

petitioner in this case. This case I think ought to be sufficient warning to men who take the duties of election agent to acquaint themselves with what these duties are, especially with reference to the statute.

We shall pronounce the interlocutor pronounced in the case of *Smith and Stoun*, but we shall allow one month instead of ten days for giving in the documents.

The Court pronounced this interlocutor . . . "On condition that the accounts in the form prescribed by the statute, together with the statutory declaration by both petitioners, be lodged in the hands of the returning officer within one month from this date, grant the prayer of the petition. . . ."

Counsel for the Petitioners—MacLaren. Agent—A. W. Gordon, Solicitor.

Counsel for the Minuter—A. R. Brown. Agents—Fraser, Stodart & Ballingall, W.S.

Wednesday, January 28.

FIRST DIVISION.

[Lord Anderson, Ordinary.

GROSSET v. BIRRELL'S TRUSTEES.

Succession—Trust—Construction—Administration—Appropriation of Securities to Meet Legacies.

A testator directed his trustees "to invest, hold, or set aside, and retain and administer for behoof of [his] six daughters . . . [certain] sums . . . for each of them, and to pay to each of [his] six daughters the annual interest or income arising upon the sum so set aside for each of them" as an alimentary liferent; upon the respective deaths of his daughters "the fee of the sums so held and set apart for each of [the] daughters" was to belong to and to be paid over by his trustees to the child or children of each of the daughters on their attaining the age of 25, with destinations-over. The fee was not to vest till the children attained 25, but the trustees were given power in certain contingencies to pay over to each of the daughters during her life any sum not exceeding one-half of the capital sum so liferented by her. Power was also given to retain any of the investments in which the testator left his estate. The testator specifically appropriated certain bonds and dispositions in security granted by the husband of one of the daughters to her legacy and provided that she should bear any loss on realisation of those loans. The share of one of the daughters was £2350. The trustees set aside a bond and disposition in security for £3550 and their half of another for £6700 (the other half being held by the residuary legatee who was a trustee) to provide for that daughter's legacy in full, for the legacies of other daughters in full, and for the legacy of another daughter in part. The amount of the legacies

so provided for was equal to the nominal value of the bonds so set apart. The daughter in question being dissatisfied with that joint security for her bequest, raised a declarator to the effect that the trustees were bound to allocate and appropriate money or securities separately and exclusively to her individual bequest. *Held* (rev. Lord Anderson) upon a construction of the terms of the settlement that the pursuer was entitled to decree to that effect.

Mrs Joanna Birrell or Grosset, with consent of her husband, and her husband as tutor and administrator-in-law of his pupil children, *pursuer*, brought an action against Mrs Elizabeth Steedman or Birrell, widow of the late Alexander Birrell of Tyrie and others (the testamentary trustees of Alexander Birrell), *defenders*, concluding for decree "that the defenders were bound at the term of Whitsunday 1917 to invest, hold, or set aside, and retain and administer for behoof of the pursuer the said Mrs Joanna Birrell or Grosset the sum of £2350 sterling, subject to provision or payment of legacy duty thereon by the pursuers, and to pay her the annual interest or income arising from said sum during the whole days and years of her life for her liferent alimentary use allenarly, and on the death of the said Mrs Joanna Birrell or Grosset to pay the sum so held and set apart to her child or children, equally among them, all in terms of and as set forth and directed by the said trust-disposition and settlement; and (*second*) the defenders ought and should be decerned and ordained by decree of our said Lords within one month from the date of the decree to follow hereon, or such other short time as our Lords shall appoint, to invest, hold or set aside, and retain and administer the sum of £2350 sterling, subject to payment or provision of legacy duty as aforesaid, and to hold, retain, and administer said sum upon such securities as are authorised by law or by the said trust-disposition and settlement for behoof of the said pursuer, and to pay to her the annual interest or income arising upon the said sum during the whole days and years of her life for her liferent alimentary use allenarly, and upon her death to make payment of the capital or fee thereof to the child or children of the pursuer equally among them upon their respectively attaining the age of twenty-five years complete or upon the death of the pursuer, whichever shall last happen, all in terms of the provisions of the said trust-disposition and settlement; and (*third*) the defenders ought and should be decerned and ordained by decree foresaid to make payment to the pursuer Mrs Joanna Birrell or Grosset, first, of the sum of £58 15s. sterling as at the term of Martinmas 1917, and the like sum of £53 15s. sterling as at the term of Whitsunday 1918, together with interest on each of said sums at the rate of £5 per centum per annum from the said dates when they respectively became due."

The *trust-disposition and settlement* of the late Alexander Birrell conveyed his whole estate, heritable and moveable, to trustees, of whom the defenders were now

the sole acting trustees, for a variety of purposes, which included the following:—

“(Fourth) Upon my own death I hereby instruct my trustees to set aside and retain in their own hands a sum of One thousand pounds sterling for behoof of my grand-daughter Elizabeth Agnes Miller, and I direct and instruct my trustees to apply the annual income arising therefrom for the benefit of my said granddaughter until the capital be paid over to her as after mentioned, and to pay the capital of said sum to my said granddaughter on her attaining the age of twenty-five years complete or being married, whichever of these events shall first occur, but notwithstanding this bequest and direction I hereby authorise, instruct, and empower my trustees, in their sole and uncontrolled discretion, instead of paying over the capital of said sum, to hold and retain the same in trust in their hands for behoof of my said granddaughter in liferent for her alimentary liferent use allenarly and of her lawful issue in fee, and I provide and declare that the decision of my said trustees in this matter shall be absolute and uncontrolled, as I specially desire that in this matter the money shall only be paid over in fee to my said granddaughter provided in the opinion of my trustees it would be a wise and prudent step to place the money into her own hands and under her own control, and any decision of my trustees in this matter shall not be open to challenge by my said granddaughter, and in the event of her challenging or attempting to challenge their decision I provide and declare that the said legacy hereinbefore bequeathed in her favor shall lapse and the principal sum of one thousand pounds hereinbefore provided to her or herself in liferent and her issue in fee as the case may be shall lapse and fall into residue: (Fifth) I hereby make and bequeath the following provisions in favor of my six daughters, *videlicet*—I direct and appoint my trustees, at the first terms of Whitsunday or Martinmas which shall happen six months after my death, to invest, hold, or set aside and retain and administer for behoof of my six daughters after named the sums herein after mentioned for each of them, and to pay to each of my six daughters the annual interest or income arising upon the sum so set aside for each of them during the whole days and years of their lifetime for their liferent alimentary use allenarly, viz.—For behoof of my said daughter Alexandrina Birrell the sum of four thousand pounds sterling; for behoof of my daughter Mrs Mary Birrell or Rintoul, wife of James Rintoul, the sum of three thousand pounds sterling; for behoof of my daughter Mrs Davina Birrell or Macdonald, wife of James Macdonald, the sum of three thousand pounds sterling; for behoof of my daughter Mrs Euphemia Birrell or Miller, wife of Berwick Miller, the sum of three thousand pounds sterling; and for behoof of my daughter Mrs Joanna Birrell or Grosset, wife of Alexander Grosset, the sum of three thousand pounds sterling; and with regard to the sum to be invested, held, or set aside and retained and adminis-

tered for behoof of my daughter Mrs Elizabeth Birrell or Hitt, wife of Peter Hitt, hotelkeeper, Cupar, Fife, I specially provide and declare that my trustees shall set apart and retain and administer for her behoof all sums contained in any bonds and dispositions in security or other security writs that may be held by me at the time of my death and secured over any property or properties wheresoever situated belonging to her husband the said Peter Hitt, my desire and intention being that in so far as my said daughter is concerned the loans granted by me to her said husband shall be held as the sum to be set apart and retained by my trustees for her behoof; and in the event of the sums contained in said bonds and dispositions in security or other security writs exceeding the sum of three thousand pounds my said daughter and her issue shall be entitled to such excess, but in the event of the cumulo amount of said bonds or security writs not amounting to the sum of three thousand pounds then my trustees shall, out of my general estate, set aside such a further sum as with the sums contained in said bonds or other securities will make up my said daughter's share to the sum of three thousand pounds in all; and I specially provide and declare that if any loss shall arise on the realisation of said loans the same shall fall upon and be borne by the said Elizabeth Birrell or Hitt and her children or others interested in the said provision in her favor as hereinafter mentioned: And upon the respective deaths of my said six daughters the capital or fee of the sums so held and set apart for each of my said daughters shall belong to and be paid over by my trustees to the child or children of each of my said daughters, and that equally among them in each family upon their respectively attaining the age of twenty-five years complete or upon the respective deaths of my said daughters, whichever shall last happen, the issue of my predeceasing grandchildren taking their parent's share, and in the event of any of my daughters predeceasing me leaving lawful issue or dying before their children shall have reached the age hereinbefore specified for division of the capital my trustees shall hold and administer for behoof of such issue the sum or sums hereinbefore directed to be set apart for my daughters respectively, and that until such issue shall respectively attain the age of twenty-five years complete or earlier period as may be decided by my trustees as after mentioned when same shall be paid over to them as above directed in the case of their mother having survived me, the issue of predeceasers always taking their parent's share: But declaring that, notwithstanding what is above written, it shall be in the uncontrolled discretion of my trustees, if they shall consider it to be a fit and prudent step, to pay over to any such child or children the share or shares falling to any of them respectively upon such child or children attaining the age of twenty-one years complete, and any decision of my trustees in this matter shall not be open to challenge by any of the said children: And in the

event of all or any of my said daughters not leaving lawful issue, then such of my said daughters as shall not leave lawful issue shall have full power, and power is hereby conferred on them accordingly by any testamentary writing, to test upon and bequeath the capital sum so set apart and held for such daughters or daughter so dying without lawful issue but that only amongst their own blood relations in such way and manner and under such conditions, restrictions, and limitations as they may think proper, and failing such disposal the same shall fall into residue. . . . And (lastly) I hereby direct and appoint my trustees, at the first term of Whitsunday or Martinmas which shall happen six months after my death, and after satisfying the whole of the provisions of these presents, to dispose, assign, convey, and make over to my two sons the said William Birrell and James Birrell, and to the survivor of them, the whole rest, residue, and remainder of my said means and estate, heritable and moveable, real and personal, of every description whatever, and that as their own absolute property."

The trust-disposition and settlement further provided—"And specially with reference to the bequests in favor of the whole of my said daughters, I hereby specially authorise and empower my trustees (notwithstanding the fact that the interests of the whole of my daughters whether married or unmarried are limited and restricted to a liferent of the funds provided for each of them) to uplift and pay over to each of my said daughters as their own absolute property any sum or sums not exceeding one-half of the capital sum hereinbefore directed to be liferented by each of them, provided always that my trustees (who shall be the sole judges or judge in this matter) are fully satisfied that it would be to the interest and advantage of my said daughters that such capital sum or sums should be placed at their disposal, and that they would be able by having said monies placed at their disposal to materially advance their prospects in life; but my trustees shall be the sole judges or judge of the propriety or otherwise of making said payments, and the decision on that matter of my trustees shall be absolute and unchallengeable, and such payments accordingly shall only be made upon written request addressed to my trustees by any of my said daughters desiring the same, and the bequest of the fee of the capital sums to the issue of my said daughters is hereby limited and qualified accordingly: And I hereby provide and declare that the bequests in favour of the issue of any of my said daughters shall not vest in them until the deaths of my daughters respectively, and that they shall become vested interests in them upon the deaths of my daughters respectively or upon my own death should any of my daughters predecease me leaving lawful issue as hereinbefore provided for, and it is hereby declared that the sums hereby provided to my children are and shall be in full satisfaction to them and each of them of legitim, bairns' part of gear, and of all other claims competent to them by or through my decease in

any manner of way: And I hereby declare that the whole provisions of this settlement, whether capital or interest so far as they devolve upon females, shall be exclusive of the *jus mariti* and right of administration of husbands whom they have married or may hereafter marry, and that the same shall not be affectable by their debts or deeds or the diligence of their creditors: And in addition to the powers and immunities conferred upon gratuitous trustees by statute or otherwise I hereby confer upon my trustees the following powers, privileges, and immunities, viz.—Power to advance and lend monies upon personal acknowledgment of indebtedness only without security of any kind, power either to leave the whole sums of money, funds, and others of which my trust estate may consist at the time of my death in the securities and investments in which the same are or may be then invested, or to lend out and invest the same upon any of the securities in which trustees are by law entitled to invest trust monies, and to sell, vary, and transfer the same as often as my trustees may think proper."

By a *codicil* the testator, in consideration of a payment of £650 made by him to the pursuer first named, reduced the legacy to her to £2350.

The parties *averred*—" (Cond. 4) The said Alexander Birrell died upon 22nd June 1916. He left moveable estate amounting, as given up in the inventory of his estate for confirmation, to £21,847, 9s. 8d. In addition to the moveable estate deceased left heritable property of considerable value in the county of Fife. (Ans. 4) Admitted. (Cond. 5) Upon 12th November 1917 the defenders' agents, Messrs Guild & Guild, W.S., intimated to the pursuer that her father by his trust-disposition and settlement and relative *codicil* directed a sum of £2350 to be invested and held for her in liferent and for her children in fee, and they annexed to their letter a note showing the security which the trustees represented they held for her behoof, with the interest accrued thereon to the term of Martinmas 1917. The note annexed to the said letter is in the following terms—

Bond and disposition in security by George Duncan over properties in Edinburgh and Portobello,	£3,550 0 0
Bond and disposition in security by William Robertson, Cupar, Fife, over property in Cupar, Fife,	6,700 0 0
	£10,250 0 0
The interest on Mr Duncan's bond is 5 per cent, less tax	£66 11 3
Do. on Mr Robertson's bond at 4 per cent, less tax,	100 10 0
	£167 1 3
Mrs Grosset's proportion of above interest is	£38 6 1
Less legacy duty on £2350,	24 4 1
Cheque enclosed for	£14 2 0

The defenders' agents deducted from the said sum of £38, 6s. 1d. the amount of legacy duty paid by the trustees upon the said sum of £2350 which fell to be paid by the pursuer, being £24, 4s. 1d., and they sent a cheque for £14, 2s., being the balance of the interest as shown in their statement. Thereafter a correspondence took place between the pursuer and Messrs Guild & Guild, a copy

of which, including the letter above mentioned, is herewith produced and referred to and held as repeated *brevitatis causa*. The pursuer did not accept the said payment, and the cheque was ultimately returned by her to the defenders' agents. (*Ans.* 5) Admitted that the pursuer declined to accept the said payment, and that the said cheque was returned. *Quoad ultra* the correspondence, including the letter of 12th November 1917 and note thereto annexed, are referred to for their terms, beyond which no admission is made. (*Cond.* 6) The action of the defenders, as intimated by them in their said letter, is not in accordance with the terms of the settlement and is illegal. It was the duty of the trustees either to set aside a suitable investment held by the truster of the value of £2350 (*less* legacy duty), or to invest a sum of £2350 (*less* legacy duty) upon good and sufficient security, and thereafter to hold said investment for the pursuer in terms of said trust-disposition and settlement. The trustees have not placed aside any sum to meet the pursuer's legacy. They have merely professed to hold for her a *pro rata* part of investments of the alleged cumulo value of £10,250. Further, the bond of £6700 contained in the said note does not constitute a good and sufficient security for the amount therein. It is over subjects forming the Royal Hotel, Cupar, Fife (the proprietor of which was a son-in-law of the said deceased Alexander Birrell), and the loan at no time constituted a security for the investment of trust funds. The trustees have, it is believed and averred, taken no steps to satisfy themselves by independent valuation that the subjects form a good and sufficient security for a loan of £6700. The pursuers believe and aver that they would not realise the sum in the bond. Moreover, the said bond is held to the extent of one half by the defender William Birrell, who is the residuary legatee under the said settlement. In the course of the said correspondence the defenders, through their agents, offered to set aside other bonds held by the testator over certain properties at Methil in place of the bond over the Cupar subjects. They have, however, refused, though called upon, to inform the pursuers as to the nature or value of the subjects contained in the bonds which they propose to hold, or to give them any information as to the sufficiency of any security which they propose to hold to meet the said legacy. Upon 23rd May 1918 the pursuers, through their agents, called upon the defenders to state whether they were prepared forthwith to set apart the funds in terms of the will, and upon what investments it was proposed to place it. To this letter no reply has been received. With reference to the statements in answer, it is not known how the defenders have dealt with the deceased's investments, or whether any other daughter of the truster has taken exception to the way in which her legacy has been set aside. Explained that under the provision of said trust-disposition and settlement, and in the event which has happened, the estate of Tyrie is specifically bequeathed to the defender William Birrell,

but the remainder of the heritable estate belonging to the truster falls to him as residuary legatee. If, as averred by the defenders, the moveable estate is insufficient to meet the legacies bequeathed to the truster's daughters—which the pursuers do not admit—said legacies are payable out of the heritage falling to the defender William Birrell as residuary legatee. In point of fact, however, the trustees have recently made payments amounting *in cumulo* to £2925 to Mrs Rintoul and Mrs Macdonald—two of the truster's daughters—under the discretionary power conferred on the trustees to advance one half of the capital of a daughter's legacy. These payments were made in consequence of said parties objecting to the way in which the defenders proposed to deal with the legacies bequeathed to them, and in order to prevent them from joining with the pursuers in any action, and were made spontaneously by the defenders. The course which the defenders aver they have adopted with regard to the pursuer's legacy is greatly to the advantage of the defender William Birrell, as it relieves him as residuary legatee and also as an individual of any loss in connection with Mr Robertson's bond. With reference to the proposal made by the defenders through their agents on 15th November 1918, the pursuers replied thereto through their agents on 22nd November pointing out that the proposal did not comply with the terms of the will, but stating that they were willing to consider it on the following conditions—(1) That the trustees satisfied them that they were unable to set aside a trust investment as directed by the trust-disposition and settlement; (2) that the trustees gave them full information with regard to the bonds in question, and (3) that they were informed as to the manner in which it was proposed that the pursuer's legacy should form a valid preferable charge upon Mr Robertson's bond. No reply has been received to said letter, and the pursuers are still without the information asked for. The defenders have not yet taken any steps to set aside an investment for pursuer's legacy. The correspondence between the parties and their agents is referred to. The defenders have withheld all information as to the trust estate or its amount, and as to any of the securities held by them. *Quoad ultra* the statements in answers are denied. (*Ans.* 6) Denied. The defenders have acted in conformity with the terms of the settlement. Express power is conferred on them thereby, if they think proper, to leave the whole sums of money, funds, or others of which the trust estate might exist at the truster's death in the securities and investments in which the same were or might then be invested. In view of the exceptional circumstances of the time defenders have not considered it advisable to realise any of the trust investments, and have retained all the truster's investments including the bond for £6700 complained of. They have set aside as the pursuer's legacy of £2350 a *pro rata* proportion of the securities set forth in the note annexed to the letter of 12th November 1917, referred to in condescen-

dence 5. None of the other daughters of the trustor whose legacies have been similarly set aside has taken any exception thereto. The bond complained of in fact constitutes a perfectly sufficient security for the amount therein. The allocation of 12th November 1917 was made in the interests of the beneficiaries other than the residuary legatee, and in particular of the married daughters of the trustor. The best bonds in the trust estate were selected and allocated to them in security of their legacies. The bonds over the properties in Methil referred to in the correspondence were after consideration deemed by the defenders to be unsatisfactory. The heritable subjects on which they are secured consist of a lodging house and a public-house. The licence of the latter was at one time taken away but has been since restored, but the borrower is not managing the property. The management is being conducted by parties who are believed to hold interests postponed to the defenders; these parties also pay the interest on the bonds. All the heritable properties of the trustor were by the settlement bequeathed to the residuary legatee, and the moveable estate is insufficient, by about £2000, to pay all the legacies in full. There is, however, ample heritable estate to meet if need be payment of all the legacies, and none of this has been made over to the residuary legatee. In these circumstances the residuary legatee agreed that the one half of the said bond for £6700 which belonged to him should be treated as part of the estate and held along with the rest of the bond and other securities in order to make the daughters' legacies up to their full amount. This arrangement is beneficial to these daughters, including the pursuer. The defenders, through their agents, on 15th November 1918 made the following proposal to the pursuer, without prejudice to the defenders' rights and pleas, to earmark and hold in security of (1) the balance of Mrs Rintoul's legacy, £1500; (2) the balance of Mrs Macdonald's legacy, £1425; (3) the balance of Mrs Hitt's legacy, £2087, 10s. 6d.; and (4) the pursuer's legacy of £2350, in all £7362, 10s. 6d., the following securities of the *cumulo* value of £8100, viz.—(a) Mr Duncan's bond for £3550; (b) the one half of Mr Robertson's bond for £6700 which belonged to the trustor, *i.e.*, £3350, and (c) a bond by the East Wemyss and Buckhaven Gas Company for £1200, bearing interest at 5 per cent. The offer further included an undertaking by agreement between the defenders and the residuary legatee that so far as the pursuer's and her children's interests were concerned they should form a first and preferable charge on the whole of the said bond for £6700. The letter is referred to. This offer is now repeated. Defenders believe and aver that pursuers' sole purpose in raising this action is to endeavour to compel them to pay 5 per cent. upon the amount of Mrs Grosset's legacy. The bond for £6700 is an investment of the trustor, and defenders are by contract precluded from calling it up until 1921. Defenders are thus unable to secure more than 4 per cent. for this money.

Pursuer, Mrs Grosset, is not entitled to any preferential treatment as against the other legatees. The money for the payments to Mrs Rintoul and Mrs Macdonald, amounting to £2925, was provided by the residuary legatee. The defenders still hold the entire residue for the fulfilment of the purposes of the trust, and it is all available in security of pursuer Mrs Grosset's legacy. With reference to the offer above referred to in defenders' letter of 15th November 1918, it is explained (1) that there are no other securities in the hands of defenders available as trust investments; (2) defenders are willing and ready to give pursuers any information they desire as to the securities mentioned; (3) pursuer's legacy would be constituted a preferable charge on the bond for £6700 by a minute of the trustees which would be binding upon the defenders and on the other legatees. The defender William Birrell would subscribe this minute both as trustee and as an individual. (Cond. 7) The testator left estate amply sufficient to meet all the legacies bequeathed by him, including that of £2350 to the pursuers, and to leave a considerable residue. The residue was bequeathed by the will to the testator's sons William Birrell and James Birrell and the survivor of them. The said James Birrell predeceased the testator without leaving issue, and the whole residue is now vested in the said William Birrell who is a trustee under the said settlement. The pursuers believe that instead of investing the said sum on good and sufficient security the trustees are desirous of throwing upon the pursuer and her family the risk of bad and doubtful investments which had been held by the testator, and thereby to benefit the residuary legatee at the risk of loss to the pursuers. (Ans. 7) Admitted that the residue was bequeathed as stated; that the said James Birrell predeceased without leaving issue, and that the whole residue is now vested in the said William Birrell who is a trustee. *Quoad ultra* denied under reference to answer 6. (Cond. 8) The defenders are due to the pursuer Mrs Joanna Birrell or Grosset the interest at the rate of 5 per cent., being the current rate of interest payable on trust investments, on the said sum of £2350 since the date when they should have set aside and invested the said sum, viz., the term of Whitsunday 1917. The said interest due at the term of Martinmas 1917 amounts to £58, 15s., and the like amount is due for the succeeding half-yearly period. The said sums of interest are the sums sued for in the third conclusion of the summons. The pursuers reserve their claim for interest from and after Whitsunday 1918 until the sum of £2350 is duly set apart for them. They will pay or allow the pursuers to deduct from the interest already due the legacy duty on the bequest in their favour on it being duly set apart. (Ans. 8) Denied. The defenders have regularly, term by term, tendered to the pursuer the interest due to her from the securities set aside as her legacy, and on her refusal to accept the same have placed the money on deposit receipt."

The pursuers *pleaded inter alia*—"1. The

defenders as trustees foresaid being bound in terms of the settlement condescended on to set aside and hold the sum referred to for the liferent of the pursuer Mrs Grosset, and in fee for her children, the pursuers are entitled to decree of declarator as craved. 2. The defenders having failed to duly set aside the bequest of £2350 for the pursuers, they are entitled to have them ordained to do so as concluded for. 3. The defenders having failed duly to invest the said sum are liable to the pursuer Mrs Grosset in the interest thereon as sued for."

The defenders pleaded *inter alia*—"1. The pursuer having no title to demand that the defenders should do more than they have already done by way of securing her legacy, the action ought to be dismissed. . . . 3. The defenders having dealt with the pursuer's legacy in conformity with the terms of the settlement are entitled to absolver."

On 17th July 1919 the Lord Ordinary (ANDERSON) pronounced the following interlocutor:—"Finds and declares in terms of the declaratory conclusions of the summons, and decerns: (Second) Decerns and ordains the defenders, on or before the first box day (14th August) in the ensuing vacation, to invest, hold, or set aside, and retain and administer the sum of £2350 sterling mentioned in the second conclusion of the summons, in terms of said conclusion; and Appoints the pursuers, on or before the second box day (25th September next) in said vacation, to lodge a minute stating whether or not they accept the security or securities proffered by the defenders, and if they object to it or them, to state to what extent they do so and on what grounds; and (Third) Decerns and ordains the defenders to make payment to the pursuer Mrs Joanna Birrell or Grosset (first) of the sum of £58, 15s. sterling as at the term of Martinmas 1917, and the like sum of £58, 15s. sterling as at the term of Whitsunday 1918, together with interest on each of said sums at the rate of 5 per centum per annum from the said dates when they respectively became due."

Opinion.—"The late Alexander Birrell of Tyrie died on 22nd June 1916 leaving a trust-disposition and settlement dated 7th February 1907, with codicil thereto dated 16th December 1908. The trustees and executors nominated and appointed by the said Alexander Birrell were his wife, his unmarried daughter Alexandrina, and his sons William and James. James, to whom certain heritable properties were bequeathed by said trust-disposition, and who was made joint residuary legatee with his brother William, predeceased his father without leaving issue. William Birrell thus became entitled to the whole residue, including the heritable estate which had been bequeathed to his brother James. The family of the truster surviving him were his widow, his son William, and six daughters, all of whom except Alexandrina were married. The said trustees were also appointed tutors and curators to such of the beneficiaries as might be in pupillarity or minority. The pursuer Mrs Grosset has three pupil children who are beneficiaries, and who are

therefore wards of the defenders. These children are pursuers along with their mother, their father suing on their behalf as their tutor and administrator-in-law.

"Mr Birrell left estate of the value in round figures of £100,000, the moveable portion of which amounted to £21,847, 9s. 8d.

"By the foresaid trust-disposition the truster, after making provision for his wife and for a granddaughter Elizabeth Agnes Miller, left by the fifth clause of the deed special legacies to his six daughters, namely, to Alexandrina, £4000, and to Mrs Rintoul, Mrs Macdonald, Mrs Miller, and the pursuer Mrs Grosset, £3000 each, Mrs Grosset's legacy being reduced by virtue of the said codicil to £2350. A special provision was made as to the sixth daughter Mrs Hitt. The interest of the said daughters in the said provisions was limited to a liferent alimentary use *à l'entier*, the fee being destined to their children. In order to secure these provisions to daughters and their issue the trustees were directed and appointed 'at the first term of Whitsunday or Martinmas which shall happen six months after my death, to invest, hold, or set aside, and retain and administer, for behoof of my six daughters after named, the sums hereinafter mentioned for each of them.' The leading question raised in the action is as to the construction and legal effect of this direction.

"The other clauses of the trust-disposition provided for the conveyance to the truster's two sons of certain heritable properties and the stocking thereon, and the residue was conveyed to the said sons and the survivor. Among the general powers conferred on the trustees is the following:—'Power either to leave the whole sums of money, funds, and others of which my trust estate may consist at the time of my death, in the securities and investments in which the same are or may be then invested; or to lend out and invest the same upon any of the securities in which trustees are by law entitled to invest trust monies, and to sell, vary, and transfer the same as often as my trustees may think proper.'

"The trustees in accordance with their duty under the foresaid direction purported to allocate as at Whitsunday 1917 certain investments which had been held by the truster in security, *inter alia*, of the pursuer's legacy. On 12th November 1917 the defenders' law agents intimated to the pursuer Mrs Grosset what had been done. The note appended to the letter of that date showed that two heritable bonds, one for £3550 and the other for £6700, had been allocated. This allocation was manifestly unsatisfactory. To begin with, Mrs Grosset was not informed what provisions were secured by the allocation. She might gather from her share of the total amount of interest divided that the provisions to four of the daughters were meant to be secured. If these provisions were then due in full the amount allocated was manifestly inadequate. If part payment had then been made to Mrs Rintoul, Mrs Macdonald, and Mrs Hitt, and the security was designed to protect their provisions, then as the total

amount due was on this footing £7362, 10s. 6d., the proffered security was adequate so far as its face value was concerned. Whether it was adequate on a consideration of the real value of the bonds is another matter. But there was at least another objection to the allocation which was serious. It was not disclosed by the defenders in November 1917, when the security was tendered, and was not discovered by the pursuer till a later date, that a substantial part of the security offered, namely, one-half of the £6700 bond, was not trust estate but the private property of William Birrell. In my judgment this justified Mrs Grosset, if she was entitled to criticise the security offered, in repudiating it. Her right was to obtain as security part of the trust estate; the defenders' duty was to tender such security.

"On 26th November 1917 Mrs Grosset expressed her dissatisfaction with the security offered. Referring to the £6700 bond which was secured on the Royal Hotel, Cupar, she wrote—'The rotten Cupar bond goes up my back.' In the ensuing correspondence which was founded on by both sides, and to which I may therefore at this stage competently refer, Mrs Grosset suggests that she was entitled to obtain an investment which would give her a return of 5 per cent. interest. I do not think that there can be two opinions as to what was the moral duty of the defenders—or rather of the residuary legatee whose interests alone were concerned—in reference to Mrs Grosset's claim. Looking to the facts that the provision to her was a small one, that the cost of living had greatly increased, that the Government was offering 5 per cent. for money lent, that the residuary legatee had taken the great bulk of this large estate, and that it was a case of a brother transacting with a sister, the moral duty of the residuary legatee, even if some diminution of the residue had ensued, was to have provided a 5 per cent. producing investment. But I am unable to hold in view of the provisions of the trust deed that it was the legal duty of the trustees to make such an investment for Mrs Grosset. If they had offered out of the subsisting trust investments such security as would adequately cover the capital value of the provision, then it seems to me they would have discharged their legal duty, and Mrs Grosset would have had to content herself with the interest which the proffered security actually earned.

"But although Mrs Grosset was in my opinion wrong in making reiterated demands for a 5 per cent. investment, the true ground of objection was at once taken when the matter was put into the hands of her law agents. In their letter of 22nd February 1918 Messrs Drummond, Johnstone, & Grosset wrote the defenders' agents—'We think she (Mrs Grosset) has a right—and a duty—to see that the investments set aside for her and her family are proper investments, and that if she has any objection to them she must state it now.' Has Mrs Grosset such a right, or are the defenders absolute masters of the situation? as seems to be suggested by the defenders' agents in their letter of

23rd March 1918, in which they write—'The deceased has entrusted to his trustees the duty of holding the funds bequeathed by him for the use of your client and her children, and they will perform that duty in accordance with the provisions of the settlement. There the matter must rest, and we cannot admit your client's right to review the investments made by her father, or to put forward a claim which virtually means that she and not the trustees are to execute the will.' That statement seems to imply that the pursuers are bound to take as security any investments which the defenders chose to tender—an extreme view of the defenders' rights which their counsel expressly repudiated at the debate.

"In order to determine what are the rights of a beneficiary in a matter of this kind, it is necessary to ascertain what are the legal effects of an allocation of investments to protect a testamentary provision. It is well settled by such cases as *Robinson*, 8 R. (H.L.), 127, *Scott*, 23 R. 52, and *Van Dunlop's Trustees*, 1912 S.C. 10, that the effect of allocation is to create a special trust, whereby the investments allocated are held and administered on behalf of the beneficiaries whose interests are to be secured. The result is that if the allocated investments appreciate in value the beneficiaries reap the benefit of the appreciation; if they depreciate in value the beneficiaries must bear the loss. In short, allocation operates a satisfaction of the beneficiaries' claims against the general trust estate. The legal effect of allocation being as stated, it is plain that the beneficiaries have a right to investigate and challenge the sufficiency of the investments allocated, and to obtain from the trustees, and at their expense, all necessary information to enable them to determine whether or not the proffered security is adequate to protect their interests.

"As the trustees have been appointed administrators of the trust estate they may allocate as security whatever trust investments they choose to select so long as they are adequate in respect of real value to protect the interests of the beneficiary. And a joint security may competently be tendered by the trustees. It was argued by the pursuers' counsel on a consideration of the terms of the trust deed that the defenders were directed to provide a separate investment for the pursuers. I am against the pursuers on this contention, and Mr Fleming, their counsel, ultimately refrained from pressing this point, and stated that he would be satisfied with such a joint security as adequately protected his clients' interests. The beneficiaries are not entitled to insist on having any particular investment allocated on the ground, for example, that it yields a higher rate of interest than that tendered.

"These being the rights and obligations *hinc inde* of the parties, Have the defenders discharged the duty which they owe to the pursuers under the fifth purpose of the trust deed? It would be sufficient for the defenders if they could make out that they have made a proposal which the pursuers ought to have accepted, and that they had afforded the pursuers all necessary informa-

tion to enable them to judge of the adequacy of the security tendered.

“The defenders have made two proposals—the first by their agents’ letter of 12th November 1917, and the second on 15th November 1918, this latter proposal being referred to in answer 6 of the defences. As to both of these offers the pursuers’ counsel made the following criticisms:—(1) The face value of an heritable bond is no proper test in these days of the question of adequacy. It is the real value that is of importance. This depends on the value of the security subjects (the defenders laid no stress on the value of the personal obligation in any of the bonds) and the rate of interest which the bond bears. The bond of £6700 overlicensed premises, and bearing no higher rate of interest than 4 per cent., has, it was maintained, a real value much less than its face value. If this had been the sole objection proposed by the pursuers to the proposed allocations I could hardly have disposed of it without having a proof to ascertain whether or not the security offered was adequate. But two other objections to the defenders’ proposals were taken which are of such a nature as to justify me in granting now the decree sought. (2) As I have stated, the pursuers are entitled to receive from the defenders the necessary information to enable them to determine whether or not the offered security was adequate. As regards Duncan’s bond, the pursuers called for a valuation of the security subjects which are situated in Joppa, Raeburn Place, St James’ Place, and St Mary Street, Edinburgh. In response to this call the defenders, to instruct the value of heritable property in 1918, handed the pursuers’ agents a valuation made in the year 1903. The values set forth in this document are manifestly fantastic as applying to the present time, and the document was therefore useless for the pursuers’ purpose. (3) But the most fatal objection to each of the defenders’ proposals is that it includes as a substantial part of the proposed security what forms no part of the trust estate but is the personal property of William Birrell. The pursuers’ counsel suggested—and there seems to be some foundation for the suggestion—that the defenders’ design was to transfer to the pursuers a dubious investment of William Birrell. Be that as it may, it seems to me that the pursuers’ position is unassailable when they maintain that they are not bound to have anything to do with William Birrell’s investments. The trust direction made no reference to these, but directed the defenders to allocate investments forming part of the trust estate. It is therefore the pursuers’ right to have an allocation of trust estate investments and of these alone, and it is the defenders’ duty to make such an allocation.

“Up to the present time therefore the defenders have failed to do their duty in this matter, and the pursuers in the circumstances are entitled to have them compelled to do so by order of the Court. The first and second conclusions must therefore be granted. As regards the second conclusion, the defenders must note that so far as I am

concerned it will be useless to propose to allocate investments other than those which form part of the trust estate. The residuary legatee has it in his power to put the pursuers to silence and terminate a pointless and insubstantial litigation by tendering an unimpeachable security. If this is not to be done, and heritable bonds are again to be offered, then I shall appoint the pursuers to put in a minute stating whether or not they accept the proffered security, and, if they object to it, to state to what extent they do so and on what grounds. On this being done the matter will be in shape for proof. As to the third conclusion, I grant decree in favour of the pursuers for three reasons—(1) because the defenders have not provided a satisfactory security from which Mrs Grosset could draw a revenue, (2) because they are therefore liable to her in the legal rate of interest of 5 per cent., and (3) because they could have obtained such a return on the best security, to wit, Government stock.”

The defenders reclaimed, and argued—Trustees were bound to sever a fund from the general trust estate and appropriate it to a particular legacy to the effect that if the fund so earmarked appreciated the legatee in question would benefit by the increase, or would suffer the loss if it depreciated, only when there was (1) either an express direction so to sever, or (2) where circumstances arose out of the provisions of the settlement or the administration of the trust which rendered severance imperative. It was not part of their general duty when those considerations were absent to appropriate trust estate to each legacy—*Robinson v. Fraser’s Trustee*, 1881, 8 R. (H.L.) 127, per Lord Selborne, L.C., at p. 128, 18 S.L.R. 740; *Scott’s Trustees v. Scott*, 1895, 23 R. 52, per Lord Trayner at p. 57, 33 S.L.R. 65; *Van Dunlop’s Trustees v. Pollok*, 1912 S.C. 12, per Lord President Dunedin at p. 14, 49 S.L.R. 7; *Colville’s Trustees v. Colville*, 1914 S.C. 255, per Lord President Strathclyde at p. 257, 51 S.L.R. 204; *Teacher’s Trustees v. Teacher*, 1890, 17 R. 303, per Lord Shand at p. 313, 27 S.L.R. 250. In the present case neither of the conditions referred to was present; the defenders were empowered either to hold or to set aside. The fourth purpose dealing with the bequest to the granddaughter was differently expressed from the fifth dealing with the daughters. The special provisions with regard to Mrs Hitt’s legacy were in contrast to the provisions relating to Mrs Grosset’s. Further, the defenders had power to retain the testator’s investments—that had reference to their power to hold the sums bequeathed to the daughters. The question of appropriation was therefore a domestic one entirely within the defenders’ discretion, and the Court could not interfere with them in the *bona fide* exercise of such discretion.

Counsel for the pursuers were not called upon.

LORD PRESIDENT—I agree generally with the conclusion at which the Lord Ordinary has arrived. Where I differ from him is

when he says that a joint security may be competently tendered to meet the legacies bequeathed to the testator's daughters. I agree with the argument submitted to the Lord Ordinary by the pursuers' counsel that it is not competent to tender a joint security of that kind. The Lord Ordinary seems to have been under a misapprehension that counsel for the pursuers had abandoned this argument, but we were told frankly by the reclaimers' counsel that the argument was pressed before his Lordship.

I do not understand the ground of objection to the Lord Ordinary's interlocutor. The reclaimers say that they do not challenge it if it does not mean that they were bound to allocate, but that they do challenge it if it can be read as imposing an obligation upon them to allocate securities. The interlocutor re-echoes the fifth purpose of the settlement, which is said to admit of two meanings. If read by itself it may admit of two meanings, but when we read it along with the other passages in the settlement which refer to the daughters' legacies it is quite clear that there is an obligation on the trustees to appropriate investments to meet each legacy separately. I suggest to your Lordships therefore, if you take the same meaning as I do from the settlement, that we ought in affirming the Lord Ordinary's interlocutor to make the first finding perfectly clear and distinct, so that no one shall doubt that it means allocation and nothing else.

The Lord Ordinary then proceeds to ordain the pursuers to give in a minute stating whether they accept the security or securities proffered by the defenders. In my opinion that is putting the duties of the parties in inverse order. We must find, if your Lordships hold the same view as I do of the first conclusion of the summons, that the defenders are now bound to state what security or securities they propose to set aside in order to meet the pursuers' legacy in terms of the settlement, and when they have so done then it will be for the pursuers to offer their criticism on the security offered, and for us to consider whether or no the offer exactly meets the finding which I propose we should pronounce.

No suggestion at all has been made in regard to the third finding in the Lord Ordinary's interlocutor, which I presume your Lordships agree with me ought to be affirmed.

LORD SKERRINGTON—The first question, which was very ably argued by the defenders' counsel, was whether or not there was to be found within this will an express direction to the trustees to allocate, at the first term of Whitsunday or Martinmas occurring six months after the testator's death, a provision of £2350 for behoof of the female pursuer in liferent and her children in fee. I agree that there is no doubt as to the meaning of the will when one reads the testator's leading direction to his trustees along with its context. The direction is clumsily expressed, but the context shows that each daughter was to have an alimentary liferent of a fund which was to be set

aside for her, and that the children of each daughter were to have the capital of the sum so held and set apart. When he deals with the contingency of a daughter having no issue, the power of disposal was expressed in exactly the same way, because it refers to the capital as set apart and held for each daughter. The pursuers in framing their declaratory conclusion have torn the badly expressed direction from its context and have obtained from the Lord Ordinary a decree of declarator which the defenders' counsel maintained to be ambiguous. I do not say that it is ambiguous, but I think that the Lord Ordinary's interlocutor should be recalled, and that a shorter, simpler, and clearer declarator should be pronounced.

We must also make a finding that it is now the duty of the trustees to do what they ought to have done nearly three years ago, viz., to set aside cash or investments of the value of £2350 for behoof of the pursuers. I approve of the procedure suggested by your Lordship.

We heard a good deal of argument about certain offers made by the defenders. I agree with the Lord Ordinary and with your Lordship that none of these offers was in conformity with the duty which the defenders owed to the pursuers.

LORD CULLEN—I agree in thinking that on a true construction of this will the defenders are bound to allocate in the sense of holding the sum of £2350 apart from the rest of the estate in suitable investments. They are not entitled to hold it massed with other portions of the estate in which the pursuer has no interest. No offer to make such an allocation has so far been made, and the pursuer, it seems to me, is entitled to the decree for interest which the Lord Ordinary has given her, on the ground that the trustees ought to have allocated timeously and have not done so. As regards the rate of 5 per cent. which the Lord Ordinary has allowed, I think that it is a fair rate in the circumstances of this case. We do not know what investments may ultimately be held for the pursuer, but this is clear, that it would have been quite easy for the trustees acting timeously to provide a 5 per cent. Government investment. As she has not been provided with anything so far, I think it is fair that she should get that rate.

LORD MACKENZIE was not present.

The Court pronounced this interlocutor—

“Recal the interlocutor [of the Lord Ordinary]: (1) Find and declare that the defenders were bound at the term of Whitsunday 1917 to set apart the sum of £2350, or a security or securities representing that amount, and to hold and administer the same for behoof of the pursuer Mrs Joanna Birrell or Grosset and her children in terms of the trust-disposition and settlement of the late Alexander Birrell of Tyrie; (2) Find that the defenders have not implemented the said obligation thus imposed upon them by the said trust-disposition and settlement, and they are now bound to

do so forthwith : Therefore appoint the defenders on or before the 17th day of February next to lodge in process a minute setting forth the manner in which they propose to implement the said obligation : And (3) Decern and ordain the defenders to make payment to the pursuer Mrs Joanna Birrell or Grosset of the sum of £58, 15s. sterling as at the term of Martinmas 1917, and the like sum of £58, 15s. sterling as at the term of Whitsunday 1918, together with interest on each of said sums at the rate of 5 per cent. per annum from the said dates when they respectively became due."

Counsel for the Pursuers—Chree, K.C.—
A.R. Brown. Agents—Lewis & Somerville,
W.S.

Counsel for the Defenders—Brown, K.C.
— Guild. Agents—Guild & Guild, W.S.

Saturday, December 20.

SECOND DIVISION.

[Lord Hunter, Ordinary.]

SMITH'S TRUSTEES v. CLARK AND OTHERS.

*Succession—Vesting—Liferent or Fee—
Direction to Hold and Apply for Behoof
of.*

*Succession—Accretion—Intestacy—Casus
amissus—Class Gift of Joint Liferent.*

A testator directed his trustees to "hold and apply, pay and convey" the residue of his estate, after disposing of three-fifths thereof, as follows, viz. — "one-fifth thereof to be held and applied for behoof of the children of my daughter" A, and "the remaining one-fifth to and for behoof of my daughter" B, "the shares effeiring to the children of my daughter" A "and to my daughter 'B' to be held for their behoof in liferent for their liferent use only and for behoof of their respective children and the survivors and survivor equally among them in fee, payable and to be conveyed to them on their respectively attaining the age of twenty-five and on the death of their parents, the issue, however, of such of them as may de cease leaving issue being entitled to the share which their parent would have taken on survivalance." Power was given to the trustees to "pay and convey" to B in the event of her marriage, and to the children of A on their respectively attaining twenty-five or being married, or at such time thereafter as they should think fit, such portions of the shares liferented by them not exceeding one-half thereof as they should think proper. The testator directed, further, that in the event of his daughter B or any of his grandchildren, the children of A, pre-deceasing him without leaving issue, or of his or her leaving issue, but of such issue not surviving to take, then the

share destined to his daughter B or to such grandchild in liferent and his or her issue in fee, should, as regards B's share, fall and accresce (not *per capita* but *per stirpes*) to the other residuary legatees, whom failing to their respective issue, and as regards the share of any such grandchild, should fall and accresce to his surviving brothers and sisters. The daughter B and a grandchild, a son of A, both survived the testator and died without leaving issue. *Held* (1) that the shares of residue liferented by the daughter B and the grandson had not vested in them; (2) that the share liferented by B did not pass to the residuary legatees by virtue of the clause of accretion, the contingency which had happened not having been provided for therein, but fell to be dealt with as intestate succession; and (3) that while the share liferented by the grandson was not carried to his surviving brothers by the terms of the clause of accretion, still the terms of the gift to A's children imported a joint liferent, and on the death of one member of the class without leaving issue his share of the liferent fell to his surviving brothers.

Sir Nathaniel Dunlop of Shieldhill, Biggar, and others, trustees acting under the trust-disposition and settlement of the late George Smith senior, *pursuers and real raisers*, brought an action of multiple-pointing and exoneration against Sir George Smith Clark, Bart., and others, *defenders*, for the determination of certain questions arising under Mr Smith's trust-disposition and settlement. These questions concerned the disposal of two shares of residue which formed the fund in *medio* liferented in terms of the will by (1) Mrs Eliza Smith or Barr, a daughter of the testator, and (2) Lieutenant-Colonel James Clark, K.C., a grandson of the testator, and which were left in doubt in consequence of the liferenters having died without issue.

By his trust-disposition and settlement, dated 12th December 1873, the testator provided, *inter alia* — "With regard to the residue of my means and estate . . . I direct my trustees to hold and apply, pay, and convey the same as follows, viz., one-fifth thereof to be paid and conveyed to my son the said George Smith junior, and that absolutely and as at the date of my death; one-fifth thereof to be held and applied for behoof of the children of my daughter the deceased Mrs Jane Smith or Clark; one-fifth thereof to and for behoof of Mrs Margaret Smith or Kerr, wife of John Pinkerton Kerr, residing at Underwood, Paisley; one-fifth thereof to and for behoof of Ellen Dunlop, only child of my daughter the also deceased Mrs Ellen Smith or Dunlop; and the remaining one-fifth to and for behoof of my daughter Eliza Smith; the shares effeiring to the children of my daughter the deceased Mrs Jane Smith or Clark, to my daughter the said Mrs Margaret Smith or Kerr, to the said Ellen Dunlop, and to my said daughter Eliza Smith, to be held for their behoof in liferent for their liferent use only and for