borne by the county or counties, or part or parts, or district or districts, of such county or counties, and by the burgh or burghs named in the determination." Therefore it appears to me that the whole object of this 88th section is to provide that bridges situated wholly within one county or burgh shall nevertheless be dealt with as regards their maintenance and management in the same way as if they were not wholly situated within one county or burgh. That is to say, they are to be brought within the category of being not wholly situated within one county or burgh for the purpose of maintenance and administration. Those which *de facto* are not locally situated within one county or burgh have been already disposed of by the 37th and 38th sections of the statute, and the kinds which are dealt with in these sections are bridges which are situated wholly within one county or burgh, but are to be made common to two or more of such counties or burghs.

Now, it has been said that the question at issue may be solved by reference to the statute, which is called an Act for shortening the language contained in Acts of Parliament, and if the framers of this statute had that object in their view, I do not think they have been very successful. But it appears to me that the statute referred to has no application. This does not appear to me to be a case of singular and plural at all any more than a case of masculine and feminine. The question here is whether a bridge not wholly situated within one county or burgh is a bridge locally situated within one county or burgh? That is not a question of number. That is a question of two terms occurring in the same statute, and I put to myself the question whether these two terms mean the same thing, or whether one precludes the other, and I think it is utterly impossible to think that they can refer to the same thing. For these reasons I feel myself compelled to dissent from your Lordships' judgment.

The Court adhered.

Counsel for Pursuers and Reclaimers—J. P. B. Robertson—Lang. Agents—Campbell & Smith, S.S.C.

Counsel for the Defenders and Respondents—Mackintosh—Begg. Agents—Morton, Neilson, & Smart, W.S.

Friday, March 20.

SECOND DIVISION.

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

Succession— Trust-Disposition and Settlement—Vesting—Disposal of Estate "in Event of the Death" of Beneficiary.

A truster died leaving a trust-disposition and settlement, in which he directed his trustees, *inter alia*, to pay the residue of his estate to his lawful children who might be alive at his decease when his youngest child should attain the age of twenty-one, and to the issue of children predeceasing the period of payment, the income being meanwhile divided equally among the children or their issue, and with power to the trustees at their discretion to make advances out of the estate, which were to be deducted from the shares of the child receiving the advances. There was no clause of survivorship. In a codicil, on the narrative that he had not provided for the disposal of his whole estate "in the event of the death of my children without leaving lawful issue," he directed his trustees in that event to pay the whole residue to his nephew, whom failing to the heirs of his nephew's body, equally among them. He was survived by one son, who died at the age of seventeen, unmarried and intestate. *Held*, on a sound construction of the deeds, that the estate vested in the son from the death of his father, and passed, capital and income, to the son's heirs in heritage or *in mobilibus* according to the character of the estate.

Peter Clark Peacock, wine merchant in Dalkeith, died on 26th July 1873, leaving a trust-disposition and settlement, and two relative codicils. His wife predeceased him, and he was survived by only one child, Thomas Storie Peacock, then only six years old. By his trust-settlement he conveyed to his trustees his whole estate which should belong to him at the time of his death in trust for (1) payment of all his just and lawful debts, and (2) payment of certain provisions to his wife, which lapsed by her predecesaing him. In the third place, he directed his trustees, *inter alia*, as follows:—"*Thirdly*, I direct that the residue of my said means and estate, heritable and moveable, hereby conveyed, shall be managed and preserved by my trustees for the use and behoof of the lawful children of my body living at my decease, or born thereafter, and the rents, interests, dividends, and annual proceeds of my said estate shall be paid by my trustees for and towards the maintenance and education of my said children until my youngest child shall have, in the case of a son, attained the age of twenty-one years complete, or in the case of a daughter, attained that age or be married, whichever of these events shall first happen: And thereafter, and so long as my wife, the said Jane Watson Storie or Peacock, shall enjoy her said annuity, my trustees shall pay over to my said children the free income of the residue of my said estate, and that equally between or among them, share and share alike, if there shall be more than one, and to the lawful issue, share and share alike, of any of them who may have married and predeceased before the time when the said revenue shall become payable, the share of the said income which would have been payable to their predeceasing parent: And I direct my trustees to pay, assign, and dispone the free residue of my said means and effects, heritable and moveable, above conveyed, to and in favour of the lawful children of my body who may be alive at my decease, should my said wife have predeceased me, or at the decease of my said wife should she survive me, when the youngest of them, if sons, shall attain the age of twenty-one years complete, and if daughters, shall attain that age or be married, whichever event shall first happen, and that equally between and among them as above provided, with respect to the disposal of the income of my said estate; declaring that if any of my said children shall die before their share of the said residue of my estate becomes payable to them, leaving lawful issue, such issue shall, share

and share alike, be entitled to payment of the share which would have been payable to their predeceasing parent." The deed also contained power to the trustees, in their discretion, to make advances to the sons or daughters, the said advances being deducted from the shares of the estate to which the beneficiaries receiving such advances might ultimately be found entitled.

The first codicil was dated 22d March 1873, and in it, in respect of the death of his wife, and the fact that there remained only one child alive of the marriage, he directed his trustees to manage the whole residue of his estate, heritable and moveable, for the use of his sole surviving child, and of any children that might thereafter be lawfully begotten by him, and to pay and apply the interest thereof for the benefit of his said child or children as appointed by the third purpose of his trust-deed, also to pay the residue in the manner specified in the said third purpose. "And further, as by my said trust-disposition and settlement I have not provided for the disposal of my whole means and estate, heritable and moveable, thereby conveyed in trust to my said trustees in the event of the death of my children or their issue, and as it is but right and proper that I should do so, therefore I hereby direct and appoint my said trustees, in case of the death of my only surviving child without leaving lawful issue of his body, or of the death of the whole other children that may be hereafter lawfully begotten of me and of their lawful issue, to pay, assign, and dispone the free residue of my said means and estate, heritable and moveable, real and personal, to and in favour of my nephew Archibald Clark Peacock, spirit merchant in Dalkeith, and son of my now deceased brother Archibald Clark Peacock, who resided in Dalkeith, whom failing by death, then to and in favour of the heirs of his body, equally between and among them, share and share alike."

The truster's sole surviving child Thomas Storie Peacock died on 8th June 1884 at the age of seventeen, intestate and unmarried.

A Special Case was then presented to determine the right to the residue of Mr Peacock's estate. The first parties were his trustees; the second party was his nephew Archibald Clark Peacock; and the third and fourth parties were respectively the heir-at-law (John Bennet Peacock) and certain of the next-of-kin of the son Thomas Storie Peacock.

The second party claimed the whole estate, heritable and moveable, including the accumulation of surplus revenue. The third party claimed the heritable estate as heir-at-law both of Peter Clark Peacock and of his son, and he also as one of the next-of-kin of Peter Clark Peacock and of his son, claimed an equal share with the other next-of-kin of the moveable estate and of the accumulation of revenue; and the fourth parties claimed each an equal share with the other next-of-kin of the moveable estate and accumulation. The second party, as one of the next-of-kin of Peter Clark Peacock and Thomas Storie Peacock, claimed an equal share of the moveable estate and the accumulation along with the third and fourth parties in the event of the next-of-kin of Peter Clark Peacock and Thomas Storie Peacock being found entitled to the same. Further, in the event of the second party being found entitled to the heritable and moveable estate, the third and fourth parties claimed equal shares along with him of the accumulation of the surplus revenue.

The questions of law submitted for the opinion of the Court were as follows:—"(1) Upon a sound construction of the said trust-disposition and settlement, and relative codicils, is the said Archibald Clark Peacock entitled to the free residue of the whole estates of the said Peter Clark Peacock in the hands of the first parties? (2) In the event of the said question being answered in the negative, is the said John Bennet Peacock entitled to the said free residue so far as consisting of heritable estate, and are the parties of the fourth part, excepting the said John Bennet Peacock, entitled to the same so far as consisting of moveable property? (3) In the event of the first question being answered in the affirmative, 1st, do the accumulations of surplus revenue in the hands of the trustees fall within the said free residue to be conveyed to the said Archibald Clark Peacock, or 2d, did the said accumulations become vested in the said Thomas Storie Peacock, and are they payable to his representatives, or 3d, are the said accumulations to be treated as intestate succession of the said Peter Clark Peacock?"

Argued for second parties—The estate never vested in Thomas Storie Peacock on a sound construction of the trust-settlement. The only right he had was one to be maintained out of the income of the estate. The substitute heir then fell to be preferred to the residue—*Ramsay* v. *Ramsay*, November 23, 1838, 1 D. 83. The accumulations, about which nothing was said in the deed, went with the principal.

Argued for the third and fourth parties—So far as the first deed was concerned there was nothing to prevent vesting *a morte testatoris*. As regards the codicil, it must be read in the event of death of my children, &c., "before me"—*Mackintosh* v. *Wood*, July 5, 1872, 10 Macph. 933; *Stiven* v. *Brown's Trustees*, January 10, 1873, 10 Macph. 262; *Maitland's Trustees* v. *M'Dermaid*, March 15, 1861, 23 D. 732. Even supposing there was no vesting *a morte testatoris* in Thomas Storie Peacock, the accumulations formed part of the liferent, and he was liferenter—*Ogilvie* v. *Cuming and Boswell*, January 27, 1852, 14 D. 363; *Graham* v. *Graham's Trustees*, February 12, 1863, 1 Macph. 392.

At advising—

Lord Young—This case is presented for the opinion of the Court as to the rights of the parties to it under the will of the late Peter Clark Peacock, who died in 1873 leaving a trust-disposition and settlement and two codicils, only one of which is, I think, important. His wife predeceased him, and he was survived by one son Thomas Storie Peacock, who at his father's death was six years old. He died in June 1884 at the age of seventeen. That is the state of the family in so far as it is interesting to inquire into it.

By the principal trust-deed the truster directed his trustees, after payment of his debts, and making certain provisions for his wife if she survived, with respect to the residue of his estate, as follows—"*Thirdly*, I direct that the residue of my said means and estate, heritable and moveable, hereby conveyed shall be managed and preserved by my trustees for the use and behoof

of the lawful children of my body living at my decease or born thereafter, and the rents, interests, dividends, and annual proceeds of my said estate shall be paid by my trustees for and towards the maintenance and education of my said children, until my youngest child shall have, in the case of a son, attained the age of twenty-one years complete, or in the case of a daughter, attained that age or be married, whichever of these events shall first happen, and thereafter, and so long as my wife, the said Jane Watson Storie or Peacock, shall enjoy her said annuity, my trustees shall pay over to my said children the free income of the residue of my said estate, and that eqaully between or among them," and so on; then he directs his "trustees to pay, assign, and dispone the free residue of my said means and effects, heritable and moveable, above conveyed to and in favour of the lawful children of my body who may be alive at my decease, should my said wife have predeceased me, or at the decease of my said wife should she survive me, when the youngest of them, if sons, shall attain the age of twenty-one years complete."

So far as this deed goes, therefore, the capital of the residue of the estate in the event which happened is directed to be paid to the lawful children who may be alive at the truster's decease. That fixes the recipients. Payment, however, is not to be actually made till the youngest child is twenty-one; there being only one, the estate is to be given to him when he attains the age of twenty-one, the income meantime being expended on him. So stands the case under the will. But during the argument, and I repeat the observation now, I suggested that there is no clause of survivorship. That would of course have been in itself inoperative in the event which happened, but it is obviously material as throwing light on the construction of the will that there is no provision directing that the share of those surviving the truster, but dying before the youngest child reaches twenty-one, should pass to the survivors.

Then comes the first codicil, and that contains this material provision—"And further, as by my said trust-disposition and settlement I have not provided for the disposal of my whole means and estate, heritable and moveable, thereby conveyed in trust to my said trustees in the event of the death of my children or their issue, and as it is but right and proper that I should do so, therefore I hereby direct and appoint my said trustees in case of the death of my only surviving child without leaving lawful issue of his body, or of the death of the whole other children that may be hereafter lawfully begotten of me and of their lawful issue, to pay, assign, and dispone the free residue of my said means and estate, heritable and moveable, real and personal, to and in favour of my nephew Archibald Clark Peacock, spirit merchant in Dalkeith, and son of my now deceased brother Archibald Clark Peacock."

Now, where a testamentary instrument contains directions "in the event of the death" of anyone, it is always a question with reference to what time is the event of death to be taken, for as death is an event which must occur, the construction is always rejected that it is indefinite, and that the testator means in the event of death at any time. The indefinite construction is never a possible construction, and is never given effect to. But it may mean, and sometimes the words of the deed show that it does mean, in the event of death before the period appointed for actual payment. The last construction, but that which should have been put first—for I think authority says it is preferable in law, and will be adopted if there is nothing to the contrary—is, that the words mean "before the death of the testator." Where a benefit is given by the will to anyone, and in the event of his death is to go to some one else, that is held, *prima facie*, to mean in the event of his predeceasing the testator. Where there is a clause of survivorship, however, there is authority for holding it to signify the period of distribution, because till that comes it is not known who are the beneficiaries, and it is now firmly enough settled that where payment is postponed till after the death of the liferenter, and payment is to be made according to the then state of the family, there being a clause of survivorship, the period with reference to which the event of death is to be taken is to be the period of distribution.

But without pursuing these general observations further, I am content to say that there is nothing here to displace the favoured and general rule that the event of death is to be taken preferably as the death of the testator. In his trust-disposition and settlement Mr Peacock made no disposition of his estate in the event of his dying childless. He assumed he would be survived by some child or its issue in so far as he provided for nothing else, but it occurred to him before making this codicil that the possibility of his being survived neither by a child nor by the issue of a child ought to be provided for. Now he was survived by a son, who if he had lived till twenty-one would have got the estate, but he died at seventeen, and according to my view of the proper construction of the deeds, the estate vested in him, and on his death passed to his heir-at-law in heritage or *in mobilibus* according to the character of the estate. Therefore the heritage will pass to the heir-at-law, the third party here, and the moveables to the heirs *in mobilibus*, the last parties. I do not think it necessary to say anything about the income. The son was entitled to that irrespective of the question on which I have given my opinion, and any savings not necessarily expended on him are his estate and pass to his heirs. In my view there is no need to separate the savings and capital, and the whole heritage will be carried to the son and the personalty to the representatives *in mobilibus*.

Lord Craighill concurred.

Lord Rutherfurd Clark—Though I have had great difficulty, I have come to concur with your Lordship.

The Lord Justice-Clerk was absent.

The Court answered the first question in the negative, the second in the affirmative, and found it unnecessary to answer the third.

Counsel for First Parties—Scott. Agents—Watt & Anderson, S.S.C.

Counsel for Second Party—Keir—G. Burnet. Agents—Watt & Anderson, S.S.C.

Counsel for Third and Fourth Parties—Gloag—Baxter. Agent—Thomas Clapperton, W.S.