Thursday, February 17.

SECOND DIVISION.

[Lord Hunter, Ordinary.

WHITE *v.* WHITE'S TRUSTEES.

Succession — Testament — Anticipation of Payment — Vested pro indiviso Share of Residue with Payment Postponed — Ulterior Purposes.

A testator, after bequeathing an annuity to his widow, directed that on her death legacies amounting to £4000 should be paid to certain beneficiaries; that the residue of his estate should be divided equally among two brothers, a sister, and a deceased sister's children; that any surplus income of the residue of the estate after payment of the annuity should "be accumulated with and fall into and form part of the residue of the trust estate, and that any deficiency of the income of the said residue required to pay the said" annuity "shall be paid and made good out of the capital of the said residue." The income of the estate was considerably in excess of the amount required to pay the annuity. The widow having claimed her legal rights, one brother, whose share had admittedly vested, claimed immediate payment thereof. None of the other beneficiaries concurred in his demand. *Held* (*diss.* Lord Salvesen) that he was not entitled to immediate payment, in respect that the interests of the residuary legatees in the interest on the legacies of £4000 would be prejudicially affected thereby.

Opinion per Lord Salvesen that not only he but the legatees of the £4000 also were entitled to immediate payment.

Muirhead v. *Muirhead*, 1890, 17 R. (H.L.) 45, 27 S.L.R. 917, *explained* and *followed*.

John White, house agent, Aberdeen, *pursuer*, brought an action against D. R. M'Gilvray and others, the trustees acting under the trust-disposition and settlement and relative codicil of the late James White of Legatesden, merchant in Aberdeen, and others, *defenders*, for declarator (1) that under the last purpose of the testator's will the pursuer acquired at 31st August 1902, the date of the testator's death, a vested right in one-fourth of the residue, including all accumulations of revenue falling into residue; (2) that the trustees had sufficient funds belonging to the estate to make payment of all legacies, and to provide a surplus fund for meeting the pursuer's claim; (3) that the pursuer was entitled to "payment, conveyance, or distribution as at 31st October 1913," the date of closing the last trust account, "of one equal fourth part of the said residue, including accumulations of revenue as aforesaid, provision being always made by the defenders first called to satisfy the legacies provided by the seventh purpose of the said trust-disposition and settlement, either by payment or discharge of the same, or by retaining a sum of £4000 sterling or such sum as our Lords may determine to meet the same;" (4) that the pursuer was entitled to payment as at 31st October 1913 of a fourth of so much of the residue, including accumulations, as was not affected by the widow's terce; (5) that the pursuer was entitled to a conveyance of one *pro indiviso* fourth share of the heritage subject to the terce payable to the testator's widow, or alternatively to payment from 31st October 1913 of one-fourth part of the free income of the heritage; and lastly (6), that the pursuer was entitled to payment as from 31st October 1913, and thereafter annually until the death of the testator's widow, of one-fourth of the surplus revenue arising from the sum of £4000 sterling retained to meet the legacies bequeathed under the seventh purpose of the will. There were petitory conclusions designed to give effect to these declaratory conclusions.

By his *trust-disposition and settlement* the testator, after bequeathing an annuity of £25 to his servant William Jack, provided, *inter alia*, as follows: — "(*Fifth*) I direct and appoint my trustees to hold and stand possessed of the residue and remainder of the trust estate during the lifetime of my said wife Mrs Robina Johnston or White, and to allow her to have the liferent use and occupation free of rent and of owner's and occupier's rates, taxes, and assessments of the mansion-house, garden, offices, and policies of Legatesden, and also to pay to her out of the trust estate or the income thereof an annuity of five hundred pounds sterling yearly during all the days of her life, . . . declaring that any surplus income of the residue of the estate after payment of the said two annuities shall be accumulated with and fall into and form part of the residue of the trust estate, and that any deficiency of the income of the said residue required to pay the said annuities shall be paid and made good out of the capital of the said residue: . . . (*Seventh*) At the first term of Whitsunday or Martinmas happening four months after the death of my wife, or after my death if she shall predecease me, I direct and appoint my trustees to pay out of the residue of the trust estate the following legacies to the persons after named . . . [*The testator then bequeathed legacies amounting in all to* £4000.] . . . (*Lastly*) As soon as conveniently may be after the death of my wife, or after my death if she shall predecease me, and after payment of the last-mentioned legacies, and providing for the said annuity to the said William Jack if he is then in life, I direct and appoint my trustees to divide the whole rest, residue, and remainder of the trust estate and accumulations thereof, if any, into four equal portions or shares, and to account for and pay over the same as follows: — one share to my brother the said Alexander White, one share to my sister the said Mrs Martha White or Paterson, one share to my brother the said John White, and one share to the said George Philip Stewart, Robina Stewart, and James White Stewart, children of my deceased sister Ann White

or Stewart, equally among them or the survivors or survivor of them: Declaring always that if any of the said residuary legatees shall predecease me leaving issue, such issue shall have right equally among them *per stirpes* to the share of residue which would have fallen to their parent had he or she survived me." The provisions in favour of the testator's widow were declared to be in full satisfaction of terce, *jus relictæ*, and every other claim competent to her through the testator's death.

The testator died on 31st August 1902, without issue, survived by his wife, who subsequently claimed her legal rights. The trust estate as at 31st October 1913 consisted of—

1. Heritable estate as of the value of	£19,404 10 9
2. Moveable estate, consisting of Government stocks, shares of public companies, sums on bond and disposition in security, and on deposit-receipt, &c.	13,264 18 5
	£32,669 9 2

The pursuer pleaded, *inter alia*—"(1) On a sound construction of the said trust-disposition and settlement the share of residue bequeathed to the pursuer by the last purpose thereof is vested in him, and he is entitled to decree in terms of the first declaratory conclusion. (2) In respect that there is now no trust purpose to be served by withholding payment of and accumulating the revenue of the share of residue bequeathed to the pursuer, and that there are ample funds in the trustees' hands to pay or meet all the legacies, the pursuer is entitled to immediate payment or conveyance of his share of residue, and decree should be pronounced in terms of the second and of the third declaratory conclusions. (3) In any event, there being no obstacle to immediate payment other than the claim of terce, decree should be pronounced in terms of the fourth declaratory conclusion and of the petitory conclusion *secundo loco* set forth."

The defenders pleaded, *inter alia*—"(1) The defenders being bound to hold the trust estate during the lifetime of the testator's widow are not in a position to make any payment to the pursuer *in hoc statu*. (2) The defenders not being presently able to obtain a discharge from all the beneficiaries are not bound to make any distribution of the trust estate *in hoc statu*. (3) The defenders have no authority under the trust-disposition and settlement or otherwise to anticipate the date of payment prescribed thereby, or to appropriate sums of money or investments for the payment of legacies not yet payable."

On 20th November 1914 the Lord Ordinary (HUNTER) sustained the first plea-in-law for the defenders and dismissed the action.

Opinion.—"In this case one of the residuary legatees of the estate of the late James White of Legatesden, merchant in Aberdeen, claims payment of his share of the residue in that estate.

"Under his settlement the truster made provision for the payment of certain provisions to his wife and of certain legacies to different legatees. His wife renounced her interests under the settlement and took her legal rights, granting a full discharge to the trustees for any interest she might have under the settlement.

"The provision under the will as regards the residue is that on the death of the truster, in the event of his wife predeceasing him or on the death of his widow in the event of his being survived by his wife, the trustees should divide the rest, residue, and remainder of the trust estate into four equal shares, one share going to the pursuer, one share to another brother, one share to a sister, and the fourth share to the children of a deceased sister. Each of these four parties take *a morte testatoris* a vested interest in a *pro indiviso* fourth share of the residue, but the ascertainment of the residue is postponed, and as regards the fourth share going to the children of the deceased sister there is a provision that it is to be payable equally among them and the survivors or survivor of them. The contention of the pursuer is this, that in respect that the widow has discharged the burden upon the estate there is no reason for delaying immediate distribution, and if the parties interested in the residue were assenting to his application there would (in virtue of the authorities to which I was referred by Mr Sandeman) have been a great deal to be said for that view. The trustees, however, inform me that the other residuary legatees are not assenting, and that they therefore require to hold the estate until the time for the ascertainment of the shares. They contend that they are not in safety to make immediate payment to the pursuer. I think that the recent case in the House of Lords to which I have been referred (*M'Culloch* v. *Macculloch's Trustees*, 6 F. (H.L.) 3, 41 S.L.R. 88) is an authority for the defenders' contention. In that case it was held that a legatee who had a vested right to a definite *pro indiviso* share of residue was not entitled to payment thereof before the date fixed by the testator for realising the estate, as the amount of residue could not be ascertained before that date.

"The reasoning of the Judges in the House of Lords appears to me to be entirely applicable to the present case, and I think that I must hold that the trustees are entitled here to retain the estate. I dismiss the action."

The pursuer reclaimed, and argued—Every interest under the will vested *a morte testatoris*—*Campbell* v. *Campbell of Melfort's Trustees*, 1866, 5 Macph. 206; *Jack* (*Cleland's Trustee*) v. *M'Nab*, 1874, 12 S.L.R. 42; *Webster's Trustees* v. *Neil*, 1900, 2 F. 695, 37 S.L.R. 493; *Cathcart* (*Cathcart's Trustees*) v. *Ewart and Others*, 1902, 10 S.L.T. 101. The only purposes of the settlement in any way continuing were the two annuities to Jack and the widow, and these were both out of the way. The whole scheme of the settlement was to protect these annuities. *M'Culloch* v. *Macculloch's Trustees*, 1903, 6 F. (H.L.) 3,

[1904] A.C. 55, 41 S.L.R. 88, founded on by the Lord Ordinary was quite distinguishable. In that case there was no disappearance of any trust purpose, and it was simply a question of the construction of the testator's will. The basis of judgment was that there were ulterior purposes to be served, and the ultimate beneficiaries could not be ascertained till the period of distribution. In the present case the operative trust purposes having disappeared by the hostile act of a beneficiary, the subsidiary administrative purposes went with them. There was in the present case no imperative direction to accumulate apart from any other trust purpose. The surplus income clause was within the ambit of the annuity clause and might be regarded as discharged with it. The case of *Muirhead* v. *Muirhead*, 1890, 17 R. (H.L.) 45, 27 S.L.R. 917, was an authority in the pursuer's favour. The two criteria which Lord Watson in that case founded on as sustaining accumulation were against it in the present case. *Roberton* v. *Davidson*, 1846, 9 D. 152, and *Rainsford* v. *Maxwell*, 1852, 14 D. 450, which were prior cases of accelerating payment, were expressly approved by Lord Watson in *Muirhead* v. *Muirhead* (*cit. sup*). *Muirhead's* case, while rejecting those cases which varied the period of vesting, gave the stamp of the highest authority to those which, vesting being *a morte* and there being no ulterior object, merely accelerated payment. In *Jack's Trustees* v. *Jack*, 1913 S.C. 815, 50 S.L.R. 536, the distinction pointed out in *Muirhead* v. *Muirhead* (*cit.*) between accelerating vesting and accelerating payment was given effect to. The present case was governed by the principles laid down in *Miller's Trustees* v. *Miller*, 1890, 18 R. 301, 28 S.L.R. 236, and applied in *Ballantyne's Trustees* v. *Kidd*, 1898, 25 R. 621, 35 S.L.R. 488. The widow's right to terce need not prevent a division of the estate—*Alexander's Trustees*, 1870, 8 Macph. 414, 7 S.L.R. 240; Menzies on Conveyancing (Sturrock's ed.), p. 651. The consent of all the beneficiaries was not required here. Such consent was only necessary where there was not vesting in everyone—*Muirhead* v. *Muirhead* (*cit. sup.*). It was a mere accident that the interest on the £4000 went to the residuary legatees. In any event it would be sufficient if a sum was put aside to meet these legacies, dividing the interest among the residuary legatees. The Thellusson Act did not apply when the shares were vested.

Argued for the defenders and respondents —There could be no acceleration of payment in the present case, even at the request of all the beneficiaries, because there was an express direction to accumulate and also that payment was not to be made till the death of the liferentrix. The annual income was largely in excess of the annuity. The testator must therefore have had some ulterior purpose in view when he directed the surplus to be accumulated, and must have meant it to be accumulated independent of the annuity. The case of *Muirhead* v. *Muirhead* (*cit. sup.*) was exactly in point and ruled the present case. The defenders were not, however, bound to find reasons why the estate should be kept up. It was sufficient if the testator wished it—*Grieve's Trustees* v. *Bethune*, 1830, 8 S. 896. In any event it was impossible to anticipate payment without all the beneficiaries concurring. The present case was quite different from the class of cases represented by *Miller's Trustees* v. *Miller* (*cit. sup.*). The distinction was that between a joint privilege and a right, and in the former all those interested must concur—*Weatherall* v. *Thornburgh*, (1877) L.R., 8 Ch. Div. 261, *per* Cotton, L.J., at p. 270; M'Laren on Wills, sec. 1504, vol. ii, p. 820. *Ballantyne's Trustees* v. *Kidd* (*cit. sup.*) founded on by the appellant was just a case of repugnancy like *Miller's Trustees* v. *Miller* (*cit. sup.*). This distinction was further recognised and illustrated in the cases of *Souter Robertson* v. *Robertson's Trustees*, 1900, 8 S.L.T. 50; *Haldane's Trustees* v. *Haldane*, 1895, 23 R. 276, 33 S.L.R. 206; *M'Culloch* v. *Macculloch's Trustees* (*cit. sup.*); *Anderson's Trustees* v. *Anderson*, 1904, 7 F. 224, 42 S.L.R. 167, *per* Lord M'Laren, at p. 230. It was a condition-precedent to anticipation of payment that the interest of other persons should not be affected and that the estate should not go to persons to whom it would not otherwise go—*Elder's Trustees* v. *Treasurer of Free Church of Scotland*, 1881, 8 R. 593, 18 S.L.R. 392; *Jack's Trustees* v. *Jack* (*cit. sup.*), *per* Lord Kinnear, at p. 828. These conditions could not be predicated in the present case; because anticipation of payment might adversely affect the interests of (1) the residuary legatees, (2) the widow, (3) the heirs *ab intestato*, (4) the Stewart family. (1) Under the seventh purpose of the will the interest on the £4000 went into residue, and the residuary legatees would lose this if there were immediate payment. Apart from this the whole of the residue was so interlocked that it could not be divided up till the period of distribution, and therefore the division required by the pursuer would not be the division contemplated by the testator. (2) It was by no means clear that, after equitable compensation had been made, the widow might not have an eventual interest in the estate, which might be prejudicially affected by present payment—*Macfarlane's Trustees* v. *Oliver*, 1882, 9 R. 1138, 19 S.L.R. 850; *Gray's Trustees* v. *Gray*, 1907 S.C. 54, 44 S.L.R. 39; *Burns' Trustees* v. *Burns' Trustees and Others*, 1911, 2 S.L.T. 392; *Nixon's Trustees* v. *Kane*, 1915 S.C. 496, 52 S.L.R. 375. (3) The interest of the heirs *ab intestato* might be adversely affected by anticipation of payment, because the Thellusson Act might come into operation in the event of the estate being maintained intact, and in that event the surplus revenue would fall to them—*Smith* v. *Glasgow Royal Infirmary*, 1909 S.C. 1231, 46 S.L.R. 860; *Weatherall* v. *Thornburgh* (*cit. sup.*). (4) There was no vesting in the individual members of the Stewart family, and the trustees would require to hold at least a quarter of the estate so as to enable the survivorship clause to be worked out. That clause referred to the period of distribution

—*Young* v. *Robertson*, 1862, 4 Macq. 314; *Bryson's Trustees* v. *Clark*, 1880, 8 R. 142, 18 S.L.R. 103. *Webster's Trustees* v. *Neil* (*cit. sup.*), founded on by the appellant, was really in the defenders' favour. The judgment in that case proceeded on the ground that the only reason for postponing payment was the protection of the widow's annuity, and that similar words of style had been used in a prior part of the deed in a bequest which undoubtedly vested *a morte*. In the present case the amount was too great merely to protect the annuity, and the survivorship clause, which was present in the bequest to the Stewart family, was absent in other bequests in the deed which undoubtedly vested *a morte*. The words "if any" used by the testator referred to the residuary legatees and not to the Stewart family. If the shares did not vest now it was impossible to say that anticipation of payment might not affect the amount ultimately payable. In any event the action was premature, and the proper contradictors to the pursuer were not and could not be represented in the present process—*Allgemeine Deutsche Credit Anstalt* v. *Scottish Amicable Life Assurance Society*, 1908 S.C. 33, 45 S.L.R. 29; *Smith* v. *M'Coll's Trustees*, 1910 S.C. 1121, 47 S.L.R. 291; *Baillie's Trustees* v. *Whiting*, 1910 S.C. 887, 47 S.L.R. 684; *Weatherall* v. *Thornburgh* (*cit. sup.*). Further, the pursuer was not entitled to ask for the conveyance of one quarter of his share of the heritage *pro indiviso*—Bell's Prins. sec. 1071; *In re Horsnaill*, [1909] 1 Ch. 631; *in re Kipping*, [1914] 1 Ch. 62. The present case was an action by a beneficiary who had not even got a liquid share.

At advising—

LORD JUSTICE-CLERK—I am of opinion that the Lord Ordinary's interlocutor should be affirmed.

I think the legacies left in the seventh purpose have vested, and also that the shares of residue have vested in the persons named in the last purpose.

The widow having elected to take her legal provisions, the fifth purpose, in my opinion, must be practically read out of the trust-disposition and settlement. The provisions at the end of the said purpose as to surplus income or deficiency of income I consider express no more than what would otherwise be implied if no such provisions had been made.

By the seventh purpose the legacies therein bequeathed are only to be paid (in the event which has happened) after the death of the widow. Subject, therefore, to any questions that might arise under the Thellusson Act, or after equitable compensation had been made, the income of the £4000 dealt with in this purpose would, until the date of payment of these legacies arrived, accresce to residue and fall to the residuary legatees. I see no reason or justification for accelerating the payment of these legacies and, to the prejudice of the residuary legatees, paying them now instead of at the date fixed by the testator.

Similarly, I see no reason or justification for accelerating the division and payment of the residue and "accumulations thereof" so as to pay them now instead of, as the testator under the last purpose directed, after the death of the widow and after payment of the legacies mentioned in the seventh purpose.

Subject to the provisions of the Thellusson Act a testator may practically give such directions as to accumulation of income and as to the period of the distribution of his estate as he thinks proper. Up till now nothing has occurred, so far as the present trust is concerned, either as to accumulation or postponement of payment which is contrary to law, or which prevents the settlement being carried out in accordance with its exact terms except as to the widow's provision. I see no reason because the widow has claimed her legal rights for reading clauses "seven" and "lastly" of the settlement as the pursuer desires, or otherwise than they would have been read if no such claim had been made. I refer to and adopt Lord Bramwell's opinion in *Muirhead's* case (17 R. (H.L.) 45 at p. 51, 27 S.L.R. 917).

It was explained to us that while none of the residuary legatees had lodged defences they objected to the £4000 of legacies under the seventh purpose being paid now, and they do not concur in the pursuer's present demand. If all the parties interested in the seventh and last purposes concurred in a joint request to the trustees to pay over and divide the whole estate now, the position might be materially altered. But that is not the position now before us. It appears to me that the case of *Macculloch*, 6 F. (H.L.) 3, 41 S.L.R. 88, cited by the Lord Ordinary, and Lord M'Laren's observations on that case in the case of *Anderson*, 7 F. 224 at p. 230, 42 S.L.R. 167, support the view taken by the Lord Ordinary.

The pursuer only asked decree *hoc statu* in terms of the first three declaratory conclusions. There was no dispute as to the first two of these conclusions, but no practical purpose would be served by granting decree in terms thereof. As to the third conclusion, I do not think the pursuer is entitled to decree in terms thereof, and in any event such decree could not be granted, it seems to me, without some amendment of the conclusion.

LORD DUNDAS—We listened to a full and careful argument in this case; I think it is not unattended with difficulty, but I have come to the conclusion that the interlocutor reclaimed against is right.

Ths first question concerns the vesting of the residue of the truster's estate. I think it vested *a morte testatoris*. There was no dispute that this is so as regards three of the four shares into which the residue is directed to be divided, including the one destined to the pursuer. The only dispute was as to the one-fourth share bequeathed to "the said George Philip Stewart, Robina Stewart, and James White Stewart, children of my deceased sister Ann White or Stewart, equally among them or the sur-

vivors or survivor of them." If the terms of the bequest had ended there I should have held that vesting was postponed until the period of distribution, in accordance with the general presumption explained in *Young* v. *Robertson*, (1862) 4 Macq. 314, and other cases. But the settlement immediately proceeds—"Declaring always that if any of the said residuary legatees"--and I think the three persons above named are plainly among these—"shall predecease me leaving issue, such issue shall have right equally among them *per stirpes* to the share of residue which would have fallen to their parent had he or she survived me." The effect of these words is, in my judgment, to rebut the presumption that the words of survivorship are referable to the period of distribution, and to show that they are intended to relate to the date of the testator's own death. This appears to me to be the proper construction of the words of this instrument, and no great aid is to be derived from cases decided on the language of other settlements, but *Webster's Trustees*, (1900) 2 F. 695, 37 S.L.R. 493, strongly resembles the present case and supports the view I have expressed.

The next question is as to the period of distribution and payment. By the fifth purpose of the settlement the trustees are directed to hold and stand possessed of the residue of the trust estate during the lifetime of the truster's wife, and to pay her an annuity of £500 during all the years of her life, "declaring that any surplus income of the residue of the estate after payment of the said two annuities"—there was a small annuity bequeathed to a servant of the testator who is now dead—"shall be accumulated with and fall into and form part of the residue of the trust estate, and that any deficiency of the income of the said residue required to pay the said annuities shall be paid and made good out of the capital of the said residue." By the seventh purpose of the settlement the trustees were directed "at the first term of Whitsunday or Martinmas happening four months after the death of my wife, or after my death if she shall predecease me," to pay certain legacies, amounting in all to £4000, to beneficiaries named. By the last purpose the trustees were directed "as soon as conveniently may be after the death of my wife, or after my death if she shall predecease me, and after payment of the last-mentioned legacies," to divide the residue and remainder of the trust estate and accumulations thereof into four equal shares, and to pay over the same to the persons indicated. The truster's wife survived him and claimed her legal rights, renouncing her claims under the settlement. She has received payment of and granted a discharge to the trustees for the *jus relictæ*, but her claim for terce has not yet been adjusted. The pursuer's counsel maintained that the directions for postponing till after the widow's death the time of payment of the legacies and distribution of residue must be held to have been given with the sole view of securing payment of the annuities, both of which have now ceased to be exigible. I should be prepared to accede to that argument. No other reason for postponement was suggested by counsel; none occurs to my mind; and the pursuer's view seems to me to be borne out by the provision that any deficiency of income required to pay the annuities should be made good out of capital. But the pursuer's counsel proceeded to argue that upon that assumption the truster's direction to postpone payment of the said legacies and distribution of the residue until after his wife's death must be read out of the settlement altogether, and that the Court ought now to ordain the immediate payment and conveyance to the pursuer of his fourth part of the residue, subject to payment of, or provision for, the legacies under the seventh purpose and adjustment of the widow's claim for terce. I cannot agree with this contention. The Court could not pronounce such a decree unless satisfied that the whole residue is now distributable. The testator has fixed in plain and unambiguous terms the date at which, and not before which, payment of the legacies and distribution of the residue shall be made, and I do not know by what warrant we are entitled to disregard his direction. Immediate payment of the legacies would obviously be to the prejudice of the residuary legatees, who, if the initial direction of the seventh purpose stands good, are entitled to the benefit of the accumulations of surplus income until the widow's death. The residuary legatees, other than the pursuer, though called as defenders, have not lodged defences, but it was made plain to us from statements made and letters read to us by counsel for the trustees that these legatees had duly entered appearance, and only abstained (very properly I think) from coming forward as active defenders on the footing that the trustees' counsel should strenuously oppose in argument (as they did) any suggestion of present payment of the legatees under the seventh purpose, and from the last purpose of the settlement it is plain that the residue is not to be distributed until after these legacies are paid. The position so maintained for them seems to me to be unassailable. It is beyond question that, as pointed out by Lord Watson in *Muirhead*, "in cases where the final distribution of a trust estate is directed to be made on the death of an annuitant, and it clearly appears that in postponing the time of division the testator had no other object in view than to secure payment of the annuity, it may be within the power of the Court, upon the discharge or renunciation of the annuitant's right, to ordain an immediate division," provided that the beneficiaries to whom the trustees are directed to pay or convey have a vested and indefeasible right to the provisions. But there is no authority in our law, so far as I am aware, and I should be surprised if there were any, for holding that it is within the functions or power of the Court, even where vesting has taken place, to order payment of legacies or distribution of residue before the time appointed by the testator, to the prejudice of any objecting beneficiary. In a later passage of the opinion above quoted from, Lord Watson says --"It is impossible to hold as a matter of

principle that the act of any person outside of and hostile to the trust can *per se* effect an alteration of the truster's dispositions with regard to the vesting of interests in his estate"; and I think one may fairly add by way of a corollary—or of his directions as to the period of payment so far as this may affect the interests of the beneficiaries *inter se* or the amounts to be received by them respectively. It may well be that if the testator had foreseen the action which his wife took after his death he might have made a different arrangement in regard to the period of division, but that is mere matter of conjecture, and cannot, as I think, affect the construction of the settlement or the legal rights of parties. Lord Watson, indeed, in another part of his opinion in *Muirhead's* case, comes very near to touching the point here raised. He discusses the case of *Lucas's Trustees*, 1881, 8 R. 502, 18 S.L.R. 363, decided by this Division of the Court. The truster there directed his trustees to accumulate the surplus income during the lifetime of his widow. She repudiated the trust, and claimed her legal rights; the Court held that the trustees were not bound to obey the direction to accumulate, and that the residuary legatees (the Lucas Trust) were entitled to immediate payment of the residue, subject to existing and contingent interests. Lord Watson pointed out that "the case differs from the present in this important respect, that the trustees of the charity, and they alone, were entitled to the estate and its accumulations, so that the transfer to them could not prejudice the interest of any beneficiary." Even in these circumstances Lord Watson expressed a doubt whether the Court, in face of "the plainly expressed intention of the testator that the residue, increased by accumulations until his widow's decease, and no lesser amount should be employed in launching his charitable scheme," were justified in giving the estate to the administration of the Lucas Trust without imposing upon them the duty of accumulation as directed by the truster. If the result of the transfer had been to "prejudice the interest of any beneficiary," it is plain that Lord Watson's attitude towards the decision would have been one not of mere doubt but of condemnation. In the case before us acceleration would, in my judgment, prejudice the interests of the residuary legatees.

I now turn to the pursuer's summons in order to see precisely what it is that he desires the Court to do and what the effect would be. The summons is long and complicated, but the pursuer's counsel asked that we should pronounce declarator *in hoc statu* in terms of the first three declaratory conclusions, and *quoad ultra* remit the case to the Lord Ordinary in order that he might ultimately, under the remaining conclusions, or some of them, give effect to the pursuer's demand that one-fourth part of the residue should be immediately made over to him. There was, I think, no serious objection stated to the first and second conclusions, which might well be granted, if they could be followed up by any effective decree of the kind desired. But difficulty is reached when the third conclusion is approached. It is for declarator that the pursuer, or those in his right—for the latter words would require to be introduced, looking to the assignations mentioned on record —are entitled to present "payment, conveyance, or distribution, of one equal fourth part of the said residue, including accumulations of revenue as aforesaid, provision being always made by" the trustees "to satisfy the legacies provided by the seventh purpose of the said trust-disposition and settlement, either by payment or discharge of the same, or by retaining a sum of £4000, or such other sum as our said Lords may determine, to meet the same." If the views I have already expressed are correct, we could not justly order present payment of these legacies to the prejudice of the residuary legatees who oppose such payment; and if this be so it seems to me that the pursuer cannot by means of this action attain the object he seeks. As regards retention, the theory of the summons is that the Court should determine that £4000 or some other definite sum should be retained to meet the legacies. But this would be a matter to be determined, at all events in the first instance, by the trustees in their discretion and not by the Court. It is quite possible that the parties may be able to arrange terms satisfactory to all of them as to the payment of the legacies or the retention of a sum for their satisfaction and as to the immediate division of the estate. If such terms were agreed on, and the trustees could obtain a proper discharge, I see no reason to doubt that the whole estate might now be distributed. Any such arrangement, however, could be effected outside altogether of the present proceedings, under which the trustees could not, in any event, obtain judicial exoneration and discharge. But I do not think that the Court can order immediate distribution or that it can be called upon to assist in or supervise the arrangement of terms upon which such distribution might be effected. It appears from what was stated to us that there may be difficulties, apart from providing for the legacies under the seventh purpose, in the way of dividing the estate before the appointed period, not only if realisation of any part of the moveable estate became necessary, as it might, but also in regard to the heritage, which would require to be realised or dealt with by some method of valuation, or conveyed in *pro indiviso* shares, and as to the adjustment of the widow's terce. It was suggested that their might be a further objection to immediate distribution owing to a possible claim by the widow emerging hereafter in connection with the doctrine of equitable compensation, but in the view I take of the case it is unnecessary to pronounce any opinion on this point. It appears to me that the objecting residuary legatees have reasonable grounds for resisting any distribution of the estate before the period appointed by the testator, and that they, or any of them, are entitled, if they so desire, to have the trust administration kept up until that

period arrives—See *Anderson's Trustees*. The pursuer has no doubt a vested right to one-fourth of the residue, but he cannot in my judgment obtain immediate payment of his share by means of this action and apart from agreement. His counsel founded strongly upon Lord Kinnear's opinion in the recent case of *Jack's Trustees*, 1913 S.C. 826, 50 S.L.R. 536, to the effect that "where there is an absolute and indefeasible right vested in a legatee the disappearance of the liferenter will entitle him to claim payment even although payment is in words directed to be made at the liferenter's death, because there is no testamentary interest to interfere with his immediate payment." The opinion quoted is unexceptionable, but it appears to me, as already explained, that there are in the case before us testamentary interests which interfere with the present payment to the pursuer.

For the reasons stated, I think that this action is really futile and ought to be dismissed, and that we should adhere to the Lord Ordinary's interlocutor.

LORD SALVESEN—The question in this case is whether the pursuer, who is one of four residuary legatees of his late brother, is entitled to immediate payment of his share of the residue, or whether the trustees are bound to hold it until the death of the truster's widow. The answer to the question depends, in the first instance, upon whether the pursuer has a vested interest in his share of the residue, and, in the second place, on whether, looking to the terms of the settlement, the postponement until the death of the widow was directed with any other view than to secure the widow in the annuity provided to her.

The deed is a very simple one, although it extends to eight pages of print. By it the truster conveyed his whole estate to certain trustees for payment in the first instance of his debts and of certain specific and pecuniary legacies. The fourth purpose provided for an annuity of £25 to a former servant William Jack. All these purposes have been fulfilled, the legacies having been paid and the annuity having come to an end with the death of the annuitant.

By the fifth purpose the testator directed that his trustees should stand possessed of the residue of the estate during the lifetime of his wife, and allow her to have the liferent use and occupation of his mansion-house, and also to pay her an annuity of £500 during all the days of her life, free of all taxes, "Declaring that any surplus income of the residue of the estate, after payment of the said two annuities, shall be accumulated with and fall into and form part of the residue of the trust estate, and that any deficiency of the income of the said residue required to pay the said annuities shall be paid and made good out of the capital of the said residue." Great stress was laid by counsel for the trustees on this direction to accumulate, but I am unable to attach any special significance to it. The declaration simply expresses what the law would imply, and although it is true that the estate left by the truster proved much more than sufficient to meet the legacies and annuities, it is plain that he contemplated that there might be a deficiency, for he expressly provided for that event. This whole clause appears to show only an anxiety on the part of the testator that his widow should be absolutely secured in her annuity.

In point of fact the widow found it more to her advantage to claim her legal rights and to renounce her claims under the settlement. This matter was adjusted in March 1904, and her *jus relictæ* was discharged by a deed executed on the 28th of that month. Her terce continued to be paid out of the heritable subjects in which the truster died infeft.

The sixth purpose of the deed of settlement did not become operative as the truster had already disposed of his business. By the seventh he directed that "at the first term of Whitsunday or Martinmas happening four months after the death of my wife, or after my death if she shall predecease me," his trustees should pay out of the residue certain pecuniary legacies. The last purpose is thus expressed—"As soon as conveniently may be after the death of my wife, or after my death if she shall predecease me, and after payment of the last-mentioned legacies, and providing for the said annuity to the said William Jack if he is then in life, I direct and appoint my trustees to divide the whole rest, residue, and remainder of the trust estate and accumulations thereof, if any, into four equal portions or shares, and to account for and pay over the same as follows":—One share to his brother Alexander, one share to his sister Mrs Paterson, one share to the pursuer, "and one share to the said George Philip Stewart, Robina Stewart, and James White Stewart, children of my deceased sister Ann White or Stewart, equally among them or the survivors or survivor of them." If the deed had stopped there, there might have been a question whether vesting *a morte* took place in the three Stewarts, as the survivorship clause might have been referred to the period of payment and not to the period of death. But that this was not the testator's intention is apparent from the declaration which follows—"that if any of the said residuary legatees shall predecease me leaving issue, such issue shall have right equally among them *per stirpes* to the share of residue which would have fallen to their parent had he or she survived me." It would be fantastic to suppose that the testator wished to provide for the issue of one of the Stewarts only if the parent predeceased himself, which would be the result of holding the survivorship clause referable to the period of payment. It is conceded that so far as the individual residuary legatees are concerned their shares vested *a morte testatoris*, and I have no doubt the same applies to the three members of the Stewart family who are named. I think it is equally obvious that the legacies given by the seventh purpose have also vested in the several legatees.

The present position of the trust accordingly is that the whole funds are vested in

the persons whom the truster desired to benefit. There is no ulterior purpose to serve, and the sole obstacle to immediate division of the estate is the direction contained in the fifth purpose that the trustees should stand vested in the trust estate during the lifetime of the widow, and after her death divide the capital. In my judgment it is impossible from the terms of this deed to hold that the testator had any other object in view in postponing payment than to secure the annuity to his wife. On this point I adopt the language of Lord Cowan in the opinion which he delivered in the case of *Alexander's Trustees*, 8 Macph. 414, at p. 415, 7 S.L.R. 240—"But the wife had an interest, in respect of her liferent provisions, in the trust estate which required to be guarded, and on this account it was that the period of division and payment was made dependent upon her death. It by no means follows that the period fixed by the deed for his children entering on the enjoyment of his estate and taking a vested interest therein was intended to be thereby affected. At all events the widow's repudiation of her liferent provision put an end to the purpose of the clause by which her security was provided for, and it seems to follow that with her interest in the deed and the extinction of the liferent provisions the condition for her security should also fall and become effete and useless." As in that case, so I think even more forcibly in the present, it may be said that there is no rational ground on which the truster should make the uncertain event of his wife's survivance to extreme old age, after she had ceased to have an interest in the deed, the cause of an indefinite postponement of the period when the beneficial interests of his brothers and sisters and sister's children were to take effect. The trustees indeed admit that they cannot effectually do so, for a legatee with a vested interest can always borrow upon it, as the pursuer has in fact done. All they can do if they are right is to keep up the administration of this estate during the survivance of the widow for no other purpose than meantime to accumulate the income along with the capital, and ultimately to divide the whole amongst the parties in whom it is already vested. *Prima facie* this can serve no good purpose, and it is difficult indeed to imagine that the testator intended it in the event which has actually occurred.

The defenders, however, contended that the decision in *Alexander's* case was overruled by the House of Lords in the case of *Muirhead*. I do not think so. The foundation of the whole decision there was that the vesting of the fee was postponed until the widow died; and Lord Watson set forth three considerations the existence of which, in his opinion, necessarily led to that conclusion. Here it is matter of admission that the residue has vested in the pursuer and the other residuary legatees *a morte*. I think the pursuer may well claim Lord Watson's opinion as a direct authority in his favour. He says at p. 48—"I see no reason to doubt that in cases where the final distribution of a trust estate is directed to be made on the death of an anuitant, and it clearly appears that in postponing the time of division the testator had no other object in view than to secure payment of the annuity, it may be within the power of the Court, upon the discharge or renunciation of the annuitant's right, to ordain an immediate division. But in order to the due exercise of that power it is, in my opinion, essential that the beneficiaries to whom the trustees are directed to pay or convey shall have a vested and indefeasible interest in the provisions. That principle appears to me to be just in itself, and to be firmly established" by three decisions which he cites. Two of these were cases of provisions under marriage-contracts, although this is probably immaterial once it is conceded that vesting has taken place; but the third, *Rainsford* v. *Maxwell*, 14 D. 450, appears to me to be directly in point. The finding there was that on the annuitant discharging his annuity "the trustees are entitled and bound to denude of and pay over the residue to the pursuers." The Lord Ordinary whose opinion is reported was Lord Rutherfurd, a high authority in a matter of this kind, and his decision was unanimously adhered to by the Second Division. There the direction to convey was upon the death of the second of two successive liferenters; yet upon the latter renouncing his annuity the Court ordained the trustees to pay over the whole estate to the residuary legatee. I can find no distinction between that case and the present, unless it be that, as the whole income was payable to the liferenters in succession, there was no declaration as to accumulation as there is in the fifth purpose of the present deed. But I have already indicated why I regard that factor as without importance. There is no intelligible reason here for accumulation as there was in the case of *Lucas*, with regard to which Lord Watson expressed a doubt as to whether it had been well decided, but he did so only on the ground that there was a "plainly expressed intention of the testator that the residue increased by accumulations until his widow's decease, and no lesser amount should be employed in launching his charitable scheme." There is nothing of the kind in this testator's will.

The Lord Ordinary has not dealt with any of the cases I have cited, and apparently for the good reason that they were not founded on in the Outer House. His ground of judgment is that the case is ruled by the decision in the case of *M'Culloch's Trustees* v. *Macculloch*. I am unable so to hold. There were there three residuary legatees who were entitled to the residue of a certain trust estate between them, but the direction of the truster was to divide the estate amongst them only on the death of all his children. It was admitted that one-third *pro indiviso* share had vested in the pursuer, but it was implied that there had been no vesting in the other residuary legatees, and all the Judges in the House of Lords were of opinion that the pursuer's contention could not receive effect because there were ulterior purposes

to be served upon the arrival of the period of ultimate distribution. The principle of the case of *Miller's Trustees* v. *Miller*, 18 R. 301, 28 S.L.R. 236, which was approved of by Lord Davey, appears to me to apply to this case. There can be no object in giving literal effect to a direction which merely purports to postpone payment of an interest which has already fully vested, and which, as in this case, it may be reasonably assumed the testator would not have desired to take effect in the event which has happened.

The view which I have expressed is in entire accord with the decision of the First Division in the case of *Jack's Trustees*. I quote from Lord Kinnear's opinion—"Now the result, to my mind, is that where there is an absolute and indefeasible right vested in a legatee, the disappearance of the liferenter will entitle him to claim payment even although payment is in words directed to be made at the liferenter's death, because there is no testamentary interest to interfere with his immediate payment; but, on the other hand, where vesting and not mere payment is dependent upon the death of the liferenter, nothing that the liferenter does in the way of abandoning his or her right can accelerate the period of vesting, because the testator has fixed it finally, and it is not for anybody else to make a new will for him." I think this passage admirably sums up the result of all the previous decisions, and as there is no question that the present case falls under the former of the two categories I confess I see no answer to the pursuer's demand.

It was suggested that the other residuary legatees had an interest to oppose immediate payment, because if they were successful in doing so it would follow that the legatees in the seventh purpose would likewise be precluded from claiming payment until the death of the widow, with the result that the income of the funds held by the trustees to meet these legacies would ultimately fall to be divided amongst the residuary legatees. I admit their interest, for I think it follows that if the pursuer has a right to demand immediate payment of his share of residue, so have the legatees under the seventh purpose. But I cannot see how that affects the legal question which we have to decide. The whole parties in whom the estate has admittedly vested are either entitled to have it divided or they are not. I cannot conceive that their right to a division can be affected by the question whether one or other of those equally entitled consents to a division or has an interest to oppose. Consent may be necessary in the case figured by Lord Watson, where the estate has vested in a class one or more of whose existing members must ultimately take. In such a case the trustees would not be safe to denude without the consent of all, but no such consent is required where the shares of residue is vested indefeasibly in persons now in existence, and I do not think the defenders would have any better defence to an action at the instance of the legatees under the seventh purpose than they have to the present action. The truth is, that the residuary legatees, other than the pursuer, desire to use the fact that the testator postponed the payment of the bulk of his estate for the sole purpose of securing his widow's annuity in order to obtain for themselves a benefit which I think it is plain the testator did not intend, and that at the expense of legatees whose legacies were first to be satisfied before the divisible residue could be ascertained.

I should like to add that, even if I am wrong as far as I have gone in holding that the estate is immediately divisible amongst all the persons in whom it is now vested, the pursuer would still be entitled to succeed, on the ground that the summons provides for the contingency of our holding the legatees not entitled to immediate payment, and that there is no practical difficulty in setting aside sufficient estate to secure these legacies. The amount might be realised in money and deposited in bank or otherwise secured so that there could be no question about it. If it were held that difficulties in regard to the valuation of the estate or the amount of the security to be provided were to affect the division of the estate otherwise divisible, then this estate could not be divided though the widow were dead while the annuitant of £25 survived. The testator, no doubt, directs that provision is to be made for this annuity, but still questions might be raised as to what was sufficient to secure the annuity, equally with what was sufficient to secure the ultimate payment of the £4000.

Therefore, even on the assumption that the legatees are not entitled to immediate payment, and that the residuary legatees are entitled to draw the income of the £4000 during the lifetime of the widow, it seems to me that there is no obstacle whatever to the division of the estate other than the amount that it is necessary to provide for these legacies. The residuary legatees whom the trustees are here actually representing are in this matter exactly in the same position as the pursuer, and I cannot conceive any reason why they should not along with the pursuer take part payment of the benefits which the testator has provided by his will in their favour, but should prefer to wait until the widow is dead (although she may survive them all) before receiving any payment from the estate. It seems to me that is a dog-in-the-manger policy which I should be very slow to support.

On these grounds I am of opinion that the interlocutor of the Lord Ordinary should be recalled, and that we should find the pursuer entitled to decree in terms of the first three declaratory conclusions.

LORD GUTHRIE — In my opinion the reclaimer requires to show, first, that the whole estate of the late Mr James White has vested; second, that the postponement by Mr White of the division and payment of the part of his estate to be divided and paid after his wife's death had no other object than to secure the annuity left to

her; and third, that the wife's interests being out of the way through her claim and receipt of her legal rights, there are no other interests under the trust which would be prejudiced by immediate payment.

For the reasons given by your Lordships —for on this part of the case I do not think there is any difference of opinion except in regard to the applicability of the case of *M'Culloch's Trustees*—I think the reclaimer has successfully established the first two propositions. It is the last which creates the difficulty, and it raises a real difficulty.

I do not know whether the soundness of the third proposition as above stated is disputed, and whether the reclaimer only maintains that he has shown that his demand does not involve the prejudice of any such interests. Suppose, for example, that the testator had bequeathed the interest on the £4000 legacies left by the seventh purpose of his settlement to a third party, the said interest to be paid to that third party until the death of the testator's wife. I should not think it doubtful that in that case the hypothetical third party could successfully object to the premature slaughter of the golden goose laying the golden eggs for him, and that (first) because the Court had no power in the place of the testator to re-form the settlement so as to deprive the third party of a benefit expressly conferred on him by the testator, and (second) because if the Court had such power to act in place of the testator it is by no means certain that he would have acted in the way suggested. If so I do not see that the absence of such an express direction makes any essential difference, or that the question is affected by the fact that the interest on the £4000 legacies has been given, not to a third party independent of the special legatees and the residuary legatees, but to the residuary legatees.

Per contra, it follows that if the interest on the £4000 legacies had been given, not to the residuary legatees but to the special legatees, my decision would have been in favour of the reclaimer.

Apart from the point made above, I do not agree with the Lord Ordinary that the absence of assent by the residuary legatees other than the reclaimer would bar his claim. I do not think that their failure to assent, or even their active opposition, would avail if they were unable to qualify any substantial interest. But they have shown a substantial interest—an interest conferred upon them by the testator—to oppose the reclaimer's demand. Their position is quite intelligible. So far as the residue has at present accrued they can borrow on it, but they do not want to lose some £50 a-year each, which will continue to be saved up for them for probably a considerable number of years by the testator's trustees, in accordance with his instructions. I cannot regard their claim as a mere incident or accident which the Court can disregard.

The point is a new and difficult one, which did not arise for decision in any of the cases quoted to us. In those cases where the whole estate had vested (the only ones of any value for the question now before us) there was no interest created by the testator which would be prejudiced by immediate payment, because the only interest which could possibly have been prejudiced by such payment had been renounced or forfeited. In the absence of any such interest the Court, rightly or wrongly, seemed to feel able to put themselves into the shoes of the testator, and thus to be in a position to regulate the administration of the estate in accordance with what they thought would have been his intentions had the possibility of renunciation or forfeiture occurred to him. In this case the reclaimer, or rather his creditors, demand that the Court shall prefer their interest to get a large sum of ready money paid down at once to the interests of the other residuary legatees who prefer to wait, so that by waiting they may ultimately get a still larger sum. Had the question been before the testator it is impossible to say with confidence what he would have done. In these circumstances I prefer to abide by the terms of his will.

I do not ignore the third and sixth conclusions of the summons, which are framed so as to endeavour to meet the view above expressed, and to enable the pursuer to obtain payment of his equal fourth part of the residue, reserving the rights of himself and the other residuary legatees ultimately to obtain the interest on the £4000 legacies on the death of the widow. I agree with the views on this part of the case contained in Lord Dundas's opinion. The proposal seems to me to involve a preference in favour of the residuary legatees as against the £4000 legatees which the testator did not contemplate or intend and which we are not entitled to make. If the widow's repudiation is to have an equal operation, as it ought to have, it would entitle the £4000 legatees as well as the residuary legatees to immediate payment.

I therefore think the Lord Ordinary's interlocutor should be affirmed.

The Court adhered.

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