£50, which was the sum left to him by Wilson's minute of acceptance.

On 22nd October the Court awarded Wilson £500 and M'Lauchlan £50. The Lord Ordinary held it established that Wilson had really salved the vessel, and that £50 was ample remuneration to M'Lauchlan for such personal services as he had rendered in the matter.

On the question of expenses it was contended for M'Lauchlan that each pursuer should pay his own expenses, and the following authority was referred to—'*The Lee*,' May 15, 1889, 6 Asp. Mar. Cas. 395.

LORD SALVESEN— . . . [*After referring to the case of "Lee" quoted by Mr Armit*] . . . The case is different when one of the claimants has said that he for his part accepts a particular portion of the sum tendered, and is ultimately found entitled to an award of equal or greater amount, because the whole subsequent expense is then caused by the action of the dissatisfied salvor who refused to take the balance as his share of the total salvage remuneration. If there had been no minute by Wilson of 5th July, then the case would have been otherwise. Looking at the matter from the broad point of view as to who caused this expense—the expense of and incident to the proof—I cannot doubt that Mr M'Lauchlan caused it by making a demand which I have found to be untenable. He must therefore pay the expenses incurred by Wilson. As to the small matter of expenses to the defender between 3rd and 27th July, I am afraid that M'Lauchlan must pay these, as if he had agreed to accept the £50 ultimately awarded to him at the same time as Wilson offered to accept the £500 which he receives the case would at once have taken end.

The Lord Ordinary pronounced an interlocutor by which he found the defender liable in expenses to both pursuers down to the date of the tender; found M'Lauchlan liable in expenses to Wilson from 5th July, and further found M'Lauchlan liable to defender in expenses from the date of the tender to 27th July, and *quoad ultra* found no expenses due to or by any of the parties.

Counsel for the Pursuer Wilson—Murray, K.C. — W. T. Watson. Agents — Beveridge, Sutherland, & Smith, S.S.C.

Counsel for the Pursuer M'Lauchlan—T. B. Morison, K.C.—Armit. Agents—Bruce & Black, W.S.

Counsel for the Defender—Horne. Agents —Boyd, Jameson, & Young, W.S.

Thursday, January 20, 1910

SECOND DIVISION.

[Lord Guthrie, Ordinary.

CORDINER *v.* DUFFUS (CORDINER'S JUDICIAL FACTOR) AND OTHERS.

Succession—Trust-Disposition and Settlement with Codicils—Construction—Vesting—Codicil Executed for a Specific Purpose—Reference to Codicil for Purpose of Modifying Construction of Trust-Disposition.

By his trust-disposition and settlement a testator gave the liferent of his estate to his wife, and by the tenth purpose provided—"After giving effect to the several provisions hereinbefore expressed in the events before specified, I appoint and direct my said trustees, after the death of my said wife, to realise the whole of my estate, heritable and personal, if it shall be necessary to do so, and to pay or convey the same . . . to Robert Cordiner, son of my late brother Robert, or to his heir-at-law. . . ."

By codicil dated 9th October 1890 the truster, after narrating the terms of the tenth purpose of his trust-disposition, directed—"And whereas I am desirous of making provision for the event which may happen of the said Robert Cordiner (otherwise Robert Charles Cordiner) predeceasing me: Therefore I do hereby direct my trustees, in the event of the said Robert Charles Cordiner having predeceased me, to dispone and make over to my wife Mrs Margaret Farquharson Busfield or Cordiner, should she survive me, my lands and estate of Cortes, in the county of Aberdeen, and that after satisfying the other purposes of the trust in manner provided by the said settlement, and I declare that I make this provision because my heir-at-law next after the said Robert Charles Cordiner . . . is already possessed of independent means and estate, and with this addition I hereby confirm the foregoing trust-disposition and settlement. . . ."

The truster was survived by his widow and by R. C. Cordiner, and the latter predeceased the former.

Held (*affirming* judgment of Lord Ordinary Guthrie) that the codicil having been executed for a specific and declared purpose unconnected with the general destination of the residue set forth in the trust-disposition, it could not be held as modifying the construction of the clause therein disposing of the fee of the residue in the event of the survivance of Robert Cordiner, and consequently that no right of fee had vested in him at his death.

On 18th January 1909 Mrs Josephine Grote Stockwell or Cordiner, widow of the late Rev. Robert Charles Cordiner, and his

executrix and universal legatory under a will dated 18th April 1893, brought an action against (1) Alexander Duffus, judicial factor on the trust estate of the late William Fraser Cordiner of Cortes in Aberdeenshire; (2) Robert Grote Cordiner and Hugo Grote Cordiner, the children of the pursuer and the said Rev. Robert Charles Cordiner, and the pursuer as their guardian, they being in pupillarity; and (3) Robert Gray, *curator bonis* to Mrs Margaret Farquharson Busfield or Cordiner, widow of the said deceased William Fraser Cordiner, in which she sought declarator that "under and in terms of the trust-disposition and settlement and relative codicils of the said William Fraser Cordiner, the pursuer's husband . . . by his survivance of the said William Fraser Cordiner acquired a vested right in the fee of the residue of the whole estate . . . of the said William Fraser Cordiner, and that the pursuer, as her said husband's executrix and universal legatory, is now in right of the said fee of the residue of the said estate."

William Fraser Cordiner died on 15th January 1907 without issue, leaving a trust-disposition and settlement dated 23rd February 1871 and relative codicils, the terms of which so far as necessary are quoted *supra in rubric*. His widow was alive at the date of this action.

Robert Charles Cordiner survived the truster but died on 28th August 1907, survived by the pursuer, his widow Mrs Josephine Grote Stockwell or Cordiner, and by the two pupil children, Robert Grote Cordiner and Hugo Grote Cordiner, to whom Mr John W. More, advocate, was appointed tutor *ad litem* by the Court.

Robert Charles Cordiner left a settlement dated 18th April 1893, bequeathing all his real and personal estate and effects whatsoever and wheresoever, or to which he should at his death be seised, possessed, or entitled, or over which he should have a general power of appointment or disposition by will, to his wife absolutely, and he appointed her his executrix.

The pursuer pleaded—"On a sound construction of the trust-disposition and settlement and codicils of the said William Fraser Cordiner, the fee of the residue of his estate vested *a morte testatoris* in the pursuer's husband Robert Charles Cordiner, and has now passed to the pursuer as her husband's universal legatory."

The tutor *ad litem* to the pupil children pleaded—"(1) The vesting of the fee of the residue of the trust estate of the said William Fraser Cordiner being postponed to the death of the liferentrix, the defenders should be assoilzied. (2) The said Rev. Robert Charles Cordiner having at the date of his death no vested right in the fee of the said residue, the defenders should be assoilzied."

The judicial factor on the truster's estate and the *curator bonis* to the testator's widow, who had been called as defenders, were represented at the hearing.

On 17th July 1909 the Lord Ordinary (GUTHRIE) assoilzied the defenders.

Opinion. — "The question of vesting raised in this case depends on the construction of the tenth clause of the late William Fraser Cordiner's trust-disposition and settlement, dated 23rd February 1871, taken along with his formally executed codicil, dated 9th October 1890. I think it follows from the opinions of Lord Watson and Lord Davey in the case of *Bowman*, 1 F. (H.L.) 69, as these have been applied in subsequent cases, that if consideration is confined to the testator's trust-disposition vesting must be held postponed till the period of distribution, namely, the death of Mrs W. F. Cordiner, who is still alive. In that case the claim for the pursuer, the widow and universal legatory of the late Rev. Robert Charles Cordiner, the testator's nephew, who survived the testator but not the liferentrix, would necessarily fall to be repelled. I read the word 'or' in the bequest to Robert (that is, Robert Charles) Cordiner, son of my late brother Robert, 'or to his heir-at-law' as equivalent to 'whom failing.' But it is said that the codicil of 9th October 1890 either shows that the testator did not mean when he executed his trust-disposition to postpone vesting beyond the date of his death, or that he subsequently resolved to change the period of vesting from the period of distribution at the death of the liferentrix to the date of his own death. The codicil shows that this is a possible view of the testator's intention, but I cannot hold it over-rides the legal meaning of his trust-disposition unless it makes the inference reasonably necessary. I do not think it has this effect. At the date of the codicil Robert Charles Cordiner was unmarried, and the testator may have had in view the contingency of his nephew dying before him without leaving children, and he provided that in that event the estate of Cortes should go to the testator's wife. He expressly says that it was that contingency which he was providing for. It does not seem to me a reasonably inevitable inference that he considered at all the other more remote contingency which has actually happened, namely, of his nephew surviving him and predeceasing the liferentrix; or that, if he did consider it, he would not intend that in that case, when in ordinary course the nephew might have married and had children, his children should not take in their own right on their father's predecease of the liferentrix. The purpose of the codicil was to secure that his own heir-at-law, who happened at the time to be also the nephew's heir-at-law, should not take the property for the reason assigned by him. It does not follow that at the later period when it might be presumed that the nephew's heir-at-law would be his child he would desire the property to go either to the nephew or to his own widow. . . ."

The pursuer reclaimed, and argued—The tenth purpose of the trust-disposition and settlement must be read in the light of the codicil of 9th October 1890. A destination-over to the heir-at-law no doubt imported a conditional institution, and vesting was postponed where the destina-

tion-over referred to the period of distribution, but not if the destination-over referred to the truster's death. The terms of the codicil showed that the period of vesting contemplated by the truster was the date of his own death. The rule laid down in *Bowman* v. *Bowman*, 1899, 1 F. (H.L.) 69, 36 S.L.R. 959, was a presumption and must yield to an expression of the testator's intention. It was not advisable to have two periods of vesting applicable to different portions of the estate. Where there were two possible views as to date of vesting, that construction was to be preferred which resulted in immediate vesting *a morte testatoris* — *Bryson's Trustees* v. *Clark*, November 26, 1880, 8 R. 142, 18 S.L.R. 103; *Bowman* v. *Bowman's Trustees, cit. sup.*; *Webster's Trustees* v. *Neil*, March 2, 1900, 2 F. 695, 37 S.L.R. 493.

The respondent (the tutor *ad litem* for the pupil children) argued—The tenth purpose of the trust-disposition and settlement provided a destination-over referable to the period of death of the liferentrix. The intention of the testator was explicit. The purpose of the codicil was to provide for one case and referred to interest of one particular person. The codicil could not override the express terms of the tenth clause.

Counsel for the tutor *ad litem* stated that in this action it was sufficient to give effect to his second plea-in-law.

At advising—

LORD ARDWALL—This action is raised by Mrs Cordiner, widow of the late Reverend Robert Charles Cordiner, for the purpose of having it declared that under the testamentary deeds of the late William Fraser Cordiner, the said Robert Charles Cordiner, on his survivance of the testator, acquired a vested right in the fee of the residue of the whole estate, heritable and moveable, of William Fraser Cordiner, and that the pursuer as universal legatory of her husband under his will is now in right of the said fee.

William Fraser Cordiner, the truster, died on 15th January 1907, and the Reverend Robert Charles Cordiner, who was his nephew, died on 28th August of the same year. Mrs William Fraser Cordiner, the truster's widow, who is liferented in his whole estate, is still in life, and is represented in this action by her *curator bonis*, and he and the trustees of William Fraser Cordiner and the pupil children of Robert Charles Cordiner are called as defenders in this action.

The purpose of William Fraser Cordiner's trust-disposition and settlement dealing with this matter is in the following terms —"(*Tenth*) After giving effect to the several provisions hereinbefore expressed in the events before specified, I appoint and direct my said trustees, after the death of my said wife, to realise the whole of my estate, heritable and personal, if it shall be necessary to do so, and to pay or convey the same, including the articles specified in article sixth hereof, to Robert Cordiner, son of my late brother Robert, or to his heir-at-law."

Had this clause stood by itself, there is, in my opinion, no doubt, having regard to the opinions of Lord Watson and Lord Davey in the case of *Bowman*, 1 F. (H.L.) 69, and to the judgment in the case of *Bryson's Trustees* v. *Clark*, 8 R. 142, that this clause must be held to import that vesting was postponed and did not take place *a morte testatoris*.

I may point out, *inter alia*, that by the seventh purpose of the settlement a liferent of the whole residue of the testator's estate is conferred on his wife, that there is no gift made of the fee of the residue till after the death of the testator's wife, and no direction to pay and convey the same, and that there is a conditional institution of the heir-at-law of Robert Charles Cordiner.

But it was ably argued for the pursuer that, reading the codicil of 9th October 1890 along with the trust-disposition and settlement, it became apparent that the death of the testator was the *punctum temporis* at which vesting must be held to take place, because by that codicil it is provided that in the event of Robert Charles Cordiner predeceasing the testator the trustees are to dispone the estate of Cortes, which constituted the heritable portion of the residue of the testator's estate, to his wife Mrs Cordiner should she survive him. It was argued that although this only applied to the landed estate, yet it must be assumed that it was intended that there was one period of vesting for the whole residue, whether heritable or moveable.

Now if the codicil properly falls to be read as part and parcel of the destination of the residue of the testator's estate in the tenth purpose of the trust settlement, I think that a good deal might be said for the argument. But I do not think it can be so read. The testator seems to have come to be of opinion either, first, that if Robert Charles Cordiner predeceased him, he (the testator) would die intestate as to the residue of his estate, at all events as regarded the estate of Cortes, or, second, that the heir-at-law of Robert Charles Cordiner, who was conditional institute under the deed, was the same person whom he considered, rightly or wrongly, to be his own heir-at-law, namely, Mr J. C. M. Ogilvie Forbes of Boyndlie, and in view of one or other of these contingencies he executed the codicil with the view of obviating intestacy and preventing his heir-at-law, whom he considered already sufficiently provided for, from succeeding *ab intestato* to the estate of Cortes; and with that view he directed the trustees, in the event of the predecease of Robert Charles Cordiner, to dispone the said property to his wife should she survive him. As his wife was also liferentrix, both the liferent and fee of Cortes would in that case vest in her, and the testator, in view no doubt of the fact that there would then be no necessity for keeping up a trust to protect the future fiar of Cortes, directs his trustees, in the case of Robert Charles Cordiner having predeceased him, to dispone the estate at once to his own wife. But this provision has

nothing to do with the destination which is to take effect should Robert Charles Cordiner survive the testator.

I accordingly think that it must be held that the codicil of 9th October 1890, having been executed for a specific and declared purpose unconnected with the general destination of the residue set forth in the deed, it cannot safely be appealed to as interpreting or modifying the construction of the clause in the trust-settlement disposing of the fee of the residue of the testator's estate in the event of the survivance and not the predecease of Robert Charles Cordiner.

I accordingly arrive at the opinion that the view of the Lord Ordinary, to the effect that there was no vesting of the fee of William Fraser Cordiner's estate in the Reverend Robert Charles Cordiner, is correct.

It was very properly pointed out to the Court by Mr Dykes, counsel for the *tutor ad litem* to Robert Charles Cordiner's pupil children, that it was sufficient for the decision of the present action to sustain his second plea-in-law without going into any question at present as to the date to which vesting is postponed.

I accordingly would propose that the Lord Ordinary's interlocutor should be recalled, in so far as it sustains the first plea-in-law for John W. More, and that in place thereof we should sustain the second plea-in-law for that claimant, and *quoad ultra* adhere to the Lord Ordinary's interlocutor.

LORD DUNDAS—I am of the same opinion. It seems clear enough that, reading the tenth purpose of the testator's settlement by itself, Robert Cordiner took no right of fee *a morte testatoris*. But the effect of the codicil dated 9th October 1890 must of course be considered. It was pressed upon us by the pursuer's council that the settlement and the codicil must be read together. I agree with this contention, in so far as it means that the Court must always consider all the subsisting testamentary writings of a testator, and endeavour upon such consideration to arrive at his matured intention. But in this endeavour the Court must, I apprehend, have regard to the sequence, the dates, and the purposes of the various instruments by which the testator has expressed his testamentary intentions. So viewing the matter, and agreeing, as I do, with the construction put upon the codicil by my brother Lord Ardwall, I think we must hold that the Lord Ordinary was right in deciding that Robert Cordiner had not at his death any vested right of fee in the residue of the truster's estate. I further agree in thinking that we ought to sustain the second plea-in-law for the tutor *ad litem* rather than his first plea, which was sustained by the Lord Ordinary, because it is enough for us simply to negative the conclusions of the summons without in any way prejudicing any other questions which may possibly arise in the future.

The LORD JUSTICE-CLERK concurred.

LORD LOW was absent.

The Court recalled the Lord Ordinary's interlocutor in so far as it sustained the first plea-in-law for J. W. More, tutor *ad litem* to Robert Grote Cordiner and Hugo Grote Cordiner, and in lieu thereof sustained his second plea-in-law, and *quoad ultra* affirmed the said interlocutor.

Counsel for Pursuer—Graham Stewart, K.C.—A. R. Brown. Agents—Alexander Morison & Company, W.S.

Counsel for Defender Alexander Duffus (William Fraser Cordiner's Judicial Factor)—Lord Kinross. Agents—Ross & M'Callum, S.S.C.

Counsel for Defender John W. More (Tutor *ad litem* to Robert and Hugo Cordiner)—Chisholm, K.C.—Dykes. Agents—Ross & M'Callum, S.S.C.

Counsel for Robert Gray (Mrs W. F. Cordiner's *curator bonis*)—Lippe. Agent—James Gibson, S.S.C.

Thursday, January 20.

FIRST DIVISION.

LEITH PARISH COUNCIL *v.* ABERDEEN CITY PARISH COUNCIL.

Poor—Settlement—Derivative Settlement—Deserted Children—Father Sent to Penal Servitude—Loss of Settlement by Father.

M.'s pupil children became destitute, receiving relief in the parish of L. through M., their father, being sentenced to penal servitude. At the time of their desertion the children had a settlement in the parish of A. derived from M. The parish of A. admitted liability till the expiry of three years from the date of M.'s having left that parish, when it repudiated liability on the ground that M. had lost his settlement there, and that the settlement of the children, which was derived from him, had lapsed also.

Held that the children were paupers in their own right; that their settlement could not change during chargeability; and that the parish of A. therefore remained liable for their support.

Beattie v. *Adamson*, November 23, 1866, 5 Macph. 47, 3 S.L.R. 44, *applied.*

Milne v. *Henderson and Smith*, December 3, 1879, 7 R. 317, 17 S.L.R. 197, *disapproved.*

On 15th July 1909 the Parish Council of the Parish of Leith (*first parties*) and the Parish Council of the City Parish of Aberdeen (*second parties*) brought a Special Case for the determination of questions regarding the liability to maintain the pupil children of William Mitchell, then a prisoner in the prison at Peterhead.

The *facts* as stated by the Lord President in his opinion (*infra*) were as follows:—"William Mitchell, who was not by birth