might, if they pleased, have excluded, by common consent, this custom from the novel mode of fishing which they introduced, or have substituted some other rule for it within the Inlet; and an endeavour seems to have been made to regulate their rights by an agreement confined to that part of the seas. This having failed, and it being admitted, that there is no local usage to take the place of the general custom, there seems to me to be nothing in the character of the Cumberland Inlet, or in the peculiar nature of drog fishing, which is necessarily incompatible with the prevalence of the custom within those limits, and that it must therefore attach upon the fishery operations carried on there in the same manner as throughout the whole fisheries in the rest of the north seas. For these reasons I think, that the interlocutor ought to be reversed.

LORD KINGSDOWN.—I agree with the noble and learned Lords who have addressed your Lordships, that the interlocutor complained of should be reversed. I think it due to the Lord Ordinary to state, that the real question to be decided, and the true grounds of the decision, are stated by him with perfect clearness and accuracy in his very able note appended to the interlocutor which he pronounced.

LORD CHANCELLOR.—I shall move your Lordships to reverse the interlocutor of the Inner House, and to affirm that of the Lord Ordinary, and to remit the case back to the Court of Session with a direction to dismiss the reclaiming note of the pursuer, with expenses.

Interlocutor reversed.

Appellants' Agents, Deans and Stein, Solicitors, Westminster. — *Respondents' Agents*, Johnston, Farquhar, and Leech, Solicitors, London.

FEBRUARY 14, 1862.

Mrs. ISABELLA YOUNG or RICHARDSON and Mrs. YOUNG or THOMSON (and Husbands), *Appellants, v.* LAURENCE ROBERTSON and Others (Donaldson's Trustees), Lieut. Colonel JOHN MACDOUGALL, Mrs. MARY ANN TRONSON or YOUNG, and JOHN LAWFORD YOUNG (and Tutor), *Respondents.*

JOHN LAWFORD YOUNG (and Tutor), *Appellant, v.* Mrs. YOUNG or RICHARDSON and Mrs. YOUNG or THOMSON (and Husbands), Lieut. Colonel JOHN MACDOUGALL, and THOMAS TRONSON YOUNG, *Respondents.*

Legacy—Vesting—Conditional Institution—Trust Settlement—Clause of Survivorship—Construction—*A testator who, by his trust settlement, provided his wife in a liferent of the whole of his estate, heritable, and moveable, directed his trustees, as to the residue, "to divide, or convey" "the whole residue," "after the death of the last liver of me and my said wife, equally, to and among" several grandnephews and grandnieces, "equally, or share and share alike, and to their respective heirs or assignees, declaring that, if any of the said residuary legatees shall die without leaving lawful issue before his or her share vest in the party or parties so deceasing, the same shall belong to, and be divided equally, or share and share alike, among the survivors of my said grandnephews and grandnieces, equally." The wife and all the residuary legatees survived the testator except two of the legatees, A and B, who predeceased the wife, A leaving no issue, while B left a son.*

HELD (reversing judgment), (1.) *That the period of vesting was the period of distribution on the death of the wife, and that a legatee dying during the lifetime of the wife without leaving lawful issue, as A did, could take no part or share of the residue;* (2.) *That B's son was a conditional institute, and so took the share that would have belonged to his father B, had he survived the period of vesting; and* (3.) *That the share of A was divisible among such of the residuary legatees as were alive at the death of the liferentrix or period of distribution, and that B's son was excluded from participating in that share.*

Where there is a clause of survivorship, then primâ facie *survivorship means the time at which the property to be divided comes into enjoyment, that is to say, if there be no previous life estate, then at the death of the testator; but, if there be a previous life estate, then at the termination of that life estate:* Per LORD CRANWORTH.

---

[1] See previous reports 22 D. 1527 : 32 Sc. Jur. 684. S. C. 4 Macq. Ap. 314, 337 : 34 Sc. Jur. 270.

James Donaldson, merchant in Glasgow, who died on 15th March 1844, left a trust disposition and settlement, (dated 30 March 1841,) the purposes of which were:—"*Fifthly*, I will and direct the said trustees or trustee to account for, pay, and divide, or convey (under the exception of so much (if any) of the foresaid two thousand pounds, as may be tested upon by my said wife in manner foresaid) the whole residue and remainder of my property, subjects, means, and estate, heritable and moveable, real and personal, or proceeds thereof, after the death of the last liver of me and my said wife, equally to and among John Macdougall, Lieutenant in the Honourable East India Company's service at Madras, William Macdougall, indigo planter at or near Calcutta, sons of my late niece, Mrs. Katharine Donaldson or Macdougall, Young, or Thomson, wife of Dr. Thomson, physician in Perth, Young or Richardson, wife of Dr. Richardson, physician or surgeon in the Honourable East India Company's service in Bengal, and Eliza Young, lately residing in Perth, now wife of Allan Cuthbertson, accountant in Glasgow, all children of the late Mrs. Elizabeth Donaldson, or Young, equally, or share and share alike, and to their respective heirs or assignees; declaring, that if any of said residuary legatees shall die without leaving lawful issue before his or her share vest in the party or parties so deceasing, the same shall belong to, and be divided equally, or share and share alike, among the survivors of my said grandnephews and grandnieces equally."

The testator, besides, left three codicils, the first of which contained the following provision: —"And further, I do hereby name and appoint my grandnephew, Thomas Young, officer in the Bengal Native Infantry, to be one of my residuary legatees, and as such entitled to an equal and eventual share, with any of the residuary legatees within named, of the whole free residue or remainder of my property, means, and estate, or proceeds thereof, which share I here leave and bequeath to him and his heirs and assignees, as within provided; and authorize, instruct, and appoint my said trustees and executors to account to him and his foresaids accordingly."

By the second codicil he altered some of the legacies provided in the settlement, and by the third he revoked and altered the settlement and previous codicils, "in so far only as these writings, or any of them, authorize and appoint the distribution or payment of certain shares of the fee, or principal sums of the free residue of my means and estate, or proceeds thereof, to be accounted for and paid to all or any of my three grandnieces therein named, it being my will and intention to restrict the provisions or bequests, in favour of such of them as shall decease without issue, to a liferent; and therefore hereby authorize, will, and appoint, my said trustees and executors, and survivors or survivor of them, to pay the share or shares bequeathed to my said grandnieces, in or by the foresaid deed of settlement, to them and their respective husbands, only in liferent, for their, her, or his liferent use allenarly, and the fee of such shares to the lawful issue of my said grandnieces equally; whom failing, to the survivors of them and my grandnephews, also named in the foregoing settlement or codicils, equally in liferent, and their issue also equally in fee, after the death of the longest liver of me and my wife."

The residuary legatees, John and William Macdougall, Mrs. Thomson, Mrs. Richardson, Mrs. Cuthbertson, and Thomas Young, all survived the testator.

Mrs. Cuthbertson died on 24th November 1845, William Macdougall died on 2d September 1847, and Thomas Young died in India on 22d March 1852, all predeceasing the liferentrix, the widow of the truster, who died on the 3d December 1857.

The trustees brought a multiplepoinding in order to ascertain who were entitled to the two sixth shares of the residue left to William Macdougall and Thomas Young.

Thomas Young left one child, John Lawford Young, and a will, by which he bequeathed his whole property to his wife, and nominated her his executrix.

William Macdougall, who died without issue, left a will, in which he nominated John Macdougall (himself one of the six residuary legatees under James Donaldson's settlement) his residuary legatee. John Macdougall was also his only next of kin and heir at law, and he was the assignee of John Campton Abbott, the executor nominate of William Macdougall.

The claimants on the fund *in medio* were—

I. John Lawford Young, with consent of his tutor *ad litem*, who claimed (1) the one sixth of the residue, viz. the sum which would have been payable to his father had he survived the liferentrix, and (2) one fifth of the remaining sixth of the residue which had been destined to William Macdougall, with interest since the death of the liferentrix.

II. Dr. and Mrs. Richardson, Dr. and Mrs. Thomson, and Mr. Cuthbertson, claimed as follows:—1. That Mrs. and Dr. Richardson should be found entitled to a successive liferent of one fourth part of the fund *in medio*. 2. That Mrs. Thomson and Dr. Thomson should be found entitled to a successive liferent of one fourth part of the fund *in medio*. 3. That Mr. Cuthbertson should be found entitled to a liferent of one fourth part of the fund *in medio*. 4. That the trustees should retain in their hands, along with the other trust funds, the said three fourth parts of the fund *in medio* so long as the said liferents subsisted, to be thereafter disposed of along with the other portion of the trust estate subject to the claimant's liferent, in terms of the codicil above mentioned, dated 19th February 1844.

III. Mrs. Mary Tronson or Young (widow of Thomas Young) claimed under his testament

the one sixth of the residue, (one half of the fund,) the sum which would have been payable to her husband had he survived the liferentrix, with interest from the death of the liferentrix.

IV. Lieut. Colonel John Macdougall claimed alternatively (1) one sixth share of the residue, (one half of the fund,) as representative of his brother William Macdougall; or (2) in the event of it being held, that the share of the residue provided to William Macdougall had not vested in him at the death of the testator, one fourth of the fund *in medio*, *i. e.* one fourth of the sixth of the residue provided for Thomas, and one fourth of the sixth of the residue provided for William Macdougall.

John Lawford Young and his tutor *ad litem* pleaded—1. The respective shares of the residue did not vest in the legatees until the death of the liferentrix. 2. The claimant, as sole surviving child of his father Thomas Young, was entitled to take the share of the residue bequeathed to his father by the codicil of 22d March 1843. 3. William Macdougall having predeceased the period of vesting without issue, the share of the residue bequeathed to him was divisible amongst the other residuary legatees, or the parties entitled to take in their room; and the claimant, as coming in place of his father, Thomas Young, was entitled to one fifth part of this share of the residue.

Dr. and Mrs. Richardson, Dr. and Mrs. Thomson, and Mr. Cuthbertson, pleaded, that no part of the succession vested till after the death of his widow, and three fourth parts of the fund *in medio* were subject to the liferent of the claimants in terms of the claim, and ought to be disposed of in terms of the codicil dated 19th February 1844.

Mrs. Tronson or Young pleaded, that—1. One sixth of the residue of the testator's estate vested in the claimant's husband, Thomas Young, *a morte testatoris*, and the claimant, as coming in his right, was entitled to his one sixth, viz. to one of the two shares which constituted the fund *in medio*, with interest. 2. The testator's husband having been, at the date of his death, domiciled in India, she was entitled under his will to the whole of his estate.

Colonel Macdougall pleaded, that—1. One sixth part of the trust estate vested in William Macdougall *a morte testatoris*, and the claimant being in right thereof, was entitled to be ranked and preferred in terms of the first alternative of his claim. 2. In the event of it being held, that the share of the residue did not vest *a morte testatoris*, the claimant was at all events entitled to be ranked and preferred in terms of the second alternative of his claim.

The Lord Ordinary (Kinloch), pronounced the following interlocutor:—"15*th February* 1859.—Finds that, under the trust settlement of the deceased James Donaldson, and codicils thereto, the right to the residue of his estate given to his six grandnephews and grandnieces therein named, did not vest in the said grandnephews and grandnieces till the death of the liferentrix, Mrs. Donaldson: Finds accordingly, that the one sixth of the said residue given to Thomas Young and William Macdougall respectively, did not vest in the said Thomas Young and William Macdougall, these having both predeceased the said liferentrix, and that the same is now claimable by their executors or disponees: Finds, with regard to the one sixth share given to the said Thomas Young, that the same belongs to John Lawford Young, his only child, as conditional institute therein: Finds, with regard to the one sixth share given to the said William Macdougall, that the same devolved on such of the said grandnephews and grandnieces as survived the said liferentrix equally amongst them, but that no right therein passed to the children of any of the said grandnephews or grandnieces who predeceased the liferentrix: Finds, that the share of the said one sixth devolving on grandnieces belongs, under the codicil of date the 19th day of February 1844, to the said grandnieces and their husbands in liferent, for their successive liferent use, but that no right therein belongs to the husband of any grandniece who predeceased the liferentrix; and appoints the cause to be enrolled in order to the application of these findings."

On reclaiming note, the Second Division of the Court pronounced the following interlocutor:—"20*th July* 1860.—The Lords having resumed consideration of this case, with the opinions of the consulted Judges, in respect of the said opinions—Recall the Lord Ordinary's interlocutor, and rank and prefer the claimant, Mrs. Mary Ann Tronson or Young, to one half of the fund *in medio*, and the claimant, Lieutenant Colonel John Macdougall, to the other half of the said fund; and decern."

Mrs. Thomson and Mrs. Richardson appealed, maintaining in their *case*, that the interlocutor of the Court of Session should be reversed:—1. On a sound construction of the trust deed and codicil, the shares of the residue did not vest *a morte testatoris*, but only after the death of the truster's widow. 2. In the clause by which the residue was bequeathed, the truster specially referred to the term of vesting, and declared, that the share of any legatee predeceasing that term should belong to the survivors, and because the term of vesting thus specially referred to, not being stated to be the truster's death, must be presumed to be some other term. 3. The period to which the truster referred throughout the trust deed and codicils for the distribution of his estate, and as the event on which his succession should open, was the death of the longest liver of himself and his wife.

Colonel Macdougall and Mrs. Tronson or Young, in their case, supported the judgment on the following grounds:—1. By the law of Scotland, where a legacy, whether special or residuary, is

directed by a testator to be paid to one individual on the death of another, it is held to vest *statim a morte testatoris*, unless it can be clearly shewn, that it was the intention of the testator, that the legacy should not so vest. 2. In this case, the intention of the testator in postponing the payment of the legacies, special as well as residuary, was solely for the purpose of securing to his widow the liferent of the whole trust estate, and it was not necessary for such purpose, that the vesting of the legacies should be postponed. 3. It was not to be presumed, that the testator intended to postpone the vesting of the residuary legacies—(1) Because the legacies were left to his grandnephews and grandnieces *nominatim*, and not as a class; (2) Because they were made payable on an event certain to arrive, viz. the death of the longest liver of himself and his wife; and (3) Because they were made payable to and among the residuary legatees, "and their respective heirs and assignees." 4. The legacies to the testator's grandnephews and grandnieces being directed to be paid to them equally, or share and share alike, "and to their respective heirs and assignees," the respondent, Colonel Macdougall, as the heir and assignee of William Macdougall, and the respondent, Mrs. Young, as the assignee of William Young, were entitled *in terminis* of the trust deed and codicils to demand payment of the legacies left to William Macdougall and Thomas Young respectively. 5. The share of a deceasing residuary legatee being directed to be divided among the surviving residuary legatees only in the event of such deceasing residuary legatee dying, without leaving lawful issue, "before his or her share vest in the party or parties so deceasing," and that event not having occurred, but William Macdougall having survived the period of vesting, viz., the death of the testator, the appellants had no right to the share bequeathed to him.—*Wallace* v. *Wallace*, 28th January 1807, Dic. *voce* Clause, Ap. No. 6; *Smith* v. *Lauder*, 12 S. 646; *Maxwell* v. *Wylie*, 15 S. 1005; *Kilgour* v. *Kilgour*, 7 D. 451; *Stirling* v. *Baird's Trustees*, 14 D. 20; *Cochrane* v. *Cochrane's Executors*, 17 D. 103; *Marchbanks* v. *Brockie*, 14 S. 521; *Forbes* v. *Luckie*, 16 D. 374; *Roxburgh Case*, 6 W. S. Appx. p. 52.

John Lawford Young also appealed, maintaining in his case, that the above judgment should be reversed, for the following reasons:—1. The right of the residuary legatees to their respective shares of the residue depended entirely upon the direction given by the testator to his trustees to pay the said shares, after the death of the last liver of the testator and his wife. 2. The trust deed contained nothing indicating an intention on the part of the testator, that the shares of the residue, or any of the bequests in the deed, should vest in the legatees before the term of payment; and because it was expressly declared in the deed, that if any of the residuary legatees should die before his or her share vested, the share of such legatee should belong to, and be divided among, the survivors of the legatees, failing issue of the legatee so dying. 3. By the expression, the "survivors of my said grandnephews and grandnieces," the testator, on a sound construction, must be understood to have intended the survivors of the only term specified in the bequest of the residue, viz. the term of payment of the several shares of the same, after the death of the last liver of the testator and his wife. 4. The conditional institution of the surviving legatees being to take effect only in the event of failure of issue of any legatee predeceasing the term of payment, the appellant, as the only child of Thomas Young, was entitled to the share bequeathed to Thomas Young, to the exclusion of the surviving legatees.

He also appealed against the interlocutor of the Lord Ordinary, (in reference to the share of William Macdougall, supposing it not to have vested,) that so much of the Lord Ordinary's interlocutor of 15th February 1859 as related to this question should be reversed, and that the claim of the appellant to participate in the share of William Macdougall should be sustained, for the following reason:—Because, although the share of a legatee predeceasing the term of payment without issue was given to the legatees surviving that term, it must be held, on a sound construction of the clause, to have been the intention of the testator, that the child or children of any predeceasing legatee should succeed to the full right of his or their parents, and should be entitled to share, equally with the surviving legatees, in the distribution of any share bequeathed to a legatee who died without issue.—*Roughead* v. *Rannie*, M. 6403; *Earl of Lauderdale* v. *Royle*, 8 S. 771.

Colonel Macdougall and Mrs. Tronson or Young, in reference to the appeal for John Lawford Young, maintained (in their case), that the interlocutor of the Lord Ordinary was well founded—1. Because the share of a residuary legatee predeceasing the period of vesting, without leaving lawful issue, was specially directed to be divided equally among the survivors of the testator's grandnephews and grandnieces. The respondent is a surviving grandnephew, whereas the appellant, John Lawford Young, is not a grandnephew, but a great grandnephew. 2. Because the effect of the condition *si sine liberis decesserit* was merely to give the parent's original share to his children, but it did not give to the children the rights of survivorship which would have belonged to the parent had he survived.—*Thornhill* v. *Macpherson*, 3 D. 394.

Mrs. Thomson and Mrs. Richardson maintained, in their case, that John Lawford Young should be excluded from all right to participate in the share of William Macdougall—1. Because the share of any deceaser dying without issue was, by the direction of the trust deed and codicil, only divisible among the surviving grandnephews and grandnieces, to the exclusion of the issue

of deceased grandnephews and grandnieces. 2. Because the condition *si sine liberis decesserit* did not apply to the case.

In regard to the appeal for *Mrs. Richardson and Mrs. Young*—

Rolt Q.C., *Anderson* Q.C., *Mure*, and *Cotton*, for the appellants, maintained—The general rule is well settled in England, that where a legacy or fund is given by will to a class, and to the survivors, without specifying at what date the survivorship is to be calculated, that means *primâ facie* the date of the distribution of the fund, whether the distribution is at the death of the testator, or tenant for life—*Cripps* v. *Woolcot*, 4 Mad. 11; *Wordsworth* v. *Wood*, 1 H. L. Cases, 129; *Sillick* v. *Booth*, 1 Y. & C. 117, 739; 2 Jarman on Wills, 684. The same rule exists in Scotland, and was established in Scotland before it was settled in England—Bell's Prin. § 1878; *Casamajor* v. *Pearson*, 1 M'L. & Rob. 685; *Clelland* v. *Gray*, 1 D. 1031; *Newton* v. *Thompson*, 11 D. 452.

It is, however, entirely a question of construction of the will or settlement, whether the period of vesting is the death of the testator, or of the liferentrix. There is nothing in the terms of this settlement to exclude the *primâ facie* rule, that the word "survivors" is to be referred to the death of the liferentrix. It is only after the death of the longest liver, that the trustees are bound to account for and convey the residue. There is only one term referred to throughout, thereby shewing, that the terms of vesting and of payment are one and the same. The words "and to their respective heirs or assignees" are not inconsistent with the period of vesting being the death of the liferentrix, for in the event of all the legatees dying before the death of the liferentrix, those words would carry the legacy to the heirs, which is the only contingency in which the words would operate, but in the event which happened, they are surplusage. The words "before his or her share vest" obviously mean "before the share vests in possession," such being the primary and natural meaning of the words.

The following cases were referred to:—*Wood* v. *Cope*, 12 D. 855; *Boyle* v. *Lord Glasgow's Trustees*, 20 D. 925; *Walker* v. *Park*, 21 D. 286; *Provan* v. *Provan*, 2 D. 298; *Thomson* v. *Scougall*, 2 Sh. & M'L. 305.

The *Solicitor General* (Palmer), and *Sir H. Cairns* Q.C., for the respondents, referred to the cases cited on the other side, and to *Clark* v. *Patterson*, 14 D. 141; Menz. Conv. 475; *Dunlop* v. *Crawford*, 2 June 1812, F.C.

Lord Chancellor Westbury.—This case has been argued at your Lordships' bar in a very elaborate and able manner, and the great attention and time which have been given to it, although such may appear somewhat large when compared with the difficulty of the question, is no more than what is due to the care and attention with which the case was viewed in the Court below, and the difference of opinion that was there entertained.

I think, upon a matter of this kind, it is desirable, if possible, to consider, in the first place, what are the reasonable, and I may say the established, rules of construction; and in speaking of what I regard to be the established rules of construction, I refer to the jurisprudence of both England and Scotland. Although we are here to construe this settlement entirely with reference to Scotch rules, yet it is desirable no doubt to ascertain, that, in the construction of ordinary words in the English language, there is no difference between the view which is taken of them in the one country and the other. Now, I apprehend it to be a settled rule of construction, and in itself a very reasonable and natural rule, that words of survivorship occurring in a settlement (that is, in a will) should be referred to the period appointed by that settlement for the payment or distribution of the subject matter of the gift. That undoubtedly is the rule, that is now finally established in this country, and I apprehend, that it has been ascertained from the authorities which have been cited at the bar, that that rule was established in Scotland in fact even before it was finally recognized and settled in this country. Now, here the application of that rule could lead to this determination in two sets of events. If a testator gives a sum of money, or the residue of his estate, to be paid or distributed among a number of persons, and refers to the contingency of any one or more of them dying, and then gives the estate or the money to the survivor—in that simple form of gift where the gift is to take effect immediately on the death of the testator, the period of distribution is the period of death. Accordingly, the event of the death, upon which that contingency is to take place, is necessarily to be referred to the interval of time between the date of the will and the death of the testator. In such a case, then, the words are construed to provide for the event of the death of any one of the legatees during the lifetime of the testator. By parity of reasoning, or rather as a necessary consequence of the same principle, if a testator gives a life estate in a sum of money, or in the residue of his estate, and at the expiration of that life estate directs the money to be paid or the residue to be divided among a number of objects, and there refers to the possibility of some one or more of those persons dying, without specifying the time, and directs, in that event, the payment to be made, or the distribution to be made among the survivors, it is understood and regarded by the law, that he means the contingency to extend over the whole period of time that must elapse before the payment is made or the distribution takes place. The result, therefore, is, that, in the event of

such a gift, the survivors are to be ascertained in like manner by a reference to the period of payment or of distribution, viz. the expiration of the life estate.

Now these are, as I have already observed, in my judgment natural and reasonable rules of interpretation. Let us now apply them generally, in the first place, to the construction of the settlement that we have before us, and then consider whether there are any particular words to be found in that settlement which of necessity compel us to depart from this natural rule of interpretation, and to adopt another and different mode of construction.

The testator or truster of this particular settlement has directed the residue of his estate to be applied, in the first place, for the benefit of his widow during her lifetime, provided that she survived himself, and at the expiration of that interest, whether it was prevented by the wife predeceasing the testator, or whether she survived the testator and afterwards died—on that event happening, he directs, in the first place, certain legacies to be paid, and then he directs his trustees "to account for, pay, and divide, or convey" "the whole residue and remainder of my property, after the death of the last liver of me and my said wife, equally" among certain persons who are named, "equally, or share and share alike, and to their respective heirs or assignees." Then follow the words of the clause of survivorship, "declaring that if any of the said residuary legatees shall die without leaving lawful issue before his or her share vest in the party or parties so deceasing, the same shall belong to, and be divided equally, or share and share alike, among the survivors of my said grandnephews and grandnieces equally."

I apprehend that, on the first consideration of the words that I have read, no one could arrive at any other conclusion than this, that the clause which commences with the word "before" is nothing more than an expression *in extenso* of that which is involved in point of fact in the expression of the word "survivors." It declares fully the contingency on which the survivors are to become entitled. But here legal ingenuity comes in and detects in some of the words employed a more recondite sense and a different meaning from that which would at first strike the mind, and particularly a mind previously imbued with a knowledge of the general principles of interpretation. Legal ingenuity suggests, that the word "vest" admits of a double meaning, or rather, that the word "vest" is a word of art, and therefore ought here to receive a technical and legal meaning, and the interpretation accordingly which is contended for is this, that these words, "before his or her share vest," must be intended to mean, and taken to be, a conclusion of law with regard to the right or interest of the individuals named as the residuary legatees, and that, if that conclusion of law takes place immediately on the death of the truster, then it must of necessity follow, that no subsequent decease without issue, after that legal rule has come into operation, can have the effect of carrying over the share of any one of the parties named to the survivors living at a subsequent time. In reality, therefore, the discussion is reduced to a very short and narrow point or question—namely, the meaning of the word "vest."

The respondents contend, that the word "vest" must be taken to mean "become absolute." Well, let us adopt that construction, and, substituting those words for the word "vest," the words then will come to signify "before his or her share becomes absolute." Well, but that is a form of expression and of language which grammatically and strictly conveys no meaning, unless you take the word "share" in a different sense from that which obviously and naturally belongs to it. If you take the word "share" in that sense which logicians call the abstract sense, in opposition to its ordinary meaning in the concrete form, then the words will be found, according to the respondents, in reality to run thus, "before the right to his or her share becomes absolute." The whole of the argument that we have heard from the respondents resolves itself in reality into this, that you are to depart from the meaning, that you would give to the rest of the sentence, and you are to abandon the ordinary conclusion which the collocation of the whole sentence would naturally suggest in order to arrive at a different meaning and a different conclusion—adopting the legal, technical, and artificial sense of these words, instead of giving them their natural and ordinary meaning. Therefore it is, that the respondents would have us, in point of fact, interpret the words in such a sense as would in reality require us to substitute other words for those which really occur, and we should, by our interpretation, make the language in effect speak as if it had originally been "before the right to his or her share become absolute in the party or parties so deceasing." Now, the whole of this contention is nothing more than an involved and legal ingenuity; it is the result of knowledge of the law, and of legal refinements applied to the interpretation of plain and simple language.

The appellants, on the other hand, say, that these words, "before his or her share vests," are of necessity relative or referential words—that they describe something, that he who used them considered to have been previously directed, and to be ascertainable from the antecedent part of his bequest or his directions. And they accordingly contend, that the words are to be read thus: "before his or her share comes into possession"—before his or her share is received, or comes to the hands of the party or parties so deceasing.

The first inquiry, therefore, that I make as to these two interpretations is, Which of them is most consonant to and most in accordance with the antecedent part of this settlement, to which,

of necessity, there is a reference here? Now, the antecedent part of this settlement is that which constitutes the gift, and the gift consists in a direction, on the death of the liferentrix, to pay and divide, or convey the property to those residuary legatees; and I cannot but think, that any man of plain understanding of language, and whose mind is divested of legal ideas, and is not wedded to a vocabulary of legal terms, would have had no difficulty whatever in arriving at the conclusion, that the words "before his or her share vests" of necessity mean before that which has been previously directed happens. That which has been previously directed has been payment on the death of the widow. The natural meaning of the words, therefore, is, before that period of payment arrives, or before that payment has actually been made. This I apprehend to be the natural, plain, and ordinary meaning of the words. And your Lordships will observe, that the word "share" is there taken according to its natural sense, namely, as meaning a portion of the residue. The word "vested" is taken in accordance also with its natural meaning, the vocabulary of ordinary life, namely, when a thing is received or comes into possession.

I therefore consider, that these particular words introduced into the clause do not give to it any different meaning from that which in reality it would have had in legal interpretation without those words; for it is perfectly clear, that if the words had run, "if any of the residuary legatees shall die without leaving lawful issue, the same shall belong to the survivor," the word "survivor" would have been referred to the period of distribution, the period of payment—that is, the expiration of the previous liferent.

But then, if that is distinctly involved in the expression, these particular words are nothing more than an expression of that which is so involved, and they are to be construed in a manner consistent with, and consonant to, the rest of the sentence; whereas, if you give them the interpretation for which the respondents contend, then of necessity you strip the word "survivor" of that meaning which it would have had without those particular words. And the expression, "if any of the residuary legatees shall die," (which is in general form, and has no time annexed to it,) you limit to the event of their dying during the lifetime of the testator.

On the particular words themselves, therefore, without the general indication of intention afforded by the rest of the sentence in immediate collocation, I should undoubtedly have been prepared to advise your Lordships to come to a different conclusion from that which has been arrived at by the majority of the Judges in the Court below; but I think this conclusion is still further confirmed by that which is the best of all possible confirmations, namely, the general intention which is to be collected from the whole collocation and arrangement of the substance.

The natural order of things which is indicated is this, that at the death of the liferentrix the duty of the trustees in the matter of division arises. They are then to convene and call together the persons who are to be entitled to share, but the words in question, namely, the clause beginning with the word "declaring," are part of the words which are descriptive of the objects to take, and the trustees therefore are called upon, at the time of distribution, to ascertain what those words mean, and to give effect to them. But as they are words of futurity, the contingency that is contained in those words, is, I apprehend, by natural consequence a contingency of futurity that must be held to cover the whole period of time when the trustees are called upon to determine who are entitled under these words. They are to ascertain the objects at the death of the liferentrix, and they are then to give a meaning to these particular words.

That is the conclusion which is suggested by the primary, and natural, and ordinary meaning of the words, and which you arrive at without substituting the secondary and artificial meaning of the words for their primary, natural, and ordinary meaning, which I hold in all cases it is the duty of a court of construction not to do; for the primary duty of a court of construction in the interpretation of wills is to give to each word employed, if it can with propriety receive it, the natural and ordinary meaning, and not any artificial, secondary, and technical meaning. If that is the conclusion which is arrived at upon these two modes of viewing the settlement, I will detain your Lordships for a few minutes by an examination of the reasons or grounds of decision which are to be found in the opinions of the majority of the Judges in the Court below.

In calling your attention first to the opinion signed by six of the Judges in the Court below, your Lordships will find, that the principal argument put forward by the learned Judges for the opposite conclusion to that which I have suggested to your Lordships is founded upon the use of the words "their respective heirs or assignees."

I have very great difficulty in dealing with this particular reason of the decision, and I am happy to find, that the difficulty which I had myself experienced has been ingenuously and candidly confessed by the Lord Justice Clerk, who, in commenting upon this portion of the reported judgment, says, that he was perfectly puzzled how to understand it, or what meaning it was intended to convey. I apprehend, however, that no conclusion to the contrary can be derived from the use of these words, "their respective heirs or assignees," which are found in connexion with the first part of the gift to the residuary legatees. I do not quite arrive at the conclusion of one of the Judges, that those words are mere surplusage. I think it has been shewn in the argument, that events might have occurred in which each of these words would have received an appropriate signification. If, for example, all the residuary legatees had died without leaving

issue in the lifetime of the testator himself, the practical result then of those words would have been to have prevented the lapse of the legacies. That might have been the effect of the word "heirs." If, on the contrary, the other interpretation, namely, the interpretation which I have suggested to your Lordships, be adopted, then, under the words "heirs or assignees," the assignees would take, in the event of any one of the residuary legatees having made an assignment during the life of the liferentrix. If the residuary legatee became entitled, the assignee would have become entitled to the share at the expiration of the life estate, that is, at the period of distribution. These words, therefore, do not in the smallest degree interfere with the construction which I have recommended your Lordships to put upon the words of the conditional institution "before his or her share vests." And, on the other hand, it cannot be objected to that construction, that it reduces those particular words to mere surplusage, for it leaves the words as words which might by possibility have had an operation in certain events which might have occurred.

Passing from that reason of decision, I come in the next place to that which is given by the consulted Judges, Lord Ivory and Lord Deas, whose interpretation, which certainly leads to a result different from that which I have recommended your Lordships to adopt, is founded altogether upon the language of the codicil by which the grandnephew, Thomas Young, was added to the number of the residuary legatees. Now, I must say, I am unable to appreciate the force of the argument derived from that codicil. For, if anything be plain, it seems to be plain, that it was the meaning and intent of that codicil to put Thomas Young in precisely the same condition in which the other residuary legatees were originally put by the settlement. Thomas Young is as it were grafted into the original settlement, as if he had been one of the original residuary legatees named in the settlement. What possible effect it could have had upon the construction of the settlement supposing there had been six residuary legatees originally named therein, (that is, including Thomas Young,) instead of there being a smaller number named therein, it is very difficult to understand.

The last of the opinions of the learned Judges who entertained a different opinion from that at which we have arrived, and which opinions we have felt it our duty, out of respect to them, carefully to consider, is that of Lord Benholme; but Lord Benholme's opinion is founded upon grounds which utterly reject out of the settlement the whole clause which gives the conditional institution. Lord Benholme's opinion is founded altogether upon this description of reasoning: He first applies himself to the consideration of the gift of pecuniary legacies. He holds, that the pecuniary legacies vested immediately on the death of the testator, and that their payment only is postponed. And then his Lordship's judgment is founded upon this question, which he asks, namely, If this be so, shall the vesting of the residue be held to be delayed merely because the period of payment in regard to it also is postponed till the lapse of the liferent? Now, there is no clause of survivorship given with regard to these legacies, but there is a clause of survivorship with regard to the residue. Therefore, to treat the settlement in the manner in which Lord Benholme deals with it, is, in point of fact, to exclude altogether the consideration of the clause upon which the whole argument depends.

I will direct your attention, in conclusion, to the very just and appropriate expressions which are found in the judgment of the Lord Justice Clerk, in whose opinion, upon the effect of this settlement, I must express my general concurrence. The Lord Justice Clerk very convincingly makes this remark with regard to the construction of the clause of survivorship: He says, "The testator did not mean the time which by a process of legal argument and ingenious construction might be discovered to be the term of vesting,—he meant some specific time fixed in his own mind, and known to himself; and when he thus speaks of the time of vesting as a specific time fixed by the operation of the deed, and when we can find mention in the deed of no term but one, it seems reasonable to conclude, that that was the term to which the testator referred when he spoke of the time of vesting." He referred to a fact, and not to a conclusion of law; he referred to an operation which he had performed—not to a period of time that might be attained to by a process of legal argument on the effect in law, with regard to the absoluteness or the contingency of the interest which he had given, derived from the words contained in the settlement.

Upon the whole, therefore, I shall advise your Lordships to declare, that, according to the true construction of the trust deed of Mr. Donaldson, no one of the residuary legatees dying in the lifetime of the liferentrix, without leaving lawful issue, takes any part or share in the residuary estate. My Lords, I think it would be impossible upon this occasion to define the whole of the order that ought to be made by your Lordships, for the two appeals are so mingled together, that it would be desirable that there should be one order in both appeals. But so far as this particular appeal is concerned, I should humbly advise your Lordships to adopt that declaration, and make an order to reverse so much of the interlocutor complained of upon this appeal, as shall be found to be inconsistent with that declaration.

LORD CRANWORTH.—My Lords, in the argument of this case below in the Court of Session, so very much of learned acumen was displayed, and that argument took so long a time, that,

probably, in ordinary cases, your Lordships would have thought it more respectful, at least in appearance, to the Judges below, that we should have taken a longer time to consider our judgment, concurring as we do with the minority, and not with the majority of those learned Judges. That would have been the ordinary course that we should have pursued. But my noble and learned friend on the woolsack, and my noble and learned friend on my left, and myself, having found, on conferring together, that we all concurred in the same view of this case, we thought, that, considering the length of time which had been occupied in the argument, and the opportunity which the intermediate days occurring in the midst of the argument had given us of considering its bearings, as it would be much more convenient to the parties that we should proceed now, we thought, that the learned Judges of the Court of Session would not feel that we were guilty of any disrespect towards them in immediately delivering our judgment.

After the very elaborate manner in which my noble and learned friend the LORD CHANCELLOR has gone through this case, I do not think it necessary for me to detain your Lordships with many observations. I take it, that the rule is well established upon the authorities as well as upon principle both in Scotland and in England, that, where there is a clause of survivorship, *primâ facie* survivorship means the time at which the property to be divided comes into enjoyment, that is to say, if there be no previous life estate, at the death of the testator—if there be a previous life estate, then at the termination of that life estate. If, therefore, the language of this settlement had been simply " declaring that if any of the said residuary legatees shall die without leaving lawful issue, the same shall belong to, and be divided equally, or share and share alike, among the survivors of my said grandnephews and grandnieces"—if, I say, the clause had stood so, there would have been no doubt that the "survivors" meant the survivors at the death of the tenant for life. And the single question, although this case has occupied (and I will not say improperly occupied) a very long time in discussion, is—Whether that *primâ facie* construction is varied by the insertion of the words, "before his or her share vest in the party or parties so deceasing." Now that being the question, it is contended on the part of the respondents, that these words do materially alter the general rule by pointing out another period to which "survivorship" shall refer, namely, the vesting of the legacy.

The first observation that occurs is this, that the word "vest" is a word of at least ambiguous import. *Primâ facie*, vesting in possession is the more natural meaning. The expressions, "investiture," "clothing," and whatever else be the explanation as to the origin of the word, point *primâ facie* rather to the enjoyment than to the obtaining of a right. But I am willing to accede to the argument that was pressed at the bar, that by long usage "vesting" is ordinarily understood in contradistinction to the not having obtained anything like an absolute and indefeasible right—it is the having obtained such absolute indefeasible right. But it cannot be disputed that the word "vesting" may mean, and often does mean, that which is its primary etymological signification, namely, vesting in possession. In my opinion, that is its meaning here, " before his or her share vest in the party or parties so deceasing." In the first place, if you do not so construe it, you must understand the testator (or rather the truster) to have made a most extraordinary circumlocution to express such a very simple idea as before the time of my own death, by saying "before the time when his or her share vest in the party or parties so deceasing." It is scarcely possible to suppose, that a person making a will, or a trust deed in the nature of a will, and meaning to refer to events that might or might not have occurred before his own death, should have expressed it by such an extraordinary circumlocution as that.

Then is there anything on the face of the instrument to shew, that "vest" does not, in this case, mean that which I admit, in the view which I take of the case, would be its ordinary meaning? I think there is. What is it that the truster is here speaking of as vesting? Why, the share of the residuary legatee, that is, in point of fact, the legacy. Now although it is quite true, as was urged at the bar, that in making a will in this country, or a trust deed in Scotland, you may speak of a share or a legacy, although it is something which does not become, strictly speaking, a share or a legacy till the death of the testator, that is, you may say, I give a legacy of £1000 to A, but if a certain event happens, B shall take A's legacy, which only means that B shall take that which, if there had not been a subsequent disposition, A would have taken ; yet when I am speaking in a will or a trust deed of a share that might or might not vest, I cannot be speaking of something which can only come into existence at my own death. There can be no possibility of its vesting in the lifetime of the testator. Therefore it is clear to me, that the testator, in speaking here of the share vesting, must have alluded to something which had existence at the time to which this reference was to apply, and that it must therefore be something that was to happen after his decease. Therefore, " his or her share" would be an inaccurate expression. What ought to have been said would have been, "his or her right to the share."

That, however, would have been a refinement which I should not have felt it safe to rely upon if the rest of the context had not led me exactly to the same conclusion. Now, here there is no doubt from these words, that the survivorship would have been survivorship at the death of the tenant for life. But why? Because the law presumes, that that is the intention of the testator. Now would it not be an extraordinary construction to put upon these words, if the word "vest"

may be consistent with that which the law assumes to be the ordinary intention of the testator, that you are to put upon it a refined and technical meaning; when if you give to it its more ordinary and natural and etymological meaning, you give it a meaning which, according to your own rule of construction, is the probable intention of the testator?

Upon these short grounds I entirely concur in the judgment which has been given by my noble and learned friend, and in the view which he has taken as to the form of order which it will be proper to make.

LORD CHELMSFORD.—My Lords, my mind has fluctuated a good deal under the influence of the very able arguments which have been addressed to your Lordships, but it has at last settled in the conclusion at which my noble and learned friends have arrived. They have gone so very fully (particularly my noble and learned friend on the woolsack) into the whole question, that it will be unnecessary for me to trespass for any length of time upon your Lordships' attention in explaining the view at which I have ultimately arrived.

The question depends upon a single clause in the deed of settlement, or it may be said, upon a few words in that clause. It is a question purely of intention, and we have to gather from the language used, whether the meaning of the testator or truster was, that the share or interest in his residuary property should vest at the time of his death, or that it should not vest until the death of the liferentrix him surviving.

Now, the clause directs the trustees to account for, pay, and divide the residue and remainder of his property, after the death of the last liver of him and his wife, amongst five persons named, (a sixth being subsequently added by a codicil,) all children of Mrs. Elizabeth Donaldson or Young, equally, or share and share alike, and to their respective heirs or assignees, with a survivorship clause, upon which the whole difficulty arises.

The respondents contend, that this clause is to be broken into parts, and to be read as containing, first, an absolute gift of the residue, and then a qualification of that gift under certain circumstances; and they say, that effect is to be given, if possible, to every word in a will or testamentary deed, and, that the construction which the appellants contend for renders wholly nugatory the words "heirs and assignees."

Now, I confess I am not disposed to lay very great stress upon the use of words of this common description, which are so likely to fall from the pen of the framer of a deed without any precise or definite object, where they cannot stand together with other words in the same deed indicating a different intention. Nor am I disposed to lay great stress upon the supposition which has been made at the bar, of the event occurring of all the residuary legatees dying without issue in the lifetime of the liferentrix, and from which supposition it is endeavoured to extract the meaning of the testator. A testator must be taken to have in his mind circumstances which are likely to occur, and not improbable possibilities of that description. And whether, therefore, in that event the word "heirs" would have no effect whatever, and, therefore, there would be an intestacy; or whether, as has been suggested, it would amount to a conditional institution, it is quite immaterial for us to consider. I think that it is absolutely necessary to read this clause as an entirety. The trustees are directed to pay and divide, and the mind cannot rest until it arrives at the conclusion of the clause by which it ascertained what is the duty of the trustees, and amongst whom the division is to take place. And it appears, that division is to be made amongst the survivors of the grandnephews and grandnieces who have survived such of them as shall have died without issue.

Now, supposing that the words rested there, there would be no difficulty at all in coming to the conclusion, that the time of vesting of the interests would be the death of the liferentrix; because until that period arrived it would not be known who were the persons who were the survivors, and who were therefore entitled to share the residue.

But it is said, that a different meaning must be given to this clause in consequence of the words "if any of the said residuary legatees shall die without leaving lawful issue before his or her share vest in the party or parties so deceasing;" and it is contended, that the testator, by the use of these words, is pointing to a different period than the time of division, and that, if he is pointing to a different period, no other period can be assigned than the time of the death of the testator.

Now, I confess, that those words lead my mind in an opposite direction. When a person is making a disposition of his property to take effect after his death, it must be taken, that he assumes that the persons, the objects of his bounty, will survive him. If he contemplates the possibility of their dying in his lifetime, there will be no difficulty in his using apt words to describe his intention; but I cannot conceive any words less applicable to an intention of that kind than these words, "the residuary legatees dying before his or her share vest in the party or parties so deceasing."

With respect to the word "share," perhaps it may be said, that it may be used popularly to describe the interest which would ultimately vest in the different parties; but how the words, "the share vesting in the party or parties so deceasing," can apply to such an event happening in the lifetime of the testator, when nothing whatever can vest in his lifetime, I think it is very

difficult indeed to understand. Then if these words cannot be applicable to the time during the life of the testator, we must look to another period, and the only period to which they can be applicable is the period when the residue is to be divided—namely, at the time of the death of the liferentrix.

For these short reasons I have arrived at the same conclusion as my noble and learned friends and the minority of the Judges in the Court below, and I agree with my two noble and learned friends, that the interlocutors must be reversed.

Interlocutors reversed, with a declaration.

In regard to the appeal for *John Lawford Young*—

Anderson Q.C., and *Mure*, for the appellant, John Lawford Young.—It is well settled, that where a testator makes a provision for persons, declaring the share of a predeceaser to accrue to the survivors, this substitution is subject to be defeated by the condition *si sine liberis decesserit*. Accordingly, when Thomas Young died, his child, the appellant, became the conditional institute of his father—Bell's Prin. 1776; Dig. 35, 1, 102; Bankton, 1, 9, 6. Not only is the child entitled to what was directly given to his father, but also to the proportion of Macdougall's share, which would also have come to the father if the father had lived.

[LORD CHANCELLOR.—Thomas Young was not a survivivor *quoad* Macdougall's share; how then can the child take what was meant only for the survivors? Could the father have transmitted by will his proportion of Macdougall's share?]

The spirit of the rule is, that whatever would have gone to the father should go to the child, and that is the correct result of the older cases—*Roughead* v. *Rennie*, M. 6403. It is true, that certain modern cases, such as *Earl of Lauderdale* v. *Paton*, 8 S. 771; *Greig* v. *Malcolm*, 13 S. 607; and *Clelland* v. *Grey*, 1 D. 1031, have attempted to restrict the rule; but these cases are at variance with principle, and ought now to be overruled.

Counsel for the respondents were not heard.

LORD CHANCELLOR WESTBURY.—Your Lordships have listened with very great attention to the very clear argument which we have heard from the counsel for the appellants; but I think your Lordships will agree with me, that, upon the only point which is now in controversy, there is no necessity to call upon the counsel for the respondents.

There is a very benignant rule in the law of Scotland originally derived from the civil law, although its application is somewhat different from the application which you have of that system, which has this effect, that if a legacy be given to an individual, and he either predeceases the testator or dies before the period appointed for vesting, leaving children, the legacy does not lapse, but the children are substituted in the place of the legatee.

Now, the extent to which that rule appears to have been carried and applied by decisions seems to be thus limited, that the children are to take all that was in the parent at the time of the death of the parent. But the contention that we now have is, that the rule should be carried to the extent of substituting the children for the parent to all intents and purposes, so as to give the child something that the parent might have become entitled to if he had lived till some later period, or if he had fulfilled some other condition named in the original gift.

It appears to be confessed at the bar, that there is not only no decision warranting the extended application of the rule in the manner which is now contended for, but that there has been a long series of decisions which we have had cited here extending for a period of more than 30 years, in which Judges have refused to carry out the application of the rule to the extent to which, it is now contended, that in principle it ought to be carried.

Now the particular circumstances of this case may be very shortly stated. There is a gift from and after the expiration of a liferent to certain individuals named as residuary legatees. Then, by a codicil, there is an addition made to the number of those individuals. The person added by the codicil to the individuals named as residuary legatees in the original settlement was a Mr. Thomas Young, the father of the present appellant, so that Mr. Thomas Young is, by force of the codicil, to be regarded as if he had been named as a legatee in the original settlement.

The decision which your Lordships have just arrived at has been to put this construction upon the original settlement, that the period of vesting is the period of distribution, namely, the death of the liferentrix. Thomas Young did not live until that period; but the operation of the rule which I have referred to substitutes John Lawford Young at the period of his death. Now the testator, the truster in this settlement, contemplating the possibility of the death of one of the residuary legatees before the period of distribution, has introduced a clause of conditional institution —what in England would be called an executory gift over—that, in the event of any one or more of the legatees dying without leaving lawful issue during the life of the liferentrix—for so we must now take it—the share of the individual or individuals so dying shall go to the survivor. And the contention now is, that, although Thomas Young is not to be numbered among those survivors, yet that, in point of fact, the effect of the rule in question is to substitute the child of Thomas Young to such an extent as to make him come within the description and class of survivors, though actually and truly his father was not a survivor.

Now it is very difficult to understand upon what principle, or by force of what species of argument, such a construction could be put upon these words creating the conditional institution. Whoever claims under and by virtue of that conditional institution must claim in the character of being a person living at a particular time; the words "survivors or survivor" refer to individuals here named. We will take Thomas Young as being put by the codicil in the same position as the individuals named in the will. The word "survivor," therefore, will be descriptive of such of the six individuals so named as were living at a particular time, and the effect is precisely the same as if, instead of the word "survivor," you were to take the names of the individuals living at that particular time, and read those names in the settlement in lieu of the word "survivors." Now, if that had been so done, it is impossible to hold, that Thomas Young, the father, would have been entitled, and I think it is impossible to hold, that any principle of surrogation or substitution would give to the child that which the father by no possibility could have taken. The very principle of surrogation is merely to place the child in the room of the father; but it would be contrary to all principle to make the surrogation extend to give to the child a right which the father by no possibility could have.

It is needless to argue this matter further on principle, or to reason as to what ought to have been the true operation and extent of the rule, because, when your Lordships find a rule, the introduction and application of which is due entirely to decisions, and the mode of interpreting it has been regulated and determined wholly by decisions, it is utterly impossible to hold, that there is any principle of law that would warrant the use of that particular rule beyond the extent to which it has hitherto been recognized as a binding authority. It would be, I think, contrary to the rules which have most reasonably and wisely regulated the interposition of a Court of Appeal, if your Lordships, disregarding this long series of cases which have determined the manner and extent of the application of the principle, were now to declare, that the principle had been hitherto misunderstood, and that it ought to have been applied and extended in a different manner; and that, therefore, the series of the cases in which its application has been limited are so many instances in which injustice has been done. I cannot advise your Lordships to recognize this rule as capable of being properly applied in a manner so different from that in which hitherto it has been applied, and I should therefore humbly advise your Lordships to confirm the interlocutor to the extent of declaring, that it is impossible to carry the principle so far as to give to John Lawford Young, on the rule of substitution, an interest which never vested in the father, and which the father by no possibility could have taken, unless the father had fulfilled the condition which he did not fulfil.

The effect of the whole argument which we have heard upon these two appeals, therefore, may be thus expressed: The former declaration, which your Lordships pronounced in the last case, would have the effect of holding, that one share only, namely, the share of William Macdougall, became distributable under the clause of conditional institution. There is involved in that declaration the conclusion of one of the points of the present appeal, namely, that the share which Thomas Young would have taken, if Thomas Young had survived the liferentrix, belongs to his only child, the present appellant John Lawford Young. The result will be, that, in the present appeal, it will be right to declare that John Lawford Young, as substitute, is entitled to the share that was originally given to his father, Thomas Young, but to declare, that the sixth share of William Macdougall belongs, under and by force of the words contained in the original settlement, to those of the grandnephews and grandnieces who were living at the time of the death of the liferentrix. Therefore John Lawford Young will be held entitled to the original sixth share, but he will not be held entitled to any portion of or participation in the share of William Macdougall. The share of William Macdougall, therefore, will be divisible into four parts, instead of being divisible into five parts, as contended for by the appellants. These declarations, with the consequent reversal of so much of the interlocutors of the Court below as is at variance with these declarations, will constitute the final order which I humbly advise your Lordships to make in these two appeals.

LORD CRANWORTH.—My Lords, in the course of Mr. Anderson's able address to your Lordships in this second appeal, he observed, that it was one of the important duties of a Court of Appeal to set right and correct errors, that might have crept in the lapse of ages into the administration of justice in the inferior Courts—to do that which those Courts probably, *proprio vigore*, would feel themselves incompetent to do. In that observation your Lordships, I am sure, most fully concur. Mr. Anderson referred to one or two instances in which, a few years since, this House acted upon that rule. He cited the case of *Miller* v. *Small*, 1 Macq. Ap. 345, *ante*, vol. i. p. 222; and I think another case in which your Lordships set right what you considered to be a vicious principle of interpretation of covenants and other matters into which the Courts of Scotland had, in the lapse of ages, fallen. (*King's College* v. *Hay*, *ante*, vol. i. p. 429.)

But coupled with that duty, there is another duty incumbent on all Courts, and pre-eminently upon a Court of ultimate appeal, and which has been invariably observed, namely, that as regards those rules which regulate the settlement and devolution of property, those Courts which have to interpret instruments and acts of parties must take care to be very guarded against letting any

supposed notion as to the inaccuracy of any rule, which has in fact been acted upon, to induce them to alter it, so as to endanger the security of property and of titles.

Now, if that principle is ever to be acted upon, I think your Lordships would be acting most unwisely if you were not to adopt the course that my noble and learned friend has suggested in a case in which the question is as to a principle, as his Lordship has observed, of what we should here call Judge-made law, which has been carried by decisions to a certain point, (rightly I suppose,) but which the Courts have refused to extend beyond that point. If your Lordships were to be the Court to interfere, and to say, "You ought to have gone further than you have gone," that I consider would be a precedent of a most dangerous character.

The only further observation that I would make is this, that it was pressed, I think, by Mr. Anderson, and certainly by Mr. Mure, that in the cases upon this subject there has not been a perfect uniformity of opinion amongst the Judges, but that one of them at least, Lord Mackenzie, (I think there was one other,) expressed his extreme reluctance in adhering to the rule which your Lordships are now called upon to sanction, but that he did so because he felt bound by the current precedents. I think that that, so far from detracting from the weight of the decisions that we are now called upon to affirm, most materially adds to it, because that very learned Judge, looking at the question in the abstract, said—"I think it ought to have been decided otherwise, but the habit has been so long and inveterate of deciding according to a particular course, that I shrink from doing otherwise than affirming." I have only further to say, that, upon these grounds, I entirely concur in the course that my noble and learned friend has proposed as to the substance and as to the form of the order.

LORD CHELMSFORD.—My Lords, it is unnecessary for me to add anything to what has fallen from my noble and learned friends, but that I entirely agree with them.

Solicitor General.—Before the question is put to the House, your Lordships, perhaps, will permit me to make two observations, one as to the form of the order, and another as to the costs. With regard to the costs, I believe all parties, if your Lordships approve, concur in thinking, that they might, with propriety, be allowed to come out of the fund *in medio.* With regard to the other point, the form of the decree, your Lordships stated, in addressing the House, that the fund would be divisible into four parts, but your Lordships, I think, overlooked the fact, that Mrs. Cuthbertson is dead, and that no claim is made in respect of her share, she having died before the period of distribution. The division, therefore, will be into three parts, and I would submit, that, inasmuch as two of those belong to married ladies, a question may still arise under the third codicil, if they should die without issue. I would therefore suggest, that your Lordships would declare, that this share is divisible into three parts, between Thomas Richardson and Mrs. Tronson and Mrs. Thompson in equal thirds, to be held by them respectively, according to the terms of the will and codicil.

Mr. Anderson.—My Lords, we have no interest in the last point, to which my learned friend has adverted. With regard to the costs, we perfectly concur, that it is right that costs of all parties should be paid out of the fund.

LORD CHANCELLOR. How does the case stand as to the share of Mrs. Cuthbertson?

Solicitor General.—It is mentioned in the papers. She died before the period of distribution, and the Lord Ordinary has declared that her husband has no interest. She died without issue.

LORD CHANCELLOR.—The declaration will be—Declare that such of the residuary legatees named in the settlement and codicils as died during the lifetime of the liferentrix without leaving lawful issue, took no share in the residuary estate of the truster; and that John Lawford Young, being the only lawful child of Thomas Young, takes one sixth part of the residuary estate of the truster; and that the share of William Macdougall being part of the fund, is, in the events that have happened, according to the true construction of the settlement and codicils, divisible into the three equal parts, among the three grandnephews and grandnieces named in the will, who were living at the death of the liferentrix, according to their respective rights and interests under the settlement and codicils. With regard to costs upon the application, and with the consent of both parties, the costs of both parties in the two appeals to be paid out of the fund *in medio.*

Declaration made, and interlocutors reversed, so far as inconsistent therewith.

For Appellants, Grahame, Weems, Grahame, and Wardlaw, Solicitors, Westminster, *Agents.* —*For Respondents,* Loch and Maclaurin, Solicitors, London, *Agents.*