question. I think there is much in that, as I stated in giving my opinion in the Court below. But when we come to the question whether, assuming the *primâ facie* competency of this reference, the Court is to exercise the discretion that belongs to it in sustaining or refusing to sustain the reference, I confess that I see every principle against sustaining the reference, and no principle in favour of it. I think it is quite clear that such a rule, as referring to the oath of a party after a case has been fully investigated, is one which, if it exists in any system of jurisprudence at all, must be guarded with a discretionary power of the Court to prevent it being abused. That discretionary power exists with reference to the administration of this branch of the law in Scotland, and when we come to look for the principle on which reference to oath is admitted, I quite concur in the view which has been expressed by my noble and learned friend opposite, that the true principle is to settle the immediate question between the two parties in contest, and to go no further. Now, if the question in a suit between two parties be one which necessarily involves the interests of a third party, if it be of a kind that the settlement of the question between those two parties would, or might, greatly injure the interests of a third party, then I think it questionable, in the first place, whether such a reference to oath would be competent, but I also think it quite clear, that any exercise of judicial discretion ought to go in the direction of preventing such risk of injury to a third party.

It is upon these grounds, that I am quite clear, that the judgment of the Court below ought to be affirmed. If, on hearing the argument, I had entertained any doubt on the question, or had come to the conclusion opposite to that at which I arrived in the Court below, I certainly should not have hesitated to concur as I did in a former case in this House, in altering the judgment which I had pronounced in the Court below, but I see no reason to entertain any doubt whatever in this case.

Interlocutors affirmed.

Appellant in person.—Respondent's Agents, Adam and Sang, W.S.; Tippetts and Son, London.

JULY 30, 1867.

Mrs. ANNE JANE HUNTER O'REILY or CARLETON, and Others, *Appellants*, *v.* LIVINGSTON THOMPSON, and Others, *Respondents*.

Trust—Succession—Vesting *a morte testatoris*—Bequest to Class—*Jus crediti*—*Jus accrescendi*—*H., in his trust disposition, directed the residue to be vested in trustees for his daughter, Mrs. O., in liferent, and her children in fee, to be kept in trust by them till they, in their discretion, should settle it safely on her and her children, and, in the event of her decease without issue of her body, then the residue to go to his nieces. Mrs. O. had some children who predeceased her, and two of them were born before the truster's death.*

HELD (affirming judgment), 1. *That a* jus crediti *vested in each of the children of Mrs. O. at its birth, although the amount of the benefit was subject to the contingency of there being more children born; 2. that the share or interest of the children who predeceased Mrs. O. did not accrue to the survivors* jure accrescendi.[1]

The Lord Ordinary and First Division held, that the residue of Dr. Andrew Hunter's estate vested in the children of Mrs. O'Reily *a morte testatoris*. Those interested in the contrary construction now appealed.

The question in the appeal was, What was the true construction of the following words constituting the residuary bequest in the trust disposition and settlement of the late Dr. Andrew Hunter?—

"And the residue of my said estate and effects, heritable and moveable, including the fee of the £10,000 set apart for answering the provisions to my said spouse, I direct and appoint to be vested in my said trustees for behoof of my said daughter, the said Mrs. Isabella Sarah Hunter *alias* O'Reily, in liferent, (exclusive of the *jus mariti* of her husband,) and her children in fee, to be kept in trust by them till they, in their discretion, shall see proper to settle it in the most safe and secure manner on her and her children. And in the event of her decease without issue of

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[1] See previous report 3 Macph. 514; 37 Sc. Jur. 257. S. C. L. R. 1 Sc. Ap. 232; 5 Macph. H. L. 151; 39 Sc. Jur. 640.

her body, I hereby direct and appoint my said trustees to convey and make over the said residue of my said estate and effects, including as aforesaid, and remaining after payment of my said debts and legacies, to and in favour of my said nieces," etc.

Anderson Q.C., and *Sir R. Palmer* Q.C., for the appellants.—1. No portion of the residue of Andrew Hunter's trust estate vested in any of the children of Mrs. O'Reily, the liferentrix, till her death. Though the general principle is in favour of vesting *a morte testatoris*, still, when the destination is to one person in liferent and to a class in fee, that presumption is less strong than where the fee is destined to individuals *nominatim*—*Donaldson's Trustees* v. *M'Dougal*, 22 D. 1535; *Sterling* v. *Baird's Trustees*, 14 D. 20. And the giving of the fee to a class indicates an intention to postpone the term of vesting till the death of the liferentrix—*Thomson* v. *Scougall*, 2 Sh. & M'L. 305; *Clavering* v. *Clavering*, 2 Sh. & M'L. 320 *n.*; *Glendinning* v. *Walker*, 4 S. 237; *Wright* v. *Fraser*, 6 D. 78. The cases of *Scheniman* v. *Wilson*, 6 S. 1019; *Shaw* v. *Shaw*, 6 S. 1149 *n.*, and *Calder* v. *Dickson*, 4 D. 1365, do not apply, because there the deeds contained no ulterior destination. 2. The words "in the event of her (Mrs. O'Reily's) death without issue of her body," mean without leaving issue in existence at the time of her death, and the class of children to whom the fee is provided consists of the children who should be living at the death of the liferentrix. It is well settled, that a direction to trustees not to hold, but to convey, an estate, or to pay a fund for behoof of a parent in liferent, and his or her children unnamed in fee, has the effect of conferring the fee upon the parent—*Ferguson's Trustees* v. *Hamilton*, 22 D. 1442; *ante*, p. 1135. The clause "to be kept in trust," etc., was not intended to regulate the period of vesting, but only to authorize reinvestment.

3. Even assuming the residue to have vested in the children as at the death of the testator, and the class to be ascertainable as at that period, the share or interest of the children who died subsequently in the lifetime of the liferentrix, accrued to the survivors *jure accrescendi.* The civil law on this subject has been adopted in Scotland—Dig. xxxii. 89; Voet, L. 30, De legatis, §§ 60, 61; Vinnius, ii. 20, 16; Stair, iii. 8, 27; Bell's Prin. § 1882; 2 Maclar. Trusts, 249; *Barber* v. *Findlater*, 13 S. 423; *Tulloch* v. *Welsh*, 1 D. 94; *Burnet* v. *Burnet*, 16 D. 780; *Paterson* v. *Paterson*, M. 8070; *Rose* v. *Rose*, M. 8101; *Torrie* v. *Torrie's Trustees*, 10 S. 597; *Sherrat* v. *Bentley*, 2 My. & K. 165; *Woodgate* v. *Unwin*, 4 Sim. 129.

4. On the same assumption, that the right of the children vested, and that the class must be ascertained as at the death of the testator, the subsequent devolution of right would be governed by the law of Ireland, where the liferentrix and her children were domiciled, and, according to that law, the interest of the children who died in the lifetime of the liferentrix survived to the appellant, Mrs. Carleton and the late Mrs. Hudson—*Egerton* v. *Forbes*, 27th Nov. 1812, F.C.; *Newlands' Trustees* v. *Chalmers' Trustees*, 11 S. 65; *Clarke* v. *Newmarsh*, 14 S. 500; *Sawer* v. *Shute*, 1 Anstr. 63; *Dues* v. *Smith*, Jac. 544.

The *Attorney General* (Rolt), *Lord Advocate* (Gordon), and *Neish*, for the respondents. -The main question is as to the time of vesting of this residue. The general rule is in favour of vesting *a morte testatoris*—*Cochrane* v. *Cochrane*, 17 D. 103. The mere postponement of the period of payment does not suspend vesting—*Forbes* v. *Luckie*, 16 S. 374; *Kilgour* v. *Kilgour*, 7 D. 451. A distinction exists where payment depends on an uncertain event like majority, marriage, and on an event certain like death; in the former case the vesting is suspended till the condition is purified; in the latter the vesting is immediate, but with payment deferred—*Pursell* v. *Newbigging*, 15 D. 489; 2 Macq. App. 273, *ante*, p. 528. It is not important that the bequest here is to a class, and not to persons *nominatim*—*Halbert* v. *Dickson*, 19 D. 762; *Douglas* v. *Douglas*, 2 Macph. 1008. The other clauses in the deed are all consistent with the construction of an immediate vesting. Here no period is specially fixed for the payment or distribution of the residue, and there is no survivorship clause; but there is a direction to the trustees for the safety and security of the trust funds in the lifetime of the liferentrix.

Cur. adv. vult.

LORD COLONSAY.—My Lords, the interlocutors of the Lord Ordinary and of the First Division of the Court of Session, now in part appealed from, were pronounced in reference to a competition of claims in a process of multiplepoinding and exoneration raised by the testamentary trustees of the late Andrew Hunter, surgeon, some time in the service of the Honourable East India Company.

Mr. Hunter, by a trust disposition and settlement, dated 12th January 1808, and two codicils thereto annexed, dated 18th January 1808 and 2d May 1809, and also by a supplementary trust disposition and settlement, dated 18th January 1808, conveyed, in the event of his death without lawful issue of his body, to trustees all and sundry his whole means and estate, heritable and moveable.

The trust deed of 12th January 1808, after securing £10,000 for the purposes of the provisions in favour of the truster's spouse, and making certain other testamentary provisions, proceeds as follows:—"And the residue of my said estate and effects, heritable and moveable, including the fee of the £10,000 set apart for answering the provisions to my said spouse, I direct and appoint

to be vested in my said trustees for behoof of my said daughter, the said Mrs. Isabella Sarah Hunter *alias* O'Reily, in liferent, (exclusive of the *jus mariti* of her husband,) and her children in fee, to be kept in trust by them till they, in their discretion, shall see proper to settle it in the most safe and secure manner on her and her children. And in the event of her decease without issue of her body, I hereby direct and appoint my said trustees to convey and make over the said residue of my said estate and effects, including as aforesaid, and remaining after payment of my said debts and legacies, to and in favour of my said nieces, Mrs. Anne Wood, Mrs. Grizel Charles, Mrs. Marion Mair, and Jane and Agnes Hunter, Mrs. Janet Riddle, Mrs. Eleanor Sandilands, Isabella and Agnes Hunters, equally among them; but in the event of them, or either or any of them, dying without lawful issue, the share of such niece dying without issue to go equally among my said other nieces and their issue, but burdened always with £3000 sterling to the said John Tracy O'Reily, which I had settled as a portion on my said daughter in case of her marriage, or such part thereof as may be due at her death, and the lawful interest of the same from the first term of Whitsunday or Martinmas after her death during the not payment, and also with the burden of an annuity of £2000 sterling yearly to the said John Tracy O'Reily during his life, after the death of his said spouse, and with the further burden of the payment of a legacy of £500 sterling to Lieut. John Hunter, in the service of the Hon. East India Company, my nephew, in the event of the decease of my said daughter without issue, and to be payable at the first term of Whitsunday or Martinmas after her death, with the lawful interest thereof, after said term of payment, during the not payment of the same." The terms of codicils and of the supplementary trust deed are immaterial in the present case.

Mrs. Isabella Sarah Hunter was the natural daughter of Mr. Hunter, the truster, and was the wife of John Tracy O'Reily, formerly of the 5th Dragoon Guards.

The truster died on 29th of March 1811 without lawful issue. He was survived by his spouse, and also by his natural daughter, Mrs. O'Reily, and her husband. At the time of the truster's death, Mr. O'Reily was resident in Ireland, and he continued to reside there till his death in 1841. He was survived by his wife, who lived till 7th of January 1861.

When Mr. Hunter made his trust disposition and settlement in 1808, there had not been any children of the marriage of Mr. and Mrs. O'Reily. Before the death of the truster, two children were born of that marriage, viz. Anne Jane Hunter, now Mrs. Carleton, born 6th of January 1809, and Isabella Sarah Hunter, afterwards Mrs. Hudson, born 20th of January 1811, both of whom survived their mother, and both were claimants in the present competition; but Mrs. Hudson, having died, is now represented by her husband. After the death of the truster, five children were born of the said marriage, all of whom predeceased their mother. Three of these died in their infancy, and predeceased their father. The other two survived their father, and attained maturity. One of them, John Tracy, died in 1852 intestate, but survived by his wife, and leaving lawful issue, who by their guardians are claimants in this competition; the other, Andrew Hunter, died in 1859, unmarried, domiciled in Ireland. and having left a will.

It appears that Mr. O'Reily the elder left a testament, dated 9th of April 1840, in the following terms:—"Whereas I have been advised that I am entitled in right of three of my deceased children to the reversion of a distributive share of certain funds and properties devised by the will of the late Andrew Hunter, my wife's father, after my said wife's decease: in case it shall appear that I am so entitled I leave and bequeath the same to my son, Andrew Hunter O'Reily, and desire that this may be taken as a codicil to my last will and testament;" and it further appears, that Andrew Hunter O'Reily by his will conveyed his interest in the trust estate to Livingston Thomson and Richard Greydon, who, as representing that interest, are claimants in this competition.

After the death of Mrs. O'Reily, the truster's daughter, the trustees raised the present process of multiplepoinding and exoneration for the purpose of obtaining a judicial determination of the rights of all parties claiming interest in the trust estate, and a judicial exoneration of their own acting as trustees. The several parties claiming an interest in the trust estate having lodged claims, a record was made up and closed, and the parties were heard upon the questions raised under that record.

The leading question debated, and which, if decided one way, would practically have disposed of the whole cause, was, whether, under the terms of the trust disposition and settlement of Mr. Hunter, those of the children of his daughter Mrs. O'Reily who predeceased her had or had not a vested interest in the trust estate? On the part of Mrs. Carleton and Mrs. Hudson, who alone survived her mother, it was contended, that no interest had vested in any of the children who predeceased their mother, the liferentrix, and in that view they claimed the whole residue. On the part of the other claimants as representing in various ways, and to various effects, the children who had predeceased their mother, it was contended, that the vesting of the interest in those children was not suspended till their mother's death; that they had a vested interest during her life, and that such interest was transmissible and transmitted to their representatives by law or by will. If that question had been decided in favour of Mrs. Carleton and Mrs. Hudson, most if not all of the other claims and questions that have been raised would have been excluded;

but the Lord Ordinary and the Inner House decided it against them, and they have appealed. Other questions are involved in the appeal, but I shall first deal with the question of vesting.

When the question arises out of a *mortis causâ* settlement, whether the benefit given is or has become a vested right, the intentions of the testator, in so far as they can be discovered or reasonably inferred from the deed, taken as a whole, and from the circumstances legitimately collected under which the deed was made, should have effect given to them. It is *quæstio voluntatis*. That is the cardinal rule and guide. The task of discovering the testator's intentions is sometimes perplexing, and in such cases may to some extent be derived from the application of general rules or presumptions recognized in previous decisions.

The general rule of law as to bequests is, that the right of fee given vests *a morte testatoris*. That rule holds, although a right of liferent is at the same time given to another, and although that is done through the instrumentality of a trust, and whether the fee be given to an individual *nominatim* or to a class. The postponement of the period of payment till the death of the liferentrix does not suspend the vesting, nor does the interposition of the machinery of a trust for carrying into effect the intentions of the testator. Indeed the creation of a trust is a very usual mode of securing an interest of a liferenter, where the right to the fee is nevertheless intended to vest in the person or class of persons for whom it is destined. Although the *jus dominii* may be in trustees, the *jus crediti* is in the beneficiaries as a vested right. At one time doubts were entertained as to the case where the settlement was by a trust deed to hold for a liferenter and successive persons as fiars, but the tendency of recent decisions in that class of cases, and indeed in almost all cases, has been in favour of the vesting of the fee *a morte testatoris*, unless the terms of the deed are such as to exclude that construction.

The case of *Forbes* v. *Luckie*, (16 S. 374,) supplies authority on most of these points. Lord Fullerton was the Lord Ordinary in that case, and the Judges in the Inner House, while affirming his judgment, delivered their opinion fully. Lord Corehouse spoke very decidedly on the several points above referred to. Lord Gillies and Lord Mackenzie added the weight of their great authority. In subsequent decisions the authority of that case has been fully recognized and given effect to. The circumstance, that some of the members of the favoured class were unborn at the testator's death is no obstacle to the right vesting in each of them as soon as they respectively come into existence, although the amount of a benefit to accrue to each may not be then ascertainable. That is quite settled.

There may be, however, cases in which vesting is suspended. Thus where the right is made conditional on a contingency personal to the legatee, such as marriage, or arriving at majority—events or dates uncertain which may never have place—there is a presumption, though not insuperable, that vesting, or right to take, was intended to be suspended until the occurrence of the contingency should be ascertained. So also, an inference to that effect may be deduced from an express clause of substitution or survivorship applicable to the members *inter se*, of a class to whom the fee is destined. These are the most usual indications of intention to suspend vesting. But neither of them occurs in the deed now under consideration. An inference of intention to suspend vesting may, in a particular case, be collected from the whole purpose and tenor of a deed. I shall presently consider whether the purpose and tenor of the present deed are or are not such as fairly to support that inference. It has been contended, that where, in addition to postponement of the period of payment during the life of a liferenter, there is a substitution, or as it is sometimes called, a destination in favour of parties other than the fiars first named, there is a presumption, that the vesting also was intended to be postponed till the death of the liferenter. There are cases in which that circumstance has, in connexion with other circumstances, been taken into account, but it is by no means a conclusive circumstance. Whether the clause founded on in the present case is truly a substitution or destination over in the sense and to the effect contended for, is a matter to which I shall afterwards advert.

As regards the purpose and tenor of the whole deed now under consideration, I am very clearly of opinion that the leading purpose of the testator was to confer the benefit of the great bulk of his fortune on his daughter in liferent, and on her children in fee. That purpose could best be carried into effect through the instrumentality of a trust; but, as already shewn, such an arrangement does not at all imply, that the right of the children as fiars was not to vest during their mother's life; that in the event of the marriage of any of the daughters during their mother's life, their right could not be made available in their marriage settlement; or that any of the sons, in the event of his entering into a profession or business, was to have no *jus crediti* that could be made available for his benefit. That is not presumable. I think it is rather to be presumed, that the truster intended to give to the children all the benefits that a right of fee could give, consistently with securing the liferent interest of their mother.

Then the deed contains a clause which, I think, shews, that the truster contemplated and authorized a termination of the trust before the death of the liferentrix, if the trustees, in their discretion, should think fit to act upon it. The words are: That the residue was to be kept in trust by them till they in their discretion shall see proper to settle it in the most safe and secure

manner on her and her children. I cannot read that clause as a mere instruction as to the investment of funds to be thereafter held by them in trust. The plain meaning of the words is, that the trust is to continne till, and only till, the trustees see proper to settle the trust fund in the most safe and secure manner on the mother in liferent, and the children in fee. If the trustees had exercised that power, the right to the fee must have vested in the children directly, instead of indirectly through the trust. That such a mode of dealing with the fund was a thing present to the mind of the testator appears to me to indicate very clearly, that he intended by the deed to create a *jus crediti* in favour of the children. It was argued, that, if the trustees were denuded of the trust under that clause, the right of fee must have gone to the mother, as the trustees could not have introduced the word "allenarly" to qualify her right, no such word being in the trust deed. That is a fallacy. The trust deed did not prescribe any formula, and the duty of the trustees would have been to introduce whatever words were necessary to give her the same measure of benefit as she had under the trust deed, and no more. Then, again, suppose the mother had renounced her liferent of the whole or a part in favour of her children, it does not appear, that there was anything to prevent the children from demanding immediate possession and enjoyment. Then, again, as already noticed, there is no clause of survivorship, nor is the right or the time of payment made contingent or conditional on an event which may never happen, such as marriage or attaining majority—elements, some of which are to be found in almost all cases in which the vesting is intended to be suspended. These considerations are all hostile to the notion, that in this case vesting was suspended till the death of the liferentrix.

On the other side of the question the feature most relied on and most deserving of consideration is the clause whereby the nieces are introduced, but, in the first place, that clause is not of the nature of a substitution. It is of the nature of a conditional institution or bequest depending on a condition or contingency which never did occur. In the second place, I think the contingency was excluded as soon as Mrs. O'Reily had issue of her body. The words "decease without issue of her body," may mean without leaving issue of her body surviving her, or it may mean without having issue of her body, and it may depend upon circumstances which of these two meanings is to be attached to the words. The appellants contend for the former of these meanings, and in that view they contend, that the clause in favour of the nieces was tantamount to a substitution, or a destination over, and therefore gives aid to their plea, that the vesting was intended to be suspended. Even if that were the character of the words, and, if there was anything else in the deed to which they could give aid, I do not think that the aid would be material, or would go far towards displacing the other considerations I have alluded to. But I am not disposed to adopt the meaning which the appellants attached to the words. I do not think the testator intended to prevent Mrs. O'Reily, in conjunction with her children, being, as they might have been, all of full age, from making arrangements and dealing with their respective rights of liferent and fee without regard to the contingent interests of the nieces.

For the reasons I have stated, my opinion is, that the right vested *a morte testatoris* in the class, some of whom were in existence at that time, and that a *jus crediti* vested in each child at its birth, although the amount of the benefit was subject to the contingency of there being more children born.

I do not think it necessary to notice in detail the several cases under the head "vesting" that have been referred to; each case depended on the particular terms of the deed which gave rise to it. But on a review of all the cases I think that the scope and tendency of them is to the effect I have indicated. The leaning of the law is towards vesting unless there be something in the deed to exclude that construction. I find nothing in this deed to exclude it.

The appellants have another plea on record which, though it does not appear to have been much if at all relied on in the Court below, and is not noticed in the *printed case* for the respondents, was pressed in argument at the bar with much ability, and deserves consideration. It is, that even, assuming the residue to have vested as contended for by the respondents, the share or interest of the children who predeceased the liferentrix accrued to the survivors *jure accrescendi*. The appellants were the only survivors, and consequently the importance to them of this plea, if well founded, is obviously very great.

In support of this plea reference was made to the civil law, and to a passage in Lord Stair's Institutes, iii. 8, 27. The doctrine of the civil law as to the *jus accrescendi* is subtle and unclear.

The civilians differ in their interpretation of it, and even Lord Stair has not succeeded in making it clear. He begins his section on the subject thus: "The right of accrescence is that whereby the portion of an heir, legator, or *fidei commissar* befalleth to another, not by a new and several succession, but by the first succession, and as part thereof. We have little use of this, and therefore, I shall be shorter in the many subtle debates agitated amongst the doctors thereupon." Nevertheless, he was led into writing a section of more than his ordinary length, and not quite free from the subtlety he ascribes to the debates of the doctors, but which was perhaps inseparable from the subject. His remark, however, is true, that the doctrine is not much in use with us, and from the whole tenor of the dissertation referred to, it appears that the

doctrine he was there more particularly dealing with had reference to the case of parties named by the testator to take immediately on his death, and as to what should happen if any of those conjoined in such a nomination cannot or will not enter or accept, that is, cannot as by reason of having predeceased the testator, or being for some reasons disqualified, or will not, as by choosing to decline. In such cases, the interest which the testator intended to give to the party who cannot or will not take it was to go to the person or persons conjoined with him, or to be otherwise dealt with according to the form of words used. Thus Stair there says, "In the institution or substitution of heirs or in legacies and *fidei commissa*, if there be more persons and some of them joint as to both matter and words, the rights of those so conjunct do accresce, if any of the persons so conjunct do not or cannot accept, to the rest of the conjunct, and not to those that are disjunct in the matter though they be conjunct in the words." The whole doctrine there treated of had reference apparently not to the case of a postponed interest, or of a subsequent succession, but to the case of parties who were to take in the first instance, or, in the words of Lord Stair, "the first succession," but we are not now dealing with a case in which there was any invalidity or unwillingness or failure to accept. The bequest was to a class, and the class must be held to have accepted the beneficial right which vested in them. It would be a mistake to suppose that Lord Stair on the *jus accrescendi* of the civil law recognized it as implicitly adopted into the law of Scotland. He not only begins the section (27) with the remark, that the right of accrescence referred to is not in much use with us, but he also begins the next section (28) thus: "The law and customs of Scotland have reduced the matter of testaments and succession in moveables much nearer to natural equity, and made it much shorter and plainer than the Roman law."

I do not mean to suggest, that the principle of accretion or *jus accrescendi* has no place in the law of Scotland in any conjunct rights. It is to some extent recognized, and although in most of the cases in which it is recognized, authority for it may be found in the civil law, nevertheless it would be wrong to hold, that everything on this subject that has authority in the civil law has been adopted into the law of Scotland, and especially wrong to hold, that the rules of the civil law applicable to the inability or unwillingness of parties to take at the testator's death are to be implicitly applied in our law to the subsequent succession to parties who have taken.

The passage cited from Bell's Prin. § 1882, also fails to support the contention of the appellants. By the word "survivor" in that passage is meant the legatee who has survived the testator, and, accordingly, the authorities Mr. Bell refers to, as collected in his Illustrations of the passage cited, are cases in which one of the legatees had predeceased the testator, and the question was, whether the share of the legatee so predeceasing accresced to the survivors.

It is a general rule in the law of Scotland, that where the right to a fee has vested, it transmits or passes to heirs, unless, in the nature of the subject or in the language of the deed which gives the right, there is something that requires a departure from that rule. In the case of a legacy or bequest which has vested, the rule applies as strongly as in other cases. The question of the vesting or not vesting of the right of fee pending a liferent is, as I have already observed, a question of intention to be gathered from the deed. The same observation applies to the question, whether, in a case where the fee is provided to a class, the share of one of the class is, on his death, to accrue to the survivor of a class, or to go to his own heirs by law or by will.

In every such question the governing rule is, that the intention of the testator must prevail, in so far as it can be reasonably inferred from the whole clauses of the deed. That such is the rule appears sufficiently from the two cases to which the appellants have referred, as if they had been decided on some abstract rule of civil law. In one of them, *Barber* v. *Findlater*, Lord Jeffrey, who was Lord Ordinary in the case, began his judgment in these words: "The Lord Ordinary considers this a *quæstio voluntatis*," and then he proceeded to examine minutely the clauses of the deed, and to inquire into the presumable intention of the testator. So also in the other case, *Tulloch* v. *Welch*, Lord Moncrieff (Lord Ordinary in that case) said, "This is rather a nice case." The whole question is on the just and legal construction of the settlement in the clauses constituting and regulating the right of liferent given. There certainly are rules derived from the civil law which have some application to that question, but the governing rule is, that the intention of the testator must prevail, in so far as that intention is expressed or can be reasonably ascertained from the whole clauses of the deed."

These cases were not decided on the authority of the civil law, though some mention of it was made incidentally. Nor do they otherwise support the contention of the appellants, for they are distinguishable from the present case, not only in the clauses and language of the deeds, but in the nature of the thing that was the subject of the contention. In neither of them was there any competition for a right of fee directly involved. In both of them the question was, whether the annual proceeds of a fund were to be wholly paid to the liferenters, so long as any of them survived, or whether, upon the death of any liferenter, a portion of the annual proceeds was to be set apart and accumulated till a future period, for the benefit of those who might ultimately become entitled to the fee. The question turned rather on the terms in which the right of liferent was given than on the terms in which the right of fee was given. In such a question as

to the enjoyment of a temporary interest in the annual proceeds, the intention of the testator may be inferred from elements which would not indicate an intention to depart from the ordinary rule of law, that a right of fee which has once vested transmits or passes to heirs.

The only other case on which the appellants founded in this branch of their argument, was the case of *Burnett* v. *Burnett*, 16 D. 780. That case is in some respects peculiar, and the statement of it in the marginal note cited by the appellants does not quite accurately express the ground of the decision. It was the case of a provision of a sum of money to children payable on majority or marriage. Several of them had obtained majority before the death of their father; one afterwards died in minority unmarried. It was held, that as some had obtained majority, the right to the sum of money had vested in the class, but as to the one who died, it was held, that as his right to participate in the fund was contingent on his attaining majority or being married, and as neither of these contingencies had ever occurred, the whole sum was payable to those who did obtain majority. That case has no applicability to the present case, which has no such elements in it.

It is therefore necessary, in reference to the plea of accretion, to look for the intention of the testator. In doing so, I assume, for the reasons I have already stated, that he intended the right of the children in the fee to vest, and did not intend that the vesting should be suspended till the death of the liferentrix. That being so, and the general rule being, that a fee once vested passes to heirs, unless there be in the deed conferring the fee something that excludes the application of that rule, I look to see if there is anything in this deed indicating an intention to exclude the application of the general rule. It is very easily excluded if such is the intention, and in the case of a bequest to a class, that is generally done by a clause declaring, that in the event of the death of any of the members of the class before the period of distribution or before some other event specified, his share should go to the survivors, as is done in this same deed in regard to the testator's nieces, but there is no such clause in regard to his daughter's children. Upon the effect of the context between these two classes, I take leave to borrow the language of Lord Jeffrey in the case of *Calder* v. *Dickson*, 4 D. 1368. "The omission (he said) in this part of the settlement of any such accrescing clause, as will be found in the immediately preceding part of it, affords the strongest possible grounds for concluding, that no similar arrangement was intended as to the provision now in question." Nor do I find in this deed anything else to lead me to the conclusion, that while the testator intended, as I hold he did intend, that the right of fee should vest in his daughter's children, he nevertheless intended, that the ordinary incidents of a vested right should be excluded. I think that is not to be presumed.

Two other reasons of appeal are stated in the *printed case*. One of them, the second reason, is involved in what I have already said. The other, the fourth reason, was not insisted on, and does not appear to be well founded

On the grounds I have stated, I am of opinion, that the interlocutors appealed against should be affirmed, and that the cause should be remitted back to the Court of Session.

LORD CHANCELLOR.—My Lords, I have had an opportunity of seeing and considering the opinion which has just been delivered by my noble and learned friend. It coincides exactly with the view which I had, independently of it, taken of the whole case, and it expresses that view so fully and so completely that I feel that I could add nothing useful. I shall therefore content myself with saying, that I entirely agree in the opinion which has been expressed by my noble and learned friend, and in the conclusion at which he has arrived, that the interlocutors appealed from should be affirmed.

LORD CRANWORTH.—My Lords, I am exactly in the same position as my noble and learned friend on the woolsack. My view of this case has been stated so fully and so ably by my noble and learned friend opposite, that I will only add that I rejoice to think that the conclusion at which the Court of Session has arrived in this case with respect to the law of Scotland, as I understand it on the subject of vesting, is precisely similar to what the decision would have been if it had been an English case.

Lord Advocate.—Will your Lordships permit me to apply to you to dispose of the costs of the appeal? it was a unanimous judgment.

LORD COLONSAY.—I presume the costs should follow the affirmance of the judgment.

Mr. Anderson.—It is a question of construction.

Interlocutors affirmed, and appeal dismissed with costs.

Appellants' Agents, Hunter, Blair, and Cowan, W.S.; Loch and Mac Laurin, Westminster.—*Respondents' Agents*, W. Miller, S.S.C.; Duncan and Lyon, S.S.C.; Adam Burn, Doctors' Commons, London.