paid into Court with liberty to either party to apply—by which I understand liberty to the creditor to apply—for payment *pro tanto* if the company did not meet its obligations at any term, and for the company to apply to have the fund released *pro tanto* if it did meet its obligations term by term. In the analogous case—*Oppenheimer*, *supra*—of a shareholders' liquidation, the lessor's interest for future rent was protected in a similar manner by setting aside the whole amount of his future claims to run the risk of sub-lessee's failure. *Gooch's* case L.R., 32 Ch. D. 41, is in the same direction. The company here must, I think, submit to appropriation on similar terms if they want to reduce their capital as proposed.

LORD MACKENZIE was absent.

Counsel for the petitioners having stated that they (the petitioners) were not in a position either to consign the rent for the remainder of the lease or to find security therefor, the Court dismissed the petition.

Counsel for Petitioners—Cooper, K.C.—Wilton. Agents—William Douglas, S.S.C.

Counsel for Respondents—Horne, K.C.—Dykes. Agents—J. & J. Ross, W.S.

Thursday, October 19.

FIRST DIVISION.

VANS DUNLOP'S TRUSTEES *v.* FERGUSSON POLLOK AND OTHERS.

Trust—Appropriation of Investments to Particular Legacies—Right to Appreciation—Power of Trustees to Sever Interests of Beneficiaries.

A testator directed his trustees, failing the opening of another succession by a certain date, to hold a legacy of £7000 for behoof of his brother-in-law in liferent and his issue in fee. He left the residue of his estate to the University of Edinburgh. The trustees were authorised to retain such of his stocks and shares as they might think proper, and to divide them among the various legatees, or otherwise appropriate them for the purposes of the trust. On the date specified (the succession referred to not having opened), A, the sole accepting trustee, set aside a sum of £7000, which he invested for behoof of himself in liferent and his children in fee. He paid over the residue to the residuary legatee. On A's death certain of the investments were found to have appreciated in value to a considerable extent.

Held that the appreciation in value fell to A's issue, for whom the sums had been so set apart, and not to the residuary legatee.

Observations (*per* the Lord President) as to the power of trustees to sever the interests of beneficiaries.

On July 19, 1910, Thomas Skene Esson, W.S., Edinburgh, and another, the trustees acting under the trust-disposition and settlement of the late Dr Andrew Vans Dunlop, sometime surgeon in the East India Company's service, and thereafter residing in Edinburgh, *first parties;* Jane Dunlop Fergusson Pollok, Pollok Castle, Renfrewshire, and others, children of the late William Fergusson Pollok, of Pollok Castle aforesaid, *second parties;* and the University Court of the University of Edinburgh, *third party*, presented a Special Case in which they craved the Court to determine whether the appreciation in value of certain of the trust investments which had been set apart for behoof of the second parties fell to be paid over to them or to the third party as residuary legatee.

The *facts* as given by the Lord President in his opinion were as follows:—"This is a Special Case presented for the disposal of a question which has arisen in the administration of the estate of the late Dr Andrew Vans Dunlop, who left a settlement by which he made various bequests. In particular, by the eleventh purpose of his trust-disposition and settlement, he provided that in case the wife of his brother-in-law, Mrs Fergusson, did not succeed to certain estates before his death or before the 1st January 1883, he left to his brother-in-law the sum of £5000 sterling 'in liferent to be held by my trustees in Europe for his liferent use allenarly and for his lawful issue in such proportions as he, and failing him, as his said wife, may direct and appoint, in fee.' That £5000 was subsequently increased by an additional £2000 being added to it. Mrs Fergusson did not succeed to Pollok estates before the death of Dr Vans Dunlop or before 1st January 1883. Dr Vans Dunlop died on 27th February 1880. After various other provisions, there was a residuary bequest by which the trustees were bound to pay over the whole residue estate to the University of Edinburgh.

"Now when the 1st January 1883 passed, the trustees set aside a sum of £7000, and they invested it in a certain way to meet the legacy which they were told to hold for Mr Fergusson in liferent and for his children in fee. They have held that investment ever since. The liferenter has now died, and the investment has appreciated in value.

"In 1883, the trust purposes being generally fulfilled, the trustees made over the whole residue, retaining merely a small sum of £400 to meet some calls which were possible upon some shares which were held by the testator, and a small sum of £183 to meet eventual expenses; and they paid the whole residue as it existed to the University of Edinburgh, and they got a receipt and discharge from their commissioner.

"The special bequest of £7000 being now free to be given to the fiars, the liferenter being dead, the University have put in a claim for the value of the appreciation which has taken place upon the investment held."

Dr Vans Dunlop's settlement, after conferring power on his trustees to invest the

trust funds in various securities therein specified, and authorising them to retain certain of his stocks and shares, proceeded as follows—"And having estimated the value of these stocks and shares at the market rate of the day, they shall divide them accordingly among the various legatees, or otherwise appropriate them for the purposes of this trust."

The second parties *contended* that as Mrs Fergusson did not succeed to the Pollok estates before 1st January 1883, said legacies of £5000 and £2000 at that date vested in Mr William Fergusson in liferent and in his issue in fee, and that the University then ceased to have any interest in said sums. That said sums were at that date properly set aside and appropriated by the said William Fergusson, as trustee, for himself in liferent and his issue in fee, as distinct from the residuary estate in which the University was interested. That the debenture of the Mortgage Company of South Australia, Limited, in which said sums were invested, and the subsequent investments by which it was replaced, belonged to, and were held exclusively for, the said William Fergusson in liferent and the second parties in fee, and that the proceeds of the British Linen Bank stock which formed one of said investments belonged exclusively to the second parties, and now fell to be paid over to them.

The third parties contended that the said William Fergusson Pollok, as trustee foresaid, had no power to and did not legally set aside and appropriate the investments above mentioned to meet the said legacies of £5000 and £2000, and did not competently sever the same from the rest of the trust estate. They further contended that the second parties were now entitled to payment only of the balance of the said legacies remaining unpaid, and that the appreciation which had taken place in the British Linen Bank stock, in which the said balance had since 1892 stood invested, enured to residue and was payable on realisation to the third parties.

The *questions of law* were—"(1) Was the late William Fergusson Pollok, as trustee foresaid, empowered by the testator's testamentary writings to set aside and appropriate particular investments to satisfy the said legacies of £5000 and £2000, so as to sever the same from the rest of the trust estate? (2) In the event of the preceding question being answered in the affirmative, did the said deceased William Fergusson Pollok, as trustee foresaid, legally and competently set apart and appropriate the particular investments mentioned in the case to satisfy the said legacies? (3) Are the second parties entitled to the benefit of the appreciation which has taken place in the investment in British Linen Bank stock representing the balance of the said legacies? or, Are the third parties entitled, on realisation of the said British Linen Bank stock, to the difference between the price realised and the balance of the capital of the said legacies remaining due to the second parties?"

Argued for the second parties—The truster had authorised his trustees to "appropriate" the estate as the trust purposes might require. That having been done, the appreciation on the sums so appropriated fell to the parties for whom it had been set aside—*Robinson* v. *Fraser's Trustees*, August 3, 1881, 8 R. (H.L.) 127, 18 S.L.R. 740.

Argued for the third parties—The trustees though authorised to appropriate the trust securities were not directed to do so, and without such direction they were not entitled (in the absence of a clear indication to do so) to sever the interests of the various beneficiaries—*Teacher's Trustees* v. *Teachers*, January 10, 1890, 17 R. 303, 27 S.L.R. 250; *Scott's Trustees* v. *Scott*, November 1, 1895, 23 R. 52, 33 S.L.R. 65.

LORD PRESIDENT—[*After stating the facts ut supra*]—I confess I can see no ground whatsoever upon which that claim can be supported. It seems to me that the trustees have all along held this particular sum of money and this investment for the liferenter and for the fiars designated, and that the appreciation, if any, belongs to them. I can quite understand that where a trust is, in all its terms, a continuing trust but for benefit of different individuals, it might be necessary to have a special power of appropriation conferred upon trustees in order to allow them to separate up the investments of the trust and tie the fortunes of each beneficiary or set of beneficiaries to particular investments. But it seems to me that when a trust is of a composite character and is partly for holding and partly for distribution, there is of necessity an implied power upon trustees to set apart the whole at the time when they have to part with some of the trust for distribution. And I think that not only is *Robinson's* case an illustration, but that Lord Trayner in the case of *Scott*, 23 R. 52, at p. 57, in the passage which Mr Millar cited as helping his case for the University, fully recognises that fact. He quotes the case of *Robinson* and then he says—"In that case appropriation of special funds to meet certain legacies was sustained, although such appropriation had not been directed to be made by the trust deed. That such a course was intended by the truster in that case might very reasonably be inferred, because such appropriation was necessary to enable the residue to be divided without undue delay, which was the truster's object and indeed direction." And I think you have a good illustration of the opposite class of case in the case of *Teacher*, which was also referred to. Indeed, I think the doctrine put forward by Mr Millar, if carried out, would really be a most inconvenient doctrine in the management of trust estates, because I think that stringent application would lead to this—that wherever a truster had directed, *inter alia*, a certain sum of money to be held by his trustees for the benefit of a liferenter or

liferenters and then fiars, it would never be possible for them to pay the other special bequests and the residue and wind up the trust with the exception of the sum to be held, because it would always be in the mouths of the liferenters and fiars to say, "Oh no, you must not part with the estate, because our investment may in the future depreciate."

Accordingly I think that the case is a very simple one, and that questions one and two and the first part of three must be answered in the affirmative.

LORD KINNEAR — I am of the same opinion.

LORD JOHNSTON and LORD MACKENZIE concurred.

The Court answered the first two questions and branch one of the third question in the affirmative.

Counsel for First Parties — Pitman. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Second Parties—Constable, K.C.—Chree. Agents—E. A. & F. Hunter & Company, W.S.

Counsel for Third Parties — Macphail, K.C.—J. H. Millar. Agents — W. & J. Cook, W.S.

Thursday, October 20.

FIRST DIVISION.

(SINGLE BILLS.)

LIQUIDATORS OF KOSMOID TUBES, LIMITED, PETITIONERS.

Company — Voluntary Winding-up — Approval of Deliverances by Liquidator on Creditors' Claims — Companies (Consolidation) Act 1908 (8 *Edw. VII, c.* 69), *sec.* 193.

Under section 193 of the Companies (Consolidation) Act 1908 the liquidators of a company, which was being wound up voluntarily, presented a petition for the approval of the whole of their deliverances on the claims of creditors, a statement of which was produced. The creditors having been duly certiorated of the petition and of the deliverances for which approval was sought, and no answers having been lodged, the Court *granted* the prayer of the petition.

The Companies (Consolidation) Act 1908 (8 Edw. VII, c. 69), section 193, enacts—"(1) Where a company is being wound up voluntarily the liquidator or any contributory or creditor may apply to the Court to determine any question arising in the winding-up, or to exercise, as respects the enforcing of calls, or any other matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court. (2) The Court, if satisfied that the determination of the question or the required exercise of power will be just and beneficial, may accede wholly or partially to the application on such terms and conditions as the Court thinks fit, or may make such other order on the application as the Court thinks just."

On 6th September 1911, Ninian Glen, C.A., Glasgow, and another, the liquidators of Kosmoid Tubes, Limited, Dumbarton, presented a petition under section 193 of the Companies (Consolidation) Act 1908 for approval of the deliverances of the liquidators on the whole claims adjudicated upon by them as contained in their statement of adjudications, and to rank the claims of the creditors in accordance therewith.

After stating the objects for which the company was established, viz., the manufacture of tubes, &c, the capital of the company, original and reduced, and the confirmation of a resolution for the voluntary winding-up, the petition proceeded—"(7) The liquidators have realised the whole assets of the company, and are now in a position to complete the winding-up by paying a dividend to the creditors. The state of affairs of the company, as made up by the liquidators, shows, provided all the claims lodged were admitted to a ranking, a deficiency of £8570, 2s. 8d., which is made up as follows:—

Total net assets . . .	£2,279 0 6
Total claims lodged . .	10,849 3 2
Deficiency,	£8,570 2 8

"This deficiency may be increased by legal and other expenses so far as not yet paid.

"(8) The liquidators have now adjudicated on all the claims lodged. A statement of adjudications, showing the claims lodged, and the liquidators' deliverances thereon, is herewith produced, and confirmation by the Court of all the deliverances contained in said statement is now craved. The following is an abstract of the liquidators' deliverances:—

Total claims lodged with the liquidators by creditors in the liquidation	£10,849 3 2
Of which amount the liquidators have rejected the sum of .	8,244 3 9
Leaving as claims admitted to an ordinary ranking by the liquidators	£2,604 19 5"

At the hearing in the Single Bills counsel for the petitioners stated that certain questions had arisen regarding the deliverances pronounced on certain claims; that in order to have these judicially determined a copy of the petition and the deliverance on his claim had been served on each of the creditors, accompanied by the relative excerpt from the state of adjudications; that the inducíæ had expired, and that no answers had been lodged. He accordingly craved the Court to grant the prayer of the petition.

The Court (the LORD PRESIDENT and LORDS KINNEAR, JOHNSTON, and MACKENZIE) pronounced this interlocutor—

"Approve of the deliverances of the