ment upon the County Council to vindicate rights-of-way, and states that the question of vindicating this right-of-way is now under consideration by the County Council. Now, I think we are bound to give the system a fair chance, and to see that no person is prevented merely by lack of funds from trying this remedy. We cannot disregard the defender's averments that the County Council are considering whether to assert this right-of-way, and we are therefore bound to give him some latitude on his undertaking not to use the path till the case is disposed of.

I am therefore of opinion that we should recal the interlocutor and sist the case *hoc statu* on this undertaking being given by the defender, it being left open to either party to come and make a motion to the Court during the sist should matters move more rapidly than is anticipated.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court, in respect that the defender had undertaken to abstain from using the road in question during any sist of this action, recalled the interlocutor of the Lord Ordinary, and sisted process *hoc statu.*

Counsel for the Pursuer and Respondent—N. J. D. Kennedy. Agent—Andrew Urquhart, S.S.C.

Counsel for the Defender and Reclaimer—J. Wilson. Agent—Alexander Ross, S.S.C.

Friday, December 12.

FIRST DIVISION.

HALDANE'S TRUSTEES *v.* HALDANE.

Trust — Succession — Vested Provisions — Several Fiars — Right to Pay Provision before Period of Payment.

A truster directed his trustees to pay certain annuities to his wife and children, and on the death of his wife to pay over £18,000 to his son and £8000 to each of his daughters; the provisions to the children being declared to vest *a morte testatoris.* The son was declared residuary legatee, and the trustees were empowered to pay to him, with consent of his mother, £5000 out of his provision on his renouncing his annuity. Under this provision the trustees advanced part of the said sum of £5000 to the son, subject to a proportional diminution of his annuity.

Thereafter the son required from the trustees payment of the balance of his provision of £18,000, and offered to renounce his whole liferent interest, while his mother consented to the trustees advancing the sum in question, and offered to renounce her liferent so far as affected. At the time the application was made the trust-estate was amply sufficient to meet all the provisions.

Held that the trustees were not bound to make payment as demanded, in respect that the son was not sole fiar, and that in case of loss to the trust-estate, rendering it insufficient to meet all the provisions, the son's provision would fall to be diminished *pro rata* with those of the daughters.

Dr Daniel Rutherford Haldane died in April 1887, leaving a trust-disposition and settlement. The testator directed his trustees—to whom he conveyed his whole estate heritable and moveable—to hold and apply his estate for the payment of certain annuities to his wife and children, and of certain legacies and provisions, and "In the ninth place, at the first term of Whitsunday or Martinmas after the decease of the longest liver of me and the said Mrs Lowthrop or Haldane" (the testator's wife), "for payment of the following further provisions to my children, viz., to the said James Aylmer Lowthrop Haldane" (the testator's son) "£18,000, and to each of my four daughters £8000: And in the last place, and after fulfilment of all the previous purposes of this trust, I direct my said trustees to set aside and hold for behoof of my said son the whole residue and remainder of my estate, means, and effects hereby conveyed."

The testator further directed his trustees that, "notwithstanding the terms of payment before specified, . . . it shall be in the power of the said James Lowthrop Haldane, with the concurrence and approval of Mrs Haldane, and at any term of Whitsunday or Martinmas after my decease, to apply for and obtain from my trustees payment of the sum of £5000, and that as payment in part and to account of the provision of £18,000, but on payment of the said sum his annuity shall cease." It was further provided that, "notwithstanding the terms of payment of the provisions in favour of my son and daughters, the said provisions shall become vested in them at the date of my decease. . . ." The trustees were further invested with power to sell the whole or part of the estate, and in general with "the most full and ample powers to manage and administer the trust-estate in whatever manner they may consider most consistent with the objects and purposes of the trust, and to do everything in relation to the management of the said estate which I could do myself."

The truster was survived by his wife, son, and four daughters. Captain James Aylmer Haldane had received payment from the trustees of £3000 to account of his provision of £18,000, and the value of the investments representing the trust-estate in the hands of the trustees was in April 1895 £60,000. The total amount of the provisions under the ninth purpose of the trust is, after deducting the payment made to Captain Haldane, £47,000.

Captain Haldane having, with consent of his mother, who agreed to the diminution of her annuity so far as necessary, requested the trustees to pay over to him £15,000, being the balance of his provision

of £18,000, and having offered to renounce all right to his annuity, the trustees did not feel warranted in paying this sum without the sanction of the Court, and accordingly a special case was presented by (1) the trustees, (2) Captain Haldane, and (3) Mrs Haldane. The question submitted for the judgment of the Court was "Whether the first parties are entitled and bound to pay over to the second party the balance of his foresaid provision, amounting to £14,990, in exchange for delivery to them of a discharge by him and the third party in the terms above indicated?"

Argued for the second party—There was no practical danger that the shares of the daughters would suffer, there being a balance of £14,000 of estate over provisions, all of which, under the residue clause, would go to the second party. Accordingly, his provision having vested in him, he was entitled to demand immediate payment on renunciation of the liferent by his mother and himself—*Rainsford* v. *Maxwell*, February 6, 1852, 14 D. 450; *Miller's Trustees* v. *Miller*, December 19, 1890, 18 R. 301; *Muirhead* v. *Muirhead*, May 12, 1890, 17 R., H. of L., p. 45, at p. 48.

Argued for the first parties—The fact that the truster had authorised the second party to receive £5000 showed that he anticipated and did not approve of a request by him for more. If the investments fell, there might not be enough to pay the daughters' provisions. In all the cases quoted by Lord Watson at p. 48 of *Muirhead* v. *Muirhead*, the person demanding payment had been entitled to the fee of the whole trust-estate, while here there were other fiars interested. A similar demand had been refused in *Grieve's Trustees* v. *Bethune*, June 9, 1830, 8 S. 890.

At advising—

LORD PRESIDENT—Unless the trustees are bound to pay over the money which they are asked to pay over by the second party we cannot answer the question put to us in the affirmative. The question is—"Is there an obligation upon the trustees to pay over this money?" The payment which is asked is of the capital of the provision destined to the second party in fee, but this is not the case of a fund directed to be set aside as the applicant's own property. In such a fund the other beneficiaries have no interest, because they can never have any right to it. Unfortunately the right of the second party is only to share *pari passu* along with his sisters in the fee of this estate, he to the extent of £18,000, and they to the extent of £8000 each, and it is perfectly plain that if the estate by loss on investments should fall to such an extent as to become inadequate to provide for the sum of £18,000 bequeathed to the second party, and for the four provisions of £8000 bequeathed to his sisters, these provisions would suffer a *pro rata* diminution. The trustees point to this consideration, and argue that the question must be answered in the negative. It seems to me impossible to hold that the trustees are bound to make the payment asked for. It may be that they are entitled, in the exercise of their discretion to make it, but with that we have nothing to do.

LORD ADAM—I agree. I think with your Lordship that the question is, whether the trustees are bound to pay over the money, not whether they are entitled to do so, in the exercise of their discretion. That is not our business. I think, as was pointed out by Mr Grainger Stewart, that this distinction exists in the cases where such advances have been authorised, that in these cases the applicant was entitled to the fee of the whole estate, so that no other party could be injured by the advance. But when the applicant is only entitled to the fee of part of the estate other parties might suffer, if the estate left in the trustees' hands should ultimately prove insufficient to provide for payment of the whole of the provisions of the settlement.

LORD KINNEAR—I entirely agree. There may or may not be any practical risk in the trustees making the desired payment. That is not a question for us but for the trustees. We, however, cannot answer the question put to us in the affirmative unless we can say, admitting the possibility of risk, that no liability would attach to the trustees in the event of the estate diminishing in value, and I do not think that we can possibly say that. I agree that, as there are five legatees with equal rights to payment out of a common fund, it is impossible to say that the trustees have now the right to pay one of these legatees in full, leaving any loss which may arise from a future diminution of the estate to fall exclusively upon the others. If we were to answer the question in the affirmative we should affirm, as Mr Dundas conceded, that the payment in full to the son would afford the trustees a good answer to any claim which might be made by the daughters in the event of the funds remaining in their hands proving insufficient to satisfy the daughters' provisions. I am of opinion that we cannot say that the trustees would have a good answer to such a claim, and I therefore agree that we cannot answer the question in the negative.

LORD M'LAREN was absent.

The Court pronounced the following interlocutor:—

> "Find and declare that the first parties are not bound to pay over to the second party the balance of the provision in his favour in his father's trust-disposition and settlement amounting to £14,000, in exchange for delivery to them of a discharge by him and the third party in the terms indicated, and decern."

Counsel for the First Parties—Grainger Stewart.

Counsel for the Second Parties—Dundas—Gillies Smith. Agents (for all the Parties)—W. & F. Haldane, W.S.