to be put upon the letter. On the whole matter, I am of opinion this defence is well founded.

LORD RUTHERFURD CLARK—I have felt a good deal of difficulty with this case. It is in evidence that an adventure of this kind cannot succeed for a long time, and can only succeed after considerable expense and loss at first. The defender by the sale of the paper had disabled himself from carrying it on, and I have considerable doubts whether at the time of the sale we are justified in saying that the paper had proved a failure. But they are only doubts, and I am not prepared to dissent.

LORD TRAYNER—I agree with the views of the Lord Ordinary, and have nothing to add.

The LORD JUSTICE-CLERK was absent.

The Court adhered.

Counsel for the Reclaimer — Dundas — C. K. Mackenzie. Agents—Mackenzie & Black, W.S.

Counsel for the Respondent — Comrie Thomson—Guthrie. Agents—Millar, Robson, & M'Lean, W.S.

Friday, March 9.

FIRST DIVISION.

SMITH'S TRUSTEES AND OTHERS.

Trust — Succession — Vesting — Declaration as to Period of Vesting — Repugnancy — Advances—Declaration that Advances should be Deducted from Shares—Effect of Discharge in Bankruptcy of Person to whom Advance had been made.

A testator left one-half of the residue of his whole means and estate to his sons equally among them, and directed that two-thirds of their respective shares should be paid to them on their attaining the age of twenty-five years, declaring "that the said half of the said residue of my said means and estate left to my sons shall vest from and after my death, and bear interest thereafter at four per cent. per annum during the not-payment; and I direct my trustees to retain the remaining one-third of the respective shares of the half of said residue of my said means and estate left to my said sons for their behoof until the winding-up of the trust-estate; and I direct and appoint my trustees to hold the other half of the residue of my said means and estate, heritable and moveable, real and personal, before conveyed in trust for behoof of my several daughters, . . . to the extent of one share each in liferent for their respective liferent use only, and their respective children or descendants equally *per stirpes* and not *per capita* in fee, and the fee of the said several shares shall be payable to the respective children of my said daughters on their mother's death, when the same shall vest, and on their respectively attaining the age of twenty-three years, the annual proceeds thereof being applied for their use and benefit until the last of said events shall take place, declaring that if any of my sons shall die either before or after me, leaving lawful issue, his or their shares of the residue of my said means and estate before conveyed shall fall and belong to such issue equally, and if any of my sons and daughters shall die either before or after me without leaving lawful issue, the respective shares of my said means and estate left to them in fee or in liferent as aforesaid shall belong to the survivors and the issue of any deceaser of my sons and daughters *per stirpes* equally, the portion or portions thereof falling to my daughters being left to them in liferent for their liferent use only, and their children or descendants equally *per stirpes* in fee: Declaring that . . . all advances which I have made or may hereafter make to my respective sons-in-law shall be deducted from the respective shares of the fee of the half of the said residue liferented by my said several daughters, their wives."

Held (1) that the entire half of the estate destined to sons vested *a morte testatoris* notwithstanding the repugnancy caused by the survivorship clause, which in terms contemplated the event of sons dying before or after the testator; and (2) that the balance of loans made to a son-in-law, for which the testator had subsequently ranked under a composition arrangement by which the son-in-law was discharged of all debts due by him, remained an advance in the sense of the trust-disposition and settlement, and fell to be deducted from the share liferented by that son-in-law's wife but without interest.

Alexander Smith of Auchentroig, Buchlyvie, died 7th December 1891, leaving a trust-disposition and settlement dated 28th April 1883, which contained the following provisions—"I leave one-half of the residue of my said whole means and estate . . . to and among my sons equally among them . . . and my trustees shall as soon as practicable after my death . . . make payment to my three eldest sons of two-thirds of their respective shares of the half of said residue of my said means and estate . . . and on my remaining sons . . . and any other son who may be procreated of my body attaining the age of twenty-five years, my said trustees shall make payment to them of two-thirds of their respective shares of the said half of the residue of my said means and estate: Declaring that the said half of the said residue of my said means and estate left to my sons shall vest from and after my death, and bear interest thereafter at four per cent. per annum

during the not-payment; and I direct my trustees to retain the remaining one-third of the respective shares of the half of said residue of my said means and estate left to my said sons for their behoof until the winding-up of the trust-estate; and I direct and appoint my trustees to hold the other half of the residue of my said means and estate, heritable and moveable, real and personal, before conveyed, in trust for behoof of my several daughters, . . . to the extent of one share each in liferent for their respective liferent use only, and their respective children or descendants equally *per stirpes* and not *per capita* in fee, and the fee of the said several shares shall be payable to the respective children of my said daughters on their mother's death, when the same shall vest, and on their respectively attaining the age of twenty-three years, the annual proceeds thereof being applied for their use and benefit until the last of said events shall take place, declaring that if any of my sons shall die either before or after me, leaving lawful issue, his or their shares of the residue of my said means and estate before conveyed shall fall and belong to such issue equally, and if any of my sons and daughters shall die either before or after me without leaving lawful issue, the respective shares of my said means and estate left to them in fee or in liferent as aforesaid shall belong to the survivors and the issue of any deceaser of my sons and daughters *per stirpes* equally, the portion or portions thereof falling to my daughters being left to them in liferent for their liferent use only, and their children or descendants equally *per stirpes* in fee: Declaring that whatever sum or sums of money I may advance to any of my sons for the purpose of enabling them to commence business or otherwise shall be imputed to account of their respective shares of the residue of my said means and estate, and that all advances which I have made or may hereafter make to my respective sons-in-law shall be deducted from the respective shares of the fee of the half of the said residue liferented by my said several daughters, their wives."

In 1876 the truster lent to the firm of Donald & Sellar, of which his son-in-law William Sellar was sole partner, a sum of £2500, and in 1880 a further sum of £1000. He also granted a guarantee to Messrs J. & W. Campbell & Co. on behalf of the said William Sellar.

On 3rd April 1883 the firm of Donald & Sellar, and the said William Sellar, as sole partner thereof, and as an individual, suspended payment, and their affairs were wound up under a trust-deed dated 3rd April 1883. The truster the said Alexander Smith acceded to the trust-deed and lodged a claim with the trustee thereunder amounting to £3162, 12s. 1d. This claim was duly admitted, and in respect thereof the truster received dividends from the trust-estate amounting to £1189, 5s. 5d., leaving a balance unpaid on the claim of £1973, 6s. 8d. The truster was also called upon, under his guarantee to Messrs J. & W. Campbell & Co., to pay, and made payment to them of £1812, 15s. 8d. The difference between the amount paid by him on behalf of his son-in-law and the amount received by him was £3786, 2s. 4d.

The trust-deed by Donald & Sellar and William Sellar contained the following clause:—"Declaring further that it is a condition of this deed that the creditors who accede hereto, or who shall take payment of a dividend on their claims, shall be held to have discharged us of the whole debts due by us to them."

A special case was presented to the Court by the trustees of Alexander Smith of the 1st part, the children of William Sellar and his wife Margaret Muir Smith or Sellar, who predeceased her father, the truster, of the 2nd part, the truster's sons of the 3rd part, and the truster's surviving daughters of the 4th part, to have the following questions determined—"(1) Does the said sum of £3786, 2s. 4d., or any part thereof, fall to be deducted by the first parties from the share of residue belonging to the children of Margaret Muir Smith or Sellar? (2) Is interest chargeable upon the said sum of £3786, 2s. 4d., and if so, at what rate? (3) Are the third parties entitled to payment of their respective shares of residue immediately upon the total amount of the trust-estate being realised, and the respective shares thereof falling to the third parties being ascertained, postponed in the case of the youngest son until he shall attain twenty-five years of age? Or (4) Are the first parties bound to retain one-third of the respective shares of residue falling to the third parties until the death of the survivor of the truster's daughters, and until the youngest child of any daughter of the truster shall attain twenty-three years of age?"

The second parties maintained and argued that the sum of £3786 did not fall to be deducted as an advance. By acceding to William Sellar's trust-deed and accepting a dividend the truster had recognised the advances made as debts, and these debts were by the terms of Sellar's trust-deed discharged. The trustees could not sue for repayment, and were therefore not entitled to regard them as subsisting advances in the sense of the trust-disposition. The sums were not "advanced" in the proper sense of that term, but lent and guaranteed. There was no presumption that an "advance" was meant; it was a question of intention—M'Laren on Wills, i. 458-461. The truster could not have intended deduction in the circumstances here. (2) Even if these sums were to be regarded as advances, no interest was payable upon them—*Baird's Trustees* v. *Duncanson*, July 19, 1892, 19 R. 1045.

The third parties maintained and argued —(1) "Advances" was to be interpreted in a general and not in a technical sense—*Astbury* v. *Beasley*, Weekly Notes, May 1, 1869, Romilly, M.R. The truster evidently intended to divide his estate among his family *per stirpes;* therefore, whatever one family had already got was to be imputed *pro tanto* to their ultimate share. His

accession to Sellar's trust-deed could not affect the provisions of his own trust-disposition. By claiming under the deed he did cease to be "out of pocket," and that was the test; not to have claimed would have been to rob the rest of his family in favour of the sellers—*Berry* v. *Downie, Morse, &c.*, July 10, 1839, 1 D. 1216, and (H. of L. 1847), 19 Jur. 447, was on all fours with the present case. (2) Interest was due on these advances, and that at 5 per cent., the rate Sellar was paying to the truster before his bankruptcy. (3) The sons took a vested interest in the entire half of the estate destined to them *a morte testatoris*, although payment of two-thirds was postponed until they reached twenty-five, and of the remaining one-third to secure the widow's annuity. This was clear from the direct and unqualified gift to them, and further, from the express declaration that vesting should take place *a morte*. The sole difficulty was created by the survivorship clause in the event of sons dying "before or after" the testator. To that extent there was repugnancy, but the words of direct gift and of declaration of vesting must prevail. A plain direction was to be given effect to in spite of subsequent inconsistent directions, especially if these served no real object, *e.g.*, purported to keep up a trust after a right of fee had been conferred—*Miller's Trustees* v. *Miller*, December 19, 1890, 18 R. 301; *Simson's Trustees* v. *Brown*, March 11, 1890, 17 R. 581; *Finlay's Trustees* v. *Finlay*, July 6, 1886, 13 R. 1052; *Archibald's Trustees* v. *Archibald*, June 15, 1882, 9 R. 942; *Alexander's Trustees*, January 15, 1870, 8 Macph. 414.

Argued for fourth parties—On the 1st and 2nd questions they adopted the argument of the third parties. *As to vesting*—There was a distinct direction to the trustees to retain one-third of the sons' shares "until the winding-up of the estate." That, looking to the subsequent survivorship clause in the event of sons or daughter dying "before or after" the testator, must mean that that one-third did not vest in the sons until the final winding-up, upon the children of the daughters attaining twenty-three years of age, predeceased by their respective mothers. There would be no repugnancy if the declaration as to vesting were to be taken as applicable to the other two-thirds—*Croom's Trustees* v. *Adams*, November 30, 1859, 22 D. 45; *Vines* v. *Hillou*, July 13, 1860, 22 D. 1436.

At advising—

Lord M'Laren—The first question has reference to a clause in the trust-settlement of the testator providing "that all advances which I have made or may hereafter make to my respective sons-in-law shall be deducted from the respective shares of the fee of the half of the said residue liferented by my said several daughters, their wives." The trust-deed is dated 28th April 1883, and prior to that date the truster had advanced to his son-in-law William Sellar the sums set out in the third article of the case. On 3rd April 1883 William Sellar, who carried on business under the firm of Donald & Sellar, suspended payment, and of the same date granted a trust-deed under which the business of the firm was wound up. The testator acceded to the trust-deed, claiming to the amount of £3162, 12s. 1d.; his claim was admitted, and he received dividends from the trust-estate amounting to £1189, 5s. 5d., leaving an unsatisfied balance of £1973, 6s. 8d. By accepting a dividend the testator of course discharged his right to recover the unpaid balance. The testator also made a payment under a guarantee which he had undertaken on behalf of Mr Sellar, and the difference between the total amount which the testator paid on behalf of his son-in-law and the amount received in the form of dividends is stated to be £3786, 2s. 4d.

1. The first question in the case is, whether this difference ought to be deducted by the testamentary trustees from the share of residue which is given to Mrs Sellar's children?

But for the direction which I have quoted, it is evident that the proposed deduction could not be made. Mrs Sellar predeceased the testator; the liferent intended for her did not take effect, and the fee of the share of the residue appropriated to the Sellar family went to her children, who are not responsible for their father's debts. Moreover, the debts of William Sellar were discharged, and even if he had been the residuary legatee of the share in question, the testamentary trustees could not have treated a debt which had been discharged as a subsisting debt of which they were entitled to operate payment by retention.

But a direction to testamentary trustees to impute advances to account of succession may be, and generally is, intended to empower the trustees to apply to advances made in the testator's lifetime a principle of accounting which would not be applicable if the will were silent on the subject, *i.e.*, to treat such advances, not as debts, but as payments to account of children's shares of succession. The object of such a direction is, of course, to secure equality in the distribution of the testator's estate amongst the members of his family, and it is perfectly understood and settled that in the construction of such directions the word "advances" is not to be confined to advances by way of loan for which the father might have sued or claimed in bankruptcy, that is, is to include money advanced of which a record is kept, but which the son or daughter was under no obligation to pay.

Now, if the direction to impute advances to account of shares of succession would include, for example, money given to a daughter on her marriage, or to a son to purchase an interest in a business, for which no receipt or obligation was taken at the time, it is difficult to see why money lent to a child upon an obligation to repay should cease to be an advance because that obligation is discharged either by the voluntary act of the father or by the operation of the principles of the law of bankruptcy.

Another consideration to which our

attention was directed by counsel for the Sellar family is, that while the advances were made to their father, payment is to be operated by deducting the sums advanced from the children's provisions. But this is the very thing which the testator has directed, and the fact that he has so directed shows that he was not thinking about getting payment to his estate of a debt, but only of dividing his succession equitably by a *per stirpes* division, in which advances made to a parent were to be imputed to the account of the children's succession. This conclusion, I think, is in accordance with the opinions expressed in the House of Lords in *Hutchison* v. *Skelton*, 2 Macq. 492, and *Berry* v. *Downie*, 19 Scot. Jur. 447.

2. It follows from what has been said that the advances in question only became imputable to account of succession at the testator's death, and that interest is not due for the antecedent period. In making up the residue account as at the testator's death the sum of £3786, 2s. 4d. will be added to residue, and then the account of the Sellar family will be debited with this sum as a sum already paid.

3. or 4. The third and fourth questions are alternative, and they raise the question whether the shares of succession given to sons vested at the testator's death, or whether to the extent of one-third these shares are affected by a contingent destination.

The material provisions of the will are these—(1) There is an original gift to the sons in terms which plainly import a vested interest—"I leave one-half of the residue of my said whole means and estate before disponed to and among my sons, equally among them." (2) There is a formal declaration of vesting *a morte*—"Declaring that the said half of the said residue of my said means and estate left to my sons shall vest from and after my death, and bear interest," &c. (3) There are provisions applicable to the death of the testator's sons and daughters, "either before or after" him, leaving issue or without leaving issue, the property being destined in the first event to issue, and in the second event to survivors and the issue of such as may die leaving children.

If we had only to consider the effect of this destination, I apprehend there could be no doubt that the provisions of conditional institution and survivorship would be referable to the period of payment—that is, the testator's death as regards the two-third parts of each son's share which is immediately payable, and probably the death of his widow as regards the one-third which was to be retained by the trustees, presumably as a fund to be invested and applied towards the payment of the lady's annuity. But then this construction is absolutely repugnant to the previous provisions—(1) and (2)—the unqualified gift of half the residue to the sons, and the unqualified declaration that their interests shall vest at the testator's death. These provisions apply only to the shares of sons, because in the case of daughters there is no direct gift, but a declaration that the trustees shall hold their half in trust, and again in the case of daughters there is no declaration of vesting.

I do not say that in all cases a direction or declaration as to vesting is to be preferred to the inferential statement which we find in a destination, because it might be that we could not give effect to the express declaration without defeating some important purpose of the will or trust. But in the present case, so far as I am able to see, no injury can result to anyone from the giving effect to the twice-repeated intention of the testator to make an immediate gift of one entire moiety of his estate to his sons. It is true that in doing so we can only give partial effect to the third provision on this subject, for this provision will then only be applicable (in the case of sons) in the event of the death of one of the original legatees before the testator's death. But some part of one of the clauses must be rejected, and I cannot help thinking that the provision of survivorship which creates the difficulty is the least important provision of the series. I think the case must be classed with those in which a testator, after giving an immediate and substantial fee to a beneficiary, has attempted to restrict the beneficiary's right by putting him under trust. In such cases the law is, as settled in *Miller's Trustees*, 18 R. 301, that the beneficiary takes the fee disencumbered of the trust.

LORD KINNEAR—I am of the same opinion. I cannot say I have any doubt that the payments made by the testator to Sellar, under an obligation to repay, are advances in the sense of the will. By Sellar's discharge in bankruptcy they ceased to be debts enforceable by action, but they none the less remained advances made by the testator.

It was competent to the testator to direct that such advances made by him should be deducted from legacies, and the only question is, whether upon a sound construction of the will the testator meant that these advances should be deducted.

The will is to be read as speaking from the date of the testator's death, and so reading it the testator was at that date out of pocket in respect of these advances, and I think there is no room for doubt that he intended to include among the reductions from the legacies advances in the position of those now in question.

LORD PRESIDENT—I agree.

LORD ADAM was absent at the hearing.

The Court pronounced the following interlocutor:—

"Find and declare, with reference to the first question, that the sum of £3786, 2s. 4d. is an advance which falls, in terms of Alexander Smith's trust-disposition and settlement, to be deducted from the share of the fee of the half of the residue of the estate thereby appointed to be liferented by

his daughter Margaret Muir Smith or Sellar: Find and declare, with reference to the second question, that such advance only became imputable to account of succession at the testator's death, and that no interest is due thereon: Find and declare, with reference to the third and fourth questions, that the fee of the shares of the one-half of the residue effeiring to the third parties vested in them respectively *a morte testatoris*: . . . Accordingly, answer the first and third questions in the affirmative, and the second question in the negative."

Counsel for First Parties—Ure—Constable. Agent—N. Briggs Constable, W.S.

Counsel for Second Parties—Dickson—Younger. Agents—J. W. & J. Mackenzie, W.S.

Counsel for Third Parties—Graham Murray, Q.C.—Dundas. Agents—Bell & Bannerman, W.S.

Counsel for Fourth Parties—Dean of Faculty (Pearson, Q.C.)—Guthrie. Agents—Simpson & Marwick, W.S.

Saturday, March 10.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

WHITE *v.* STEELS.

Parent and Child — Tutor — Expenses—Liability of Tutor for Expenses in Action Raised on Behalf of Pupil.

Held that a father who sued an action unsuccessfully in the character of tutor to his pupil child was personally liable in expenses to the opposing party.

William White, 4 Steel Street, Glasgow, as tutor and administrator-in-law of his pupil son Robert Frew White, residing with him, brought an action of damages against Elizabeth Steel and others for injury caused to his son through the defective state of a railing at his house, of which the defenders were proprietors. A jury returned a verdict in favour of the defenders, and the Lord Ordinary (KINCAIRNEY), in applying the verdict and assoilzieing the defenders, found William White liable personally in the expenses of the action.

"*Opinion.*—The sole pursuer of this action is William White, as tutor and administrator-in-law of his pupil son, and he concludes for damages on account of injury suffered by his son through the fault of the defenders. The pupil is not a party to the action. A jury has returned a verdict for the defenders, who have moved for application of the verdict, and for decree for expenses against the pursuer personally. The pursuer contends that he is not liable for expenses personally, but only in his character of tutor and administrator-in-law of his son—in other words, that the defenders can only recover their expenses from the estate of the pupil, which means practically that they cannot recover them at all. The point is very important, and I was informed that it has not been decided.

"I have studied our authorities bearing on the question, and so far as I have been able to discover, they seem to stand as follows—It is, I think, settled that trustees litigating for their estate, whether a sequestrated estate or a trust-estate, will in general be liable in expenses to the opposing party succeeding in the litigation. It was decided, in a case which presented no specialty, that a liquidator of a joint-stock company was personally liable for the expenses of an action in which he was unsuccessful. That liquidator was appointed by the Court. *The Consolidated Copper Company of Canada* v. *Peddie*, December 22, 1877, 5 R. 393.

"On the other hand, it was decided in the case of *Fraser* v. *Pattie*, March 9, 1847, 9 D. 903, that a *curator ad litem* could not be made liable in expenses.

"The case of a guardian appointed by the Court, such as a *curator bonis* or judicial factor, has always been distinguished from the case of a trustee, and their appointment to these offices by the Court has been regarded as an important distinction. But that specialty occurred in the case of the *Consolidated Copper Company*. In *Forbes* v. *Morrison*, June 10, 1845, 7 D. 853, that distinction between a trustee and a *curator bonis* was taken, and it was held that a *curator bonis* who had been sisted in an action 'in room of' the pursuer, who had become insane, and who was unsuccessful, was not liable in the expenses of the action. A judgment finding 'the pursuer liable to the defender in the expenses of the action' had been pronounced, and the question of the liability of the *curator bonis* personally was tried in a suspension of a threatened charge. The Lord Ordinary (Cunninghame) suspended the letters. It appears from his note that he proceeded on the ground that tutors and curators were exempt from personal liability for expenses. His judgment was affirmed; but Lord Mackenzie observed that in certain cases a curator might be made personally liable, and that 'if the curator knew that there were no funds out of which expenses could be paid, that would be sufficient if it were clearly made out;' and Lord Fullerton said that there might be a great many cases in which such liability would be held to exist.

"In *Ferguson* v. *Murray*, December 20, 1853, 16 D. 260, Lord Anderson, as Lord Ordinary, decided that a party who, on the failure of trustees, had been appointed '*curator bonis* or judicial factor,' and had unsuccessfully defended an action of maills and duties, had not subjected himself to liability for expenses personally. But this interlocutor was recalled, and an interlocutor was pronounced which appears to signify that the party would be individually liable so far as the expenses could not be recovered out of the curatorial estate.