The Court answered the question of law in the negative.

Counsel for the Appellant—Carmont—Russell. Agents—W. & J. Burness, W.S.

Counsel for the Respondent—Fraser, K.C.—Patrick. Agents—Weir & Macgregor, S.S.C.

Thursday, June 26.

FIRST DIVISION.

MURRAY'S TRUSTEE *v.* MURRAY.

Succession—Trust—Construction—Bequest to a Class—Ascertainment of Class—"Hold . . . for behoof of the Children of my Nearest of Kin if any there be."

A testator directed his trustees to pay over the income of the residue of his estate to his cousin and on her death to hold the residue for behoof of his son John Charles Murray in liferent and for behoof of his children in fee, and on the death of that son to hold the fee for behoof of his children if he any had, and "in case he shall have no children, then my trustee shall hold the . . . residue for behoof of the children of my nearest of kin if any there be . . ." The testator was survived by his cousin and by two sons, John Charles Murray and another, and a daughter. His cousin died a few months after him, and his son John Charles Murray died unmarried on 8th February 1908 predeceased by his sister. The other son of the testator was at that date next-of-kin, and his eldest son was then *in utero* and was born on 13th June 1908. Thereafter other children were born to him, and his wife was again pregnant, when a special case was brought to determine who were entitled to share in the residue in question. *Held* that there being nothing in the settlement to indicate an intention to postpone payment beyond the date of the death of John Charles Murray, that the period of distribution had arrived and the class of beneficiaries entitled to receive the bequest was fixed at that date, and consequently that the eldest son of the testator's surviving son, being *in utero* at that date, was entitled to the whole of the residue.

Alastair Dallas, W.S., Edinburgh, the sole acting testamentary trustee of the late James Murray, *first party;* Lieutenant James Alexander Russel Murray, a son of the late James Murray, as tutor and administrator-in-law of his pupil son Patrick Jesse Alexander Russel Murray, *second party;* and Lieutenant Russel Murray as tutor and administrator-in-law of his other pupil children, *third party*, brought a Special Case for the opinion and judgment of the Court upon questions relating to the vesting and payment of the residue of the estate of James Murray.

James Murray, the testator, died on 19th June 1897 leaving a *trust-disposition and settlement* which conveyed his whole estate to trustees for various purposes, of which the third was,—"(*Third*) my trustees shall pay over the interest or income to be derived from the residue of my means and estate to my cousin Nina Lesingham Bailey, and that annually or at such shorter times and in such sums as my trustees shall think proper, and at her death my trustees shall hold the said residue for behoof of my said son John Charles Murray in liferent for his liferent use only and for behoof of his children in fee, and they shall pay to him or for his behoof as they shall judge expedient (as regards which they shall be entitled to exercise the fullest discretion) the free yearly interest or revenue derived from the said residue, and that in such sums or proportions and at such times as my trustees shall judge expedient . . . and on the death of my said son they shall hold the fee for behoof of his children if he any have, and shall pay the same to such children, share and share alike, on their respectively attaining the age of 25 years in the case of males and at the same age or on marriage in the case of females, and in case he shall have no children who shall survive the foresaid term of payment, then my trustees shall hold the said residue for behoof of the children of my nearest of kin if there any be; and I declare that these provisions shall be alimentary and, in so far as in favour of or descending on females, shall be expressly exclusive of the *jus mariti* or right of administration of husbands, and shall not be affectable by their debts or deeds or by diligence of their creditors."

The Special Case set forth:—"1. . The only one of the trustees, original and assumed, now surviving and acting is the said Alastair Dallas, W.S., the first party to this case. . . 4. The testator was survived by the said Miss Nina Lesingham Bailey, and by three children, viz.,—The said John Charles Murray, the said James Alexander Russel Murray, and Jessie Rose Mary Murray. The said Nina Lesingham Bailey died on 8th November 1897. The said Jessie Rose Mary Murray died unmarried on 22nd August 1902, and the said John Charles Murray died also unmarried on 8th February 1908. 5. The said James Alexander Russel Murray is the nearest of kin of the testator. He has five children, viz.—(1) The said Patrick Jesse Alexander Russel Murray, who was born on 13th June 1908, and was accordingly *in utero* at the date of the death of the liferenter John Charles Murray; (2) Anton John Russel Murray, born 1st July 1910; (3) Eugenie Alexander Russel Murray, born 30th July 1911; (4) Jessie Alice Russel Murray, born 28th August 1913; and (5) Doris Mabel Russel Murray, born 1st April 1915. The said James Alexander Russel Murray is forty-six years of age, and his wife is in her thirty-seventh year and is now pregnant. . . . 6. The residue of the testator's estate at present consists of railway stocks to the value of £522 or thereby, and yields a nett income of £28 per annum or thereby. 7. Since the death of the liferenter John Charles Murray the income of the residue

has been paid to the wife of the said James Alexander Russel Murray with his consent for the behoof of his children. The said James Alexander Russel Murray has no independent means and his sole income is his army pay. His income, together with the income derived from his father's trust estate, is insufficient to enable him to educate his children in a suitable manner, and he has requested the first party to make payment to him on behalf of his children of the whole or a reasonable proportion of the capital of the trust. The first party, however, has declined to do so, maintaining that in terms of the settlement he is bound to hold the residue for behoof of the whole children of the said James Alexander Russel Murray, and that as the amount of the shares of the children now in life is subject to diminution by the birth of other children to the said James Alexander Russel Murray he is not in safety to make any payment of the capital."

The first party *contended* "that on a sound construction of the trust-disposition and settlement he is bound to hold the said residue for behoof of the whole children of the said James Alexander Russel Murray, and that even assuming that the said residue has vested in the children of the said James Alexander Russel Murray now in life, this is subject to partial defeasance in the event of a child or children being hereafter born to him, and that the first party is therefore bound to maintain the trust in order to secure the interests of such future children."

The second party contended "that on a sound construction of the said trust-disposition and settlement, the whole of the residue is vested in the said Patrick Jesse Alexander Russel Murray as the only one of his children in existence at the date of the expiry of the liferent of the said John Charles Murray, and that he is entitled to payment of the whole of the said residue to the exclusion of his brothers and sisters. Alternatively, the second party maintains that the said Patrick Jesse Alexander Russel Murray has a vested right to one-fifth of the said residue, subject only to partial defeasance in the event of other children being born to the said James Alexander Russel Murray, and that he is entitled now to receive payment of the said one-fifth share or a portion thereof, subject to caution being found as after mentioned."

The third party contended "that on a sound construction of the said trust-disposition and settlement each of his children now in life has a vested interest in one-fifth share of the said residue, subject only to partial defeasance in the event of a child or children being hereafter born to him. The third party offers on receiving payment of one-half of the said shares of residue to grant to the first party a discharge for the amount so paid, and to obtain and deliver to him a paid-up policy by an insurance company approved of by him, providing for payment of £250, or such other sum as may be necessary in the event of any child or children being born to him in the future, to be held by the first party for the protection of the interests of any such child or children.

The *questions of law* were—"1. Has the said residue vested in the said Patrick Jesse Alexander Russel Murray to the exclusion of his brothers and sisters, and is he entitled now to receive payment thereof? or 2. Has the said residue vested in equal shares in existing children of the said James Alexander Russel Murray, subject to a partial defeasance in favour of any child or children that may be hereafter born to him? 3. In the event of the second question being answered in the affirmative, is the first party entitled to pay over and divide among the second and third parties the said shares of residue in whole or in part on receiving the discharge and insurance policy above referred to? or 4. Is the first party bound to retain and administer the said residue until the death of the said James Alexander Russel Murray?"

Argued for the first party—The fourth question of law should be answered in the affirmative. A direction to hold was binding as such until the whole class of beneficiaries had been ascertained—*Hope Johnstone* v. *Sinclair's Trustees*, 1904, 7 F. 25, *per* Lord Pearson (Ordinary) at p. 28; 42 S.L.R. 30. *Macpherson's Trustees* v. *Hill*, 1902, 4 F. 921, 39 S.L.R. 657, was distinguished, for the words of bequest were different. *Scheniman* v. *Wilson*, 1828, 6 S. 1019, and *Shaw* v. *Shaw*, 6 S. 1914, were also distinguished for the same reason, but in those cases payment had been made upon the other interests being secured.

Argued for the second party—The second party was entitled to immediate payment on behalf of his eldest son, who was *in utero* at the date of distribution, *i.e.*, the death of John Charles Murray. The word "hold" was equivalent to the word "pay" unless there was something in the settlement from which an intention to delay payment must be inferred, and the class of beneficiaries was fixed at the date of distribution—*Wood* v. *Wood*, 1861, 23 D. 338, *per* Lord Cowan at p. 342; *Buchanan's Trustees* v. *Buchanan*, 1877, 4 R. 754, *per* Lord Justice-Clerk Moncreiff at p. 759, and Lord Gifford at p. 764, 14 S.L.R. 503; *Greenlees' Trustees* v. *Greenlees*, 1894, 22 R. 136, 32 S.L.R. 106.

Argued for the third party—The date for distribution had not arrived and would not arrive until the class of beneficiaries had been closed. The word "hold" was not equivalent to "pay," and in any event it was for the second party to demonstrate that it was not used in its natural meaning, viz., to stand possessed of. *Buchanan's* case was distinguished. *Hope Johnstone's* case was against the second party, and turned mainly on the use of the word "hold." Even where there was a direction to distribute, children born later could share in what remained undistributed. [Lord Skerrington referred to *Stopford Blair's Executors* v. *Heron Maxwell's Trustees*, 1872, 10 Macph. 760, 9 S.L.R. 490].

LORD MACKENZIE—This case raises a question as to the residue of the estate left by the testator, who disposed of his means and estate by means of a trust-disposition

and settlement. As regards the residue, the scheme of the deed was to provide two liferents—one in favour of a cousin, which terminated on her death in 1897, and the other in favour of his eldest son, who died in 1908; and the direction as regards residue is, "on the death of my said son" the trustees were to hold the fee for behoof of his children if he had any, "and in case he shall have no children who shall survive the foresaid term of payment"—as was the fact—"then my trustees shall hold the said residue for behoof of the children of my nearest of kin if there any be." The nearest of kin is James Alexander Russel Murray, his second son, and the contest is between his son Patrick, who was born on 13th June 1908—the uncle having predeceased the date of his birth by four months—and the other children, who were all born subsequent to the expiry of the liferent.

The argument submitted by Mr Wark was that the period of distribution was postponed, and that the trustees were bound to hold the residue for behoof of all who might satisfy the description of the class, although *postnati*, of children of the nearest of kin. I am unable to construe the settlement in the manner contended for by Mr Wark, and I think that this case admits of being decided upon the special terms of the deed without reference to the general rules or presumptions as laid down in the decided cases. I am unable to find any indication of an intention on the part of the testator to provide that there should be a continuing trust. The argument that the word "hold" is equivalent in this deed to "hold and retain" appears to me not to be the sound construction. I think the direction to hold is merely equivalent to an expression of the intention that the residue shall belong to, that it shall be the property of, or that the trustees are to stand possessed of it for the children of the nearest of kin if any there be.

The date of vesting, accordingly, was the date when the liferenter died. The result of construing the settlement in that way is to answer the first question of law in the affirmative, with the result that it is unnecessary to dispose of any of the other questions.

LORD SKERRINGTON—The success of the third parties depends upon their counsel being able to establish two propositions.

In the first place he must satisfy us that the gift in favour of the children of the testator's nearest of kin, if any there be, ought to be construed as a gift in favour of all such children. That seems to me to be a large assumption. When one speaks of the children of a particular person, one's meaning varies with the date to which one refers, because the persons constituting the class of children may vary. I think that the *prima facie* and natural reading of the words quoted is to construe them as referring to the time when this gift took effect upon the death of the liferenter. It so happened that there were no such children then in life except one *in utero* who was born a month or two thereafter, and it is common ground that upon his birth he took a vested interest in the residue. The only question in dispute was whether he took it not merely for himself but also in trust for any other children who might be born of his father's present marriage or of any future marriage which his father might enter into.

The next point which counsel had to establish was that when the testator directed the trustees to hold the residue for behoof of the children, he had in view the constitution of a continuing trust for behoof of all the children. That raises very much the same question. If the testator had made it clear that the beneficiaries were all children whosoever who might at any time be born to his next-of-kin, the word "hold" might have been interpreted in the manner suggested. In ordinary circumstances, however, to say that trustees shall hold a fund for behoof of a person is simply another way of saying that the fund shall belong to him, and of course if the fund belongs to a person, then the legal result is that he is entitled to immediate payment unless there is some special reason which would make it a violation of the intention of the testator that he should at once take the money out of the trust.

For the reasons indicated it seems to me that the construction contended for by the third parties creates a wholly artificial and needless difficulty in a simple deed. I think that the only party entitled to the fund is the eldest child of James Alexander Russel Murray, and that the class does not remain open until the death of the parent.

LORD CULLEN—I am of the same opinion. On a construction of the terms of this particular deed I think that the word "hold" is a neutral expression—that is to say, it does not involve the idea of an indefinitely continued retention of the estate by the trustees—and the case is the same as if the testator had said that in the contingency which has happened the residue of his estate should belong and go to the children of his next-of-kin. There is no postponement of the payment beyond the period of the opening of the gift, and I think that present payment is fairly implied. The deed is devoid of any indication that the testator intended that there should be a continuing trust to be kept up till the death of the last survivor of his possible next-of-kin.

The LORD PRESIDENT was absent.

The Court answered the first question in the affirmative and found it unnecessary to answer the other questions.

Counsel for the First Party—Crawford. Agents—Forbes, Dallas, & Co., W.S.

Counsel for the Second Party—J. R. Dickson. Agent—H. Bower, S.S.C.

Counsel for the Third Party—Wark. Agent—William Charles Dick, Solicitor.