Counsel for the Appellant—T. B. Morison. Agents—Sibbald & Mackenzie, W.S.

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Tuesday, June 18.

FIRST DIVISION.

CORBETT'S TRUSTEES *v.* POLLOCK.

Succession—Vesting—Vesting Postponed—Vesting Subject to Defeasance—Persons to whom Fee Given not Ascertainable Till Death of Liferenter—Destination-over—Intestacy.

A testator who was survived by five children—A, B, C, D, and E, after directing his trustees to divide the nett annual proceeds of the residue in certain proportions among his son C and his daughters B and E, and the survivors, during their respective lives, subject to certain provisions in favour of the issue of deceasers, and certain contingent liferent provisions in favour of his son A and his daughter D, directed his trustees, on the death of the longest liver of C, B, and E, to realise his estate, and to divide the capital of the residue equally among the children respectively of C, B, & E—one share to each family—but declaring that in the event of the death of any of C, B, and E without leaving issue, his son A and his daughter D, or in the event of their death leaving issue, their said issue, should be entitled to an equal share along with the issue of C, B, and E *per stirpes* of the share of residue of which such child so deceasing had or would have had the interest. B died without issue. She was predeceased by A. He left a son who survived B, but predeceased E, the longest liver of B, C, and E, without leaving issue. E was predeceased by D. C, D, and E all had issue who survived E. The representatives of A's son claimed one-fourth of the share of residue of which B, who died without issue, had enjoyed the interest, and alternatively maintained that the said fourth had fallen into intestacy. *Held* (1) that the said fourth did not vest subject to defeasance in the event of B having issue either *a morte testatoris* in A or in A's son at A's death, and that it did not vest in A's son at B's death: but (2) that vesting in said fourth was suspended till the death of E, the longest liver of C, B, and E; (3) that said fourth did not fall into intestacy; and (4) that those of C, D, and E's children who survived E were entitled thereto *per stirpes*, to the exclusion of the representatives of A's son, who had predeceased her.

Thomas Corbett, surgeon, Pollokshaws, died on 19th August 1855, leaving a trust disposition and settlement whereby he conveyed his whole heritable estate (excepting certain heritable subjects in Bridgeton then about to be conveyed by him to his son John Campbell Corbett, and also excepting a plot of ground at the corner of Vennel and Main Street, then about to be conveyed to his daughter Susan Corbett or Steel), and his whole moveable estate, to the trustees and for the trust purposes therein mentioned. By the fourth purpose he directed his trustees to hold the whole remaining residue of his estate, and to divide the nett annual proceeds thereof as follows, namely, "into sixteen equal shares, and to pay or deliver six shares thereof to" his son "Robert Corbett, and five shares thereof to each of my daughters Margaret Corbett and Agnes Corbett or Gilroy . . . during all the days and years of their respective lives: Declaring that on the death of any of these my said children leaving lawful issue, my said trustees shall pay to such issue equally among them if more than one, and if only one then to him or her, the sum of Eight hundred pounds sterling, and thereafter divide and pay or deliver the annual interest or produce of my said means and estate amongst the survivors of my said children (excepting my said son John Campbell Corbett and my daughter Susan Corbett or Steel) in the like proportions before mentioned: Declaring, however, that on the death of any of my said children without leaving lawful issue, the share of the annual interest or produce of my said estate falling or that would have fallen and belonged to such child shall be divided and paid or delivered equally to or amongst my surviving children, including my son John Campbell Corbett and my daughter Susan Corbett or Steel: Declaring also that on the death of the longest liver of my said children Robert Corbett, Margaret Corbett, and Agnes Corbett or Gilroy, my said trustees shall realise the whole of my estates, and after the foregoing provisions of Eight hundred pounds are paid shall divide, pay, or convey the residue in equal portions to and amongst the children respectively of my said son Robert and of my daughters Margaret and Agnes—that is to say, one share to and amongst the children of each family: Declaring, however, that in the event of the death of any of my said children without leaving lawful issue, my said son John Campbell Corbett and my said daughter Mrs Susan Corbett or Steel, or in the event of their death leaving lawful issue, their said issue, shall be entitled to an equal share alongst with the issue of my other children, and that *per stirpes* and not *in capita*, of the share of the residue of my said estates of which such child or children so deceasing without issue had or would have had the interest, and my said trustees are in that event directed so to divide, pay, or convey the same accordingly."

The testator was survived by five children, namely, (1) John Campbell Corbett, who died in 1864 leaving one child William Curr Corbett who died without issue in 1885; (2) Margaret, Mrs Waddell, who

died in 1877 without issue; (3) Robert Corbett, who died in 1888 leaving four children who were still alive; (4) Susan, (Mrs Steel) who died in 1898 leaving three children who were still alive; and (5) Agnes (Mrs Gilroy), who died in 1899 leaving five children who were still alive.

On the death of Robert Corbett the trustees paid a sum of £800 to his surviving children as directed by the fourth purpose of the truster's settlement, and the like sum of £800, to which the issue of Mrs Gilroy were entitled was now in course of being paid to them. From 1855 to 1877 the annual proceeds of the trust-estate were divided in the proportions directed between Robert Corbett, Mrs Waddell, and Mrs Gilroy. From 1877 to 1888 the proportions of the annual proceeds directed continued to be paid to Robert Corbett and Mrs Gilroy, and the five-sixteenths thereof formerly paid to Mrs Waddell were divided equally between Robert Corbett, Mrs Steel, and Mrs Gilroy, the surviving children of the truster. From 1888 to 1898 the annual proceeds (except as regards the said five-sixteenths thereof) were paid to Mrs Gilroy, and the said five-sixteenths were equally divided between Mrs Steel and Mrs Gilroy. During the year 1898-9 Mrs Gilroy received the whole income.

Upon the death of Mrs Gilroy the time arrived for carrying out the directions of the truster to realise the estate and divide the residue. Certain questions having arisen as to the persons who were entitled to the share of the residue to which the issue of Mrs Waddell, had she had any, would have been entitled, the present special case was presented for the opinion and judgment of the Court.

The parties to the special case were (1) Thomas Corbett's trustees; (2) William Curr Corbett's testamentary trustees; and (3) the surviving children of Robert Corbett, Mrs Steel, and Mrs Gilroy.

On behalf of the second parties it was contended that in consequence of the death of Mrs Waddell without issue they were entitled to one-fourth of the share destined to her and her issue, on the ground that an interest in this share of residue vested *a morte testatoris* in John Campbell Corbett, subject to defeasance only in the event of Mrs Waddell leaving issue, and that William Curr Corbett succeeded to his father's interest upon his father's death in 1864; or otherwise that as regards this share of residue the substitution of the issue of the said John Campbell Corbett suspended vesting until his death in 1864, and that upon that event the said one-fourth of said share vested in the said William Curr Corbett, subject only to defeasance in the event of Mrs Waddell leaving issue; and that in either view, upon Mrs Waddell's death without issue in 1877, the vesting of this share in either John Campbell Corbett or William Curr Corbett became absolute; or otherwise that on the death of Mrs Waddell without issue a right to said one-fourth share vested in William Curr Corbett. They further contended, in the event of its being held that vesting was suspended until the death of Mrs Gilroy, that said one-fourth share fell into intestacy and was divisible among the testator's heirs at the date of his death or their representatives.

The third parties contended that the institution being in favour of a class of unascertained children the case was one to which the doctrine of vesting subject to defeasance did not apply; that the vesting of the share in question was suspended until the death of Mrs Agnes Corbett or Gilroy, the last surviving child of the truster and the longest liver of the three liferenters, and that the surviving children of Robert Corbett, Mrs Susan Corbett or Steel, and Mrs Agnes Corbett or Gilroy were entitled to the said share of residue *per stirpes* according to the direction in the fourth purpose of the settlement.

The questions of law for the opinion and judgment of the Court were as follows:—"1. Did one-fourth of the share of residue destined to Mrs Waddell and her issue vest (*a*) *a morte testatoris* in John Campbell Corbett subject to defeasance in the event of Mrs Waddell leaving issue; or (*b*) in William Curr Corbett as at the date of the death of John Campbell Corbett subject to defeasance as aforesaid? or (*c*) in the said William Curr Corbett as at the date of the death of Mrs Waddell without issue? or (2) Was vesting of said share suspended until the death of Mrs Gilroy in 1899? (3) If vesting of said share was suspended until the death of Mrs Gilroy, are the third parties entitled thereto *per stirpes?* or (4) Is there intestacy with regard to the said share?"

Argued for the second parties—The claim of these parties was within the doctrine of *Steel's Trustees* v. *Steel*, December 12, 1888, 16 R. 204. In the event which happened of Mrs Waddell leaving no issue, the trustees were to hold for the issue of her brothers and sisters in fee; one of that class at the date of Mrs Waddell's death was William Curr Corbett, whose trustees were consequently entitled to have their claim sustained. That conclusion was strengthened by the fact that the opposite view would lead to intestacy—*Paxton's Trustees* v. *Cowie*, July 16, 1886, 13 R. 1191. The Lord President's *dictum* in *Bryson's Trustees* v. *Clark, &c.*, November 26, 1880, 8 R. 142, had no application here—*Thompson's Trustees* v. *Jamieson*, January 26, 1900, 2 F. 470, Lord Kincairney, at p. 487. Though payment was postponed till the death of the longest liver of the favoured children, that did not postpone vesting.

Argued for the third parties—Here, as in *Bryson's Trustees, cit. supra*, there was no gift of the fee except "at the death of the longest liver" of the three favoured children. The testator's intention was to benefit survivors. The provision as to payment of £800 to issue of the favoured children on the death of their parent could only refer to surviving issue, and John Campbell Corbett could only take a share of the liferent of Mrs Waddell's share if he survived her, and clearly also William Curr Corbett could only

participate in the final division of residue if he survived the longest liver of the liferenters, because otherwise John Campbell Corbett left no *stirps*.

At advising—

LORD ADAM—The late Thomas Corbett died on 19th August 1855. He was survived by five children, Robert Corbett, John Campbell Corbett, Mrs Susan Corbett or Steel, Mrs Margaret Corbett or Waddell, and Mrs Agnes Corbett or Gilroy.

He left a trust-disposition and settlement dated 30th June 1855, by which he conveyed his whole property, heritable and moveable, to trustees, except a property in Bridgeton and another at the corner of Main Street and Vennel, which he intended to convey to his son John Campbell and to his daughter Mrs Steel respectively.

After providing for payment of debts and certain legacies and annuities, the truster by the fourth purpose of the trust directed his trustees to hold the whole remaining residue of his estates, and to divide the annual proceeds thereof into sixteen equal shares, and to pay six shares thereof to his son Robert, and five shares to each of his daughters Margaret (Mrs Waddell) and Agnes (Mrs Gilroy) during their respective lives. He further directed that on the death of any of these children leaving lawful issue, the trustees should pay to such issue £800, and thereafter pay the annual produce of the estate among his surviving children, excepting John Campbell Corbett and Mrs Steel, but he declared that on the death of any of the children without leaving lawful issue, the share of the annual produce of the estate that would have fallen to such child should be divided and paid equally among his surviving children, including John Campbell Corbett and Mrs Steel.

Having thus disposed of the income of his estate, the truster then proceeds to dispose of the capital, and he directs his trustees on the death of the longest liver of his children Robert, Margaret (Mrs Waddell), and Agnes (Mrs Gilroy), to realise his estates and, after payment of the foregoing provisions of £800, to divide the residue in equal portions among the children respectively of his children Robert, Margaret, and Agnes, one share to and among the children of each family; but he declared that in the event of the death of any of his said children without leaving issue, his son John Campbell Corbett and his daughter Mrs Steel, or in the event of their death leaving lawful issue, their issue should be entitled to an equal share along with the issue of his other children, and that *per stirpes* and not *in capita*, of the share of the residue of which such child or children so deceasing without issue had or would have had the interest.

It is this last-mentioned event which has occurred and has given rise to the questions at issue among the parties. Mrs Waddell died on 18th October 1877 without leaving issue. On that event occurring the income of her five sixteenth shares was duly paid to the truster's surviving children. Mrs Waddell was predeceased by John Campbell Corbett, who had died in 1864. He, however, left a son William Curr, who died in 1885, thus surviving Mrs Waddell but predeceasing Mrs Gilroy, the longest liver of the children. He is represented by his trustees, who are the second parties to the case.

It further appears that Robert and Mrs Steel both survived Mrs Waddell, but predeceased Mrs Gilroy, and both have left issue who still survive. Mrs Gilroy also left issue. The surviving children of Robert, Mrs Steel, and Mrs Gilroy are the third parties to the case.

It will be observed that the residue now to be paid over is directed to be divided into three equal portions, and one share paid to the children of each family, that is to say, that each family is to get five and one-third of the original sixteen shares into which the residue was directed to be divided. But when dealing with the destination in favour of John Campbell Corbett and Mrs Steel and their issue, the truster declares that they shall be entitled to an equal share along with the issue of his other children "of the share of the residue of which such child so deceasing had or would have had the interest." Now, Mrs Waddell, who is the child who has deceased without issue, never had or could have had a right to the interest of one-third of the residue as now divided, that is, to five and one-third of the original sixteen shares, but only of five of these shares.

I presume, therefore, that the second parties' claim is limited to a share of the five-sixteenths. The first question of law which we are asked is, whether one-fourth share of the residue destined to Mrs Waddell and her issue vested (*a*) *a morte testatoris* in John Campbell Corbett subject to defeasance in the event of Mrs Waddell leaving issue, or (*b*) in William Curr Corbett at the date of the death of John Campbell Corbett subject to defeasance as aforesaid, or (*c*) in the said William Curr Corbett as at the date of the death of Mrs Waddell without issue; or whether vesting of said share was suspended until the death of Mrs Gilroy in 1899.

I do not think that the principle of vesting subject to defeasance has any application in this case.

The persons to whom the fee of the share liferented by Mrs Waddell is destined are, in the first place, John Campbell Corbett and Mrs Steel, and failing them, leaving issue, to their issue. There was thus a destination-over in both cases, and it could not be known until Mrs Steel's death whether or not she would leave issue entitled to share, and she survived until 1898. But these persons were only to take along with the issue of the truster's other children Robert and Mrs Gilroy, and, as in Mrs Steel's case, it could not be known until their deaths whether Robert or Mrs Gilroy would leave issue to take. It appears therefore to be clear that the persons to whom the fee of Mrs Waddell's share was destined could not be ascertained until the death of all the liferenters. In this

case, as we have seen, the fee was given partly to persons known and existing at the time of the truster's death, and partly to certain classes called by description. Now the law as regards vesting subject to defeasance, as laid down in the case of *Steel's Trustees*, 16 R. 204, is that where the fee is given to persons known and existing at the time, it must, in order to vesting, be given absolutely without further destination, which is not the case here, because there was a destination-over to their issue, and where the destination is to a class called by description it depends upon whether the persons who constitute the class are ascertained at the date of the truster's death, or whether he or they cannot be known or ascertained till the death of the liferenter, or the occurrence of some other event. If the person or persons are not known, or the individuals who are to constitute the class are not ascertained at that date, the fee will not vest until the occurrence of the event which will determine who are the persons called, or the individuals composing the class are ascertained. That being the law, there could be no vesting of the fee of Mrs Waddell's share until the death of Mrs Gilroy, when only the persons to whom the fee was destined could be ascertained. But if the share of the residue destined to Mrs Waddell and her issue did not vest in the beneficiaries until the death of Mrs Gilroy, it is clear that a right to one-fourth share of it did not vest at any earlier period. I am therefore of opinion that the first question should be answered in the negative, and the second in the affirmative.

The next question is, whether the third parties are entitled to the share in question *per stirpes*, or whether there is intestacy with regard to the said share?

In my opinion the third parties are entitled to it. The direction of the truster is that John Campbell Corbett and Mrs Steel, or failing them their issue, are to share with the issue of his other children. That appears to me to be very clearly an implied destination of the share to the issue of the other children, and that their right to a share is not contingent on there being issue both of John Campbell Corbett and Mrs Steel to share it with them. In fact Mrs Steel has left issue to share it with them.

I therefore think that the third question should be answered in the affirmative, and the fourth in the negative.

The LORD PRESIDENT, LORD M'LAREN, and LORD KINNEAR concurred.

The Court answered the first question in the negative, and the second and third in the affirmative, found the third parties entitled *per stirpes* to the one-fourth of the share of residue destined to Mrs Waddell and her issue, and answered the fourth question in the negative.

Counsel for the First and Third Parties—Guthrie, K.C.—W. C. Smith. Agents—Graham, Johnston, & Fleming, W.S.

Counsel for the Second Parties—Dundas, K.C.—Clyde. Agents—Smith & Watt, W.S.

Friday, June 21.

SECOND DIVISION.

[Lord Low, Ordinary.

J. M. SMITH, LIMITED *v.* COLQUHOUNS' TRUSTEE.

Contract—Offer and Acceptance—Right to Withdraw Offer—Sale of Shares—Offer Made in Terms of Article Giving Right of Pre-emption to Shareholders — Company—Sale.

By article 4 of the articles of association of a company it was provided that if any holder of ordinary B shares wished to sell them he must offer them in writing to the company at the price at which he was willing to sell, and the company should either take the shares at that price or intimate the offer to the other ordinary B shareholders, who might lodge sealed offers with the company specifying the price which they were willing to pay for the shares, and the highest of such offers should be accepted by the seller provided it was equal to or above the sum specified by him. It was also provided that the sealed offers should be opened by the directors within fourteen days after the notice to the other B shareholders.

A trustee in a sequestrated estate became entitled in that capacity to certain ordinary B shares in the company, and by letter dated 31st January 1900 he offered them to the company at a certain price "under article 4 of the articles of association of your company." The trustee's letter was considered at a meeting of directors held on 3rd February, and by circular dated 10th February they made intimation of the trustee's offer to the holders of the ordinary B shares. On 10th February A, one of ordinary B shareholders, sent to the company a letter offering to purchase the shares at the price specified in the trustee's letter. No other offer was made by the B shareholders, and the company intimated A's offer to the trustees on 12th February. Meantime, however, the trustee on 5th February had written to the company withdrawing and cancelling his offer of 31st January.

In an action at the instance of the company and A against the trustee, for declarator that a contract had been concluded for the sale of the shares, and that the defender was bound in implement thereof to deliver the share certificates to A, and for decree ordaining him to do so, *held* (*aff.* judgment of Lord Low, Ordinary) that no contract for the sale of the shares to A had been concluded, in respect that the trustee