson and Shaw's App. Cases, vol. iii. p. 366.

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beneficiaries are specially named, or merely described by general characters. The cases of Macdowal and Selk-rig, Leitch v. Smith, Mirrlees v. Mathie, and Buchanan v. Downie¹ belong to the first class, in which the eventual beneficiaries were named.

On the other hand, the cases of Duncan and others v. Miles, Beath, and Lawson, Glendinning v. Walker, and Dick v. Gillies², fall under the class where not only the persons of the beneficiaries, but also their number, were uncertain until the death of the parent or the dissolution of marriage; and in such cases it is presumed that the testator did not intend that there should be a vested right in any individual beneficiary until the uncertainty should be removed.

There is another class of cases in which the testator, instead of leaving the question of the vesting of the right of the beneficiary during the subsistence of a life-rent to be determined by mere presumptions, has, by distinct directions, ordered payment to be made on the happening of events previous to the lapse of the life-rent. In these it may be truly said, that the question of interpretation as to the vesting never occurs at all. The testator having expressly ordered payment to be made before the lapse of the life-rent, that direction must be obeyed, however inconvenient it may be; for presumptions of intention are altogether out of place where the testator has distinctly and expressly declared his will. It is to this class that the cases of Scheniman

¹ Mirrlees v. Mathie, 17th May 1826, Fac. Coll., 4 Shaw and Dunlop, p. 591; Buchanan v. Downie, 12th Feb. 1830, Fac. Coll. and 8 Shaw and Dunlop, p. 516, New Ed. p. 599.

² Duncan v. Miles, Beath, and Lawson, 27th June 1809, Fac. Coll.; Glendinning v. Walker, 30th Nov. 1825; 4 Shaw and Dunlop, p. 241, New Ed.; Dick v. Gillies, 4th July 1828, vol. 6, p. 1066, New Ed.

against Willison¹ and of Shaw against Shaw are to be referred.²

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LORD BROUGHAM.—My Lords, I move that the decision of your Lordships in this case be postponed, for I feel that in some respects the impression which this case raises leads to a difficulty in agreeing with some of the doctrines held in the Court below. Undoubtedly it is staggering to find it argued that these words gave no interest whatever to the parties *primâ facie* appearing to take an interest in fee, unless those parties survived the tenant of the particular estate: “ To
“ my second daughter Jean Fraser one fourth thereof in
“ life, for her life use of the interest thereof only
“ during all the days of her lifetime, and to trustees in
“ fee.” Now, for what? “ As trustees for the children
“ of the said Jean Fraser of her present or any sub-
“ sequent marriage, equally to be divided among them.” To say that this conveys no interest whatever to the children of Jean Fraser, unless such children have survived Jean Fraser, does certainly appear at first sight to be a startling proposition; for manifestly, on the first blush of it, this is a gift to Jean Fraser for life, with remainder to her issue in fee; and though the children should not survive her, their remainder, so vested in them during her lifetime, may by assignment from them, made during their lifetime, pass to such devisees or legatees as they shall bequeath such remainder to, and may therefore be assigned by the legal effect of the marriage, which operates as an assignment of the personal property of the wife to the husband of that marriage,

¹ Scheniman v. Willison, 25th June 1828, 6 Shaw, p. 1019.

² Shaw v. Shaw, 6 Shaw and Dunlop, p. 1149.

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in which capacity it is that I understood the present appellant claims this share of Jean Fraser's fourth part distributable; that husband being represented by Dr. Lushington,—

Dr. Lushington.—By virtue of a special contract of marriage.

Lord Brougham.—It appears there is a special contract of marriage, therefore this removes any question as to that. The instrument purports to deal with this very remainder in fee.

Dr. Lushington.—Yes, my Lord.

Lord Brougham.—Then the question is, whether the non-surviving defeats the claim, and leaves those parties only entitled to take a share which may answer the description of issue of Jean Fraser by that or any subsequent marriage her surviving? That is the contention on the side of the respondents, and that is the proposition, which the Court below has adopted by its decision by a great majority. The reasons can hardly be said to have been given; for what is reported to have fallen from the learned judges, though claiming the greatest respect, only contains unreasoned statements of opinion. Their Lordships mention different propositions, and merely say that they do not agree with them; and so of the cases which are cited. They say the case of Leitch is ruled by the case of Crawford, and that case, they say, is not sufficient to support this case, because it arose upon merely the validity of an assignment, and not upon the interest in the party assigning. Now, this is very general, and does not satisfactorily displace the authority. And when I look to the case of Smith, which is called Russell v. Macdowel in the reports, it is true there is no argument given by the

Court there, either for or against, according to the manner of reporting in those days ; the book merely says the Court refused the prayer of the petition ; but when I look to the decision, as stated by the learned reporters, they state the subject of discussion in that case ; and the only question raised before the Court was, whether there existed such a right in the party assuming to assign as could be passed by that assignment. It is clear that does raise the question of whether that assignment would pass the right, but it also raises another question of whether the right was so constituted in the party assuming to assign as that it could be assigned by him. I cannot therefore agree that the case of Smith has no bearing upon the present case. Whether it is decisive of it or not is quite another question ; but at all events it comes upon the same facts, and does not relate merely to form,—the purport of the assignment. Now, my Lords, undoubtedly, I should say, if this question had arisen here, no doubt could have been entertained ; because, as to the proposition assumed that the interposition of a trust, by giving the fee to the trustee for the purpose of that trustee conveying it to the children of the marriage, makes the case totally different from what it would have been had the fee been given without any trust at once to the children of the marriage, and that the difference is so great as to preclude the application of the cases ; I have two remarks to make upon this proposition : the one is, that it is difficult to see the ground of distinction between an equitable and a legal fee, between a fee given to the trustees to distribute the beneficial interests under their trust, and a fee given at once without the interposition of trustees ; but the other remark is, that I cannot

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apply the doctrine to this case; for some of the cases referred to are cases of trust,—just as much cases of trust as the present,—consequently those cases do not fall within the scope of that proposition, which raises a distinction between a fee given directly to the donee and the fee given to the donee through the interposition of a trustee who shall take the legal estate. In this country, we should have had no difficulty in assuming that the party to whom the fee, whether legal or equitable, was given, in the first instance,—should take it subject to open and let in the share of the other fiars, afterwards coming in esse,—A. for life, B. remainder in fee, and with B. all the after-born children of A. the tenant for life. It is clear that if there be no words, which limit the gift to the survivors of A., or to the children or issue living at A.'s death, that B. will take a fee in remainder in the first instance, but liable to open and let in as sharers with him in that fee the after-born children of A. the tenant for life; and as I have frequently said, in the course of the argument on the part of the respondents, all that was said of the difficulty, arising from an unknown number of parties who are to be entitled to the fee, does not exist in a case where a particular estate is limited to the person from whom are to come the issue who are to take the fee. If it were to A. for life, remainder to B. in fee, remainder to the children of C., then I agree that the particular estate of A. might determine before the decease of C., and that consequently there would be after-born issue of C. entitled to take with B. the fee expectant on the determination of A.'s life estate; and there might be some difficulty in apportioning, by allowing the fee which B. first took to open

and then to let in the issue of C. to take it with him ; because non constat, at the death of A., when B. takes a fee in possession—what children of C., after the determination of B.'s estate, shall live beyond that ; but that is not the case here. No such difficulty whatever arises ; because the very event, the death of A., which, first of all, vests B.'s fee in possession, determines the number of children who are to be in esse at the time B. takes possession, and consequently there never can remain any doubt how many children should enjoy that fee-simple. It is very possible, however, that the Scotch law, though recognizing the difference, peculiar to the law of England between a legal and an equitable estate, with the incidents of that difference, may also recognize the proportion to which I have referred, from the repugnance to allow a pendency of the fee,—a repugnance upon which we had a good deal of discussion in a case referred to by Mr. Forbes, and which was decided in 1833. It is also very possible there may be no doctrine of the Scotch law analogous to our doctrine of the fee opening and letting in others to share it. I am, however, by no means convinced, from the argument I have heard, that it is not the law in Scotland as it is with us ; for it is a strictly correct and very equitable doctrine. My Lords, upon these grounds I shall take time to look into this matter, and shall state my opinion upon it at a future day.

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(31st August.) On this day LORD BROUGHAM said, In the case of Thomson and Scougalls I threw out some doubts upon the question whether the fee opened. I am of opinion that the Scotch law is not different from the English law upon this point ; but if any doubt could

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have arisen upon the English law the judgment in this case would have been the same.

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The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutor therein complained of, be, and the same is hereby affirmed. And it is further ordered, That the costs of both parties attending the said appeal be paid out of the fund in medio in the said proceedings mentioned.

RICHARDSON and CONNELL,—SPOTTISWOODE and
ROBERTSON, Solicitors.