Friday, March 18.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

BOWMAN'S TRUSTEES *v.* BOWMAN.

Succession—Vesting—Destination to Persons Named or their Heirs—Postponement of Period of Payment.

A truster, who was partner in a firm of coalmasters, gave his trustees power to represent him in the firm, and also to be partners to any new lease which the firm might consider it expedient to enter into.

He made certain provisions for his widow, chiefly by way of annuity, the amount of which was to be in the discretion of the trustees, and gave them power to make advances out of capital for any child or for the issue of a deceased child. As regards the residue of his estate he provided—"On the dissolution and winding-up of the said firm, in the event of the predecease of my said wife, and if she then survives, on her death, I direct my trustees to realise my whole means and estate, and to divide the same into four equal shares, and pay one share to each of my children"—the truster's four children were mentioned *nominatim*—"or to their respective heirs."

Two of the truster's children survived him but predeceased his widow before the dissolution of the firm.

Held that the shares of residue vested in the children *a morte testatoris*, their heirs being introduced into the destination to take only in the event of their not surviving the testator.

Hay's Trustees v. *Hay*, June 19, 1890, 17 R. 961, *followed.*

Mr Lawrence Bowman, coalmaster, Buckhaven, died on 22nd September 1882, leaving a trust-disposition and settlement dated 17th March 1882, whereby he conveyed to trustees his whole estates, which included his interest in the firm of Bowman & Co., coalmasters, Muiredge, and in the leases in the coalfields in favour of that firm, giving full power to his trustees to represent him in the firm and carry on the leases. The deed contained the following directions to the trustees:—"*Secondly*, I direct my trustees to allow Mrs Catherine Cairns or Bowman, my wife, in the event of her surviving me, the liferent use and enjoyment of the house presently occupied by me, with the whole furniture and plenishing therein, and such allowance as my trustees may consider necessary for the maintenance and support of herself and such of my daughters or their children as may be living in family with her." Then followed a direction as to the use of the house and furniture by the truster's daughters in case they were not required by his wife, and as to an allowance to be made to the daughters as ong as they should occupy the house, for their own support, and for the support of the children of one who was married. The deed then continued—"*Fifthly*, in respect that I have already given my son Archibald and my daughter Janet £1000 each, I direct my trustees, on the realisation of my estate, to pay my daughter Isabella the like sum of £1000, and to pay to or hold for behoof of my son Robert the like sum of £1000; these provisions in favour of Isabella and Robert being over and above and independent of the share of the residue of my estate hereinafter bequeathed to them. . . . *Eighthly*, I hereby specially empower my trustees to advance during the currency of the trust out of the principal of the shares of my estate effeiring to any child any portion thereof that my trustees may consider to be for their advantage, and in like manner to the child or children of any deceased child, the sum or sums so advanced to be deducted from the share of my estate effeiring to the parties to whom such advance or advances have been made at the period of division, but no interest shall be charged on such advances: *Ninthly*, I hereby appoint my said son Archibald Bowman to attend to the interests of the trustees as representing me in the said firm of Bowman and Company: and I direct my trustees to pay him for so doing a salary of £104 per annum so long as he shall continue to perform the said duty, and that quarterly, as the said quarterly payments shall become due: Failing the said Archibald Bowman filling the said office by his predeceasing me, refusing to do so, or resigning the same, I direct my trustees to appoint another to the office, whether of their own number or other fit person, at such salary as the services of a competent party can be obtained, until the said firm of Bowman and Company shall be wound up. . . . *Tenthly*, I hereby specially empower my trustees, as representing me in the said firm of Bowman and Company, to be parties to any new lease or leases which the said firm may consider it expedient to enter into." It was declared that the trustees were not to incur any personal responsibility for any loss sustained while representing him in the firm, but were to be indemnified for such loss out of the trust-estate, and the truster then proceeded—"*Eleventhly*, On the dissolution and winding-up of the said firm of Bowman and Company, in the event of the predecease of my said wife, and if she then survives on her death, I direct my trustees to realise my whole means and estate, and to divide the same into four equal shares, and pay one share to each of my children Archibald, Janet, Robert, and Isabella, or to their respective heirs: Declaring, however, with reference to the share of the residue to my son Robert, and to the bequest of £1000 to him, my trustees shall have full power, if they consider it to be for his benefit, to invest the share of the residue of my estate, and the said sum of £1000 provided to him, and pay him the annual proceeds thereof for his alimentary use and subsistence only."

The truster was survived by his wife

and by his four children, Archibald, Mrs Geddes, Robert, and Isabella. Of these Isabella died in 1891, and Robert in 1893. Robert, who was born in 1844, was addicted to drinking, and at the date of his father's trust-disposition was undergoing fifteen years' penal servitude for having killed his wife in the course of a violent quarrel.

The trustees, in virtue of the powers contained in the tenth purpose of the trust, became parties along with the other partners in the firm to new leases of the collieries worked by them, the last of which was to expire in 1912. They were also parties to a contract of copartnery of the firm which was to last till the expiry of the leases.

Advances were made by them from time to time to all the truster's children, in virtue of their powers under the eighth purpose.

While Mrs Bowman, the truster's widow, was still alive, an action was raised by the representatives of Isabella and Robert against Mr Bowman's trustees and others, craving for declarator that the shares of residue bequeathed by Mr Bowman under the eleventh purpose of the trust-disposition, vested in his four children *a morte testatoris*. The defenders averred that at the date of his trust-disposition Mr Bowman was suffering from an incurable disease, and that he did not expect to live many months, and that he did not contemplate that the partnership would be continued beyond Whitsunday 1892, which was the date referred to by him in his trust-disposition as that of "the dissolution and winding-up of the said firm." They pleaded —"(2) On a sound construction of the said trust-disposition and settlement of Lawrence Bowman, the shares provided under the eleventh purpose to his children, or to their heirs, do not vest until the death of Mrs Lawrence Bowman, she having survived the period of the dissolution and winding-up of the firm of Bowman & Company contemplated by the truster, viz., Whitsunday 1892."

The Lord Ordinary (STORMONTH DARLING) on 30th June 1897 granted decree of declarator in terms of the conclusions of the summons.

Opinion—"This case takes the form of a declarator of vesting, and presents for construction the eleventh or residuary purpose of the late Mr Lawrence Bowman's will. The pursuers are the representatives of two of his children who survived him, but are now dead, and the defenders are his trustees and his grandchildren. I am of opinion that the pursuers are entitled to the declarator which they ask.

"The testator was at his death (which took place in 1882) partner in a firm for working certain coalfields in Fife, and he gave his trustees power not only to represent him in the firm (which the contract of copartnery allowed them to do), but also to be parties to any new lease or leases which the firm might consider it expedient to enter into. New leases have been entered into, and the firm has not yet been dissolved. The testator left a widow, who is still alive, and four children, two of whom, as I have said, are now dead. For his widow he made certain provisions, chiefly discretionary on the part of his trustees, and he gave his trustees power to make advances out of capital for any child or for the issue of any deceased child. Finally, he dealt with the residue thus—'On the dissolution and winding-up of the said firm of Bowman & Co., in the event of the predecease of my said wife, and if she then survives, on her death, I direct my trustees to realise my whole means and estate, and to divide the same into four equal shares, and pay one share to each of my children, Archibald, Janet, Robert, and Isabella, or to their respective heirs.'

"The question is, Did the residue vest in these four persons *a morte testatoris*, or was vesting postponed to the period of division, which has not yet arrived?

"The arguments of counsel resolved themselves into the inquiry whether the rule adopted in *Bryson's Trustees* v. *Clark*, 8 R. 142, or the rule adopted in *Hay's Trustees* v. *Hay*, 17 R. 961, was applicable. It is true that every will must be judged according to its own terms, but a principle of construction was established in *Hay's* case which seems to me to have a direct bearing. I find that principle expressed in Lord M'Laren's opinion thus—'We must endeavour to find some definite criterion to be applied to such cases, and I think the true criterion is this, that where legatees of the second order are either mentioned by name or by some description independent of the first, then they may be taken to be *personæ delectæ*, and their contingent interest is sufficient to suspend the vesting of the estate; but if the legatees of the second order are described as the children, or issue, or heirs of the institute (there being no ulterior destination), these are to be considered in this question as persons instituted in consequence of their being the natural successors of the institute, and therefore as taking a right which is subordinated to his, and is not intended to interfere with his acquisition of the fullest benefit which it was possible for the truster to give him, consistently with the benefits previously given to liferenters or other persons.'

"That opinion was concurred in by the late Lord President and Lord Shand, who had taken part in the decision of *Bryson's Trustees* v. *Clark*. I think it fits the present case exactly, for I can see no material difference between the expression '*and* his heirs' in that case, and the expression '*or* their respective heirs' in this. Nor can anything be made of the fact that the evident purpose of postponement in *Hay's* case was to provide a total liferent to the testator's widow, while here the evident purpose was both to provide for the widow's discretionary annuity, and also to allow of the testator's capital being left for a considerable time in the prosperous business of his firm.

"An argument was founded by the defenders on the eighth purpose of the will, as tending to show that vesting was post-

poned; but the language of that clause seems to me quite as consistent with the view that the mention of 'heirs' was merely intended to provide for the case of one or more of the institutes predeceasing the testator. I can find nothing in any part of the will to suggest that the testator preferred his grandchildren to his children, and the fifth purpose indicates very pointedly his wish to make his four children exactly equal.

"The defenders alternatively demanded a proof, but they have averred nothing which could be relevantly admitted to probation. A court of law is entitled to know the circumstances surrounding a testator when he made his will, but it is not entitled to go outside the will for evidence of his intention."

The defenders reclaimed.

Argued for reclaimers — This was not a case where payment was postponed only for keeping up a liferent, but it was also for the purpose of keeping the estate in the business, and the estate was given as it was to be at the dissolution of the firm, and that was the date when the testator intended the beneficiaries should be ascertained. It would be a novelty to hold that a vested right could exist in money tied up in a speculative business, the amount of which would depend upon the conduct of the trustees. This case was not governed by *Hay's Trustees* v. *Hay, supra*, the rule laid down there being an artificial one, for the *ratio* of which there was no room here. For to give effect to the contention of the reclaimers would not result in letting in strangers as opposed to *personæ prædelectæ*, since the latter were the very persons who would benefit thereby. Moreover, the testator showed as much interest in his grandchildren, and treated them as primary beneficiaries to as great an extent as his children. At the time the testator made his will he was aware that he was dying, and accordingly the words "or to their respective heirs" could not be read as intended merely to provide for a lapse in case of a child predeceasing — *Adam's Trustees* v. *Carrick*, June 18, 1896, 23 R. 828; *Stodart's Trustees*, March 5, 1870, 8 Macph. 667. The limitations of the application of the rule in *Hay's Trustees* were expressed in *Hughes* v. *Edwardes*, July 25, 1892, 19 R. (H. of L.) 33, December 19, 1890, 18 R. 319. Moreover, there was a destinction here in the use of "or" instead of "and" in *Hay's Trustees*, and it was for the respondents to show that it was used as equivalent to it.

Argued for respondents — There were none of the usual clauses indicating postponement of vesting, while the power to advance indicated that something was already due to the beneficiaries. The distinction between "or" and "and" in no way differentiated the case from *Hay's Trustees* by which it was clearly ruled— *Cochrane* v. *Cochrane's Executors*, November 29, 1854, 17 D. 103; *Douglas* v. *Douglas*, March 31, 1864, 2 Macph. 1008,

At advising—

LORD M'LAREN—Mr Lawrence Bowman, coalmaster, Buckhaven, died in 1882, leaving a will or trust-settlement whereby he conveyed his personal estate and his interest in the leases of coal and his business of coal mining for the benefit of his family. The question raised under this action of declarator is, whether Mr Bowman's four children took vested interests at his death under the will, or whether the vesting of the beneficiary interests was postponed or suspended during the lifetime of Mrs Catherine Cairns or Bowman, his widow, who under the will is in receipt of an annuity, and has also a liferent of the truster's house and furniture. Two of the four children who survived the father, Isabella and Robert, have since died, and this action is instituted by their testamentary representatives for the purpose of establishing a claim to participation in the residue of the estate. On the part of the two surviving children it is contended that no right to residue vested in Isabella or Robert, and that the vesting is still in suspense. The leading provision of the will with respect to residue is the eleventh purpose, which is thus expressed—"On the dissolution and winding-up of the said firm of Bowman & Company, in the event of the predecease of my said wife, and, if she then survives, on her death, I direct my trustees to realise my whole means and estate, and to divide the same into four equal shares and pay one share to each of my children Archibald, Janet, Robert, and Isabella, or to their respective heirs," and then follows a power to invest the share of Robert, and to pay the annual proceeds of this share and of a legacy of £1000 for his alimentary use and subsistence. In connection with this residuary destination it is necessary to consider what were the truster's declared reasons for postponing the distribution of his estate. These were, first, to make provision for his wife and daughters, and, secondly, to provide for the more efficient management of the business of coalmaster in which he was engaged, by having it carried on by his trustees after his death. The provision made by the truster for his wife is the subject of the second trust-purpose, under which she is secured in the liferent of his house and furniture, and is also entitled to "such allowance as my trustees may consider necessary for the maintenance and support of herself and such of my daughters or their children as may be living in family with her." Passing over the direction in the third purpose, as to the use of the house and furniture by the daughters in the event of these not being required by his wife—a clause which is probably not very material to the present question—the trustees are directed, under the fourth trust-purpose, to allow to the truster's daughters Isabella Bowman and Janet Bowman or Geddes, so long as they or either of them occupy the house, such allowance as the trustees may consider necessary for the maintenance and support of such daughters or daughter and for the children of Mrs Geddes, including a provision for the education of the children.

Then follow pecuniary legacies of £1000 each to two of the children, an allowance to the two sons during the subsistence of the firm, a legacy of the truster's gold watch and chain, and powers of advancement in favour of his children and grandchildren, to be exercised by the trustees.

As regards the other reason or motive which presumably influenced the truster in postponing the distribution of his estate, I observe that by the ninth purpose his son Archibald is directed to attend to the interests of the trustees as representing him in the firm of Bowman & Company, for which service Archibald is to receive a yearly salary of £104, and failing Archibald Bowman, another fit person is to be appointed to this duty, the trustees to be indemnified out of the trust-estate for any loss that may arise on the business transactions of the firm. Again, by the tenth purpose the trustees are empowered to become parties to any new lease or leases which the firm may consider it expedient to enter into, with a corresponding right to indemnity against business losses. Then follows the residuary clause already quoted.

As regards those provisions which relate to the management of the mining business by the trustees, it is a fair observation that the trustees were entitled to retain the estate in security of their claim of indemnity against losses, and that no interim division of the capital could be made except in the form of an advancement under the eighth purpose, should the trustees think proper to exercise the powers of advancement thereby given. But the right of retention of the estate for the security of the trustees is perfectly consistent with the theory of vested rights in the children. Its motive is the convenient administration of the estate for the benefit of the family, and I do not think that any argument against vesting can be founded upon it. As regards the provisions for the maintenance of the wife and daughters, these appear to me to be consequential on the scheme of administration. The postponement of payment was to a term certain, either the winding-up of the partnership of Bowman & Company or the cessation of the life-interest of Mrs Bowman, and if we assume, in accordance with the usual presumption in such cases, that the several members of the family took vested interests, some temporary arrangements were obviously necessary in order that the family should not be without the means of living. As regards the legacies of £1000 each, payable to Robert and Isabella, it is provided (fifthly) that these provisions are "over and above and independent of the share of the residue" bequeathed to them. This direction is quite consistent with the supposition that other interim payments to children are to be debited to account of the shares of the respective recipients, and this is specially provided with respect to advances under the eighth purpose of the trust.

In the arguments addressed to us our attention was naturally directed chiefly to the terms of the destination contained in the eleventh or residuary purpose. If there were no authorities to guide us, I should read this trust-purpose as a direction to divide the residue of the truster's estate equally amongst his four children, in whom, according to the truster's intention and understanding, his estate had already vested.

If the hypothesis of the residuary clause were that the succession was not vested—that it was only to vest in right at the same time that it vested in possession, I should expect the clause to take the form of a direction to divide amongst the surviving children at the time, or it might be amongst the survivors and the issue *per stirpes* of such as might die before the period of distribution.

But there is nothing elastic in the framework of this direction, nothing that is adaptable to a change of circumstances. The testator had four children, and the direction is to divide into four shares, no account being taken of the possibility of the number of the family being diminished by death. Then the clause proceeds—"And pay one share to each of my children, Archibald, Janet, Robert, and Isabella, or to their respective heirs." But for the reference to "heirs," I imagine that these words are plainly descriptive of a vested interest, all contingency being excluded when the estate is divided into as many parts as there are objects to be provided for, and one share is given to each. It may be that the somewhat incomplete addition made to the clause creates a difficulty. A well-drawn disposition would either have stopped at the last name or would have ended with "and to their respective heirs, executors, and assignees." But I am not aware of any case in which vesting has been held to be suspended in favour of heirs-in-general, who cannot be regarded as *personæ prædelectæ*, and I think another meaning can be found which explains and satisfies the reference to "heirs," viz., that the words were introduced to provide for the possibility of the death of one or more of the children in the testator's lifetime. We are informed that when the will was made the testator was suffering from an illness from which he was not likely to recover; but I do not see that this circumstance would necessarily lead to the rejection of words which were intended to prevent a lapse. Then in the declaration regarding Robert Bowman the testator deals with the special legacy of £1000 (which certainly vested) and with his share of residue in identical terms, as if these were rights of the same character, or as if the legacy of £1000 was only an addition to Robert's share of residue.

The law or rule of construction of a gift of residue to a *nominatim* legatee and his heirs was considered in the case of *Hay's Trustees* v. *Hay*, 17 R. 961; and the Lord Ordinary has held that the present case is ruled by *Hay's Trustees*, and has decided the case in favour of vesting. My opinion in that case (which was concurred in by the Lord President) does proceed on a presumption favourable to vesting; and while that opinion must be taken with the necessary

limitation that rules of construction are only guides to the discovery of testamentary intention, I confess it seems to me to be very desirable that as far as possible the interpretation of words of destination should be subjected to fixed rules. The rule laid down in *Hay's Trustees* is to this effect—where a testator makes a gift of a sum of money or a share of residue to a person named and his heirs, without specifying more particularly the time or event on which the conditional institution is to come into effect, the provision in favour of heirs is presumed to be inserted to prevent a lapse through the death of the legatee in the lifetime of the testator, and the legacy accordingly vests in the legatee or his heirs, as the case may be, *a morte testatoris*. It is no doubt possible that a testator should intend to keep open the vesting for the benefit of the legatee's heirs to a later period, *e.g.*, to the period of distribution. But in such a case I should expect the intention to be clearly expressed.

In the absence of expressions pointing to a postponement of vesting, I should not infer that a gift expressed to be in favour of a legatee and his heirs amounted to a contingent destination—a destination conditional on the legatee surviving an event certain to happen. I do not understand that the case of *Hay's Trustees* introduced any new principle or rule of construction into this branch of the law. There are at least three previous decisions to the same effect, viz., *Elliot* v. *Bowhill*, 11 Macph. 735; *Ross's Trustees*, 12 R. 378, and though less directly bearing on the point, Lord Colonsay's judgment in *Carleton* v. *Thomson*, 5 Macph. (H.L.) 151. I do not overlook the distinction that in these cases the persons conditionally instituted are the "issue" or "children" of the *nominatim* legatees; but in my view the distinction is immaterial, because the reasons which determine the vesting of a gift—notwithstanding the fact that issue are included as objects of the gift—are equally applicable to the case of a destination in favour of heirs. I mean there is no reason for supposing that the heirs of a legatee are a more favoured class than issue or children.

The only other distinction between the present case and that of *Hay* is the distinction depending on the use of "or" in place of "and." Now, for the purposes of a conditional institution, whether taking effect at the testator's death or at a later period, I should say that "or" is the more appropriate word, because conditional institution is always alternative. I think that in the case of *Hay's Trustees* we construed the destination to Charles Crawford Hay and his heirs as equivalent to a destination to him or his heirs; that is, we held it to be a conditional institution, but limited to the event of Mr Crawford Hay dying in the testator's lifetime. If this be so, the suggested distinction has no substance in it.

I may add, that although not much was said in the arguments about the more recent cases, it is within my recollection that the principle of the decision in *Hay's Trustees* has been recognised and acted on in more than one case that has come before this Division as at present constituted. I am for adhering to the Lord Ordinary's interlocutor.

The LORD PRESIDENT, LORD ADAM, and LORD KINNEAR concurred.

The Court adhered.

Counsel for Pursuers—J. Reid. Agents—Macpherson & Mackay, S.S.C.

Counsel for Defenders—W. Campbell. Agent—Thomas White, S.S.C.

Friday, March 18.

WHOLE COURT.

[Lord Kyllachy, Ordinary.

MACARTHUR *v.* COUNTY COUNCIL OF ARGYLL.

County Council — Parliamentary Burgh — County General Assessment — Local Government (Scotland) Act 1889 (52 *and* 53 *Vict. cap.* 50), *secs.* 11, 12, 13, 14, 26, 27, 60, 66, *and* 105—*County General Assessment Act* 1868 (31 *and* 32 *Vict. cap.* 82), *secs.* 1, 2, 3, and 4.

Held, by a majority of the Whole Court (*diss.* Lord Justice-Clerk, Lord Young, Lord Trayner, and Lord Moncreiff), that a county council has no power to impose any rate upon lands and heritages situated within a parliamentary burgh lying within the county.

Police Commissioners of Oban v. *County Council of Argyllshire*, March 9, 1894, 21 R. 644, *overruled.*

Burgh of Galashiels v. *County Council of Selkirk*, June 18, 1896, 23 R. 818, *approved* and *followed.*

Res judicata.

In 1893 the Oban Police Commissioners raised an action of declarator against the County Council of Argyll to have it found that the defenders had no power to levy or enforce payment of county general assessment upon lands and heritages within the burgh of Oban. The defenders in this action were assoilzied. Thereafter an owner and occupier of heritages situated within the burgh, who had been a police commissioner at the date when the former action was brought, having been assessed by the county council for county general assessment as such owner and occupier, brought a suspension and interdict against the County Council of Argyll, to interdict and prohibit the County Council from levying or enforcing payment of any assessment upon any lands or heritages situated within the burgh of Oban.

Held, by Lord Kyllachy (Ordinary), that the previous decision was not *res judicata*. The question on the merits was on reclaiming-note submitted to