The cases mainly relied on by the second parties are *Miller's Trustees*, and the numerous cases which have been subsequently decided in deference to that decision. Apart from those cases the authorities in support of the argument for the second parties are by no means conclusive. The words "a fully vested and indefeasible right of fee" admit of two constructions. They may mean an unconditional and unqualified right of fee, or they may mean a fully vested right of fee in this sense, that the fee is vested in and must ultimately come to the beneficiary and his heirs or assignees when certain conditions have been fulfilled. But the opinion of the Consulted Judges proceeds on the footing that the latter interpretation of the words, viz., that there may be a qualified though vested right of fee is inadmissible. If the case of *Chambers' Trustees* (5 R. (H.L.) 151) is examined, I think it will be found that the learned Lords recognised that there may be a vested right subject to a condition. I am aware that in that case the trustees were specially empowered in certain circumstances to limit the beneficiary's right to a liferent, and this presented a clear ground of judgment. But the opinions do not seem to proceed so much on that specialty as on the general ground of the testator's power to annex conditions to his gift. Apart from the power to divest the beneficiary the trustees had power to withhold payment as long as they thought fit; and it would appear, especially from Lord Hatherley's opinion (pp. 154-155), that this power of itself would have been held sufficient to prevent the legatee obtaining immediate payment.

The fact that the beneficiary can defeat the testator's intention by assigning his right seems to me to be beside the question. The same may be said of any case in which there is a vested right of fee—as, for instance, where a liferent is interposed.

Without pursuing the subject further I will only add that, taking these testamentary writings as a whole, I am not prepared to concur in the judgment proposed.

The Court, in conformity with the opinions of the majority of the Whole Judges, answered the first question in the negative and the second question in the affirmative.

Counsel for the First Parties — C. H. Brown. Agent—F. J. Martin, W.S.

Counsel for the Second Parties—Hunter. Agents — Graham, Johnston, & Fleming, W.S.

Thursday, May 29.

SECOND DIVISION.

ROSS'S TRUSTEES *v.* ROSS.

Succession — Vesting—Payment—Direction to Divide on Death of Widow and on Youngest Child Attaining Twenty-Five—Annuity Restricted by Marriage of Widow—Power to Advance before Period of Division subject to Payment of Interest —Vesting Held Postponed till Youngest Child Twenty-Five, but not till Death of Widow.

A testator by his trust-disposition and settlement directed his trustees to pay his widow an annuity of £1300 (restricted in the event, which happened, of her second marriage to £200), she being bound from said annuity to provide for the maintenance and education of the children of the marriage; and on the death of his widow, provided the youngest of the children of the marriage should have attained the age of twenty-five years, to divide the residue amongst the children of the marriage equally. He declared that the trustees should have power to pay to any of the children on their respectively attaining the age of twenty-five a sum equal to one-third of the share which fell to them, said child being bound to pay interest on the sums so advanced until the arrival of the period of division; and that in the event of the death of his widow before the youngest child attained twenty-five the trustees might pay their full shares to any child who had attained that age. The testator also provided for the maintenance and education of the children in the event of the re-marriage of the widow. By a codicil he declared that the balance of the income of the estate, after providing for the annuity of £1300 to the widow, was to be accumulated and form part of the residue to be divided among the children as provided in the settlement. The testator was survived by his wife and by three children. Upon the second marriage of the widow, the children, none of whom had attained twenty-five, maintained that they were entitled to immediate payment of their shares of residue, subject to provision being made to secure the widow's restricted annuity; or alternatively that they were entitled to such payment upon their respectively attaining the age of twenty-one, or upon their respectively attaining the age of twenty-five. *Held* (*diss.* Lord Moncreiff) that vesting of the children's shares was postponed till the youngest child attained the age of twenty-five, but not, in the events which had happened, till the death of the widow; that the trustees after securing the widow's restricted annuity were bound to hold the residue until the period of division, but subject to their power to make advances; and

that subject to their power of providing for the education and maintenance of the children, the trustees meantime were bound to accumulate the whole free income of the estate, including the amount set free by the widow's restriction of her annuity, and add it to residue, for division amongst the fiars on the arrival of the period of division.

James Ross, Arnotdale, Falkirk, died on 16th June 1893, leaving a trust-disposition and settlement dated 31st August 1890, with four relative codicils, by which he assigned and disponed his whole heritable and moveable estate to the trustees and for the purposes therein mentioned.

By the second purpose of the trust-disposition and settlement the testator directed his trustees to pay to his wife Christian Risk Fairlie or Ross, the yearly sum of £1300 during all the days of her life, provided she remained his widow, "the said Christian Risk Fairlie or Ross being, from said yearly sum above mentioned so to be paid to her, bound to provide for the maintenance and education of the children procreated or that yet may be procreated of the marriage betwixt her and me, and that in a manner becoming their station in life: Declaring that in the event of the said Mrs Christian Risk Fairlie or Ross entering into another marriage, then my trustees are to make payment to her of the yearly sum of Two hundred pounds sterling, and that during all the days of her life, and if my trustees think it expedient to allow said children procreated or to be procreated to live in family with her after that event to make payment to her of the sum of Three hundred pounds for the maintenance of said children; my trustees being hereby authorised, if they should consider said sum not adequate to provide for the maintenance, education, and upbringing of said children in a manner suitable to their station in life, to allow her whatever sum they may consider necessary to enable her to do so; my trustees being hereby authorised and empowered if they should consider it not proper and expedient to allow said children to live in family with their said mother after her entering into another marriage, to remove them from her and board them in a suitable and proper place where their education and upbringing shall be properly attended to."

By the fourth purpose the testator directed as follows:—"In the fourth place, my trustees shall, on the death of the said Christina (*sic*) Risk Fairlie or Ross, provided the youngest of said children procreated or to be procreated shall have reached the age of twenty-five years complete, divide and apportion the whole free residue or amount of my said means and estate amongst the children of the marriage betwixt her and me, equally share and share alike: Declaring that my trustees are to have full power and authority to pay over to any of said children on their respectively attaining the age of twenty-five years complete, a sum equal to one-third of the share which falls to each of them of my said means and estate; said child or children receiving such advances being bound to pay to my trustees the legal interest on the said sums so advanced them, until the arrival of the period of division of my said means and estate: . . . Declaring that in the event of the said Christian Risk Fairlie or Ross dying before the youngest of said children arrive at the age of twenty-five years complete, then my trustees are hereby empowered to pay any of said children who may have reached that age their full share of my said means and estate." . . .

By the fourth codicil, dated 17th February 1893, the testator directed his trustees to allow his widow the liferent use and enjoyment of his mansion-house of Arnotdale with the furniture, but that only so long as she remained his widow; and also provided as follows:—"Declaring that the balance of the yearly income of my whole means and estate, heritable and moveable, after providing for the said sum of Thirteen hundred pounds to the said Christina (*sic*) Risk Fairlie or Ross, is to be accumulated by my trustees, and form part of the residue or amount of my means and estate, to be divided amongst my children, as provided for in the fourth purpose of the foregoing trust-disposition and settlement."

The testator was survived by his wife and by three children of the marriage, one daughter and two sons. In 1900 the widow contracted a marriage with a gentlemen who had been previously married to her sister. In view of the fact that questions might arise as to whether this was a valid marriage, and whether she had married again and so forfeited the provisions of the settlement and codicil which were dependent upon her remaining the testator's widow, she executed a discharge of these provisions and agreed to restrict and restricted the annuity to £200 as provided in the event of her re-marriage.

The value of the trust estate was approximately £51,000 and the revenue £2000.

Questions having arisen as to the rights of the children in relation to the residue, and also the surplus income after providing for the widow's restricted annuity, and as to the duties and powers of the trustees with regard to the capital and residue of the estate, the present special case was presented for the opinion and judgment of the Court.

At this date the testator's daughter, who was now married, was twenty-three years of age, and the ages of the sons were respectively seventeen and nineteen.

The parties to the special case were (1) the trustees, (2) the daughter and her husband as her curator and administrator-in-law, (3) the sons, and (4) the widow.

The first parties maintained that the estate should not be divided and paid over until the period appointed in the trust-disposition and settlement, viz., the death of the fourth party and the youngest of the testator's children reaching the age of twenty-five years, and that they were bound to accumulate the whole of the free yearly income after providing for the fourth party's annuity and add it to the residue to be divided amongst the truster's

children on the arrival of the period of division, or at least that they were not in safety to pay away any part of the capital or of the free income as contended by the second and third parties without the authority of the Court. Alternatively the first parties maintained that prior to said period they were only entitled to pay over to the respective children one-third of their said shares, and that on each child respectively attaining twenty-five years.

The second parties maintained that Mrs Elizabeth Ann Ross or Gibson (the testator's daughter) was entitled to immediate payment of her share of the trust-estate, under deduction of one-third of the amount retained to secure the fourth party's annuity. Alternatively they maintained that she was entitled to such share upon her reaching the age of twenty-five. In any event, they maintained that she was entitled to one-third of the free income of the trust-estate until her share of the capital should be paid over, either now or at any later date at which it should be found to be payable, or alternatively that she was entitled to one-third of the income set free by the fourth party renouncing her right to an annuity of £1300.

The third parties maintained that they were each entitled to payment of their respective one-third shares of the capital of the trust estate, under deduction of the corresponding two-thirds of the amount retained to secure the fourth party's annuity, either now, or on their respectively attaining majority, or on their respectively attaining the age of twenty-five. They also maintained that in the meantime they were each entitled to the benefit of one-third of the free income of the trust-estate until their shares of capital were paid; and either to receive payment thereof from the first parties, or that the first parties should apply the same or so much thereof as should be required towards their maintenance and education, and should accumulate the balance to add to their shares of capital. In any event, they maintained that they were each entitled to one-third of the income set free by the fourth party renouncing her right to the annuity of £1300, and that either now or on their respectively attaining majority.

The fourth party maintained that the first parties were bound to retain in their hands sufficient estate amply to secure her annuity of £200; and as she was satisfied that this would be done, she did not object to the rest of the trust estate being divided in the event of the Court finding that this should be done.

In these circumstances the following questions were submitted for the opinion and judgment of the Court—"(1) Is Mrs Elizabeth Ann Ross or Gibson (the testator's daughter) one of the second parties, entitled to demand from the first parties, and are the first parties bound to make payment to her of one-third of the capital of the trust estate under their charge after setting aside such portion thereof as shall be sufficient to secure the annuity of £200 per annum to the fourth party, (*a*) immediately or (*b*) on her reaching the age of twenty-five. (2) Are the third parties respectively entitled to demand from the first parties, and are the first parties bound to make payment to them respectively of one-third of the capital of the trust estate under their charge, after setting aside such portion thereof as shall be sufficient to secure the annuity of £200 to the fourth party, either (*a*) immediately, (*b*) on their respectively reaching majority, or (*c*) on their respectively attaining the age of twenty-five? Or, alternatively to the first and second questions, (3) Are the first parties bound to retain and hold the fiars' shares of the capital of the whole estate until the death of the fourth party, and until the truster's children shall respectively have reached the age of twenty-five years? (4) Is Mrs Elizabeth Ann Ross or Gibson (the testator's daughter) entitled to demand from the first parties, and are the first parties bound to make payment to her of one-third of the free annual income of the trust estate until her one-third share of the capital thereof shall be paid over to her, or alternatively of one-third of that portion of said income which has been set free by the renunciation and discharge of the fourth party? (5) Are the third parties respectively entitled to demand from the first parties, and are the first parties bound to make payment to them respectively of one-third of the free annual income of the trust estate until their respective one-third shares of the capital shall be all paid over to them, or alternatively, of one-third of that portion of said income which has been set free by the renunciation and discharge of the fourth party, and that either (*a*) as from Whitsunday 1901, or (*b*) as from their respectively attaining majority? (6) In the event of the second query, or of either the first or second alternatives thereof, and of the fifth query or the first concluding alternative thereof, relating to the period of payment, being answered in the negative, are the first parties entitled to expend the income of the shares provided to the third parties respectively, or any parts or portion thereof, for their maintenance, upbringing, and education? (7) Are the first parties bound to accumulate the whole of the free income of the trust estate and add it to the residue for division amongst the fiars on the arrival of the period of division of the residue? (8) Does the income, or any portion of the income, which has been set free by the renunciation and discharge of the fourth party, become intestate succession of the said James Ross?"

Argued for the first parties—There was no vesting in any child until the youngest child had attained twenty-five and until the death of their mother. The direction to accumulate indicated an intention to suspend vesting. It was true that there was no destination-over, but neither was there any in the case of *Brodie* v. *Brodie's Trustees*, June 13, 1893, 20 R. 795, 30 S.L.R. 713, and yet vesting was held to be postponed until the beneficiary had attained twenty-five. The case of *Graham's Trustees* v. *Graham*, Nov-

ember 30, 1899, 2 F. 232, 37 S.L.R. 163, was directly in point. In that case there was nothing more than a direction to pay over on a certain event, and it was held that there was no vesting until that event happened. The widow's renunciation of her annuity could have no effect on the question of vesting—*Muirhead* v. *Muirhead*, May 12, 1890, 17 R. (H.L.) 45, 27 S.L.R. 917; *Haldane's Trustees* v. *Haldane*, December 12, 1895, 23 R. 276, 33 S.L.R. 206.

Argued for the second and third parties—The residue had vested in the children. There was no survivorship clause and no destination-over. The direction to retain until the youngest of the children attained the age of twenty-five was merely an administrative condition—*White* v. *Gow*, July 11, 1900, 2 F. 1170, 37 S.L.R. 895; *Alves' Trustee* v. *Grant*, June 3, 1874, 1 R. 969, 11 S.L.R. 559; *Home's Trustees*, July 14, 1891, 18 R. 1138; *Ballantyne's Trustee* v. *Kidd*, February 18, 1898, 25 R. 621, 35 S.L.R. 488; *Matheson's Trustees* v. *Matheson*, February 2, 1900, 2 F. 556, 37 S.L.R. 409. The postponement of payment until the death of the widow was directed solely in order to secure her annuity. The Court if satisfied of the safety of the annuity would authorise a sum to be set aside to meet it—*Graham's Trustees*, December 23, 1898, 1 F. 357, 73 S.L.R. 273. A widow could competently renounce her annuity, as was done in the case of *Pretty* v. *Newbigging*, March 2, 1854, 16 D. 667. The widow's annuity as restricted being sufficiently secured, and the postponement of payment till the youngest of the children attained twenty-five being repugnant to the gift of a fee and consequently ineffectual—*Miller's Trustees* v. *Miller*, December 19, 1890, 18 R. 301, 28 S.L.R. 236—the children were entitled to payment of their shares either immediately or at latest on their respectively attaining majority.

At advising—

LORD TRAYNER—The first matter to be determined under this special case is the date at which the rights conceived in favour of the testator's children vested in them. It is maintained for the children that their rights vested *a morte testatoris*, or on their respectively attaining majority, or on their attaining the age of twenty-five years. On the other hand it is maintained that no vesting took place until the death of the testator's widow and until the youngest of his children had attained the age of twenty-five. I think the view that vesting took place *a morte* cannot be sustained It is to be observed, in the first place, that the settlement before us makes no direct gift to the children, and contains no expression which can be regarded as equivalent to a gift. It contains simply a direction to the trustees to do something at a certain time, until when the children's right to claim does not arise. There is a provision that the trustees may advance to any child attaining twenty-five a third of its prospective share. It is possible that that clause was intended to do nothing more than authorise payment to children who had attained twenty-five, but before the youngest child has attained that age. But however that may be, the clause seems to me to tell against vesting. For any child receiving benefit under that clause is called on to pay legal interest on the advance made until "the arrival of the period of division." Now, if the right to this third had vested prior to the period of division no interest would have been due or exigible. No one pays interest on funds belonging to himself. A direction to give children the interest or produce of their prospective shares between the date of the testator's death and the period of division is held to tell in favour of vesting, and the direction on the contrary that children should pay interest on an advance seems to me to tell against it. Further, the testator has amply provided for the necessities of his children before the period when they are to receive payment of their shares, by putting the burden of their maintenance and upbringing on his widow, and failing their living in family with their mother, by direction to his trustees to make all necessary and proper provision for the children. I understood it to be argued on behalf of the children, as in favour of vesting *a morte*, that there was no survivorship clause, or provision that the share of a child predeceasing the period of division should go to that child's issue. But I do not regard that as of any importance on the question of vesting here, (first) because the indications against vesting to which I have alluded are so strong, and (second) because I think the direction to the trustees is really a direction to divide among the children of the marriage existing at the period of division. If any of them predeceased that date leaving issue, such issue would take the benefit of the implied condition *si sine liberis*.

If vesting, then, did not take place *a morte*, when did the children's rights vest? According to my view they only vested at the period of division, which was to take place when the truster's widow had died and his youngest child had attained the age of twenty-five. But in the circumstances which have occurred I think the provision which postponed division (and therefore vesting) until the death of the truster's widow may be disregarded. I do not reach that conclusion without some hesitation, having regard to the express terms of the trust settlement. But I see no reason to think that that postponement of division had any other purpose than that of securing payment to the widow of the provisions made in her favour. She has renounced all right under the truster's settlement except to a restricted annuity which is being amply secured, and it may therefore be held that the truster's purpose and intention in postponing division until his widow's death have practically been given effect to. It follows that in my opinion there is no vesting in the children until the youngest of them has attained the age of twenty-five years. I am of opinion further, that so far as the rights of the children are concerned, no

distinction can be drawn between the funds set free by the widow's renunciation and any other part of the trust funds. The view which I have thus expressed would lead to the 1st, 2nd, 4th, and 5th questions being negatived. The 3rd question should be answered to the effect that the first parties are bound to retain the fiars' shares of the capital of the trust-estate until the youngest child of the truster has attained the age of twenty five, subject to the trustees' right to make advances as authorised by the settlement.

In regard to the 6th question, I have no doubt that the trustees are entitled, under the express direction of the testator, to apply the revenue of the testator's estate towards the maintenance, upbringing, and education of the third parties to such extent as they (the trustees) think proper. But they are the judges of how much of the revenue should be so applied. Subject to what I have already said, I think the 7th question should be answered in the affirmative. The 8th question I would answer in the negative. The testator directed £1300 a-year to be paid to his widow. If she renounces her right to this or any part of it the amount so set free just remains in the testator's estate. It has not to be paid out—that is all—and as part of his estate falls to be dealt with according to his directions for the disposal of that estate.

The LORD JUSTICE-CLERK and LORD YOUNG concurred.

LORD MONCREIFF—1. Although the deed contains many directions postponing the payment of the provisions in certain circumstances, I find nothing in it sufficient to infer postponement of vesting.

2. It follows from the decision in *Miller's Trustees* and the recent judgment of the Whole Court in *Yuill's Trustees*, May 29, 1902, 39 S.L.R. 668, which are binding on us, that the direction to withhold payment of the shares till the death of the truster's widow and until the beneficiaries attain the age of 25 may be disregarded, and that payment may be made (at least to such as are majors) provided the widow's reduced annuity is sufficiently secured.

I would answer the questions accordingly.

The Court pronounced this interlocutor—

"Answer the first, second, fifth, and eighth questions of law in the negative: Answer the fourth question also in the negative, except in so far as it is dealt with in the answer to the sixth question: Answer the third question by declaring that the first parties are bound (1) to set aside until the death of the fourth party such portion of the capital of the trust estate as shall be sufficient to secure the annuity of £200 to her; and (2) after so providing for the said annuity, to retain the fiars' shares of the capital of the trust estate until the youngest child of the truster has attained the age of twenty-five, subject to the right of the trustees to make advances and payments to beneficiaries as authorised by the trust-disposition and settlement: Answer the sixth question by declaring that the trustees are entitled, in terms of the directions of the truster, to apply the revenue of the truster's estate, under deduction always of the said annuity of £200 to the fourth party, towards the maintenance, upbringing, and education of the whole children of truster to such an extent as the trustees may think proper; and subject to such application of the revenue, Answer the seventh question in the affirmative: Find and declare accordingly, and decern," &c.

Counsel for the First Parties—Macfarlane. Agents—Millar, Robson, & M'Lean, W.S.

Counsel for the Second and Third Parties—Hunter. Agents—Horsburgh & Bryden, S.S.C.

Counsel for the Fourth Party—Pearson. Agents—Cameron & Orr, S.S.C.

Wednesday, May 21

FIRST DIVISION.

[Lord Kincairney, Ordinary.

MITCHELL *v.* BAIRD

Trust—Liability of Trustee—Expenses of Litigation—Reduction of Trust Deed—Expenses.

An action for the reduction of a trust-disposition and settlement was directed against the trustee appointed thereunder, as trustee and as an individual, and against certain other individual defenders. The action so far as laid against the trustee as an individual was dismissed, but he remained a party to the action and conducted the defence till the end. The trust-disposition having been reduced, *held* that the pursuer was entitled to expenses against all the defenders including the trustee.

Mrs Agnes Pyle or Mitchell brought an action against Mr John Baird, solicitor, Edinburgh, as trustee and executor under a trust-disposition and settlement executed by the late Andrew Millar Mitchell, and as an individual, and also against the whole next-of-kin of Mr Mitchell, concluding for reduction of the said trust-disposition and settlement.

Defences were lodged by Mr Baird, and the other defenders lodged a minute in which they adopted these defences.

The defender pleaded, *inter alia*, "(1) No relevant case, at all events so far as the action is directed against the defender John Baird personally."

On 28th January 1902 the Lord Ordinary (KINCAIRNEY) dismissed the action so far as laid against the defender John Baird as an