that I think it is the more probable meaning—that he believed that the Divine Spirit spoke to him through his conscience, and his action was directed by what he conceived to be the command of the Almighty so conveyed. You may call this an insane delusion if you will, but it is a delusion (if it be one) which has been shared by some of the greatest benefactors of the human race, who, in obedience to such a call or command (as they have believed), have devoted their lives to mitigating the misery of the world and endeavouring to raise mankind to a higher life and a better conception of their duties on earth.

I assume that the words which have been introduced by amendment are the utmost which the pursuers can aver with any hope of being able to prove them at the trial, and I am unable to read the words as necessarily amounting to, or a relevant averment of, insanity.

Ordered that the cause be remitted to the Court of Session to proceed further therein, that the appellants have the costs of this appeal, and that the expenses of process hitherto incurred in the Court of Session do abide the issue of the cause.

Counsel for the Appellant—The Lord Advocate, Graham Murray, Q.C.—Ure, Q.C.—Sym. Agents—Loch & Co., for Dundas & Wilson, C.S.

Counsel for the Respondents—The Solicitor-General for Scotland, C. S. Dickson, Q.C.—Guthrie, Q.C.—Danckwerts—John Wilson. Agents—R. S. Taylor, Son, & Humbert, for Macpherson & Mackay, S.S.C.

Monday, August 1.

(Before the Lord Chancellor (Halsbury) and Lords Watson, Shand, and Davey.)

HICKLING AND OTHERS *v.* FAIR AND OTHERS.

(*Ante*, March 12, 1896, 33 S.L.R. p. 465, and 23 R. 598).

Succession—Vesting—Objects of Gift—Contingent Bequest—Destination to Issue of Liferentrix Conditioned on Liferentrix Leaving Issue.

A testator by his trust-disposition and settlement directed his trustees to pay the interest of a certain sum to his daughters equally. The deed then proceeded—"And on the death of my said daughters respectively leaving lawful issue, I hereby direct my trustees to divide equally amongst the issue of each of my said daughters" the sum liferented by their mother. One of the daughters had four children, two of whom survived both the testator and their mother, and two survived the testator but predeceased their mother without issue. *Held* (by a majority of the House of Lords—*rev.* the judgment of the Second Division) that the two predeceasing children were entitled to share in the bequest to "issue" of the liferentrix, the condition that the liferentrix should "leave lawful issue" not having the effect of confining the gift to those of her issue who survived her, although making the gift to the class contingent on that event

Boulton v. *Beard*, 3 De G., M. & G. 608; and *Selby* v. *Whittaker*, L.R., 6 Ch. Div. 239, *commented on.*

Succession—Conditio si sine liberis decesserit.

Observed (*per* Lord Watson) that the condition *si institutus sine liberis decesserit* has no application where the parent is not instituted, but is given merely a liferent of the provision.

This case is reported *ante ut supra.*

The fifth and sixth parties appealed.

At delivering judgment—

Lord Watson—By his trust-disposition and settlement, dated the 5th September 1862, the late Thomas Fair, whose family at that time consisted of four sons and three married daughters, directed his trustees to convey certain heritable subjects to his sons, whom he also appointed to take the residue of the trust-estate. By the fifth purpose of the trust he directed his trustees, within five years from the time of his death, to invest £30,000 upon good security, and to pay the interest or annual profits thereof equally to each of his daughters, Margaret Fair or Spence, Harriot Fair or Macaulay, and Mary Jane Fair or Thomas during their respective lives. An annuity of £200 was directed to be paid to each of these beneficiaries from the time of the testator's death until the investment of the £30,000.

With regard to the capital sum to be liferented by his daughters, the testator by the fifth purpose of his trust-deed directed as follows:—"On the death of my said daughters respectively leaving lawful issue, I hereby direct my trustees to divide equally amongst the issue of each of my said daughters the sum of ten thousand pounds sterling, being one-third of the sum directed to be invested as aforesaid, and should any of my said daughters die before the succession to the foresaid provision opens up to them without leaving lawful issue, the share of the interest or annual profits of the said sum of thirty thousand pounds sterling directed to be invested as aforesaid to which my daughter so dying would have been entitled had she survived, shall be divided equally, share and share alike, between my surviving daughters, or paid to the last surviving daughter, during all the days of their lives or of her life allenarly, and the share of the said capital sum of thirty thousand pounds sterling, which would have fallen to be divided amongst the issue (if any) of my daughter so dying, shall be divided equally between the issue of my surviving daughters, or should there be only one surviving daughter having issue, to be paid equally to such issue."

By a codicil dated the 1st March 1865 the testator directed his trustees, instead of £30,000, to invest the sum of £36,000, and to pay the interest and annual profits thereof equally to each of his three daughters, and that in the manner specified in his trust-disposition and settlement, "the said fifth purpose of the said last disposition and settlement in all other respects remaining the same as therein specified, excepting always that the sum to be divided equally amongst the issue of each of my said daughters shall be twelve thousand pounds sterling instead of ten thousand pounds sterling."

The trust-disposition and settlement contains no express directions with respect to the disposal of the fee of the share liferented by each daughter in the event of her decease without leaving issue after her succession to the liferent. In that event, accordingly, the capital of her share falls into residue.

The testator died in the year 1865. He was survived by all of his three daughters, who were alive at the time when the said sum of £36,000 was duly invested by the trustees, and continued thereafter to receive payment of their respective shares of the interest and annual profits in terms of the testator's directions.

Mary Jane Fair or Thomas, whose husband predeceased her, died without issue on the 2nd July 1874, and the capital of £12,000 which she had liferented fell into residue. By a formal deed of discharge and renunciation executed in April and registered on the 4th May 1885, the residuary legatees renounced their interest in that sum, and directed that £6000, being a half of it, should be enjoyed in liferent and fee respectively by each of the two surviving daughters and their issue, so that the shares of the provision of £36,000 belonging to Mrs Spence and Mrs Macaulay in liferent, and to their respective issue in fee, should each be £18,000, and that the said shares should be held and applied by the trustees upon the conditions expressed in the fifth purpose of the trust-disposition and settlement.

Harriot Fair or Macaulay died on the 16th February 1895, and her husband on the 22nd March in the same year. The present controversy relates to the interest, if any, which the representatives of her predeceasing issue had or took in the said capital sum of £18,000 at the time of her death. Four children were born of her marriage, these being Harriot Fair Macaulay or Garland, Mary Anne Fair Macaulay or Hickling, Thomas Fair Macaulay, and Margaret Fair Macaulay or Kinmont. Two of these children predeceased their mother. Thomas Fair Macaulay survived the testator, but died before his maternal aunt Mrs Thomas, a minor, unmarried and intestate, his legal representatives *in mobilibus* being his surviving sisters and his father. Mrs Hickling died in October 1893 without having had issue.

Mrs Garland and Mrs Kinmont, the only children who survived their mother Mrs Macaulay, claim to be entitled each to one-half of the capital of £18,000 liferented by her. That they both have right to a share of the fund is admitted, but the amount of their claim has been disputed by the marriage-contract trustees of Mrs Hickling, and by the executors of Mr Macaulay, her father, who maintain that under the terms of the fifth purpose of the trust Mrs Hickling and her brother Thomas Fair Macaulay, as issue of Mrs Macaulay who survived the testator although predeceasing their mother, had a right to an equal share with the children who survived her.

The various parties claiming an interest with the trustees under the trust-disposition and settlement of Thomas Fair presented a special case to the Second Division of the Court, which narrates the facts already stated and submits these questions for decision—"(1) Had the said Mrs Hickling at the date of her death a vested interest in any part of the sum of £18,000 liferented by her mother Mrs Macaulay? (2) If so, was her interest limited to one-fourth of the sum of £12,000 originally liferented by Mrs Macaulay? or (3) Did it extend to a share of the sum of £6000 set free by the death of Mrs Thomas, which was liferented by Mrs Macaulay, and is dealt with by the deed of renunciation and direction? (4) Had the said Thomas Fair Macaulay at the date of his death a vested interest in any part of the said sum of £18,000?"

On the 12th March 1896 the Court, consisting of the Lord Justice-Clerk, with Lords Young and Trayner, by the interlocutor appealed from, answered the first and fourth queries in the negative, and found it unnecessary to answer the second and third. In the argument at your Lordships' bar it was assumed that no distinction could be made between the original £12,000 and the £6000 which was added to it by the deed of renunciation. I see no reason to doubt the correctness of the assumption, because the destination to these portions of the fund depends upon the construction of the same words of the trust settlement which are applicable to both.

The answer to be given to the first and fourth questions depends upon the construction which ought to be put upon these words occurring in the fifth purpose of the trust—"on the death of my said daughters respectively leaving lawful issue, I hereby direct my trustees to divide equally amongst the issue of each of my said daughters the sum of ten thousand pounds sterling." These words do not admit of the application of the maxim or rule of Scotch law *si sine liberis decesserit.* That rule obtains in the case where a general settlement is made by a parent containing provisions in favour of children or other descendants, or by a person who stands *in loco parentis* to the beneficiaries therein designated. Its effect is to introduce into the provisions of the settlement by implication of law a conditional institution of the issue of a *nominatim* legatee who may die before the period of vesting. It is an implied gift-over on the failure of the parent to take, which will defeat an ulterior and express gift. In the present case the only gift to

each daughter of the testator is one of liferent, which dies with them; there is no gift of fee which their children could take by implied institution. The gift is not to the children of each daughter, but to her "issue," a term which would bring in lineal descendants however remote. It is not necessary for the purposes of this case to consider whether if a daughter had issue of several degrees of propinquity such issue would take *per capita* or *per stirpes*, seeing that Mrs Hickling and Thomas Fair Macaulay, whose rights alone are in question, were both children of Mrs Macaulay, the liferentrix, and neither of them had issue. The case does not raise any question as to the respective interests of Mrs Garland and Mrs Kinmont, and their issue, if they have any.

It has not been disputed, and it does not appear to me to admit of serious controversy, that the death of a daughter, or of any other person "leaving lawful issue" means and requires that they shall be survived by lawful issue of their body. On the other hand, the term "issue" may, according to circumstances, signify either the whole issue of the person named, whether in existence or not at the time of his or her death, or such of them only as are alive at that period. *Prima facie*, and in the absence of words directly controlling the expression "issue," or of any provisions in the instrument from which it is matter of reasonable inference that the expression was not used in that sense, it must be taken to bear the wider of these meanings. The appellants maintained that Mrs Hickling and Thomas Fair Macaulay, as issue of their mother, took a vested interest in the fee of the share liferented by her *a morte testatoris*, and the strength of their contention lay in the argument that in providing for the distribution of the capital on the death of the liferentrix the testator directed it to be made, not among issue then surviving, but "amongst the issue of each of my said daughters."

Having regard to the scheme of the settlement, in so far as it relates to the provisions made by the testator in favour of his daughters and their issue, there appear to me to be various considerations pointing to the inference that he did not intend any right to vest in the issue upon his death, which make the present case an exceptional one. There is no gift to issue beyond what is implied in the direction to distribute, which depends upon the contingency of the daughter dying survived by issue. In the event of a daughter dying before the capital sum of £30,000 has been invested during the period prescribed by the testator, without leaving living issue, the interests and profits of her third pass to the surviving sisters or sister for their lifetime, and the fee of it to their issue. In the event of her death after she has entered upon the enjoyment of the liferent provided to her, if she has living issue at the time of her death, the direction to distribute the capital liferented by her amongst her issue is to take effect; if she leaves no issue surviving her, the capital goes to the residuary legatees. Whether the daughter dies before or after the period of investment, the gift-over to the surviving daughters and their issue in the one of these cases, and to the residuary legatees in the other, which ignores the interests of issue of the deceasing daughter who predeceased her, appears to me to afford a strong indication that it was not in the contemplation of the testator to make any provision for such issue.

Although the case is one of nicety, I have come to be of opinion, differing from my noble and learned friends who are present to-day, that when the whole provisions of the settlement with regard to the interest destined to the issue of daughters are taken into account, as they may legitimately be, in arriving at the meaning which ought to be attached to the word "issue," as it occurs in the direction to distribute, the testator must be held to have meant that those issue alone were to participate who survived the daughter from whom they are descended. I am not aware of any Scotch authority which has a material bearing upon that aspect of the case. *Selby* v. *Whittaker* (L.R., 6 Ch. Div. 239), which was decided by an Appeal Court consisting of Sir G. Jessel, M.R., with the Lords Justices James, Baggallay, and Cotton, although not the same in all its circumstances, comes nearer to the present question than any of the authorities which were cited at the bar. In that case it was held, reversing the judgment of Hall, V.-C., that the words of a will directing the distribution of a fund, upon the death of the liferentrix, among her children or other descendants, words which, standing by themselves, would have been sufficient to give a share to all the children or descendants whether alive or predeceasing, were to be read as limited to those of them who survived the liferentrix, by reason of other considerations arising on the face of the will, the chief of these being, that the distribution was made contingent upon the death of the liferentrix "leaving lawful issue or other lineal descendants her surviving," and that there was a gift-over to the other daughter and her child or children or other lineal descendants in the event of that contingency not occurring. In the event of both daughters dying "without leaving any lawful issue or other lineal descendants her or them surviving," there was a gift over to other persons. In this case, upon the death of a daughter not survived by issue, the fee of her share passed to the residuary legatees. Lord Justice James (L.R., 6 Ch. Div. 249) stated the point thus—"A testator gives a sum of money, £3000, to a daughter for her life, and then he says that if she should die leaving issue or descendants, then he gives it to her issue or descendants, but if she should die without leaving any issue or descendants, then it is to go over to somebody else. It is said that he means this—that if she dies leaving one descendant, the whole of her children and descendants, whether they survive her or not, are to share in the property, but that if there is not one living at

her death, then none of them takes anything. That is a most monstrous and capricious intention to attribute to any testator."

I am of opinion that the interlocutor appealed from ought to be affirmed.

LORD HERSCHELL—(read by LORD WATSON)—The question to be determined in this case is the true effect of a clause in the trust-disposition and settlement of Thomas Fair, dated 5th September 1862, whereby he made certain provisions for the benefit of his daughters. He directed that his trustees should, within five years of the period of his decease, invest on good security the sum of £30,000, and pay the interest or annual profits to each of his three daughters for life, and on the death of his daughters respectively, leaving lawful issue, he directed his trustees to divide equally amongst the issue of each of his said daughters the sum of £10,000, being one-third of the sum directed to be invested. It is not in controversy that, in case any of the daughters died without leaving any issue surviving her, no benefit would be acquired by the representatives of any issue who predeceased her. But the question which has arisen is, whether in case a daughter should leave issue surviving her the third part of the sum invested is to be divided among the issue so surviving, or whether the representatives of predeceased issue are entitled to share in the distribution. Though it is admitted that if all the issue of a daughter died in her lifetime, their representatives would not be entitled to any part of the invested fund, it is said that if one of the issue survives, the division is to be made equally amongst all the issue or their representatives. Ought this to be held on a consideration of the terms of the will to have been the intention of the testator? I do not think so. I think with Lord Justice James, who had to consider a very similar testamentary provision to that with which your Lordships have to deal, that it would be " a most monstrous and capricious intention to attribute to any testator."

It is to be observed that there is no direct gift to the issue of any of the daughters; such right as they have is derived from a direction to the trustees on the death of a daughter to divide equally amongst the issue the sum of £10,000. Although I freely admit that in some circumstances it might be quite proper to interpret these words as authorising the payment of an aliquot share to the representatives of deceased issue, I do not think the words necessarily require that interpretation, or that any violence is done to them by holding that the division is to be made only amongst issue then in existence. Indeed, that seems to me the more natural meaning of the language. No Scotch authority was cited to your Lordships which is at variance with the conclusion at which I have arrived as to the construction of the disposition now in question, or which lays down any rule or principle requiring a different construction. But reliance is placed upon several English decisions where somewhat similar provisions came under the considerations of English Courts. Your Lordships are, however, in the present case bound to administer the law of Scotland.

I cannot regard the statements of Lord Colonsay and Lord Gordon, made in particular cases, that there is no difference between the law of England and that of Scotland in the principles regulating the construction of wills, as a warrant for treating all the decisons of English Courts upon the construction of such instruments as authorities binding the Courts of Scotland, or as laying down authoritatively what the law of that part of the United Kingdom is. I think it would be very unfortunate if your Lordships were to do so.

I am by no means satisfied that every rule which has been applied to the construction of wills in this country is a part of the law of Scotland.

It is no doubt a sound canon of construction, applicable to both countries, that words of art must be interpreted in their technical sense, unless the testator has shown that he is using them otherwise. But I think there has been too much tendency in England to go beyond this, to evolve rigid rules from decided cases and to apply previous decisions to the interpretations of wills which have subsequently to be construed, instead of endeavouring to ascertain by a study of the particular instrument what was the intention of the testator.

I have referred so far only to the terms of the original testamentary disposition, because the codicil which increased the sum to be invested to £36,000, affects only the amount involved, and no distinction can, I think, be made between the original £12,000 and the £6000 added by the deed of renunciation. For these reasons I am of opinion that the judgment appealed from is right, and that the appeal should be dismissed with costs.

LORD SHAND—After anxious and careful consideration of the provisions of the settlement of the testator Mr Thomas Fair, which were the subject of a full and satisfactory argument, I have found myself unable to agree with the judgment of the learned judges of the Court of Session. I am of opinion that Mrs Hickling and Thomas Fair Macaulay, the children of Mrs Macaulay who predeceased their mother, had each a vested interest in a share of the sum of £18,000 enjoyed in liferent by their mother under the trust-deed of settlement of the testator, their grandfather.

The question is one of interpretation or construction of a short provision relating to a sum originally of £30,000, but afterwards by a codicil enlarged to £36,000, of which the testator directed that his daughters, three in number, should have the liferent. It seems to me, that the case raises no question of Scottish as distinguished from English law. The general principles to be applied in the construc-

tion of the language used by the testator in the provison he has made are, I believe, the same in both countries, and the question is simply one of the meaning and legal effect of the language used.

After providing for the enjoyment by his daughters equally amongst them of the annual interest or profits of the capital sum the settlement proceeds with the following clause, on which the decision of the case really turns, although no doubt other parts of the deed may be referred to in so far as they throw light on the meaning of the testator:—"And on the death of my said daughters respectively leaving lawful issue I hereby direct my trustees to divide equally amongst the issue of each of my said daughters the sum of £10,000 sterling," afterwards increased to £12,000, "being one-third of the sum directed to be invested as aforesaid."

Mrs Thomas, one of the testator's three daughters, after enjoying the liferent of £12,000 for some years, died without issue, and though her third share of the provision of £36,000 fell into residue, the residuary legatees declined to take this sum, and executed a deed by which, on the narrative that they were clearly of opinion that in the case which had occurred it was not the testator's intention that the residuary legatees should have the benefit, but rather that the share of a daughter dying without issue should "accresce to the provisions of the other sisters or sister surviving and their or her families," they renounced all right to such benefit, and directed that the fund of which Mrs Thomas had enjoyed the liferent should be held by the trustees upon the conditions contained in the fifth purpose of the settlement, which contains the clause already quoted.

By that clause a liferent is given by the testator to his daughters, and the fee to their issue. In the construction of provisions to that effect, of which innumerable cases, with much variety of expression, have occurred, there have been, as might be expected, certain general principles or rules adopted which have great weight in the determination of each particular case as it occurs, and which are of value as a guide or assistance to professional men in the framing of testamentary deeds.

The cardinal rule or principle to be kept in view is, of course, that effect shall be given to the expressed intention of the testator, but in the consideration of the language used the principles to which I have referred are of much importance. Thus, as applicable to the settlement in question, it is clear by the law of Scotland that a provision to one in liferent only, with a fee to children, vests the fee in the children as a class, so that each child alive at the testator's death, or born afterwards, takes a transmissible interest at once—or, in other words, the vesting of the fee is not suspended till the death of the liferenter, with the result that vesting takes place only in such children or issue as survive that event. An express provision that survivors only of the liferenter shall take, will, of course, receive effect, but if there be no such condition expressed, and no words used from which such a condition is clearly implied, the ordinary rule which favours vesting will take effect, with the desirable result that the persons, children, or other descendants called as "issue" who are made fiars may themselves make the fee available by way of provision for their own families or others, in case of their happening to predecease the liferenters.

Another principle which it is of importance to bear in mind in the determination of this case is, that although the bequest may be dependent on a contingency, this will not necessarily prevent the vesting. The time at which the contingency happens in a bequest to a class does not determine the vesting in the individuals composing the class. If the contingency should apply to the individual and relate to his capacity to take, as, for example, a bequest left subject to the condition that the legatee should attain the age of 21 years, there can be no vesting till he or she shall reach that age, but where the contingency applies to a class, and not as a condition of the capacity of the legatee to take, the contingency is not to be imported into the constitution of the trust so as to suspend vesting till the death of the liferenter. These general principles or rules are, I think, applied in the construction of settlements alike in England and in Scotland, but it is sufficient for the disposal of this case that they are part of the law of Scotland. That they are so sufficiently appears from two cases regarding provisions in settlements from Scotland which formed the subject of appeals to this House. In the case of *Carleton* v. *Thomson* in 1867 (5 Macph., H.L. 151), Lord Colonsay, who gave the judgment of the Court, said—"The general rule of law as to bequests is that the right of fee given vests *a morte testatoris*. That rule holds, although a right of liferent is at the same time given to another, and although that is done through the instrumentality of a trust, and whether the fee be given to an individual *nominatim* or to a class.

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

"The case of *Forbes* v. *Luckie* (1838, 16 S. 378) supplies authority on most of these points. Lord Fullerton was the Lord Ordi-

nary in that case, and the Judges in the Inner House, while affirming his judgment, delivered their opinions fully. Lord Corehouse spoke very decidedly on the several points above referred to. Lord Gillies and Lord Mackenzie added the weight of their great authority. In subsequent decisions the authority of that case has been fully recognised and given effect to. . . .

"There may, however, be cases in which vesting is suspended. Thus, where the right is made conditional on a contingency personal to the legatee—such as marriage, or arrival at majority, events or dates uncertain which may never take place—there is a presumption, though not insuperable, that a vesting or right to take was intended to be suspended until the occurrence of the contingency should be ascertained. So also an inference to that effect may be deduced from an express clause of substitution or survivorship applicable to the members *inter se* of a class to whom the fee is destined. These are the most usual indications of intention to suspend vesting. But neither of them occurs in the deed now under consideration."

Lord Cranworth, in the case of *Carleton*, in giving his concurrence merely added—"I rejoice to think that the conclusion at which the Court of Session has arrived in this case with respect to the law of Scotland, as I understand it, on the subject of vesting, is precisely similar to what the decision would have been if it had been an English case."

Again, in the case of *Taylor* v. *Graham*, in 1878 (5 R., H.L. 217) there are *dicta* by the learned Judges which indeed formed the ground of judgment as to the same general principles applicable to the construction of wills. Thus, Lord Gordon said, with reference to a provision of liferent followed by a destination of the fee to children—"I think this leaves no room for doubt that the testator intended that the children of each niece should take a share of the fee of his estate. No doubt there were personal conditions attached to the children, namely, that they were not to take unless they attained the years of majority or were married. But as soon as these conditions were fulfilled I think the children each became possessed of a vested right in the fee. There was no condition that the children should survive the liferentrices. Of course the payment of the fee was postponed till the death of the liferentrices, but this did not affect the vesting, which, I think, took effect on the children attaining majority or being married. . . .

"No doubt there was a contingency in regard to these latter shares, that the Gilberts might have left children, and so have defeated the right of fee given to the children of the M'Cainshes. But this, I think with the Lord Justice-Clerk, was a mere contingency, and was not a condition suspensive of the vesting. As his Lordship says—'It is in no respect a proper condition of the legacy. It is only an event, before the arrival of which it cannot be known whether the devolving clause has or has not taken effect in favour of the conditional institute. But when that is once ascertained, James Taylor simply takes from the date of his majority or marriage, that is to say, it vests, and whether he predeceases or survives the liferentrix is a matter of no moment.'"

In the same case, Lord Blackburn said—"I quite agree in the judgment proposed. I think that the decision of this House in *Carleton* v. *Thomson* goes a great way towards deciding this case. . . .

"In the present case, Mr Taylor's interest in the fund in dispute was subject not only to the life interests of the two Misses Gilberts, but also to a bequest in fee in favour of their children attaining full age or marrying, and until the survivor of the Misses Gilberts died such children might come into existence and attain full age or marry, and so till then it was uncertain whether Mr Taylor, however long he lived, would ever come into possession.

"I do not think, however, that does or ought to make any difference. It is in general for the benefit of the objects of the testator's bounty that they should be able to deal with their expectant interests at once, which they can do if their interest is vested, though subject to be divested by the happening of a subsequent event, but which they cannot do if their interests are kept in suspense and contingency until that event has happened. And therefore it is to be presumed that a testator intends the gift he gives to be vested, subject to being divested, rather than to remain in suspense."

There are considerations which have been fully recognised by the Courts in Scotland as of much weight in determining whether in the particular case the ordinary rule in favour of vesting shall not receive effect, but where vesting shall be held to have been suspended till the death of the liferenter. Two cases may be referred to with advantage on this head—the cases of *Hay's Trustees* in 1890, 17 R. 961, and *Douglas' Trustees* in 1864, 2 Macph. 1008. In both of these cases it was observed that (1) the absence of any express condition of survivance, (2) the absence of any destination-over of the bequest in favour of persons to take after the fiars called on the expiry of the liferent, and (3) the absence of any indication of a reason to postpone the term of payment other than to provide the yearly income to the liferenter—were all important considerations against the view that suspension of the vesting till the death of the liferenter was intended. Lord Curriehill, in his judgment in the former of these cases, said—"In the first place, survivance of the term of payment is not made an express condition of the provision. The payment is not postponed to a *dies incertus*, but to a date which was certain, sooner or later, to arrive—the death of the liferentrix. Further, there is also an absence of any substitution to the legatees, or what is called in England a destination-over. Now, the absence of these things, which are the usual indications of an intention to suspend the vesting of legacies to the term of payment or solution, although

it is not *per se* conclusive, leaves a strong presumption that no such suspension was intended, and what confirms this presumption is that there is no indication of the terms of payment having been postponed for any purpose other than that of providing the yearly income to the widow."

Reverting now to the terms of the clause on which the present question arises, I observe that what the testator has said is, that on the death of his daughters respectively leaving issue he directs his trustees to divide the funds liferented "equally amongst the issue of each of my said daughters." These words are not qualified or restricted in any way so as to confine their meaning to issue alive at the liferenter's death. According to the ordinary construction of the language they designate and include issue predeceasing the term of division or payment as well as issue surviving that term; and the authorities to which I have referred, on the rational grounds which are there fully stated, make it clear that unless the testator, by some addition to the language used, has shown that the words are not to be taken in their natural and comprehensive meaning, then they shall have the effect for which the appellants have here contended. There is not, however, in the clause here in question, a word to indicate that the benefit was given to surviving issue only. If that had been intended, the most obvious, and, as I think, natural mode of expression, as the clause is framed, would have been after the words "on the death of my said daughters respectively leaving lawful issue," to add—I hereby direct my trustees to divide equally among *such* issue, &c., in place of which the direction is to divide amongst *the* issue. There is no direction to pay to or divide amongst issue surviving the term of payment only, and there is no destination-over, for failing issue the fund falls into residue.

The appellants' contention as to the meaning and effect of the clause in my opinion receives strong confirmation, if confirmation were needed, from the terms of two other provisions of the deed, the first relating to the residue of the estate, and the second to the contingency of a daughter dying without leaving issue, before the succession to her liferent provision opened up to her. In the former of these the testator has provided for the death of a son before the division of residue that "the share of any one of them so dying leaving lawful issue shall be divided equally amongst his issue alive at the period of said division," language in clear contrast with that used in the clause now in question. In the other provision for the contingency I have just mentioned there is no such clause limiting the provision to surviving issue. The benefit is given by a direction that the money "shall be divided equally between the issue of my surviving daughters," or "should there only be one surviving daughter having issue, to be paid equally to such issue." It could not, I think, be argued that this clause, in the absence of words of limitation, has the effect of excluding issue predeceasing the term of payment.

The argument of the respondents against giving to the words of destination their ordinary meaning and legal effect rests on the circumstances (1) that the bequest is one which is made subject to a contingency which is said to make the provisions so capricious that the language used should not receive its ordinary meaning and effect, and (2) that the form of the bequest being merely to divide money on the death of the liferenter, in place of bequeathing it by a clause of destination formally vesting it in the legatees, indicates that the division was to be among surviving issue only. To this last consideration I attach no real weight. In a great many deeds a direction to pay or divide a fund at a date which as here (the death of a liferentrix) will certainly arrive, has created vesting, and that a vesting *a morte testatoris*, and if this had not been so held the intention of the testator would have been frustrated in many cases. In the deed itself now under consideration, even the fee of the important part of the estate is given in the same way by a direction, after legacies and other provisions have been fully met, to divide the residue amongst the testator's sons. The deed conveys the whole of the testator's estate to trustees, and all of the beneficiaries obtain the benefits conferred on them simply by directions to the trustees to pay or to divide.

As to the circumstance that the provision to issue predeceasing the liferenters is made dependent on a daughter leaving issue surviving, while if no issue should survive, the fund liferented would fall into residue, it cannot be disputed that a bequest subject to such a contingency is unusual and somewhat capricious. But what then follows? Is the Court thereupon to disregard language, however plain, and to refuse to give effect to it, because of speculative considerations—because the Judges think the testator did not mean what he has said, and that if his attention had been drawn to the matter he would have employed different language? It seems to me that the respondents' argument must go that length in order to their success. For the reasons I have stated I think there is no ambiguity in the language used, nor any difficulty in giving the legal effect to that language. The testator has said that if a daughter does leave issue the fund shall be divided amongst the issue of that daughter, without limiting the gift to issue then surviving, and the effect of such a provision is well settled, and, with deference, I cannot agree with those of my noble and learned friends who think that a consideration of the nature of the contingency, which is not one personal to the legatee and affecting his or her capacity to take, can warrant the House in giving any but the ordinary meaning to the general words descriptive of the class to take the benefit.

On this peculiarity, of the particular contingency under which the bequest is given, which raises the only difficulty in the case,

no authority has been cited from Scotland, and the ordinary principles relative to contingencies arising out of their nature as already explained must be applied. But the two English cases cited in the argument seem to me strongly to support the appellants' argument. These cases were not dealt with on any view of a peculiarity in English law, but on precisely the same general considerations which arise here. The case of *Boulton* v. *Beard* (1853, 3 De G., M. & G. 608) was, as it seems to me, identical with the present, and was decided in favour of the contention here maintained by the appellants. In the latter case, Sir George Jessel, dealing with a provision similar in effect to the present, distinctly expressed the view that capricious though the intention of the testator might be—and he thought it was capricious—"unless there were other words sufficient to make the interests of the children contingent on their surviving their parents," the capricious intention should receive effect, and I think that view sound.

LORD DAVEY—The words which your Lordships are called upon to construe in the events which have happened are contained in the fifth provision of the will. The testator gives the interest on a trust legacy of £30,000 to each of his daughters, Mrs Spence, Mrs Macaulay, and Mrs Thomas equally during their lives. He then provides for the division of the capital in the following words:—"On the death of my said daughters respectively leaving lawful issue, I hereby direct my trustees to divide equally amongst the issue of each of my said daughters the sum of £10,000 sterling, being one-third of the sum directed to be invested as aforesaid." Then follows a gift-over in an event which did not happen. By a codicil the legacy of £30,000 was increased to £36,000. There is no gift-over in the event of the death of a daughter not leaving issue after the succession had opened to her.

The testator died in the year 1865. Mrs Thomas died in 1884 without issue, and upon her death questions arose as to the disposition of the capital sum which she liferented. A deed of renunciation and direction was thereupon executed by the residuary legatees, which, in my opinion, had the effect of settling Mrs Thomas' one-third share upon her two sisters equally during their lives, and after their deaths respectively upon their issue, in the same manner and under the same conditions as they took their original shares under the will. Mrs Macaulay died in the year 1895. She had four children, of whom two, having survived the testator, died in her lifetime without issue, and two have survived their mother. Your Lordships were not asked at the bar to say who are entitled to the shares liferented by Mrs Macaulay, but only whether her two deceased children are entitled to a share.

With great deference to the Court below, and to those of your Lordships who think otherwise, I have found myself, after anxious consideration, unable to say that the two deceased children of Mrs Macaulay can be excluded from a share in the trust legacy. It is an elementary principle in the construction of wills that a gift to a class after a life interest or liferent includes all persons within the description of the class who were alive at the testator's death or have come into being during the lifetime of the life tenant or liferenter. That principle is common to Scotland and England, and is applicable, I should suppose, wherever the English language is used. I think it is equally clear that when the gift is made to depend on the happening of a contingency, that contingency is not imported by implication into the description of the class so as to confine the gift to those members of the class who survive the contingency. In the case of *Boulton* v. *Beard*, 3 De G. M. & G. 608, cited by the appellants, Lord Justice Turner thus expressed himself:—"The first argument in support of a different construction is that the bequest to the children of Catherine Rayner being only given in the contingent event of her leaving issue, therefore only the children who were living when the contingency happened would take. That argument would go to a great extent and affect many decisions, affirming as it must the principle that where there is a gift to a class upon a contingent event the time of the happening of the contingency determines the individals composing the class. That is not the rule."

The Lord Justice then quotes the judgment of Vice-Chancellor Wigram in *Bull* v. *Pritchard* (5 Hare 567), laying down the distinction between cases in which there is a gift-over on a contingency, and cases in which the contingency is made part of the description of the class which is to take. There are many other cases to the same effect, but I will not trouble your Lordships with a citation of them.

The case of *Selby* v. *Whittaker*, 6 Ch. D. 239 was relied on by the counsel for the respondents, but when examined it appears to me to be an authority for the appellants rather than for the respondents. In that case the gift was on the occasion of the death of a daughter leaving lawful issue to pay the fund of her so dying to her children or other lineal descendants. So far your Lordships will observe the gift is almost identical with the one before you. But it was further provided that such children or lineal descendants should take *per stirpes* and not *per capita*, and there were other indications in the will which were relied on by the Court of Appeal as showing that only surviving children or descendants were to take. Sir George Jessel in his judgment used the following words:—"The only event in which there is a gift is upon their (the tenants for life) leaving lawful issue or other lineal descendants. I fully admit that on the authorities and the reason of the thing, if that stood alone, followed by an immediate gift to children, though it might appear to be and would be a very capricious intention, because it would make the interests of the children, if they all died in their parent's lifetime, depend

on whether one of them had left a grandchild who would not take anything, still there being no other words, that would not be sufficient to make the interests of the children contingent on their surviving their parents."

Sir George Jessel in that passage relied not only on the authorities, but (to use his own language) on "the reason of the thing."

It has frequently been stated by noble Lords in this House (including Lord Colonsay and Lord Gordon) that there is no difference in the law of England and that of Scotland in the principles regulating the construction of wills. In the case from Scotland in this House of *Taylor* v. *Graham*, 3 App. Cas. 1287 (5 R., H.L. 217), Lord Blackburn treated as applicable to Scotland as well as England the principle that it is to be presumed that a testator intends the gift he gives to be vested subject to being divested rather than to remain in suspense. Of course if there is any rule of law or canon of construction peculiar to the jurisprudence of either part of the United Kingdom, or even any uniform course of decision in the Courts of either part differing from the view taken by the Courts of the other part, effect should and must be given to it. But I am not aware of any such in the present case. The learned counsel for the respondents did not call your Lordships' attention to any rule or course of decision peculiar to Scotland, but relied largely on the English case of *Selby* v. *Whittaker*. Nor do I understand either my noble and learned friend opposite (Lord Watson), or my noble and learned friend whose judgment he has read (Lord Herschell) to rest their opinion on any speciality in the law of Scotland.

If therefore this were a gift on the death of the liferentrix leaving issue to be equally divided between her children, I should myself have no doubt that any child living at the testator's death or born afterwards, would take a share if the liferentrix left issue, notwithstanding that he died in the lifetime of the liferentrix. I do not think that the gift, being in the form of a direction to divide, affords any context leading to a contrary conclusion. You can equally well allot a share to a deceased member of a class as a living one. Then it is said that if you give a share to a deceased person, you may be giving it to creditors or strangers claiming as legatees or otherwise. Very true, so far as regards the beneficial interest, but the same observation applies to a member of the class who survives the liferentrix, but who may have previously become bankrupt or insolvent, or may have settled, sold, or mortgaged his expectant share.

The gift, however, in the present case is not confined to children of the liferentrix, but extends to her issue of every degree. I am unable to see that this makes any difference in considering the question now before your Lordships. I can find no words and no context to modify or vary the ordinary construction of a class gift or to rebut the presumption which always exists in favour of immediate vesting, so as to exclude any persons who are *prima facie* members of the class from a share. The learned counsel for the respondents argued that on his opponent's view the word "issue" was used in different senses in the same sentence. But in my opinion that is not so. It means in each case descendants of every degree. On the death of my daughter leaving any descendant, I direct my trustees to divide her share equally between her descendants. There is literally nothing more than the recurrence of the word "issue" which even raises a suspicion that the testator meant anything different from what I hold to be the plain meaning of the words he has used.

The gift, as I invite your Lordships to construe it, is no doubt unusual, and may be called capricious. But in my judgment it is not in any sense extravagant, and I do not think that your Lordships would be justified by any considerations of that kind in inserting words which are not there, or putting any but the ordinary meaning on the words which you find there.

The context of the will, so far from supporting the construction of the respondents, appears to be more favourable to that of the appellants. The gift under discussion is followed by a gift-over in the event of any of any of the daughters dying before the succession to the foresaid provisions opens up to them (*i.e.*, in the lifetime of the testator) without lawful issue. In that event the share of the interest of the trust legacy, to which the daughter so dying would have been entitled had she survived, was to be divided between the surviving daughters or paid to the last surviving daughter for life, and the capital then was divisible between the issue of the surviving daughters, or should there be only one surviving daughter having issue, to be paid equally to such issue. It would, I think, be found difficult to suggest the issue of a daughter who predeceased her were excluded from this gift. On the other hand, in the residuary gift there is a contingent provision in the event of the death of anyone of the residuary legatees before division, of the share of anyone so dying leaving lawful issue amongst his issue alive at the period of division, showing that the draftsman of the will knew how to provide by apt words for those only who should be alive at the period of division taking when he meant it.

I am therefore of opinion that the judgment of the Court of Session should be reversed, and it should be declared that Mrs Hickling and Thomas Fair Macaulay, the deceased children of Mrs Macaulay, are not excluded from a share in the sum of £18,000 liferented by her. No argument was addressed to the House as to the *quantum* of the share taken by Mrs Hickling and Thomas Fair Macaulay which is involved in the second and fifth questions, and I do not think that all proper parties were before the Court to enable it to answer those questions in the terms in which they are framed. All your Lordships can do on the present appeal is to

reverse the interlocutor of the Court of Session, and instead thereof direct that the first and fourth questions of the special case be answered by declaring that the representatives of Mrs Hickling and Thomas Fair Macaulay in the events which have happened are respectively entitled to a share in the whole sum of the £18,000 liferented by their mother Mrs Macaulay.

LORD CHANCELLOR—I have had an opportunity of reading the judgments which your Lordships have just heard delivered, and as I entirely concur in the judgments of my two noble and learned friends who have last spoken (Lord Shand and Lord Davey), I propose to add nothing to them.

Ordered that the interlocutor appealed from be reversed, and that this House declares that the appellants are entitled to a share in the whole sum of the £18,000 liferented by Mrs Macaulay, and that the costs of all parties in this House be paid out of the estate.

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END OF VOLUME XXXV.