3 Macph. 514, and (1867) 5 Macph. (H.L.) 151, see Lord Colonsay, at p. 154. On the other hand, where there is contingency both in time and event in connection with a bequest, the presumption is that there is no right in the beneficiary unless and until the condition had been purified. A clause of survivorship is, in general, referable to the period of division, and a proper destination-over is, in substance, equivalent to a clause of survivorship. It is maintained by the third and fourth parties that in the present case there is a proper destination-over, the effect of which is to postpone vesting. The decision accordingly really turns upon the effect which is to be given to the phrases in the third and fourth purposes "and her heirs and successors whomsoever" and "and her heirs and representatives."

Prior to the decision of the House of Lords in the case of *Bowman's Trustees*, 25 R. 811, and 1 F. (H.L.) 69, it was well settled that a destination-over, in order to be effectual to postpone vesting, must be to a person named or described independently of the institute. (*Hay's Trustees* v. *Hay*, 17 R. 961; *Ross's Trustees* v. *Ross*, (1897) 25 R. 65; *Mellis* v. *Mellis' Trustee*, (1898) 25 R. 720; *Bowman's Trustees* v. *Bowman*, 25 R. 811, and 1 F. (H.L.) 69). In *Bowman's Trustees* in the House of Lords there are dicta in the opinions of Lord Watson and Lord Davey to the effect that a destination-over in favour of the heirs of an instituted child should have the same effect as a destination-over in favour of a stranger. The question always remains, however, whether the clause under consideration has effected a proper destination-over. In *Bowman's Trustees* the phrase used was "or to their respective heirs," the conjunction "or" being a proper equivalent for the words "whom failing," which are ordinarily employed in a proper destination-over. In the present case the conjunction used is "and," which is not synonymous with "whom failing." It seems to me that the law laid down in *Bowman's Trustees* cannot be held as impugning what has been so often decided in these Courts—that a gift to A and his heirs is nothing more than a gift to A. The law, in my judgment, still remains as stated by Lord Justice-Clerk Moncreiff in the case of *Jackson*, where he says at p. 630—"But a legacy to A and his heirs, or A and his children, is not a separate institution of a new and independent object of the testator's bounty, but the expression of a derivative interest favoured by the testator only out of regard to the legatee whose children or heirs are mentioned. They only find a place in the destination through the relation which they bear to the *persona prædilecta;* and in cases like the present, in which the gift is only inferred from the direction to divide, the instruction to the trustees to pay to the heirs of the legatee, if he predecease the period of division, may be regarded more as the natural result of the legacy having vested than as an indication of the reverse." I find that this passage was quoted and approved in *Ross's Trustees*, 25 R. 65, at pp. 72 and 73. Lord M'Laren's opinion in *Hay's Trustees* is to the same effect. I do not regard the terms "successors" and "representatives" in conjunction with "heirs" as having any other effect than that of strengthening the considerations in favour of vesting *a morte*. The term "heirs" has reference to intestate succession, and the other terms were probably introduced to include testate succession. If this be so, vesting *a morte* is presupposed, as otherwise there could be no proper testamentary disposition by the institute of the property bequeathed by the trust-disposition.

I stated at the outset that the question for decision was mainly dependent on a consideration of the third and fourth purposes of the trust-disposition, but in endeavouring to ascertain the truster's intention his deed as a whole should be looked at. An examination of the fifth clause seems to confirm and corroborate the conclusion as to the date of vesting which I have expressed. By that clause the residue is bequeathed to the two daughters of the truster *nominatim*, and without any reference to their heirs. This clause clearly imports vesting *a morte*, and I cannot think the truster intended to fix a different period of vesting for the other bequests which he made in favour of his daughters.

I therefore agree that the questions should be answered as suggested by your Lordship.

LORD JUSTICE-CLERK — I have had an opportunity of reading the opinions of Lord Salvesen and Lord Anderson, with both of whom I concur.

LORD DUNDAS and LORD GUTHRIE were absent, Lord Dundas being engaged in the Extra Division, and Lord Guthrie being on circuit.

The Court answered head (*a*) of each of the two questions in the affirmative.

Counsel for the First and Second Parties —D. P. Fleming. Agent—John Sturrock, Solicitor.

Counsel for the Third and Fourth Parties —Macquisten. Agents—Purves & Simpson, S.S.C.

Wednesday, March 11.

SECOND DIVISION.

ROSS *v.* ROSS.

Poor's Roll—Admission—Poverty—Absence of Objections by Adverse Party—Power of Court to Refuse Admission—Codifying Act of Sederunt, A, x, 6.

The Codifying Act of Sederunt, A, x, 6, enacts—"On the lapse of eight days after the date of insertion in the minute book, or of four days next after publication of the printed minute book containing said intimation, if the paper shall have been lodged during vacation or recess, the party's agent shall box a note to the Lord President of the Division, simply stating the names and

designations of the parties, and craving a remit to the reporters on the *probabilis causa;* whereupon the Court may, on hearing any objections, either refuse the application *de plano* or remit to the reporters, who shall thereupon consider the party's case, hear all objections, and report whether the applicant has a *probabilis causa litigandi*, and, should the remit so require, whether he otherwise merits the benefit of the poor's roll. . . ."

A man applied for admission to the poor's roll, and lodged a certificate of poverty which stated that his weekly earnings were 31s. No appearance was entered for the adverse party. The Court remitted to the reporters *probabilis causa* to inquire whether the applicant had a probable cause of action, and on their reporting that he had, admitted him, *holding* that it could not *ex proprio motu* refuse admittance on the ground of his circumstances.

Observed per Lord Salvesen—"I desire to say, for my own part, that I think the sooner the abuse of the poor's roll, of which this case is an illustration, is remedied so that we can at any time take up the question of the suitability of the person for admission to the poor's roll, the better."

David Ross presented an application in ordinary form for admission to the poor's roll in order to carry on a litigation against his wife, and lodged with it a certificate of poverty in terms of the Codifying Act of Sederunt, A, x. The certificate stated that the applicant's weekly earnings were 31s.

On 21st January 1914, no appearance having been made by the adverse party, the Court made the usual remit to the reporters *probabilis causa litigandi* to inquire and report whether the applicant had a *probabilis causa litigandi.*

On 24th February 1914 the reporters reported that the applicant had a probable cause, but appended the following *note* to their report:—"Had a special remit been made in this case, the reporters would have refused the application on the ground that the applicant's circumstances are not such as to entitle him to the benefits of the poor's roll."

On 11th March 1914, on the case appearing in the Single Bills, counsel for the applicant moved that the applicant should be admitted to the poor's roll, and argued—The Court could only remit the question of the applicant's unsuitability for the poor's roll if the adverse party objected to the application on that ground. The Court could not make the remit *ex proprio motu*, but was bound to admit the applicant, since he had lodged a certificate of poverty in terms of the Codifying Act of Sederunt and the reporters had reported that he had a probable cause of action—Codifying Act of Sederunt A, x, 6; Act of Sederunt, 21st December 1842, section 5; Act of Sederunt, 16th June 1819, section 6.

LORD JUSTICE-CLERK—In this case the Court had nothing before them when they made the remit except the application for admission to the poor's roll, in which the applicant asked that his case be remitted to the reporters on *probabilis causa.* Now the matter which the reporters had to inquire into, and on which alone they had to report, was the question of probable cause. I do not blame them at all if they came to the conclusion, as expressed in this note, for calling our attention to the circumstances of the applicant, in case the Court might see fit to hold in law that he could not get on the poor's roll because he was not qualified for it. But I do not see how we can interfere in that matter.

When the case comes up in which the applicant for the poor's roll asks a remit to the *probabilis causa* reporters, to see whether he has a good case *prima facie* for litigating, and the adverse party does not appear and object to the application on the ground that the applicant's circumstances do not entitle him to admission to the roll, the sole question remitted for the reporters' consideration is — Is there a *probabilis causa?* and when the report comes back to us stating that there is a *probabilis causa*, the adverse party having taken no steps to have it ascertained whether the certificate of poverty is exact or not, or whether the party is in such circumstances that he ought not to be put on the poor's roll although he has a *probabilis causa*, I think we have no power then to deal with the question of the applicant's means. We have power, if the adverse party appears at the Bar to object before the case is remitted to the *probabilis causa* reporters, to take their assistance upon the question of whether there is poverty or not by making a special remit. It is often done. But here there was no such objection. The ordinary remit was made, the applicant has got a report that there is a *probabilis causa*, and I do not see that we can now do anything but admit him to the poor's roll.

LORD DUNDAS—I agree.

LORD SALVESEN—On the regulations as at present existing I am forced to concur in the opinion which your Lordship has just delivered, although I do so with reluctance.

It is quite obvious that under the present system parties may be admitted to the poor's roll although their circumstances are such that they are not entitled to be so admitted. The condition of our considering, or directing others to consider, the question of suitability for admission is that objection shall be taken in Single Bills when the application for remit to the reporters is made. Well, if we have tied our hands in that way by our own regulations, it is obvious that this applicant is entitled to take the benefit of these regulations as they at present exist. But I desire to say, for my own part, that I think the sooner the abuse of the poor's roll, of which this case is an illustration, is remedied so that we can at any time take up the question of the suitability of the person for admission to the poor's roll, the better.

LORD GUTHRIE—I am of the same opinion. Whether there should not be some change in the earliest stage of such proceedings as those before us, namely, in the practice of granting a certificate of poverty without any consideration whatever of what the amount may be that is being earned by the applicant is a question not directly before us. But so far as we are at present concerned it is quite clear that we should not be as we now are in a position of helplessness unless somebody appears to state objections. Whatever papers disclose, apparently we can do nothing unless there is an objector.

The larger question that Mr Crawford referred to, namely, whether the present scale of income that will entitle an applicant to be put upon the poor's roll, which was fixed at a time when money was much more valuable than it is now, should not be altered, may require also to be considered, but is not directly before us now.

The Court found the applicant entitled to the benefit of the poor's roll, and remitted to counsel and agent for the poor to conduct the case.

Counsel for the Applicant—Crawford. Agent—W. Macduff Urquhart, S.S.C.

HOUSE OF LORDS.

Friday, April 3.

(Before the Lord Chancellor (Haldane), Lord Kinnear, Lord Dunedin, Lord Atkinson, and Lord Shaw.)

SHIELDS *v.* SHEARER AND ANOTHER.

(In the Court of Session, July 4, 1913, 50 S.L.R. 794, and 1913 S.C. 1012.)

Reparation—Illegal Apprehension—Issue—Glasgow Police Act 1866 (29 *and* 30 *Vict. cap. cclxxiii*), *sec.* 88—*Malice and Want of Probable Cause in Issue.*

In an action of damages for wrongous arrest brought against two Glasgow policemen who had apprehended the pursuer without warrant, an issue "whether on or about 14th October 1912 the defenders wrongfully, illegally, and without reasonable grounds of suspicion apprehended the pursuer in or about Glebe Street, Townhead, and conveyed him to the St Rollox Police Office in Glasgow, to his loss, injury, and damage," *approved.*

This case is reported *ante ut supra*, where will be found the Glasgow Police Act 1866 (29 and 30 Vict. cap. cclxxiii), sec. 88, and the pursuer's averments.

The defenders appealed to the House of Lords.

At the conclusion of the argument on behalf of the appellants, counsel for the respondent being present but not being called upon—

LORD CHANCELLOR—It would only be with reluctance that I should criticise a decision come to in the Court of Session on a question of procedure, but on the present occasion I find myself, for reasons I will presently state, entirely in accordance with the views of the learned Judges who have decided this case in the Court below; and I am strengthened in my sense of concurrence by the fact that three of your Lordships who have large experience in connection with Scottish procedure are of the same opinion. Of the issue as framed I only proposed to say that it seems to me, if it is justifiable, a convenient course to have adopted for the bringing to justice of the case before us.

The real question seemed to me, at a very early stage of the opening of the Solicitor-General for Scotland, a question of substance—the question whether it is necessary for the pursuer to prove that malice in fact was in the minds of the police when they took steps which resulted in what he alleges was his false imprisonment.

Between malice in fact and malice in law there is a broad distinction which is not peculiar to any particular system of jurisprudence. A person who inflicts an injury upon another person in contravention of the law is not allowed to say that he did so with an innocent mind; he is taken to know the law, and he can only act within the law. He may therefore be guilty of malice in law, although so far as the state of his mind is concerned he acts ignorantly, and in that sense innocently. Malice in fact is quite a different thing. It means an actual malicious intention on the part of the person who has done the wrongful act, and it may be, in proceedings based on wrongs independent of contract—a very material ingredient in the question of whether a valid cause of action can be stated.

What has happened in the present case is this, that an issue has been framed under a statute which governs these matters in Glasgow, and an issue which substantially follows the words of that statute. The issue proposed is—". . . [*quotes, v. sup. in rubric*] . . .," and the damage is laid at £100. In order to succeed on what is the real question of substance underlying this case, the learned Solicitor-General frankly admitted that he would have to say that if the defenders the police wrongfully and illegally, without reasonable grounds of suspicion, apprehended the pursuer, still the pursuer could not succeed without proving that malice in fact which I have distinguished from malice in law.

I asked the learned Solicitor-General, than whom no one is more competent to answer the question, whether he could produce any train of authorities in the Court of Session, or any decision of this House, which introduced what would be a most startling demarcation between the law as it exists in Scotland and the law as it exists here, and he replied with candour that he could not. There was one case, the case of *Young*, which we were all agreed was a case which related to a different state of matters. That being so, it appears to me that the issue