

ample, these ships had been reconveyed to the directors by a mortgage whose advances were being paid off, it may very well be that the directors might have claimed in bankruptcy to retain the ships against past as well as subsequent advances. But, in the actual case, the security was the act of the directors themselves, and in such circumstances, and in view of the minute, equivalent to a declaration of trust, limiting the effect of the proposed transfer to a security for specific debts, I fail to see that the directors could have any general security or right of retention for past advances. The subsequent minute, stating that the individual directors were to hold the ships in security of advances made or to be made, cannot in my opinion affect the question, because the directors could not in my view extend the operation of the security so as to cover past advances.

But the immediate question is not whether the directors could have made good a claim to retain for past advances, but whether the non-disclosure of the objection to the security amounts to the suppression of a material fact which deprives the Lord Ordinary's assent to the compromise of the authority otherwise due to it. I think that the report when fairly read amounts to the statement that the directors held the ships in security of advances generally, including the £20,000 liability, and this statement is not consistent with the terms of the minute defining the purpose of the transfer. The Lord Ordinary states in his judgment that, if the terms of the transaction had been before him, he would not have given his sanction to the compromise, and it is palpable that, with the knowledge which we now have of the facts of the case, the compromise was not a fair one. That being so, I think that a judicial compromise which is affected by error *in essentialibus* may be annulled under the same conditions as any other agreement. The creditors, whose interests are affected, are not responsible for the erroneous statement, and I think that the directors must be taken to be responsible for it, because it was in setting forth their case that the error was committed; it was their representation that they held the ships in security of the liability in dispute.

I have had some doubts as to whether we could do more in this case than to reduce the Lord Ordinary's decree. But we were invited by counsel on both sides to adjudicate on the validity of the directors' claim, and I think we are now in a position to do so, provided it is made clear that neither of the parties desires a proof.

LORD PRESIDENT—I agree with the opinion of Lord Kinnear, and, with reference to the point last adverted to by Lord M'Laren, I understand the prevalent opinion to be that the safer course would be to stop short of reducing the compromise and to restrict our decree of reduction to the decree of the Court sanctioning the compromise. That being your Lordships' view, probably the most convenient course would be to recal the Lord Ordinary's interlocutor, which does a great variety of things, and to

of new repel the defences as preliminary, reserving them on the merits, hold the production as satisfied, close the record, and reduce the decree. Then, as regards the future proceeding in the case, perhaps the parties will consider whether they could by minute of admissions place the case in shape for decision and renounce probation, but should that not be done it would be necessary that there should be an allowance of proof.

The Court pronounced the following interlocutor:—

“The Lords having considered the reclaiming-note for James Reid Stewart and others against the interlocutor of Lord Stormonth Darling dated 18th July 1894, and heard counsel for the parties, Adhere to the said interlocutor in so far as it repels the defences, so far as preliminary, reserving them as defences on the merits; allow the defender, Alexander Moore, to satisfy the production as regards the interlocutor or decree called for in the summons, and hold the production satisfied so far as regards the said interlocutor or decree; hold the record already closed as the record on the merits, and reduce the said interlocutor or decree: *Quoad ultra* recal the interlocutor reclaimed against *in hoc statu*, and continue the cause: Find the defenders, James Reid Stewart and others, liable to the pursuers in expenses from the date of the interlocutor reclaimed against,” &c.

The directors subsequently lodged a minute consenting to the reduction of the bills of sale and to declarator that they were not entitled to any preferential ranking.

Counsel for the Pursuers—Ure—Salvesen. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for the Directors—Asher, Q.C.—Aitken. Agent—P. Gardiner Gillespie, S.S.C.

Counsel for the Liquidator—C. S. Dickson—Younger. Agents—Webster, Will, & Ritchie, S.S.C.

Friday, December 7.

SECOND DIVISION.

[Lord Low, Ordinary.]

RICHARD'S TRUSTEES v. ROLAND.

Succession—Vesting—No Gift Apart from Direction to Pay—Destination to Children, whom Failing their Issue.

A testator directed his trustees to hold the residue of his estate so long as his wife survived him, and from the free annual income to pay her an annuity of £2000, and to divide the balance of the income equally among his children *nominatim*. On the death

of the wife the trustees were directed to divide the residue equally among the children. In the event of the wife marrying again, a sum sufficient to provide an annuity of £200 to her was to be set apart, and the residue divided equally among the children, and on the death of the wife the sum set apart to meet the annuity was to be divided in the same manner. The testator further provided, that, in the event of the decease of any of his said children before receiving payment of his or her provisions, leaving issue, the same should fall and belong to such issue in room of their parent equally among them, *per stirpes et non per capita*.

Held (dub. Lord Rutherford Clark—aff. judgment of Lord Low) that the fee of the residue vested in the testator's children at the date of his death.

By trust-disposition and settlement dated 24th October 1884 Walter Richard of Kingsmuir Hall, Peebles, conveyed his whole estate, heritable and moveable, real and personal, to trustees for purposes therein set forth. By the second purpose he directed and appointed his "trustees to make payment to my wife, in case she shall survive me, of a free life rent annuity of two thousand pounds sterling. . . and it is hereby provided and declared that in the event of my said wife re-marrying after my death, the said annuity shall be restricted to two hundred pounds sterling yearly, payable at the terms and with interest as aforesaid." After making provision for payment of a number of legacies, the testator provided as follows—"*Twelfth*) I direct my trustees to hold the whole residue and remainder of my estates, so long as my said wife shall survive me, and from the free annual income and produce thereof that shall accrue from and after my death, satisfy and pay the foresaid annuity of two thousand pounds which I have provided to my said wife so long as she remains unmarried, as well as the other prior purposes of this trust; and as to the balance of said annual income and produce, I direct my trustees to divide and pay the same equally among my said sons, John and Walter, and my said daughters, Wilhelmina and Mary, and that half-yearly, or at such other times as my trustees may find most convenient, so long as my said wife shall remain unmarried; but if she shall remarry, the foregoing directions shall come to an end. (*Thirteenth*) I hereby direct my trustees, on the decease of my said wife, or at my death in the event of her predeceasing me, after implementing the whole prior purposes of the trust, to divide and pay over as soon as convenient thereafter the whole residue and remainder of my estates between and among my two sons, John Miller Richard and Walter Miller Richard, and my two daughters, Mrs Wilhelmina Richard or Roland and Mrs Mary Richard or Schaw, equally, share and share alike; and in the event of my said wife remarrying after my death, I direct my trustees to set apart a sum sufficient to provide from the income thereof the restricted annuity pay-

able to her as aforesaid, and after satisfying the whole prior purposes of the trust, to divide and pay over my whole remaining means and estate in manner above specified—that is to say, between and among my two sons and my two daughters, equally, share and share alike—and if there shall be any surplus of the income of the sum set apart to meet the said restricted annuity after settling the same, I direct my said trustees to divide and pay over such surplus among my said sons and daughters equally; and on the decease of my said wife, I direct my trustees to divide and pay over the sum set apart to meet her restricted annuity in the manner hereinbefore provided with reference to the residue of my means and estate. (*Lastly*) I desire to express my earnest wish that the typefounding business of Miller & Richard, in which I have spent the greater period of my life, should be continued by my sons, John and Walter, and my grandson, Walter." The trustees were then authorised, on the narrative that a great part of the testator's means was engaged in the said typefounding business, and that the withdrawal thereof on his death might cause embarrassment to the same, to allow the whole or any part of the capital belonging to the testator, which might at his death be engaged in his business, to remain in the business so long as they might think expedient, upon condition that the said firm should pay interest upon the moneyleft in the business at a rate of not less than 4 per cent. The deed then proceeded—"Declaring that the sums and provisions hereby made and granted to my children are in full satisfaction of all claims of legitim, bairns' part of gear or executry, and every other claim whatsoever competent to them or any of them by or through my decease, or in any other manner of way. As also declaring, without prejudice to the declarations and conditions hereinbefore contained, that the provisions in favour of my daughters, granddaughters, and all female beneficiaries, shall belong to them exclusive of the *jus mariti* and right of administration of their respective husbands, and shall not be affectable by the debts or deeds, legal or voluntary, nor by the diligence of the creditors of such husbands; and also declaring, that in the event of the decease of any of my said surviving children before receiving payment of his or her provisions leaving issue, the same shall fall and belong to such issue in room of their parent, equally among them *per stirpes et non per capita*. Declaring that in the event of my estate not being sufficient to meet the whole provisions and bequests made by me, the provisions in favour of my wife shall form a first charge upon my estate, and thereafter my trustees shall rank the other beneficiaries *pari passu*." The remainder of the last clause dealt with matters affecting the administration of the trust.

Mr Richard died on 7th March 1886 survived by his wife and the four children named in the settlement. His

widow did not marry a second time. One of the daughters, Mrs Wilhelmina Miller Richard or Roland, survived her husband, and died on 1st June 1891, survived by George Richard Roland and other ten children, and one grandchild, named Walter Miller Roland, whose father Walter Roland predeceased Mrs Roland.

Mrs Roland left a trust-disposition and settlement dated 23rd January 1891, by which she conveyed to trustees her whole estate, heritable and moveable, which might belong to her or of which she might have the power of disposal, in trust for certain purposes.

In these circumstances, questions having arisen as to the persons entitled to Mrs Roland's share of the trust-estate, an action of multiplepinding was raised by Mr Richard's trustees, the fund *in medio* consisting of the said share, which had not been set apart from the general fund in the trustees' hands, but was expected ultimately to amount to £25,000.

Claims were lodged by certain of Mrs Roland's children, her grandchild, and her trustees.

Mrs Roland's trustees, on the one hand, contended that a fourth of the residuary estate vested in Mrs Roland at the date of the truster's death, and that it and the surplus income arising therefrom during Mrs Richard's lifetime had been conveyed to them by Mrs Roland's settlement. Mrs Roland's children and grandchild, on the other hand, contended that the fourth of the residue of Mr Richard's estate had not vested in Mrs Roland, or alternatively had vested in her subject to defeasance in the event which had happened of her decease before payment, and that therefore this fourth of the trust-estate had vested in them, and that the surplus income arising therefrom should be paid to them during Mrs Richard's lifetime.

On 10th July 1894 the Lord Ordinary (Low) pronounced the following interlocutor:—"Finds that on a sound construction of the trust-disposition and settlement of the deceased Walter Richard of Kingsmuir Hall, Peebles, set forth on the record, the fee of the one-fourth share of his estate and effects, forming the fund *in medio* destined to his daughter, the now deceased Mrs Wilhelmina Miller Richard or Roland, vested in her at the date of the death of the said Walter Richard, and that the right thereto was carried by the trust-disposition and settlement of the said Mrs Wilhelmina Richard or Roland," &c.

"*Opinion.*—The question which has been argued in this case is as to the vesting of the residue of the estate of the deceased Walter Richard under the trust-disposition and settlement left by him.

"Mr Richard directed his trustees, by the 12th purpose of his trust, to hold the whole residue of his estates, so long as his wife should survive him, and to pay to her from the free annual income an annuity of £2000, and to pay the balance of the annual income equally among his sons John and Walter and his daughters Wilhelmina and Mary. If his widow married

again, Mr Richard declared that the foregoing directions should come to an end.

"The 13th purpose of the trust was in the following terms—[*His Lordship here quoted the purpose*].

"The restricted annuity referred to in the above purpose was only £200, so that if Mrs Richard had married a second time the great bulk of the estate would then have become payable to the sons and daughters.

"The 14th and last purpose of the trust, besides providing for a great variety of matters, to which I shall afterwards have occasion more particularly to refer, contained this clause—'And also declaring that in the event of the decease of any of my said surviving children before receiving payment of his or her provisions leaving issue, the same shall fall and belong to such issue in room of their parent, equally among them, *per stirpes et non per capita*.'

"The testator's four children all survived him, but one of them, Wilhelmina, predeceased the testator's widow, who is still alive and has not married again. Wilhelmina left children, and she also left a will, and the question is, whether, on the one hand, the one-fourth of the residue bequeathed to her vested in her so as to be carried by her will; or whether, on the other hand, vesting was postponed until the term of payment, or alternatively, whether her share of the residue vested in her, but subject to defeasance in the event of her predeceasing the term of payment leaving issue.

"I think that it will be convenient to consider, in the first place, what would have been the rights of the residuary legatees if the settlement had not contained the declaration in the last purpose in regard to their issue, and then to consider how the result is affected by that declaration.

"The first matter which it is important to determine is, what purpose the testator had in view in postponing the division of the residue until the death of his widow in the event, which has happened, of her surviving him and not marrying again. In my opinion, the only purpose which he had in view was to secure to the widow her annuity of £2000. I arrive at that conclusion upon the following grounds:—

- "1. There is no direction to accumulate.
- "2. There is no destination-over and no institution of survivors. The testator favours his sons and his daughters equally, and (apart from the declaration as to issue, which I am meantime leaving out of view) he favours no one else. The directions which he gives his trustees suggest that his intention was that his sons and daughters should have the enjoyment of the benefits given to them at the earliest date, which was consistent with his widow's annuity being fully secured. Thus, if his widow predeceased him, the residue was to be divided at once; if she survived him, any income not required to meet her annuity was to be divided among the sons and daughters, and in the event of her second marriage the whole of the residue, except what was required to meet an an-

nuity of £200 a-year, was to be then divided. It was only in the event of his widow not marrying again, and of the large annuity of £2000 being payable, that division of the residue was postponed until her death.

"3. It is narrated in the settlement that the bulk of the testator's capital was tied up in the business of typefounder, which he carried on in partnership with his sons and a grandson, and he gives special directions for the withdrawal of the capital from the business gradually, and at such time and in such sums as shall be most convenient to the partners continuing the business after his death. Therefore, although the estate, as realised by the trustees, appears to be very considerably greater than is required to meet the widow's annuity, I think that a careful man of business might quite naturally have considered that a much larger capital sum when so tied up might be required to give ample security for an annuity of £2000 than would have been the case if the capital had been under his own control and invested in his own name.

"4. Finally, the testator in the last purpose declares that 'in the event of my estate not being sufficient to meet the whole provisions and bequests made by me, the provisions in favour of my wife shall form a first charge upon my estate, and thereafter my trustees shall rank the other beneficiaries *pari passu*.' That provision shows that the testator contemplated the possibility of his estate not being sufficient to meet all the bequests which he had made, and that he was anxious to secure, in any event, his widow's annuity.

"I am therefore of opinion that the only purpose which the testator had in view in postponing the period of payment was to secure his widow's annuity, and that therefore the case falls to be dealt with just as if instead of a large annuity the testator had left his widow a *lifereit* of the residue. But that appears to me to be conclusive of the question of vesting if the settlement is considered (as I am now considering it) apart from the declaration as to issue. If that declaration is left out of view, and if it is clear (as I think it is) that the only object in postponing the term of payment was to secure the widow's annuity, then it seems to me that the only conclusion which could be come to consistently with a long series of authorities would be that the residue vested in the testator's children *a morte testatoris*.

"The next question is, What is the effect of the declaration as to issue? If the declaration had been added on to the 13th purpose, the question would have been one of much greater difficulty than it appears to me to present, the clause occurring as it does in a subsequent part of the deed. But even in the former case I am disposed to think that the vesting of an absolute right in the sons and daughters *a morte testatoris* would not have been prevented.

"In the first place, the clause in regard to issue does not take the form of a destination-over. The trustees are not directed 'to divide and pay over' to the issue.

These words are used in reference to the sons and daughters, and to them alone. The clause in regard to issue takes the form merely of a declaration that the provisions of a child dying before receiving payment 'shall fall and belong to such issue.' I think that at all events the clause as it stands is not so favourable to the view of postponed vesting as it would have been if it had taken the form of a direction to the trustees to pay to issue failing a child.

"In the next place, as I have already pointed out, the favoured beneficiaries were the testator's four children, whom he called by name, and the indications that his intention was that they should obtain an immediate benefit, except in so far as it was necessary to postpone payment for the purpose of securing the widow's annuity, are very strong.

"Finally, if vesting did not take place *a morte testatoris*, a somewhat anomalous position of matters might have arisen if the widow had married a second time. If that event had occurred, a child who survived the marriage, but died before the widow, leaving issue, would have taken an absolute right to the portion of the residue set free by the marriage, and no right whatever to the remainder of the residue. That is, of course, a possible result, but I do not think that it is one which the testator contemplated. It seems to me that what he intended was that the residue should be dealt with as a *unum quid*, and that the same persons should have right to the whole residue, whether the period of division arrived at his own death or at his widow's death, or partly upon the second marriage of his widow, and partly upon her death.

"In the case of *Ross's Trustees*, 12 R. 378, a testator directed his trustees upon the death of his widow (who had a *lifereit*) in case she should survive him, 'to divide equally among my sons the said free residue of my said estate, the children of such as may have predeceased the term of payment, taking their parents' share.' That appears to me to be a provision almost identical with that with which I am now dealing, but the First Division, upon considerations very similar to those which I have noticed, held that the residue vested in the sons *a morte testatoris*.

"It appears to me, however, that the position which the clause in this case occupies in the settlement furnishes an element in favour of vesting *a morte* which was not present in the case of *Ross's Trustees*.

"The 13th purpose concludes the provisions of the settlement which are properly testamentary. There is only one other article or purpose in the settlement, and it does not contain a single bequest or a single direction to the trustees to pay, or divide, or hold.

"The last purpose commences with the expression of an 'earnest wish' on the part of the testator that his sons should continue the typefounding business after his death. He then gave directions in regard to his money which was invested in the business, and gave his trustees a very large

discretion as to allowing it to remain in the business. There then follow four declarations—The first, that the provisions made for the children are in full of their legal rights; the second, that the provisions in favour of the daughters, granddaughters, and all female beneficiaries, shall belong to them exclusive of the *jus mariti* and right of administration of their husbands; the third, the declaration in question in regard to the issue of his children; and the fourth, the declaration which I have already quoted, to the effect that if his estate should not be sufficient to meet the whole provisions and bequests, the provisions in favour of his wife should have priority. The remainder of the clause gives to the trustees powers of sale and investment, and deals with other matters regarding the administration of the trust.

"Now, I do not think that a purpose of the settlement of that character—a purpose not in any way disposing of the estate, but dealing with a variety of miscellaneous matters connected with the testamentary arrangements previously made—is a part of the settlement in which one would expect to find a destination-over materially curtailing the benefits previously given to favoured beneficiaries. And it is here that the form of the declaration to which I have already alluded—the fact that it does not contain any words of bequest or direction to the trustees to pay or divide—comes to be of importance.

"Further, it seems to me that it is instructive to observe the character of the other declarations with which the declaration now in question is conjoined in the last purpose, and with which it is presumably *ejusdem generis*.

"There is first the declaration that the provisions to children shall be in full of their legal rights. Such a declaration was, I apprehend, unnecessary, because the settlement, being a general settlement of the testator's whole estate, the law would have put the children to their election between their conventional provisions and their legal rights, even although no such declaration had been contained in the deed. Then the declaration that the *jus mariti* of husbands of female beneficiaries was excluded did not involve any curtailment of rights previously given to them, but expressed the intention of the testator that these beneficiaries, and they alone, should have the benefit of the provisions in their favour. I think that the natural inference is that the clause in question was of a character similar to those immediately preceding it, and was intended to have an effect analogous to that which these declarations were designed to operate. I am therefore of opinion that the main purpose of the declaration was to make it clear that the death of a child before the settlement came into operation should not infer a lapse of the bequest of residue in favour of that child if he or she left issue. It is true that the *conditio si sine liberis decesserit* would have applied, and would have accomplished the same object, but, as in the case of the declaration excluding

legal rights, the testator must, in my opinion, be held to have inserted the provision *ob majorem cautelam*.

"It was pointed out that the declaration in regard to issue refers to 'surviving' children. The words are, 'in the event of the decease of any of my said surviving children before receiving payment.' It is not stated upon record, but from the settlement it appears that one daughter—Mrs Ann Hogg Richard or Dryburgh—was dead, and it is obvious that the word 'surviving' refers to the time when the settlement was written, and not to any subsequent period.

"I shall therefore pronounce a finding to the effect that the right to the one-fourth share of the residue destined to Wilhelmina—Mrs Roland—vested in her *a morte testatoris*, and was carried by her settlement."

The defender, W. M. Roland, Mrs Roland's grandchild, reclaimed, and argued—1. The fee of the estate had not vested in Mrs Roland at the date of Mr Roland's death, because (1) there was a provision of income to Mrs Roland as well as a provision of fee. The same words were used respecting both, viz., "divide and pay." The income had not vested in Mrs Roland so as to be carried by her will; it should now be paid to her children. It followed that the fee had not vested in her either. (2) The words "before receiving payment" in the last clause of the deed showed that there was no vesting in any of the children till the actual payment of the shares. In this clause the issue were substituted to their parents—*Bryson's Trustees v. Clark*, November 26, 1880, 8 R. 142; *Reeve's Executor v. Reeve's Judicial Factor*, July 14, 1892, 19 R. 1013, opinion of Lord Rutherford Clark, 1020. 2. Assuming that there had been vesting of the fee in Mrs Roland at the date of her father's death, that vesting was subject to defeasance. It vested subject to the condition that she died without leaving lawful issue—*Reeve's Executor*, *supra*, opinion of Lord Young, 19 R. 1017; *Steel's Trustee v. Steel*, December 12, 1888, 16 R. 204, opinion of Lord President Inglis, 208; *Dalglish's Trustees v. Bannerman's Executors*, March 6, 1889, 16 R. 559; *Earl of Dalhousie's Trustees v. Young*, May 24, 1889, 16 R. 681.

Argued for Mrs Roland's trustees—The fee of one-fourth of the residue of the trust-estate had vested in Mrs Roland, and had been carried by her will to her trustees. The Lord Ordinary's opinion fully set forth their argument—*Wilson's Trustees v. Quick*, February 28, 1878, 5 R. 697; *Waters' Trustees v. Waters*, December 6, 1884, 12 R. 253; *Ross's Trustees*, December 13, 1884, 12 R. 378; *Byars' Trustees v. Hay*, July 19, 1887, 14 R. 1034.

At advising—

LORD JUSTICE - CLERK—The deceased Walter Richard by his trust-disposition and settlement left to his widow an annuity of £2000 a-year, but directed that if his widow should marry again the annuity should be reduced from £2000 to £200 a-

year. The trustees were directed to hold the residue of his estate until the death of his wife, should she survive him, the annuity of £2000 being paid to the widow as long as she should remain unmarried. Any surplus of income was directed to be paid in equal shares to his four children, who are named, and of whom the late Mrs Roland was one. But there was a further direction relative to the event of his widow remarrying. In that case the direction to hold the estate until his wife's death was not to take effect, but the trustees were on her marriage to set aside a sum of capital sufficient to secure the reduced annuity of £200, and having satisfied all other claims upon the trust, to divide the rest of the estate at once between his sons and daughters previously named, and in that case the trust was to be finally closed by the trustees, on the death of the widow and the consequent setting free of the capital sum set apart to meet the restricted annuity, dividing that sum between the same beneficiaries.

The direction in the case of the truster's wife predeceasing him was that after implementing the other purposes of the trust, they should "divide and pay over, as soon as convenient thereafter, the whole residue and remainder of my estates between and among my two sons, John Millar Richard and Walter Millar Richard, and my two daughters, Mrs Wilhelmina Richard or Roland and Mrs Mary Richard or Schaw, equally, share and share alike."

A subsequent clause, containing a number of expressions of wish and direction as to shares of female beneficiaries, and as to the course to be followed if the income was not sufficient to meet the widow's annuity, contains also as one of the declarations the following, "and also declaring that in the event of the decease of any of my said surviving children before receiving payment of his or her provision having issue, the same shall fall and belong to such issue in room of their parent, equally among them, *per stirpes et non per capita*."

Such being the general direction of the deed, the facts we have to deal with are these—The testator was survived by his wife, and she is still alive, and has not married again. Mrs Roland died in 1891 leaving issue, and leaving a trust-disposition and settlement by which she directed her trustees to pay certain legacies, and divide the residue of her estate in certain shares, and to apply them in certain unequal proportions and on varying conditions among or for behoof of her children. It is unnecessary to enter into a consideration of these, except to say that they do not produce the same result to her children respectively as would have resulted had she left no settlement, and her share of her father's estate had fallen to her children under the clause in her father's settlement, in which case her children would be entitled to receive her share equally among them, share and share alike. It is in consequence of this disparity that the present case has arisen. Mrs Roland's

estate, apart from her rights under her father's settlement, has proved insufficient to pay the specific legacies left by her, and accordingly all that is at present in question is the proportion of the surplus left over in each year from the annual proceeds of Mr Richard's estate after paying the £2000 annuity to old Mrs Richard. Mrs Roland's trustees maintain that her share of her father's estate vested *a morte testatoris*, and that she was entitled to dispose of it by testamentary direction. Some of her children, on the other hand, whose interest is made less than an equal share with the other children by Mrs Roland's settlement, maintain that no right vested in Mrs Roland, there being no vesting before the period of payment, and alternatively, that if any right did vest in her it was subject to defeasance, and that she having had issue, and not having received payment of her share before her death, her children succeed to their grandfather's money in terms of his settlement, and their interest cannot be affected in amount by an apportionment made by Mrs Roland, she having no right in herself, and no power of apportionment being given by the grandfather's deed.

In the deed of Mr Richard there appears practically one purpose—and one purpose only—in the postponement of payment of residue to those to whom it is bequeathed, viz., the securing to his wife, should she survive him, of the large annuity of £2000 a-year. That he had no other object is brought into relief by the fact that in that part of the deed in which he contemplates a possible second marriage of his widow, he directs that on that event all residue not required to secure the restricted annuity to be paid is to be at once divided and paid over, and thus the greater part of the estate would be distributed finally. It is therefore plain that the testator did not in any way desire to postpone or limit his gift to his sons and daughters, and that his purpose of postponing payment was protection of another interest only, unless such an intention can be found expressed in the clause upon which the children impugning the validity of their mother's settlement of their share found. The whole language of the settlement in its main clauses points to an opposite conclusion. There is no indication anywhere of any intention on the part of the testator other than this, that her children should receive payment of their shares either in part or in whole at the earliest periods compatible with the fulfilment of his wishes in regard to provision for his widow during her survivance. Everything not required for that purpose was to be at once distributed for their unrestricted enjoyment. No accumulation is contemplated, no protection to subsequent generations by alimentary liferent restriction is provided, and the provisions to his daughters are expressed in the language of confidence in their fitness to enjoy without restriction, for their shares are to belong to them exclusive of the *jus mariti* and right of administration of their husbands.

It is true that on the death of the testa-

tor the whole estate was to be held up by the trustees, and nothing distributed to the children except any surplus income that might be over after paying the £2000 to the widow. But the settlement itself supplies a good reason why this was done, and makes the doing of it quite consistent with the otherwise evident intention. Mr Richard had been engaged successfully in a large typefounding business, and at his death practically all his capital was employed in carrying it on. In his settlement he expressed his earnest wish that his sons should continue the business. And that this might be done without the business being hampered by a hasty realisation of his capital, he vested a very full discretion in his trustees as regards allowing it to continue where it was, so that the business might not suffer. The capital was to be withdrawn gradually, with consideration for the convenience of the partners. This desire of the testator necessarily made the security for the widow's annuity more or less doubtful, as the capital was to be risked in a business more or less precarious, and this may well account for the fact that he made his whole estate the security for the large annuity of £2000 which he provided for her, he being anxious that her annuity should be secured to her. This he plainly was, for he gave a special direction that if there should be any deficiency in his realised estate, the provision to the wife was to be preferable, and the other beneficiaries were to be ranked *pari passu*. There is, further, no clause of survivorship. This is not a case of a testator favouring those children who may survive a life tenant beneficiary. There is nothing therefore in the bequeathing parts of the deed indicating any intention of postponing vesting of the shares of children. Security for the annuity-provision is the only ground for withholding payment, and the directions cause payment to be made of all that can from time to time be paid without weakening the security for the annuity. There is no trace of intention to delay the benefit to children till the occurrence of a certain event, and none of intention to protect the capital for the descendants of children from the acts and deeds of the children themselves. Everything indicates that the intention was that they should receive their shares absolutely as soon as the other purposes of the trust, to which in greater or less degree payments must be postponed, have been carried out. In one contemplated event, the children would have been entitled to receive practically eighteen-twentieth parts of the whole estate during the lifetime of their mother. Thus, had their mother married again, if the contention of those who impugn Mrs Roland's power to test as on a fee vested in her were sound, Mrs Roland, who might have actually received payment of the great bulk of her share to do with as she pleased, would have been unable to dispose of her share of the fraction remaining to be paid when Mr Richard's wife should die, and thereby set it free for the final division.

All these considerations lead, I think, to the conclusion that unless there are expressions in the deed inconsistent with vesting a *morte testatoris*, that must be held to be the effect of the settlement.

But the children who impugn their mother's right to a fee maintain that the clause already quoted to the effect that the provisions of any child dying before receiving payment "shall fall and belong to such issue in room of their parent," are sufficient to prevent any vesting until the death of the testator's widow. But, unless the case in this view of it can be held to be different from that in which a life tenant is given to a widow and a fee to her children, with a declaration that the children of such as may have predeceased the term of payment shall take their parents' share, this contention cannot receive effect. For it has been held that such a gift to children does vest a *morte testatoris*. I am unable to distinguish the two cases. In the one, the widow gets an annuity which may absorb the whole annual income of the estate or may not; in the other, she gets the whole annual income, but it is difficult to see what difference there is in principle which should cause the same or precisely similar words relating to the fee to be interpreted to different effects in the two cases. The only practical difference is, that in the case of the annuity some payments may be made to children while the widow is still alive, and it is not easy to see how that should make their position more unfavourable as regards vesting than in a case in which they cannot receive any payment at all, and do receive none if they predecease the life-tenant. It is further worthy of notice, as pointed out by the Lord Ordinary, that this declaration is in this settlement put in at the end of the deed, after the proper testamentary clauses are concluded, along with a number of others, some of which were unnecessary, as they merely expressed what the law would accomplish although the deed had been silent upon them, as indeed was the case with this one itself, the object of inserting it being to declare that there should be no lapse of a share into intestacy, if there was issue left, an object which the application of the *conditio si sine liberis* would have effected without any expression of it in the deed.

The last argument which is raised is, that the clause relating to grandchildren succeeding to their parent's share, in the event of the parent dying before receiving payment, has this result, that even if there was vesting a *morte testatoris* in Mrs Roland, it was subject to defeasance if she should have issue, and that therefore as she had issue surviving her, she had no fee vested in her at her death. That, where there is a bequest to A to take effect on a certain event, and there is a direction that issue are to take if A dies before the issue, there may be vesting in A subject to defeasance, if he die before the event which opens the time of payment, but leaving issue, may be held to have been laid down in the case of *Dalhousie*, 16 R. 681. In

that case there was no defeasance. It was only held that a legacy appointed to be paid to a nephew on the death of a certain person vested in him, subject to defeasance if he died before that certain person and left issue. But in this case it was plainly the intention of the testator, as already pointed out, not that all payment should be postponed till a certain event, but that there should be payment of greater or less amount whenever possible to all his children, and in one possible event of very large amount indeed in proportion to the estate. His intention was that, in so far as might prove to be possible consistently with what he provided for his widow, the division should be made among his children. I am unable to hold that, because he expressed in words what would have resulted by operation of law, the fee which he intended to give to his children was taken out of his daughter by her dying before her mother. I do not know of any decision, and can find none, where this has been held in such a case as the present—that of a settlement by a father on his own children, where plainly the intention was to give a fee, and payment was only postponed in part in order to provide for the mother of his children, the testator taking pains to provide for as early payment as possible of such parts of the residue as might be set free during the widow's survivance to his children. That seems to me to be a different case from any to which we were referred, where vesting subject to defeasance was treated as being part of our law.

Upon the whole matter I propose that the Court should adhere to the judgment of the Lord Ordinary.

The LORD JUSTICE-CLERK added that Lord Young, who was absent, concurred.

LORD RUTHERFURD CLARK—I have found this case one of very considerable difficulty. I only wish to say that if I had been left entirely to my own judgment I would have been of the opposite opinion, but seeing that all your Lordships concur in the judgment to be pronounced, I do not dissent.

LORD TRAYNER—I agree with the Lord Ordinary. I should only add, that with reference to the question argued at the bar (but not referred to in the Lord Ordinary's note) upon the doctrine of vesting subject to defeasance, I give no opinion.

The Court adhered.

Counsel for the Claimant, W. M. Roland—Rankine—Sym. Agents—Richardson & Johnston, W.S.

Counsel for the Claimants, Mrs Roland's Trustees—H. Johnston—Dundas, Agents—Carment, Wedderburn, & Watson, W.S.

Tuesday, December 11.

FIRST DIVISION.

[Lord Stormonth Darling,
Ordinary.

HERON v. WINFIELDS, LIMITED.

Jurisdiction—Arrestment Jurisdictionis fundandæ causa—Possession—Liability to Account.

H, at the termination of his engagement as agent of an English company, retained in his possession goods belonging to the company, on the ground that he had a claim against them for commission. These goods he placed in the hands of D, instructing him not to deliver them up to the company without further orders from himself. Thereafter H arrested the goods in the hands of D, and raised an action in the Court of Session against the company.

Held (rev. judgment of Lord Stormonth Darling) that the arrestment was ineffectual to found jurisdiction, in respect that the arrestee was under no obligation to account for the goods to the defenders.

Charles Millar Heron, commission-agent, Edinburgh, was in the employment of Winfields, Limited, a manufacturing company, whose registered office was in Birmingham, and who carried on business there. His engagement with them terminated in April 1893. He subsequently claimed from Winfields a sum of £100, which he alleged to be due to him in respect of commission, and in security of this claim he retained certain samples, drawings, &c., belonging to them which were in his possession. In January 1894 Heron placed these goods in the custody of Messrs Aitken Dott & Son, picture framers, Edinburgh. In the same month he arrested the goods in the hands of Messrs Aitken Dott & Son *jurisdictionis fundandæ causa*, and on 22nd January he raised an action against Winfields, Limited, in the Court of Session, of count, reckoning, and payment in respect of the commission alleged to be due to him.

The defenders pleaded, *inter alia*—"No jurisdiction."

On 10th July 1894 the Lord Ordinary (STORMONTH DARLING) allowed the parties a proof of their allegations as to the arrestment *jurisdictionis fundandæ causa*. The evidence led showed that the pursuer had admittedly placed the goods in the hands of Messrs Aitken Dott & Son for the purpose of arresting them; that after delivering the goods to Messrs Aitken Dott & Son he had directed them to retain them till he had had an opportunity of using arrestments in their hands; that Messrs Aitken Dott & Son knew the goods to be the property of the defenders, but that they would at any time have returned them to the pursuer on demand without any reference to the defenders. The pursuer admitted that he would not have allowed the goods to be returned to