Counsel for Pursuer (Respondent)—J. P. B. Robertson—Dickson. Agent—T. F. Weir, S.S.C.

Counsel for Defender (Appellant)—Pearson—Gardner. Agents—Webster, Will, & Ritchie, S.S.C.

Wednesday, December 17.

FIRST DIVISION.

ROSS'S TRUSTEE *v.* ROSS AND OTHERS.

Succession — Vesting — Annuity to Widow — Residue—Power to Advance Shares of Residue on Provision being made for Annuity.

A truster directed that his widow should have the liferent of the residue of his estate so long as she did not marry again, and that on her death or second marriage the residue should be divided among his sons, the issue of any predeceasing son taking the parent's share. He gave power to the trustees to convey to any of the sons their shares or part of their shares during the widow's survivance on security being given for her receiving the income of the share so conveyed. *Held* that the vesting of the sons' shares was not postponed till the widow's death, but that they vested a *morte testatoris* and were therefore carried by the settlements of sons who predeceased the widow.

William Ross senior, of Greenside, in the county of Fife, died on 15th January 1859. He was survived by his widow, three sons, and three daughters.

He left a trust-disposition and settlement, dated 22d February 1853, and codicil dated 28th December 1858. By the second purpose of the trust-settlement he provided for his widow, in addition to the liferent of his household furniture, an annuity of £150. By the third purpose he divided the residue of his estate among his children in such proportions as he should appoint.

By the codicil, which was executed within three weeks of his death, he first made an alteration in the trustees; second, he revoked the third purpose of his trust-disposition and settlement disposing of the residue of his estate, and directed his trustees to settle a sum of £3000 on each of his daughters in liferent and their children in fee, and to pay to each of them a certain further sum. By the sixth purpose he provided as follows—"*Sixth*, with regard to the free residue of my estate, I hereby direct and appoint my said trustees to make payment to the said Mrs Jean Ross, my wife, if she shall survive me, of the annual income during all the days of her lifetime while she remains my widow, and that at the same terms as set forth in the second purpose of the trust created by me in my said deed of settlement; and declaring that in case the said Mrs Jean Ross shall again marry, then the said liferent of the residue of my estate shall from the date of such marriage cease and for ever determine, and at the term of Whitsunday or Martinmas after the death or marriage of the said Mrs Jean Ross, if she shall survive me, and in the event of her predecease, at the first term of Whitsunday or Martinmas after my death, I hereby appoint and direct my said trustees to divide equally among my sons the said free residue and remainder of my said estate, the children of such as may have predeceased the term of payment taking their parent's share; declaring always that in the event of my wife surviving me, it shall be competent to and in the power of my said trustees, at any time after the first term of Whitsunday or Martinmas that shall happen after my death, to pay or convey to each or any of my said sons their shares, or a part of their shares, of the free residue of my said estate, but that upon due security only for the regular payment to the said Mrs Jean Ross, during all the days of her lifetime while she remains my widow, of the annual income of each share, or part of a share, so paid or conveyed; and my said trustees before denuding of the trust shall be bound not only to secure the annuities provided to the said Mrs Jean Ross, and to my said brother-in-law, but also to securely settle, as before directed, the provisions conceived in favour of each of my daughters, and of the children of their bodies; and likewise to secure in the most satisfactory manner that the annual income of the free residue of my said estate shall be regularly paid to the said Mrs Jean Ross during all the days of her lifetime while she remains my widow." The codicil also provided to the brother-in-law of Mr Ross an annuity of £20 and the liferent of a house.

Mr Ross left heritable and moveable estate amounting to £54,000. The sums provided to his daughters and their families were secured as he directed.

After the decease of Mr Ross, his widow, on 16th May 1859, granted a renunciation and discharge, by which, on the narrative of her provision given by the trust-disposition and settlement as above narrated, and that shortly before his death he executed the codicil, in terms of which she might claim provisions much larger than by his trust-disposition were conceived in her favour, and greater than she believed he intended her to enjoy, and that she was perfectly satisfied with the provision in her favour before narrated of an annuity of £150, and the liferent use of the whole furniture, as given her by the settlement, and that the trustees had secured her annuity by making over to her in liferent debentures of the Edinburgh, Perth, and Dundee Railway Company, to the extent of £5000 sterling, in security of her said annuity of £150 sterling, she renounced all right competent to her under and in virtue of the said codicil, and discharged the trustees and the trust-estate of all claim or demand against the trustees or against the estate of her late husband, either under the said codicil or in any other way.

The trustees thereafter proceeded to realise and pay over to the testator's three sons, who were his residuary legatees, the bulk of the estate, saving that portion only which was set aside to meet the annuity to Mrs Ross, and which consisted of preference stock of the North British and Caledonian Railways.

Mrs Ross died in 1883, and these stocks fell to be realised and paid in terms of the settlement of her husband. Two of the testator's sons, James Ross and William Ross junior, had predeceased

Mrs Ross. William Ross junior was succeeded by a daughter, and James Ross by three sons and four daughters. Both William Ross junior and James Ross left a settlement. A question arose whether proportional shares of the funds had vested in James Ross and William Ross junior, and were therefore carried by their *mortis causa* settlements, or whether vesting was suspended until the death of Mrs Ross, so that the children of James Ross and William Ross junior took these shares in their own right.

This Special Case was accordingly presented.

The surviving trustee of William Ross senior was first party. The trustees of James Ross were second parties. The children of James Ross were third parties. The trustees of William Ross junior were fourth parties. The only child of William Ross junior was fifth party.

The questions were—"(1) Did the residue of the trust means and estate of Mr William Ross senior, and in particular, did that part thereof which his trustees held in security of Mrs Ross' annuity, vest in his three sons at his death, or was the vesting suspended until the death of Mrs Ross? (2) Do the shares of the part of the said residue held for Mrs Ross' annuity, which would have fallen to James Ross and William Ross junior had they survived her, now fall to be paid to the second and fourth parties hereto as trustees under their respective *mortis causa* settlements, or to the third and fifth parties hereto in their own right?"

Argued for the children of James Ross and William Ross junior (third and fifth parties)—The term of payment in this case was the time of the widow's death, and those who were entitled to succeed were those who happened to be alive at that date. There was no gift to the children until they had survived the term of payment, and no vesting until the term of payment, *i.e.*, the death of the liferentrix arrived.

Authorities—*Stewart's Trustees* v. *Stewart*, July 17, 1851, 13 D. 1386; *Howat's Trustees* v. *Howat*, Dec. 17, 1869, 8 Macph. 327; *Ross* v. *Dunlop*, May 31, 1878, 5 R. 833; *Dickson* v, *Corsar*, Jan. 20, 1880, 17 Scot. Law Rep. 311; *Bryson's Trustees* v. *Clark*, Nov. 26, 1880, 8 R. 142; *M'Alpine's Trustees*, March 20, 1883, 10 R. 837; *M'Laren* on Wills, ii. 12.

Argued for the trustees of James Ross and William Ross junior (second and fourth parties)—The ordinary rule of vesting *a morte testatoris* applied; there was no destination-over; the term of vesting was the death of the testator; there was no intention on the testator's part to favour in particular any one or any one class of his sons.

Authorities — *Muir's Trustees*, October 23, 1869, 8 Macph. 53; *Elliot*, June 21, 1873, 11 Macph. 735; *Henderson's Trustees*, January 8, 1876, 3 R. 320; *Campbell*, Dec. 21, 1866, 5 Macph. 206; *Leighton* v. *Leighton*, March 2, 1867, 5 Macph. 561; *Jackson* v. *M'Millan*, March 18, 1876, 3 R. 627; *Scott* v. *Scott's Executors*, Jan. 27, 1877, 4 R. 384; *Wilson's Trustees* v. *Quick*, Feb. 28, 1878, 5 R. 309; *Popham's Trustees* v. *Parker's Executors*, May 24, 1883, 10 R. 888.

At advising—

Lord President — The general scheme of this testamentary settlement is very simple. It consists of a trust-disposition and settlement, and codicil, the former of which contained a provision in favour of Mrs Ross of £150 in name of an annuity. It appears, however, that some time after this deed was executed the testator, considering that he had not made a proper provision for his wife, proceeded to the opposite extreme, for by the terms of the codicil to which I have just referred he gives her the liferent of the income of the whole free residue of his estate. Before, however, the amount of this residue could be ascertained, the provisions in favour of the testator's daughters had to be settled. That, however, has been arranged, and it is not a matter which requires to be noticed in dealing with the question now before us.

Among the other provisions of the trust-deed the only one which I shall notice is an annuity of £20 in favour of the truster's brother-in-law, Richard Greenshields—a provision to provide for which it was clearly not necessary to keep up the trust, and therefore the object of continuing this trust was to secure the widow in her annuity. The fee of the residue was directed by the truster to be divided equally among his three sons.

Now, the clause of residue, upon the construction of which this question depends, provides that Mrs Ross, if she survives her husband, is to have the interest of the whole free residue of his estate during her lifetime while she remains his widow, but in the event of her again marrying, then her rights to the revenue of the residue were to cease, and the fee of the residue was to go to the testator's sons.

There are thus three possible periods of payment of this fee of residue present to the mind of the testator. First, the date of his own death; second, Mrs Ross's second marriage; and third, the date of Mrs Ross's death. These are all present to the mind of the testator, and he gives expression to these possible terms of payment in the first part of this residuary clause, the latter portion of which provides for the disposal of the fee of the residue, and is in these terms—"At the first term of Whitsunday or Martinmas after the death or marriage of the said heir Jean Ross, if she shall survive me, and in the event of her predecease, at the first term of Whitsunday or Martinmas after my death, I hereby appoint and direct my said trustees to divide equally among my sons the free residue and remainder of my said estate, the children of such as may have predeceased the term of payment taking their parent's share." If the deed had ended here, it would, I think, have been a very difficult matter to have made out a case of vesting *a morte testatoris*, but there are certain clauses which immediately follow what I have just read which have a most important bearing on the question which we have now to determine. The deed goes on to provide—"Declaring always that in the event of my wife surviving me it shall be competent to and in the power of my said trustees, at any time after the first term of Whitsunday or Martinmas that shall happen after my death, to pay or convey to each or any of my said sons their shares, or a part of their shares, of the free residue of my said estate, but that upon due security only for the regular payment to the said Mrs Jean Ross during all the days of her lifetime while she remains my widow of

the annual income of each share, or part of a share, so paid or conveyed." Now, here another possible term of payment is added to these which I have already referred to, for the trustees are empowered to terminate the trust and pay over the fee to the truster's sons provided they or any one of them upon their part offer a sufficient security for the widow's annuity. I speak of one of the sons coming forward and so proposing, because if any one of them did make such a proposal and found security, it would have been very difficult for the trustees to resist such a demand, all the more as the testator has a favour for such a proceeding, or he would not have given his trustees the authority he has done in this part of his codicil. But there is yet another clause to be taken into consideration, and it is not by any means a repetition of those which have gone before it. It contemplates a different event, and is in these terms—"And my said trustees, before denuding of the trust, shall be bound not only to secure the annuities provided to the said Mrs Jean Ross, and to my said brother-in-law, but also to securely settle, as before directed, the provisions conceived in favour of each of my daughters, and of the children of their bodies; and likewise to secure, in the most satisfactory manner, that the annual income of the free residue of my said estate shall be regularly paid to the said Mrs Jean Ross during all the days of her lifetime, while she remains my widow."

The condition which the truster here makes comes to this, that before the trustees denude, the whole annual income of the residue of his estate is to be carefully secured to his widow, and paid over to her while she remains his widow. The result of all this is that in addition to the three periods of payment provided by the first part of the deed two others are introduced. No doubt these two latter periods are of uncertain occurrence, and only emerge when the truster's sons find security for the widow's annuity and the trustees are satisfied with the sufficiency of the security offered. But the making of such an arrangement is clearly in the power of the trustees and the sons, and accordingly the decease of the widow is not a necessary condition of payment, and her death therefore does not necessarily fix the term of payment.

Now, what has occurred in the present case is perfectly clear. The widow, quite satisfied with her husband's provision contained in the trust-deed, intimated that she did not desire the interest of the residue of the estate, and gave effect to this by her deed of renunciation and discharge of the testamentary trustees. A period of payment had thus arrived, and accordingly all the residue was set free except what was required to meet the widow's annuity of £150. The surplus was accordingly paid over to the beneficiaries, and the only obstacle which stood in the way of a complete division of the residue was the sum which required to be set aside to meet the widow's annuity. Now, as I have already pointed out, this annuity was by the provisions of the codicil no serious obstacle to the division of the whole free residue, because all that the sons had to do was to offer sufficient security for this annuity, and then no questions would arise. There was not therefore in the contemplation of the truster anything like a postponement of vesting. The presumption is in such cases for vesting *a morte testatoris*, and the mere fact of a liferent standing in the way will not prevent the application of this rule. That is all the more the case here, as it is quite clear that it was the truster's intention that vesting was not to be postponed until the execution of the purpose of the trust.

There was accordingly nothing in the present case to prevent vesting taking place *a morte testatoris*.

Lord Mure concurred.

Lord Shand—I am clearly of the same opinion. Keeping in mind the circumstance that the truster makes a provision for his daughters, his settlement comes to this—a liferent to the widow and the fee to his sons.

In such a case the law holds vesting to take place *a morte testatoris*, unless the provision is very clearly expressed that vesting is to be postponed. The purpose of postponing payment of a portion of the fee of any estate is usually to secure liferents or to pay annuities. That being the general principle, does the special clause in this deed postpone vesting?

The question turns in the first place upon the provisions of the clause, which is in these terms —[*His Lordship here read the passage quoted above in the opinion of the Lord President*].

It is to be observed that the first part of this clause is unlike in its terms those which we find when there is intended to be a destination-over; in them the language is more precise, and we find also the words "whom failing," or some such equivalent expression.

But the material provisions of this clause which are to be found in the latter part of it, make it clear that the trustees might have denuded at once if the sons had only found satisfactory security for the widow's annuity. Taking the deed, then, as a whole, there is not, I think, anything to prevent vesting *a morte testatoris*, and that I think was the intention of the testator.

Lord Deas was absent.

The Court pronounced the following interlocutor:—

> "Find and declare that the residue of the trust, means, and estate of the late William Ross senior, including the part thereof which his trustees held in security of Mrs Ross' annuity, vested in his three sons at his death, and that vesting was not suspended until the death of Mrs Ross, the testator's widow: Find it unnecessary to answer the second question."

Counsel for First, Second, and Fourth Parties (Trustees)—Sol.-Gen. Asher, Q.C.—Jameson. Agents—Millar, Robson, & Innes, S.S.C.

Counsel for Third and Fifth Parties (Children of William Ross junior and James Ross)—Trayner—Dickson. Agents—Dove & Lockhart. S.S.C.