or among them, the free rents, after deducting public and parochial, a species of lease. If the feu-duty of £36, 15s., payable at Whitsunday and Martinmas, is viewed as a rent, that will be in accordance with the obvious intention of the parties, gathering the intention entirely from the deed.

The superior is to relieve the vassal, as if he himself were landlord and the vassal were tenant. The relation of landlord and tenant requires and implies a rent, and here the £36, 15s., payable by the vassal as if he were tenant to the superior as if he were landlord, is truly in the meaning of the charter, and according to the intention of the parties, just a rent. I have no doubt that it was meant to be so, and I think we must hold it to be so. I think that the defender's proposal to pay rates effeiring to a rent of £36, 15s. is a fair and equitable offer, and that the pursuers are not entitled to further relief.

Lord Mure concurred.

The Court adhered.

Counsel for Pursuers—Balfour—Keir. Agents—Webster & Will, S.S.C.

Counsel for Defender—Dean of Faculty (Watson)—Rutherford. Agents—Leburn, Henderson, & Wilson, S.S.C.

Saturday, January 8.

SECOND DIVISION.

SPECIAL CASE—HENDERSON'S TRUSTEES AND OTHERS.

Succession—Testament—Residue—Vesting—Vesting a morte testatoris.

A testator directed his trustees to divide the residue of his heritable and movable estate equally amongst his "children, or the survivors of them, at such times and in such manner" as they might "think proper."—*Held*, in the circumstances, that this direction vested the residue in the beneficiaries *a morte testatoris*, there being in none of the provisions of the deed a postponement of vesting direct or implied.

Succession—Testament—Special Destination—Vesting a morte testatoris.

A testator directed his trustees to "hold for and pay over to" his sons *nominatim*, "whom failing," to their lawful children, the "free rents" of certain houses. In the event of any of the sons dying leaving children, he directed his trustees "to hold and apply the free annual rents of the property hereby directed to be conveyed to such of my said sons for behoof of such child or children until the youngest of them shall attain the age of twenty-five years complete, when the property shall be conveyed to, or, in the option of my said trustees, sold, and the free proceeds thereof shall be divided equally amongst them if more than one." Further, it was declared "that in event of any of my said beneficiaries predeceasing me without leaving lawful issue, the share and interest of my said estates which would have fallen to such beneficiary is hereby declared to form part of the residue of my said estates." None of the testator's sons predeceased him.—*Held* (*diss.* Lord Gifford) that the specially destined subjects vested in the sons *a morte testatoris*.

This was a Special Case, brought by—(1) The trustees of the late James Henderson senior; (2) the widow of James Henderson junior (eldest son of James Henderson senior), as her husband's general disponee; (3) the trustees and widow of the late David Henderson, the original truster's second son; (4) the universal legatee of the third son John Gray Henderson; and (5) the tutors-dative of the second son's two children David and Janetta.

James Henderson senior died on 28th May 1869, leaving a trust-disposition and settlement dated 5th November 1866, by which he conveyed his whole means to the first parties as trustees, for the purposes therein mentioned, viz.:—"To the end and intent that my said trustees and executors may immediately after my decease enter into possession of my estates, heritable and movable, real and personal, generally before conveyed, and, if they consider it necessary and expedient, may, as soon thereafter as convenient (except the subjects hereinafter directed to be specially disponed), sell, dispose of, and convert the same into money," and to hold and apply the premises and prices and proceeds thereof for the following purposes:—*First*, To make payment of his debts, &c. *Second*, Legacy of stock, furniture, and fittings, and goodwill of his business and lease of the premises, subject to trade debts, to his son John Gray Henderson. *Third*, An annuity of £150 to his widow, the said Mrs Agnes Henderson, "payable out of the free income of my said estates, heritable and movable, at the terms," &c. "In the *fourth* place, I direct and appoint my said trustees . . . after making provision for the current expenses of carrying on the said trust . . . to divide the surplus annual income of all of my said heritable and movable estates equally among my children after mentioned, and that at such times and in such manner as to them may seem proper, and in the event of the death of any one or more of my said children leaving lawful issue, such lawful issue shall be entitled to receive the share of said surplus which would have fallen to his or her parent had such parent survived, and upon the death of my said spouse, or should she predecease me, upon my decease my said trustees shall hold for and pay over to my said son James Henderson, whom failing, to his lawful children, equally between or among them, the free rents, after deducting interest on bonds and all other charges, of that tenement of land belonging to me, situated in Florence Street, Hutchesontown, Glasgow, and in the said event I also direct and appoint my said trustees to pay over to my said son David Henderson, whom failing, to his lawful children, equally between or among them, the free rents, after deducting as aforesaid of that property belonging to me, situated in William Street, Anderston, Glasgow; and further, in said event, I also direct my said trustees to pay over to my said son John Gray Henderson, whom failing to his lawful children, equally between

as aforesaid, of that property belonging to me, situated in Albert Drive, Queen's Park, Cathcart parish, near Glasgow, and also to deliver to him the said household furniture, bed and table linen, plate, pictures, and other articles directed to be liferented by my said spouse, as before provided, and which I hereby leave and bequeath to him accordingly: Further, I hereby authorise and empower my said trustees either to collect the rents of said respective properties or to appoint a factor to do so, or to allow each or any of my said sons to collect the rents of and manage the properties in which they are respectively interested, and that so long as my said trustees may think proper. In the *fifth* place, in the event of any of my said sons dying leaving a child or children, I hereby direct and appoint my said trustees to hold and apply the free annual rents of the property hereby directed to be conveyed to such of my said sons, for behoof of such child or children, until the youngest of them shall attain the age of twenty-one years complete, when the property shall be conveyed to, or, in the option of my said trustees, sold, and the free proceeds thereof, after deducting expenses, sums secured on bond over said property, and expenses, shall be divided equally amongst them if more than one; declaring, however, that in the event of any of my said beneficiaries predeceasing me without leaving lawful issue, the share and interest in my said estates which would have fallen to such beneficiaries is hereby declared to form part of the residue of my said estates, and shall be divided as after mentioned." After (*sixth*) a legacy of a bond and disposition in security for £400 to his son John Gray Henderson, the deed proceeds:—"In the *seventh* place, I direct and appoint my said trustees to divide the residue of my said heritable and movable estate equally amongst my said children, or the survivors of them, at such times and in such manner as my said trustees may think proper." Afterwards the testator appoints his trustees and executors before named, and their foresaids, "to be tutors and curators to such of my said children or their issue as may be in pupillarity or minority, with all the usual powers and privileges belonging to these offices."

James Henderson senior was survived by his wife, who was alive, and by three sons, James, David, and John Gray, all of whom were dead at the date of this case. The movable estate in the hands of the trustees amounted to £2259, 9s., and there was also heritable property, consisting of the subjects specially destined, and one tenement acquired subsequent to the date of the settlement.

The testator's second son David died on 6th December 1869, leaving his whole estate, heritable and movable, by deed dated November 26, 1869, to certain trustees for behoof of his children—David, born 15th April 1866, and Janetta, born 17th August 1867. This settlement was reduced on the ground of death-bed on 8th January 1870, at the instance of the pupil son David.

John Gray Henderson, the third son, died on August 12, 1870, leaving a holograph document purporting to be his will, but subsequently his estate was, under an agreement entered into between his widow, as executrix, his surviving brother, and the tutors of his children, divided "according to law had said John Gray Henderson died intestate."

James Henderson, the eldest son, died on August 19, 1874, without issue, but leaving his whole estate to his wife by deed dated August 7, 1874.

After James Henderson senior died, certain questions as to the carrying out of his settlement arose among the beneficiaries. Some of these, however, were arranged by a minute of agreement, whereby, *inter alia*, it was arranged that the widow should accept the provisions made for her, discharging her liferent over certain heritable subjects specially destined to her in her husband's settlement; that James should receive £50 over and above his share; and that John Gray should give up his claims to shop furniture and stock.

After the death of the three sons this Special Case was brought to regulate the final distribution of the trust-estate, the questions at issue relating mainly to the surplus revenue of the trust-estate, and to the nature and vesting of the residue.

The following questions were submitted for the opinion and judgment of the Court:—"(1) Under the settlement of James Henderson senior, did the residue of his estates vest at his death, or is vesting postponed till the death of his widow? (2) If it shall be held that the said residue did not vest at the testator's death, are the second and fourth parties bound to repay all or any of the sums paid on the footing of the residue having so vested, with interest? (3) If the second and fourth parties are not bound to repay the said sums, or if, on being called upon, they shall fail to do so, are the first parties personally bound, conjunctly and severally, to replace the same, or any of them, with interest, to be available for the purposes of the trust? (4) Did the bequest of residue lapse on the testator's sons all predeceasing his widow? (5) Did the three subjects personally destined vest in the testator's sons respectively *a morte testatoris?* (6) If vesting in said subjects did not take place at the death of the testator, do the subjects destined to James and John fall to be dealt with as intestate succession, or have they fallen into residue? (7) In the event of the said subjects being held to form part of the residue, is the whole of the residue movable *quoad* succession, or is part of it heritable and part movable, and if so, what parts? (8) Does the whole of the surplus revenue fall to be paid to the children of David Henderson senior, or are they only entitled to one-third thereof, the rest falling into residue? and has the surplus revenue been correctly divided since John Gray Henderson's death? (9) Was the legacy of furniture, &c., to John Gray Henderson, immediate, so as to vest in him on the testator's death, or was it conditional on his surviving the liferentrix?"

Authorities—*Young* v. *Stewart*, 21st October 1875, 13 Scot. Law Rep. 5, and cases cited by Lord Ordinary there; *Ralston* v. *Ralston*, 8th July 1842, 4 D. 1496; *Elliot* v. *Bowhill*, 21st June 1873, 11 Macph. 735; *Allan's Trs.*, 12th December 1872, 10 Scot. Law Rep. 14; *Hutcheon*, 1 Vesey 365 (and Lord Eldon there); *Martin*, 2 L. R. (Eq.) 411; *Jamieson* v. *Allardice*, 30th May 1872, 10 Macph. 755; *Leigh-*

ton v. *Leighton*, 8th March 1867, 5 Macph. 561; *Young* v. *Robertson*, 4 Macq. 337; *Graham's Trs.* v. *Graham*, 20th March and 26th May 1868, 6 Macph. 820 (Lords President and Ardmillan there); *Aitken's Trs.* v. *Wright*, 22d Dec. 1871, 10 Macph. 278; *Boag* v. *Walkinshaw*, 27th June 1872, 10 Macph. 872; *Fotheringham*, 2d July 1873, 11 Macph. 545; *Buchanan* v. *Angus*, 4 Macq. 379.

Authorities for 5th parties—*Lang* v. *Barclay*, 20th July 1865, 3 Macph. 1143; *Donaldson's Trs.* v. *M'Dougall*, 20th July 1860, 22 D. 1527, 24 D. (H. of L.), 4 Macq. 314; *Smith's. Trs.* v. *Graham*, 29th May 1873, 11 Macph. 630; *Cosens* v. *Stevenson*, 26th June 1873, 11 Macph. 761; *Hunter's Trs.* v. *Carleton*, 11th February 1865, 3 Macph. 514; 30th July 1867, 5 Macph. (H. L.) 151; *Clelland* v. *Gray*, 20th June 1839, 1 D. 1031; *Buchanan* v. *Young*, 4 Macq. 374; *Newton* v. *Thomson*, 27th January 1849, 11 D. 452; *Rhind's Trs.* v. *Leith and Others*, 5th Dec. 1866, 5 Macph. 104; *Ogilvie* v. *Boswell*, 22d May 1850, 12 D. 940; M'Laren on Trusts, ii. 572; *Newbigging and Others* v. *Russell*, 9th March 1853, 15 D. 489.

At advising—

Lord Justice-Clerk—The solution of the questions in this Special Case depends upon the construction of a complicated and imperfect settlement. As to the matter of vesting, this must be decided by a general review of the provisions of the instrument and of the conclusions to be drawn therefrom. Now as to the scope of the deed—The settlement of Mr Henderson had two purposes—firstly, to provide for his widow, and secondly, for his sons. Shortly these may be described as the chief objects of the deed before the Court. It may be generally said that—(1) in *a mortis causa* deed the presumption is for vesting *a morte testatoris*; (2) in such a deed the presumption is not affected by the interposition of a liferent; (3) vesting *a morte testatoris* is the more readily presumed where there are no ulterior interests provided for directly or contingently. [His Lordship then referred to the case of *Elliot* v. *Bowhill*, 21 June 1873, 11 Macph. 735, and to the cases of *Provan* v. *Provan* 14 Jan. 1840, 2 D. 298 (Lord Moncreiff there), and of *Forbes* v. *Luckie*, 26 Jan. 1838, 16 S. 374 (Lord Corehouse there); *Hunter's Trustees* v. *Carlton*, 11 Feb. 1855, 3 Macph. 514, 5 Macph. (H. L.) 151.] As to the form of the provisions of the deed, whatever the object for postponement of the time of payment may have been, there was no ulterior object to affect the question of vesting, and this question further remains unaffected by the provisions, such as they are, with regard to the predecease of the children. Lastly, there is a clause in favour of the children, and of no other person whatever. Had these been the only elements I should not have had any doubt as to the vesting, but there are two things which would seem to raise a certain degree of difficulty. First, there is the provision as to the distribution of the accruing interest. [*reads*] Now that looks as if the trustees might retain the whole *corpus* of the estate during the life of the widow, while the clause as to decease would imply that any one dying would have the right to transmit his share of the estate. Secondly, the main difficulty arises from the residue clause [*reads*]. It was argued very strongly that at the death of the widow the trustees were bound to divide the residue, and that the survivorship clause applied to that period. On that matter I think that the clause of survivorship applies and can only apply to the death of the testator. It was, I think, in the power of the trustees at any time after Mr Henderson's death to have divided the residue. Now suppose the trustees had thought proper to divide the whole movable estate at the testator's death, I must say that I can see nothing in the deed to have prevented their doing so, and if they could do so then the estate clearly vested *a morte testatoris*.

The question next to be decided by your Lordships is in regard to the heritable subjects specially destined, and whether they also vested *a morte testatoris*. It is not easy to see what grounds there are for arriving at the conclusion that the testator Mr Henderson intended to make a period of vesting for these subjects different from that appointed for the residue of his estate. There are two views which might be taken as to the vesting of these specially destined subjects, *firstly*, that they vested *a morte testatoris;* and *secondly*, that the destination conveyed nothing but a liferent to the sons named, with the fee to their children, and in the event of their leaving no children that the shares fell into residue or intestacy. I have come to the conclusions that the special subjects were really intended to vest *a morte testatoris*, and that the provisions made were only to meet the contingency of the predecease of the testator's sons.—[*His Lordship then read the clause in the deed.*] This clause, I think, contains the whole provisions of the deed with respect to these special subjects so far as the event has turned out, and I further think that no other clause in the deed affects the destination of these subjects. The question then is whether this clause provides to the sons mentioned the fee or the liferent only. The real intention of Mr Henderson, as I gather, was to leave a considerable discretion in the trustees as to the period of the conveyance, and this would explain the absence of any express direction to convey. Even putting aside the absence of such a direction, the clause I have just read appears to point to the sons mentioned having the fee. The trustees are directed to hold and "pay over" to these sons the "free rents" till such time as they think fit to convey—a direction which necessarily seems to imply a fee in the beneficiaries named. Further, the provision to "pay over"—"whom failing to his lawful children"—seems to me to be conclusive; what follows had reference only to the event of any of the sons predeceasing their father—[*His Lordship then read clause 5.*] There I think "dying" is equivalent to "dying before myself," as is shown clearly by the counterpart in the clause which declares that if any of the testator's beneficiaries predecease him without leaving lawful issue, their share or shares should fall into residue.

The other construction involves this absurdity, if one may call it so, that the trust is to continue indefinitely, and that it is to go on in event of there being no sons' children left. I do not think the testator contemplated anything of this kind, and accordingly, although without disguising the difficulty of spelling out this deed, I am of opinion that a clear construction and interpretation is to be found by holding that these special subjects also vested *a morte testatoris*.

Lord Ormidale—Although I for some time

felt considerable difficulty in regard to various points in this case, not even excepting the leading question of when the residue must be held to have vested, I have at length arrived at the same conclusion with your Lordships on that question.

The general scope and effect of the testator's settlement may be said to be the creation of a trust and the transference of his whole estates, heritable and moveable, to trustees for the purpose of securing payment of an annuity to his widow, constituting certain provisions chiefly of surplus income in favour of his children, and dividing the residue "equally amongst my said children, or the survivors of them, at such times and in such manner as my said trustees may think proper." There is not in these words any direct gift or disposition of the residue, but the testator's estates having been previously conveyed in trust for behoof of the beneficiaries, that was not necessary. The object therefore of the residuary clause I take to be not to determine the period of vesting, but merely the times and manner of division. In support of this view the recent decision of the House of Lords in *Galt* (*Alexander's Factor*) v. *Miller* (*Finlay's Trs.*) 25 February 1875, reported I believe as yet only in the Scottish Law Reporter, vol. xii. p. 630, has, I think, an important bearing; for, although the controversy in that case arose out of an *inter vivos* trust, and not a *mortis causa* one as here, that circumstance does not appear to have affected the judgment. And although the circumstances of that case and the structure of the deed there under consideration were very different from those of the present, the observations of the Lord Chancellor and the other noble and learned Lords who took part in the judgment are of a general character, and go far, I think, to show that the residue here must be held to have vested at the death of the truster James Henderson senior.

Being of that opinion, very much on the grounds which have been fully stated by your Lordship, I consider it unnecessary to repeat them or to say more than to express my satisfaction at finding that this result appears to be in conformity with the principles which have been hitherto acted on by all the parties interested in this case.

The decision of the leading question governs the 2d, 3d, and 4th questions.

In regard to the fifth question, I am of opinion that the subjects to which it refers as specially destined vested in the testator's sons respectively *a morte testatoris*. I am unable to see how any other conclusion can be come to consistently with the fact that all of the testator's sons survived him, and with the declaration in the fifth purpose of the testator's settlement to the effect that "in the event of any of my said beneficiaries predeceasing me without leaving lawful issue, the share and interests in my said estates which would have fallen to such beneficiary is hereby declared to form part of the residue of my said estates, and shall be divided as after mentioned." According to this declaration it was only in the event of his sons or any of them predeceasing the testator that the subjects in question were intended by the testator to fall into and be divided as residue; but as no such event happened—that is to say, as none of his sons predeceased the testator, none of the subjects specially destined to them can be held to have fallen into and to be divided as residue. But then it was objected, as I understood the argument for some of the parties, that there was no express destination at all of the fee of the subjects referred to, and in a literal sense this is true, for undoubtedly the testator's settlement is defective in that respect.

Having regard, however, to the whole scope and tenor of the settlement, and particularly its fourth and fifth purposes, I think that on the principle of implied, if not of express destination, it must be held that the three sons had right respectively to the fee or *corpus* of the special subjects in question. This view is supported and illustrated by various cases which are referred to by Mr M'Laren in his work on Wills, p. 327, *et seq.* On any other footing the result would be that the fee of the special subjects in question must be held as undisposed of altogether by the testator, and to constitute intestate succession, a result which is not to be arrived at if it can on any reasonable ground be avoided.

The answer I have now given to the fifth question renders any answer to the sixth question unnecessary.

And so also of the seventh query, which, as it is expressed, appears to require an answer only on the assumption of the special subjects referred to being held to form part of the residue. But I think it right to explain in answer to this query that the subject No. 20 Florence Street, which was acquired by the testator subsequent to the date of his settlement, and not specially destined by him, must be held to form part of the residue, and also that although it is in its own nature heritable, it must, on the principle of constructive conversion, be dealt with along with the rest of the residue as movable *quoad* succession, in respect the division which the testator appoints to be made would be otherwise impracticable.

In answer to the eighth question, I am of opinion that the children of David Henderson are only entitled to one-third of the surplus revenue, and that, having regard to the deed of agreement referred to in the case, the surplus revenue has been correctly divided since John Gray Henderson's death.

I have only farther to add, in answer to the ninth or last question, that in my opinion the legacy referred to vested in John Gray Henderson on the testator's death.

Lord Gifford — The trust-disposition and settlement of James Henderson senior, the terms of which have given rise to the questions put in this Special Case, is so framed as to make it very difficult to gather therefrom what were the real intentions of the testator in the special circumstances which have actually occurred, and there is great room for difference of opinion upon the questions raised.

The cardinal rule in such cases is that the intention of the testator, as the same is disclosed in or is discoverable from his testamentary deed, determines the distribution of his estate and the term at which the provisions vest in the various beneficiaries. But it very often happens that circumstances emerge which the testator himself or those advising him have not contemplated, and it is only by inferences or by presumptions

more or less strongly founded that the true meaning and effect of the deed can be determined. In the present case it is very difficult to reach, in reference to some of the questions put, any satisfactory assurance as to what the will and intention of the testator really was.

I have come to be of opinion, in the first place, that under the terms of the deed, taken as a whole, the general residue of the trust-estate (whatever that general residue may ultimately be found to consist of or embrace) vested in the three sons of the testator *a morte testatoris*, and that vesting of the general residue was not and is not postponed till the death of the widow. The residuary bequest is expressed in the most absolute and general words—"In the seventh place I direct and appoint my said trustees to divide the residue of my said heritable and movable estate equally amongst my said children or the survivors of them, at such times and in such manner as my said trustees may think proper." There is no time or term of payment specially mentioned or even implied, as sometimes occurs by the use of the word "thereafter" or otherwise, and the powers given to the trustees to divide the residue, "at such times and in such manner as my said trustees may think proper," is so absolute in its form as scarcely to admit of its being limited or controlled by any other clauses in the deed.

Now, there is always a general presumption for vesting as at the date of the testator's death, and even special directions regarding the term of payment are in general held as applicable merely to the payment and not to the vesting of the provision. Thus, a declaration that legacies or provisions are to be payable at the first term of Whitsunday or Martinmas after the testator's death, or shall not be payable for a year after the testator's death, are held to be mere arrangements for convenience of management and do not prevent the bequests themselves from vesting instantly upon the testator's death.

I have come to be of opinion that there is nothing in the deed which would prevent the general residue from vesting *a morte testatoris*. It is true there are preferable purposes created by the trust, and these preferable purposes must be fulfilled before the general residue can be finally fixed and ascertained. It is also true that some of these preferable purposes may require a long time for their fulfilment, as, for example, when a liferent or an annuity is bequeathed, but the vesting of the residue will not be stopped during the non-fulfilment of preferable purposes or during the lives of annuitants or even life-renters. The residue will vest instantly under the burden of these preferable purposes, or charged with the preferable annuities or other special rights. This is the general rule, unless the testator has otherwise directed.

Now, I am of opinion that none of the provisions of the deed either direct or imply a postponement of the vesting of the general residue. The first purpose is the payment of the testator's debts and certain expenses. The second purpose is a special bequest of stock and furniture. Of course neither of these provisions affect the vesting of the residue. The third purpose provides an annuity of £150 to the widow, with the liferent of certain furniture. It was not contended that this provision *per se* would prevent the residue from vesting at the testator's death. The widow's annuity might be provided for or secured in any way, and there is nothing to prevent the residue of the estate from being paid, and even, if it is necessary, that a portion of the estate be retained to meet the widow's annuity. This is done merely for her security, and will not prevent the fee or the reversion from instantly vesting in the residuary legatees. The fourth purpose creates more difficulty however, for under it the testator directs that, after providing for the widow's annuity, the truster's debts, and others, the trustees shall, during his widow's liferent, divide the surplus annual income of his estates among his three children or their issue. There is undoubtedly great force in the argument that this is equivalent to directing the trustees not to give the sons or their issue anything excepting the free surplus income during the widow's life. I do not think, however, that the provision can be read so strongly as a prohibition against distributing capital, much less as a declaration that no immediate right shall vest in the residuary legatees. It rather appears to me to be a mere provision that if the whole income is not required for the widow, the surplus income shall belong to the three sons, who are the residuary legatees, and that this provision does not control the general terms of the residuary bequest, which is absolute in favour of the sons, with a power to the trustees to divide whenever they think proper. It may even be argued, as it has often been in similar cases, that the present gift of surplus income, so far as not needed for preferable purposes, is an indication that the fee has already vested in the person to whom the surplus income is given.

The second part of the fourth purpose is quite distinct and separable from the provision as to income, and as I read it, it consists of a special provision of three separate heritable subjects, one to each of the testator's three sons. I view these separate provisions as just special legacies, which may govern the destination of the three special subjects provided, but which will not affect the general residue, which must be struck in the first instance, at least, leaving these three special subjects out of view. These three special subjects, or some of them, may or may not ultimately fall into residue by converging circumstances, as, for example, by the failure of the beneficiaries, but the mere possibility of this, and its uncertainty, does not prevent the vesting of the general residue, be that residue more or less. The fifth purpose, although it is expressed under a separate head, is really a pendant to the second part of the fourth purpose, for it relates exclusively (holding it to terminate at the word "declaring") to the special subjects provided to each of the three sons under the fourth purpose. The clause commencing with the word "declaring" seems, however, to have a wider application.

The sixth purpose is a special bequest of a bond for £400, and as this is to be given at the testator's death, it cannot affect the vesting of the residue which is given, as already mentioned, in the seventh purpose.

I am of opinion, therefore, that the prior purposes of the deed, prior to the gift of residue, whether taken separately or together, do not control or deprive of their meaning and effect the absolute words in which the residuary bequest is

expressed, so as to prevent the general residue from instantly vesting. I think this conclusion is strengthened by the declaration which follows the fifth purpose, and which, although one would not naturally expect to find it where it is, seems yet to have a general reference to the whole estate. It runs thus: — "Declaring, however, that in the event of any of my said beneficiaries predeceasing me without leaving lawful issue, the share and interest in my said estates which would have fallen to such beneficiary is hereby declared to form part of the residue of my said estates, and shall be divided as after-mentioned. This is the only general provision in the deed applicable to the death of beneficiaries predeceasing the testator, and not with reference to their predeceasing the widow or predeceasing any term of distribution. Several special cases of survivorship are elsewhere provided for, but none of these affect the general residue.

I am well aware of the weight and importance to be attached to a general rule, announced in recent cases in the House of Lords, that where there are clauses of survivorship and a period of distribution provided, the term of distribution is in the general case, and apart from all specialties, the term at which the survivorship refers, and at which it is to be asked who are the survivors. I give the fullest weight to that *prima facie* presumption of law, for such I take it to be; but in the present case, in reference to residue, I think there is no term of distribution prescribed either directly or by implication, and no prohibition against a distribution of residue as far as it can safely be done immediately on the testator's death. Indeed, this seems expressly left to the discretion or will of the trustees, and I do not think that the previous or preferable purposes create by implication the death of the widow as the term of distribution, especially where there is a general clause providing for issue only in the case where the beneficiaries predecease "me," the testator. I answer the first question put, therefore, that the general residue of the trust estate vested *a morte testatoris.*

The answer to the first question supersedes, I think, the second, third, and fourth. I think it quite clear that if the residue vested, the partial division which has already taken place, under the agreement of all parties of July 1869, is valid and effectual, and that none of the parties are bound to repay or replace the sums paid under that agreement.

On all the points referred to I agree with your Lordships except as regards these special subjects, and I regret that I am unable as regards them to come to the same conclusions as your Lordships have done.

The remaining five questions relate to difficulties as to what subjects do and what subjects do not fall under the general residue of the testator's estate, and as to the special bequests and special provisions of heritable subjects contained in the trust-deed, as to which, or as to some of which, it is doubtful what is to become of them, or whether they have lapsed into the general residue or not. The chief of these special legacies or special provisions are the three separate heritages specially destined in the deed.

Now, in reference to these three special heritable subjects, I am sorry that I have found myself unable to concur in the view taken by your Lordships. I am of opinion that as special bequests or special provisions these special heritages did not vest in the three sons of the testator at the testator's death. As I read the deed, the subjects are not given to the testator's sons at all. All that the testator gives to his sons is the rents of these special subjects after his widow's death. The fee of the property is not given to the sons; on the contrary, the trustees are specially directed to hold and to pay the rents even after the death of the respective sons, and to continue to apply the rents, but still only the rents, for behoof of the lawful children of each son, and that until the youngest of such children respectively—that is, of the three families of grandchildren respectively—shall attain the age of twenty-one. It is only when this event happens—the majority of the youngest grandchild—that the fee of these special subjects is disposed of, for it is only then that the properties are to be conveyed to the respective families of grandchildren, or to be sold, and the proceeds divided among them.

Now, I do not think that this bequest or provision gave anything whatever to the immediate sons of the testator, excepting an interim right to rents. I view the fee as provided conditionally to the grandchildren, and to them alone. I think the provisions, so far as concerns the fee of the special heritages, are really conditional bequests to the testator's grandchildren, and to the grandchildren alone—conditionally, that is, if there should be any grandchild of the respective sons alive when the time of payment or of conveyance shall arrive, and as there is interposed all the machinery of an effectual subsisting trust, I think a bequest or provision of this nature is quite valid.

It is true that a bequest or provision to a father in liferent and to his unborn children in fee vests an instant fee in the father, and the children take nothing but a bare *spes successionis*, unless there be some restrictive words, such as "liferent allenarly," which restrict the father's right and exclude him from the fee. But this is a somewhat arbitrary rule, introduced from a supposed necessity that a fee cannot be *in pendente*, but must instantly vest somewhere, and the rule only applies to cases where there is a conveyance or disposition to the father himself in liferent. It has never been applied to cases where there is no conveyance at all to the father; but where a subject is vested in trustees, who are directed to hold and keep it, and to pay the rents for a time, or for his lifetime to a father, and only upon the father's death, or upon some other event mentioned, to convey the fee to his children, a direction like this has always been held equivalent to restrictive words; the arbitrary rule has no place, and the intention of the testator receives effect, which is, that the father shall only receive the rents, and shall have no power to defeat his children's right to the fee.

If therefore all Mr Henderson's three sons had survived, and were yet alive, I should say that these three special subjects had vested in none of them—that none of the sons had right to defeat the rights of the grandchildren—and that the fee was vested in the trustees for behoof of the grandchildren, if they should survive the appointed time of conveyance.

But all the sons, although they survived the testator, have now deceased, two of them without issue, and the third son leaving two children. I am of opinion that, by the death without issue of the two sons who left no issue, the special subjects destined to them have lapsed and fallen into residue. The fee of these two special subjects was intended for and given to grandchildren who have never existed, and who now can never exist. The condition therefore has failed, the provision is simply a lapsed legacy, and the subject of it falls, not into intestacy, for there is a general and universal settlement, but into residue, just like other lapsed legacies. As to the third subject, as David the third son has left issue, I am of opinion that the trustees must continue to hold for David's children, and in exact terms of the deed they must convey to these children or sell for their behoof when the youngest of them attains majority, and not till then. The result is that, in my opinion, two of the special subjects have fallen into residue, and belong with it one-third to those in right of each son. The third special subject must be held still for David's children. To this extent I regret to be obliged to differ from your Lordships, and this difference would lead to a different answer to some of the questions put. In other respects I agree with your Lordships.

Lord Neaves was absent.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the Special Case, with the questions as amended, being No. 9 of process, are of opinion, and find—(1) That under the settlement of James Henderson senior the residue of his estates vested at his death; (2) That the three subjects specially destined vested in the testator's sons respectively *a morte testatoris;* (3) That the children of David Henderson senior are entitled only to one-third of the surplus revenue—the rest falling into residue—and that the division under the minute of agreement, so far as applicable to the residue, has been correct; (4) That the legacy of furniture, &c., to John Gray Henderson vested in him on the testator's death; and find it unnecessary to answer any further queries, and decern."

Counsel for First, Second, Third, and Fourth Parties—M'Laren—Innes. Agents—M'Ewen & Carment, W.S.

Counsel for Fifth Parties—Moncreiff. Agents—Wilson & Dunlop, W.S.

Counsel for Curator *ad litem*—Lee. Agent—P. Murray, W.S.

Saturday, January 8.

SECOND DIVISION.

[Lord Curriehill.

HOULDSWORTH *v.* BAIN AND OTHERS.

Landlord and Tenant—Lease—Minerals—Reparation—Violent Profits—Bona fide *Possession.*

A proprietor let the coal and fire-clay in his estate to a tenant under a lease and minute of agreement, whereby he (the proprietor) was empowered, in the event of the tenant's death during the currency of the lease, to resume possession of the colliery, "if he should at any time thereafter be dissatisfied with the working thereof by the representatives" of the tenant. The tenant died during the currency of the lease, which was transferred to his representatives. Thereafter the proprietor, being dissatisfied with the management of the colliery by the said representatives, intimated to them his intention of resuming possession thereof. The representatives refused, and denied the proprietor's right, and he accordingly brought an action against them for declarator that he was entitled to resume possession of the colliery, and that they were bound to remove therefrom, and for decree ordaining them to concur with him in having the plant and machinery valued. In this action the Lord Ordinary gave decree in favour of the proprietor, and the Inner House, on a reclaiming note, adhered. The proprietor then brought an action against the representatives, concluding for a sum of money, which he explained in the condescendence represented the amount due by the defenders as violent profits from the date of the intimation that he was about to resume possession, or as damages caused by their wrongous retention of possession since that time. In defence the representatives pleaded that their opposition to the action of declarator and removing was made and continued in the *bona fide* belief that the lease could not be put an end to without their consent, and that as the questions raised were attended with difficulty, their retention was not wrongous, and that they were not liable either for violent profits or for damages.—*Held* that the claim which the pursuer had against the defenders was not one for violent profits, but for breach of contract by the defenders having retained possession of the colliery after the period at which they were bound to remove, and that they were therefore liable to the pursuer in reparation for such injury as had thereby been occasioned to him.

Opinion per Lord Justice-Clerk, that in the circumstances, in so far as the action was for violent profits, the defence of *bona fide* possession was sufficient to protect the defenders until their title was the subject of judicial decision.

Opinion per Lord Ormidale, that in the circumstances, the *bona fides* of the defenders must be held to have ceased, and their liability to have commenced at the date of citation in the action of declarator and removing.