Street, Partick? (3) Whether the pursuer was drunk in or near Argyle Street, Glasgow, on or about Saturday, 13th July 1895, and was taken by two policemen to the Central Police Station, Glasgow? (4) Whether the pursuer, in or about the month of August 1898, in or near the 'Edinburgh Castle' public-house, Argyle Street, Glasgow, when under the influence of drink, assaulted A. C. Kellock, publican, 127 Eglinton Street, Glasgow, by striking him on the head with a chair, thereby inflicting a very severe wound? (5) Whether early in the year 1898 the pursuer was drunk and incapable at the office in James Watt Street, Glasgow, of the Shipping Federation, Limited?

No objection was taken to the issues, but the pursuer objected to certain of the counter-issues.

Argued for the pursuer—In a counter-issue the same specification was required as in a criminal indictment. Generally speaking, here all the counter-issues, with the exception of II. (1) and II. (4) were too loose and vague in their allegations to be allowed—*Bisset* v. *Ecclesfield*, May 21, 1864, 2 Macph. 1096; *Grant* v. *Fraser*, July 16, 1870, 8 Macph. 1011; *Anderson* v. *Hunter*, January 30, 1891, 18 R. 467 (fifth issue at p. 468). Counter-issue I. (1) did not counter anything in the issue, and therefore ought not to be allowed. A statement that the pursuer was drunk two years before November 1898 could not be justified by proof that the pursuer was drunk on 13th July 1895. Counter-issue I. (2) did not counter the second part of the issue. It was not said that Mrs Taylor was a common prostitute, nor was it said that her two sisters were common prostitutes. Moreover, the counter-issue was lacking in specification. In the first part too great latitude in point of time was taken. The same objection applied with even greater force to the second part, and the women referred to were not sufficiently identified. In counter-issue I. (3) the month at least should be stated. Counter-issue II. (2) did not counter the issue. The sting of the slander lay in the statement that the pursuer had paid a sum of money to let the matter drop, and there was no attempt to justify this in the counter-issue. The defender was bound to counter the whole of the issue—*Ogilvie* v. *Paul*, June 28, 1873, 11 Macph. 776. Counter-issue II. (3) did not counter the issue, and counter-issue II. (5) was too vague in point of time.

Argued for the defender—The counter-issues sufficiently countered the issues, and all the specifications which could reasonably be required had been given.

The Court after considering the case disallowed the counter-issues I. (1) and (2), and II. (3), and allowed counter-issues I. (3) and II. (1), (2), (4), and (5).

Counsel for the Pursuer—Jameson, Q.C. —Cook. Agent—Campbell Faill, S.S.C.

Counsel for the Defender—Shaw, Q.C.—Guy. Agents—Clark & Macdonald, S.S.C.

Friday, February 2.

SECOND DIVISION.

MATHESON'S TRUSTEES *v.* MATHESON.

Succession — Vesting — Survivorship — Destination to Children and their Issue —Conditional Institution.

A testator directed his trustees after payment of his debts and a legacy of £50 to hold the remainder of his estate for the liferent use of his wife during her life, and to divide the estate after her death amongst his children *nominatim* equally, share and share alike; declaring that in the event of the death of any of the said children leaving lawful issue before the division took place, the issue should succeed to the predeceasing parent's share; and declaring also that the shares falling to his daughters should be held for their liferent use allenarly, with power to the daughters to dispose of the capital by will, and with power to the trustees to advance to the daughters such portion of the capital as they might see fit.

The liferentrix and all the children survived the testator, but one of the children died before the liferentrix, leaving issue and a trust settlement disposing of his whole estate.

Held that the estate vested in the children of the testator *a morte testatoris*, and that the share belonging to the child who died before the liferentrix was accordingly carried by his trust settlement.

Robert Matheson of West Coates died on 5th March 1877, leaving a trust-disposition and settlement dated 24th February 1877, by which he conveyed his whole estate, heritable and moveable, to trustees. The deed provided for the payment of debts and a legacy of £50. The remaining trust purposes were as follows:—"*Third*, I direct my trustees to hold the whole of the remainder of my means and estate for the liferent use and enjoyment of Alexa Urquhart or Matheson, my wife, during all the days of her life. And *Lastly*, I direct and appoint my said trustees to divide the said estate after her death amongst my children, the said William James Matheson, Robina Reid Matheson, Alexa Matheson or Robertson, Ann Matheson or M'Call, Johan Matheson, and Percival Matheson equally, share and share alike; declaring that in the event of the death of any of my said children leaving lawful issue before the said division takes place the said issue shall succeed to their predeceasing parent's share, and also that the shares falling to my daughters already married shall be held under the provisions of their marriage-contracts, and to my daughters still unmarried shall be held by my said trustees and settled in similar terms in their marriage-contracts, and in the event of their remaining unmarried shall be held by said trustees for their liferent use allenarly, but with

power to them to dispose of the capital by will, but with power to my said trustees to advance such portion of the capital to them as they may see fit, of which they, my said trustees, shall be the sole judges."

The trust-estate consisted almost entirely of heritage. The testator was survived by his widow and six children, all named in the deed. One of the children, William James Matheson, died on 17th June 1892, leaving four children, the eldest of whom was born in 1876 and the youngest in 1888, He also left a trust-disposition and settlement disposing of his whole estate.

Mrs Alexa Urquhart or Matheson, the testator's widow, died on 19th February 1897, and a question thereafter arose as to the persons entitled to succeed to the share of the trust-estate destined to William James Matheson.

For the settlement of the point a special case was presented to the Court by (1) Robert Matheson's trustees, (2) William James Matheson's trustees, and (3) William James Matheson's children.

The questions of law were—"(1) Did the share of the late Robert Matheson's estate which was destined by his trust-disposition and settlement to the late William James Matheson, vest in the said William James Matheson, and was it carried by his trust-disposition and settlement to his trustees, the second parties? or (2) Does the said share fall to be transferred or paid over to the third parties equally among them?"

Argued for the third parties—The share did not vest till the death of the liferentrix, and they were entitled in terms of the declaration in the will to have the share conveyed to them equally among them. The direction to divide was not a substantive bequest; it was merely part of the machinery of administration — *Bryson's Trustees* v. *Clark*, November 26, 1880, 8 R. 142. The case of *Ross's Trustees* v. *Ross*, November 16, 1897, 25 R. 65, could be distinguished from the present. In that case the dispute arose, not between issue and disponees, but between different sets of legatees. But if the case of *Ross* could not be distinguished, it must be held to be overruled by the *dicta* in *Bowman's Trustees* v. *Bowman*, July 25, 1899, 36 S.L.R. 959, in the House of Lords. The opinions in that case conclusively settled that where there was a destination to *A*, with an after provision that if *A* did not survive the liferentrix the estate should go to his children, the presumption was that there was no vesting *a morte testatoris*. The estate in the present case consisted chiefly of heritage, and there was thus a presumption in favour of substitution in the destination of his estate. Even if it were held that the estate had vested in William James Matheson, it had vested subject to defeasance in the event (which had happened) of his leaving children—*Snell's Trustees* v. *Morris*, March 20, 1877, 4 R. 709.

Argued for second parties—The share of his father's estate had vested in William James Matheson *a morte testatoris*, and was accordingly carried by his trust-disposition and settlement to them. The clause declaring that the issue should succeed to their predeceasing parents' share was only an accident of expression and not an instruction to the trustees. There was a long series of decisions, the latest of which were *Richardson's Trustees* v. *Rolland*, December 7, 1894, 22 R. 140, and *Ross*, *supra*, which had decided that where there was a destination similar to the present vesting was not suspended but took place *a morte testatoris*. The case of *Bowman* had not broken this chain of decisions, and had not overthrown the general presumption in all these cases in favour of vesting *a morte testatoris*. All that the *obiter dicta* in *Bowman* amounted to was this, that in construing the destinations of a will the canons of construction were not to be looked at too rigidly, but that effect was to be given to the obvious intention of the testator. The intention here was that the estate was to vest at his death. The fact that the estate consisted principally of heritage had no bearing on the question. There was no restriction to liferent in the event of the beneficiary having children as in *Lindsay's Trustees* v. *Lindsay*, December 14, 1880, 8 R. 281.

At advising—

LORD MONCREIFF—The material dates are these. The testator Robert Matheson died on 5th March 1877, survived by a widow and six children, of whom the eldest was William James Matheson. Robert Matheson's widow died on 19th February 1897, having survived her husband for nearly twenty years. William James Matheson died on 17th June 1892, having survived his father, but having predeceased his mother the liferentrix. He left four children, who are the third parties to this case; he also left a trust-disposition and settlement disposing of his whole estate, the trustees under which are the second parties.

The question which we have to decide is, whether the share of Robert Matheson's estate destined to William James Matheson vested in him or not. I am of opinion that it did, and was carried by his settlement to his trustees, the second parties to the case.

The terms of the settlement, which is extremely short, are perhaps not so favourable to vesting *a morte testatoris* as those under consideration in the case of *Thompson's Trustees* v. *Jamieson*, January 26, 1900, 37 S.L.R. 346. The destination to issue is in form a conditional institution, and the deed does not contain so many provisions from which the intention of the testator as to vesting may be inferred. At the same time I am satisfied, as a question of intention, that vesting took place on the death of the testator.

There is a presumption in favour of vesting *a morte testatoris*, and also a presumption against intestacy, and it lies upon those who maintain suspension of vesting to establish it. Now, there are various considerations which tell in favour of vesting *a morte testatoris*, some of which are to be found in the terms of the deed itself, and others of equal importance which are

derived from the omission of certain conditions which are usually inserted when postponement of vesting is intended. The estate which the testator had to leave was of no great amount, and the income was no more than sufficient for the support of the truster's widow and such of the children as lived in family with her. Accordingly, by the third purpose of the trust she was given a total liferent of the estate. There was no other reason for postponing immediate payment of their shares—throughout they are called "their shares"—to the children, and no apparent motive for postponing vesting.

The trustees are directed after the widow's death to divide the estate equally among the truster's children, who are all named. There is no survivorship clause, and there are no words which would involve accretion in the event of any of the children predeceasing the liferentrix without issue. In such a case, unless the predeceasing child's share vested *a morte testatoris*, intestacy would result.

Again, there is no destination-over in favour of strangers or any person named, and the destination to the issue of a predeceasing child is in these terms:—"The said issue shall *succeed to their predeceasing parent's share*"—words which indicate a derivative rather than an independent right.

It is in these circumstances that we have to consider what weight is to be given to the destination in favour of grandchildren; was it the intention of the truster to exclude altogether from the benefits of his will such of his children as might predecease the liferentrix in favour (if they left issue) of their issue who were not or might not have been in existence at the date of the will or death, and that if they left no issue their shares should go to his heirs *ab intestato?*

There is a long series of decisions in both Divisions of our own Court to the effect that a destination in favour of the issue or heirs of a legatee, although in form a conditional institution, yields readily to indications or presumptions pointing to vesting in the parent or ancestor *a morte testatoris* being construed as merely a direction that if the parent did not dispose of his share his children should take in preference to the residuary legatee, this being simply what the law itself would imply. I shall only name some of them—*Wilson's Trustees* v. *Quick*, 5 R. 697; *Byars' Trustees* v. *Hay*, 14 R. 1034; *Richardson's Trustees* v. *Rolland*, 22 R. 140; and *Ross's Trustees*, 25 R. 65, which as regards the terms of the will closely resemble the present case; and *Jackson* v. *M'Millan*, 3 R. 697; *Hay's Trustees* v. *Hay*, 17 R. 961, in which the destination was to the legatee and his heirs.

I am not prepared to hold that this current of authority has been overruled by the case of *Bowman*, although doubt has been thrown on the soundness of the decisions by the weighty *dicta* of Lord Watson and Lord Davey. If there is an inflexible canon of construction that what is in point of form a conditional institution of heirs or issue necessarily infers posponement of vesting it must receive effect. But this is not so. The judgment in *Bowman's* case is in favour of the view which I have stated, because what was held, at least by Lord Watson and Lord Davey, to be a proper conditional institution of heirs of the legatee was disregarded, and the case was determined according to the intention of the testator as gathered from the settlement. Indeed, I do not gather from Lord Davey's opinion that his views of a destination-over in these terms differ materially from those of the judges who decided the Scottish cases which I have cited. No doubt he takes exception to the broad terms in which the law was formulated in the case of *Hay's Trustees*, but he adds—"I think the circumstance that the gift-over is not in favour of some *persona delecta* by name may be taken into consideration with other circumstances appearing on the will which affect the construction."

This, as I understand it, means that if other circumstances appearing on the will indicate that the truster's intention was that the bequest should vest in the legatee *a morte testatoris*, the gift-over in favour of heirs or issue will not prevent effect being given to such intention, although a gift-over to a stranger or a person named would have that effect.

It must depend upon the circumstances of each case whether the truster's intention that the legacy should vest at once if sufficiently disclosed. In the present case, although I think the question is narrow, I am of opinion that it can be reasonably inferred from considerations, express and implied, that it was the truster's intention that the shares of his estate which were destined to his children should vest in them at his death, and there being nothing to indicate a contrary intention except the form in which the share of a predeceasing child is destined to his issue, I am prepared to answer the first question in the affirmative.

LORD JUSTICE-CLERK—That is the opinion of the Court.

The Court answered the first question in the affirmative.

Counsel for the First Parties—Lorimer. Agents—Morton, Smart, & Macdonald, W.S.

Counsel for the Second Parties—H. Johnston, Q.C.—Cunningham. Agents—Horne & Lyell, W.S.

Counsel for the Third Parties—W. Campbell, Q.C. —Hunter. Agents — J. & J. Galletly, S.S.C.