CASES

DECIDED IN THE HOUSE OF LORDS,

ON APPEAL FROM THE

COURTS OF SCOTLAND.

1841.

[*29th April* 1841.]

Miss JANE CASAMAIJOR and others, Appellants.[1] (No. 7.)

[*Attorney General* (*Campbell*) — *Lord Advocate* (*Rutherfurd*).]

Messrs. PEARSON and ROBERTSON (Mrs. FOTHRINGHAM's Trustees) and Mrs. PATERSON, Respondents.

[*Pemberton — Donaldson.*]

Testament — Residuary Legatee — Annuitant — Competition. — Terms of a trust settlement, where — Held in the circumstances (reversing, in part, interlocutors of the Court of Session): (1.) That two annuitants were respectively entitled to payment of the full amount of their annuities only in so far as the free annual proceeds of the trust fund, during the year for which such annuities were payable, were sufficient for the payment thereof; but that when in any one year the free proceeds exceeded in amount the said two annuities, such excess belonged to

[1] Fac. Coll., 6th June 1840.

and became divisible among the residuary legatees: (2.) That upon the death of one of the two annuitants one half of the capital of the trust fund became divisible among the residuary legatees: And (3.) that from and after the death of such annuitant, the other annuitant was entitled to the free income in each year of only one half of the capital of the trust fund; but in any one year when such free income exceeded the amount of her annuity, such excess should belong to the residuary legatees.

2d Division.

Lord Ordinary Moncreiff.

Statement.

THE late Alexander Porterfield of Porterfield, by trust disposition and settlement dated the 16th April 1810, conveyed and disponed to the respondent Alexander Pearson, and Frederick Fothringham, now deceased, and the survivor of them, his whole estate, real and personal, in trust for certain purposes; and among others, in the first place, to sell and dispose of his whole property, as soon after his death as convenient, either by public sale or private bargain, and at such prices as they might think proper; in the second place, to pay, from the first proceeds of his funds and estates, his debts, to fulfil his obligations, and to reimburse themselves of the whole expense attending the execution of the trust; and thirdly, to pay the sum of 500*l.*, bequeathed as a legacy to his sister, Mrs. Camilla Porterfield or Alexander, wife of Boyd Alexander of Southbar.

Then follows this direction:—" I hereby direct and " appoint my said trustees or trustee to pay the follow- " ing annuities to my sisters after named, which I " hereby leave to and settle on them during their " respective lives, viz. to Mrs. Christian Porterfield or " Fothringham, wife of the said Frederick Fothring-

" ham, an annuity of 400*l.* sterling; to Mrs. Ann
" Porterfield or Paterson, wife of Lieutenant Colonel
" Thomas Paterson, residing in Charlotte Square,
" Edinburgh, a like annuity of 400*l.* sterling; to
" Mrs. Margaret Porterfield or Buchanan, an annuity
" of 200*l.* sterling, and this over and above and in
" addition to the annuity already settled on the said
" Mrs. Margaret Porterfield or Buchanan by me;
" which several annuities hereby provided I direct and
" appoint my said trustees or trustee to pay to my said
" sisters during all the days of their respective lives,
" and that half-yearly, commencing payment thereof
" at the second term of Whitsunday or Martinmas
" which shall happen after my death, for the year pre-
" ceding such first term of payment, and continuing
" payment thereafter at two terms in the year, Whit-
" sunday and Martinmas, as aforesaid, during the lives
" of my said sisters respectively; and for the better
" fulfilment of this purpose, I hereby direct and
" appoint my said trustees or trustee to vest and lay
" out capital sums for answering the foresaid respective
" annuities on any security or securities which they or
" he may think proper, either personal, heritable, or in
" the public funds, and to take said securities in such
" terms as he or they may think best adapted for ful-
" filling the foresaid purpose; and in the event that
" after payment of my debts, fulfilment of the obliga-
" tions of which I may stand bound at the time of my
" death, payment of the expenses attendant on the
" execution hereof, and of the 500*l.* to my said sister
" Mrs. Alexander, the residue of the proceeds of my
" funds and estate shall not be sufficient for yielding

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" the foresaid annuities hereby settled on my said " sisters, then it is my meaning and intention that the " said residue, whatever it may be, shall be vested and " laid out, and the interest or dividends arising there- " from be paid unto and divided among my said " three sisters, Mrs. Fothringham, Mrs. Paterson, and " Mrs. Buchanan, during their respective lives, in the " same proportions, and exactly in the same terms in " every respect as above pointed out with respect to " the full annuities of 400*l.*, 400*l.*, and 200*l.*; and I " do hereby direct my said trustees or trustee to regulate " themselves accordingly."

The sixth provision is as follows;—" Sexto, In the " event that the residue of my funds and estate, after " payment of all my debts, fulfilment of all obligations " in which I may stand bound at the time of my death, " payment of the expenses attendant on the execution " of this trust, and of the 500*l.* to my sister Mrs. Alex- " ander, as above mentioned, shall amount to the sum " of 15,000*l.* sterling or upwards, then I hereby direct " and appoint my said trustees or trustee to pay out of " such residue the sum of 1,000*l.* sterling to each of " George and Thomas Patersons, also sons procreated " of the marriage between the said Lieutenant-Colonel " Thomas Paterson and Mrs. Ann Porterfield or Pater- " son; but if such residue shall be under the above " sum of 15,000*l.*, and shall not be less than the sum " of 8,000*l.*, then the said George and Thomas Pater- " sons shall only be entitled to the sum of 500*l.* sterling " each, the remainder of said residue being to be vested " and laid out for yielding the said annuities hereby " provided as aforesaid; but if such residue shall not

" amount to the said sum of 8,000*l.*, then it is my " meaning and intention that the said George and " Thomas Patersons shall not be entitled to receive " anything whatever under this deed, and I direct my " said trustees or trustee to regulate themselves accord- " ingly; the above-mentioned eventual legacies being " to be payable to the said George and Thomas Pater- " sons at the first term of Whitsunday or Martinmas " after my death, with interest from the said term of " payment till paid."

Mr. Porterfield died on the 30th of May 1815. His sister, Mrs. Buchanan, one of the annuitants, predeceased him.

Mrs. Fothringham and Mrs. Paterson, the two other annuitants, survived Mr. Porterfield. The former of them died on the 31st March 1834. The latter is still alive.

On the death of Mr. Porterfield, the respondent Alexander Pearson and the deceased Mr. Fothringham accepted of the trust conferred upon them, and entered upon the management of the trust estate. The amount of Mr. Porterfield's fortune did not turn out so considerable as was expected. The trustees did not sell the lands till the year 1834.

The trustees paid to Mrs. Fothringham and Mrs. Paterson, the only surviving annuitants, at first the whole, and thereafter as large a portion of their several annuities as the funds in their hands arising from the annual revenues of the estate would admit of.

In 1834, a considerable portion of the capital fund became divisible, in consequence of the death of one of the annuitants, Mrs. Fothringham. Doubts having

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thereupon arisen as to the rights of the several parties who were legatees under Mr. Porterfield's trust disposition and deed of settlement, a process of multiplepoinding was raised in the Court of Session, for the purpose of distributing this portion of the funds and of having the rights and interests of the several claimants judicially ascertained.

A record was prepared betwixt the appellants (legatees) and Mr. Pearson for the annuitants. A separate record was also prepared between (1) the appellants, (2) the representatives of certain of the residuary legatees who had predeceased Mrs. Fothringham, one of the annuitants, and (3) the present respondents, regarding two separate questions. One of these questions was, Whether or not the sum which became tangible by the death of Mrs. Fothringham had become vested in the residuary legatees prior to that event? And the other was, Whether the interest which had become payable on two legacies of 1,000*l.* each, left to George and Thomas Patersons, was payable out of the capital or the annual proceeds of the trust estate? These questions were disposed of by the judgment of this House, 18th July 1839.[1]

The judgment of this House, of 18th July 1839, having been applied, the question as to the annuities betwixt the appellants and Mr. Pearson was discussed. The respondents, as the parties interested in the annuities, came forward and adopted the record prepared by Mr. Pearson.

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[1] See Rep. in Fac. Coll., 16th Dec. 1836; 15 D., B., & M., 275; M'L. & Rob. 685.

The points insisted on by the parties respectively were [1]: for the appellants, 1st, that on the death of the testator two tenth parts of the capital of the free residue of the trust funds became tangible and divisible among the residuary legatees; 2d, that at least any surplus of the capital of the free trust funds at the time of the testator's death, beyond what was then necessary for securing the annuities payable to Mrs. Fothringham and Mrs. Paterson, did then become tangible and divisible among the said residuary legatees; 3d, that, at all events, any surplus of the annual proceeds of the free residue of the trust estate, which has existed in any year or years during the subsistence of the trust, beyond what was necessary for satisfying the annuities payable for such year or years respectively, was not claimable by the annuitants to make up deficiencies in other years, but that the same, with the interest thereof, belongs to the said residuary legatees; and, 4th, that no other or greater amount of the trust expenses is chargeable on the capital than what would have been a burden on the said capital had the estate been disposed of tempestivè in terms of the trust deed.

For the respondents it was pleaded, that there is a claim competent to the executors of Mrs. Fothringham, or to Mrs. Paterson, to the arrears of annuity due to them prior to Mrs. Fothringham's death, out of the income of the trust funds subsequent to that event; and that they are entitled to have the income of the trust estate, arising subsequent to the death of Mrs. Fothringham, applied in payment of the arrears of annuity which fell due previous to that event.

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[1] See prayers of the mutual reclaiming notes.

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The Lord Ordinary, 20th Dec. 1839, pronounced the following interlocutor, annexing thereto the subjoined note[1]:—"The Lord Ordinary having resumed "consideration of this cause, and having considered the

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[1] "*Note.*—Some observations may be necessary or useful.

"1. The judgment of the House of Lords finds 'that the sum appli-
" 'cable to the payment of the annuities' was 'the residue of the said
" 'trust fund, after deducting,' &c. It is very clear to the Lord Ordi-
" nary that this can only mean that the residue of the estate, after the
" deductions specified were made, that is, the free capital is the fund,
" the annual issues and profits of which are to be applied in payment of
" the annuities. There might, indeed, have been an ambiguity in the
" terms employed in the first part of the fourth provision of the trust,
" by which the annuities are appointed; because, in general, annuities
" given as special legacies, where no other intention is expressed, may
" be preferable over the whole capital of the estate. But when the
" whole of that fourth provision is read together, there can be no ambi-
" guity; because it is in plain words provided, that capital sums are to
" be invested for securing and paying the annuities which are afterwards
" to be paid to the residuary legatees, but that 'in the event that after
" 'payment of my debts,' &c. 'the residue of the proceeds of my funds
" 'and estate shall not be sufficient for yielding the foresaid annuities,'
" &c. 'then it is my meaning and intention that the said residue, what-
" 'ever it may be, shall be vested and laid out, and the interest or
" 'dividends arising therefrom be paid unto and divided among my said
" 'three sisters,' &c. in the same proportions; and the testator directs
" his trustees to regulate themselves accordingly. The Lord Ordinary
" cannot, therefore, entertain any doubt, that all that the annuitants
" could claim is, either full payment of their annuities, or, if the estate
" did not yield so much in annual produce, the whole interest, dividends,
" rents, and profits of the free residue, whatever it might be; and the
" judgment of the House of Lords does not import any thing else.
" The object of that judgment was singly to find that the two legacies
" provided to George and Thomas Patersons must be deducted from the
" capital before striking the residue, as well as the debts, expenses, and
" the legacy of 500*l.*

" But, on the other hand, there can be as little doubt that the full
" annuities of 400*l.* each must be paid to the annuitants, in so far as
" the free annual proceeds of the residue of the funds and estate,
" reckoned according to the judgment of the House of Lords, were, or
" might be at any time during their lives respectively, sufficient for satis-
" fying them. Therefore the Lord Ordinary has no doubt, that the
" arrears of the annuities unpaid must be made good, in so far as there
" are any funds in the hands of the trustee, which consist of rents, pro-
" fits, interest, or dividends, accruing from the trust estate in any of the

" interlocutors of the Court, and the judgment of the " House of Lords, as applied by the Court, holds the " state of the trust accounts, No. of process, " the revised objections to that state, for Miss Jane

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" years during which both the rights of annuity subsisted, although in " particular years the annuities may have been paid in full, while there " was a deficiency in other years.

" 2. The Lord Ordinary thinks it very clear that there is no ground " for the plea, that the annuity which was provided to Mrs. Buchanan " must be considered as a burden on the proceeds of the estate, to " diminish the fund for payment of the annuities to Mrs. Fothringham " and Mrs. Paterson. That annuity never existed, having completely " lapsed by Mrs. Buchanan having predeceased the testator. But still " the full annuities of 400*l.* each were provided to Mrs. Fothringham " and Mrs. Paterson, and are found to have been primary and preferable " burdens on the whole proceeds of the estate. The real meaning of the " plea of the objectors is, that the benefit of Mrs. Buchanan's pre- " decease is to accrue to them as residuary legatees, although there " should be a defalcation in the annuities to Mrs. Fothringham and " Mrs. Paterson; in other words, that these annuities shall not be pre- " ferable over the proceeds of the estate, but that the residuary legatees " shall be preferable to them, pro tanto. The Lord Ordinary conceives " this to be contrary both to the express words of the settlement, and to " the final judgment of the Court and the House of Lords. Mrs. Pa- " terson and Mrs. Fothringham's executors are asking nothing in the " right of Mrs. Buchanan, or as emerging to them by her death; for " nothing ever was vested in her, and therefore nothing could so emerge. " They are asking simply their own annuities, and no more; and though " the proceeds appropriated to the payment of them are greater in " consequence of their being relieved of the annuity intended for her, " they are still nothing else but the proceeds of the estate over which " their claim is preferable, aye and until their full annuity shall be " satisfied.

" 3. As Mrs. Paterson is still surviving, the Lord Ordinary thinks it " clear that her full annuity of 400*l.* must be paid de futuro, although " the proceeds of the estate may have been insufficient before Mrs. Foth- " ringham's death to pay both the annuities in full; for her right " remains just what it was, a preferable claim over the whole pro- " ceeds of the estate, though the fund is enlarged by the death of " Mrs. Fothringham.

" 4. The only question on which the Lord Ordinary entertains real " doubt is, how far there is a just claim over the now enlarged proceeds " of the estate to make up retro the deficiencies in the annual proceeds, " to pay the two annuities during Mrs. Fothringham's life. It is with " some difficulty that he has come to be of opinion that this part of the

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" Casamaijor and others, No. of process, and " the revised answers to those objections, for Alexander " Pearson, No. of process, as now duly lodged; " and having heard parties procurators on the state of

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" claim is not well founded. In the case of Mrs. Fothringham's " executors, it can hardly be maintained; for, attending particularly to " the words of the settlement, it is evident that the preference given to " the annuities was over the annual proceeds of the estate only, and that " there is no warrant for applying any part of the capital to make up " those annuities. But to give Mrs. Fothringham's executors any part " of the proceeds accruing after her annuity had ceased, would really be " to apply part of the capital, otherwise devolving on the residuary " legatees, to make up her annuities during her life; or, in another " view, it would be to allow her executors to draw annuities after her " whole right to them had fallen by her death. The question is much " nicer in the case of Mrs. Paterson, she being still alive, and in a situ- " ation to say that the whole free proceeds at any time arising should " still be appropriated to the full payment of her annuity from the " beginning. The Lord Ordinary is sensible of the difficulty of denying " effect to this. But, on the whole, considering the anxious terms " of the provision for the payment of proportional sums only out of " the proceeds existing, and the clause regulating the effect of the " failure of one annuitant, he does not think that, on a fair construc- " tion, it can be held to have been the testator's intention to give " such a retro-active effect to the increase of the funds by the death of " an annuitant.

" 5. The Lord Ordinary sees no sufficient ground laid in this process " for any claim on the part of the objectors against the trustee per- " sonally, on account of his administration, or the delay in the sale of " the estate. In all such trusts, there are difficulties which the parties " interested in the ultimate result are very apt to undervalue; and they " are but too much inclined to assign interested or unworthy motives " for what is no more than the ordinary course of such things. If the " objectors meant seriously to make a case of malversation to any effect " against the trustee, they ought to have libelled a proper action of " damages, on such relevant grounds as they might venture to adopt. " All that the Lord Ordinary says, or means to find, is, that there is " no sufficient ground laid in this process for requiring the pursuer to " account on any other principles than those which are applicable to " every trust, containing the usual clauses for the protection of such " trustee.

" 6. But, undoubtedly, the accounts of the trustee rendered must be " duly audited. And the Lord Ordinary certainly thinks, that there " are several matters involved in them which do require investigation. " The points of objection at last insisted in were very few. Indeed,

" the cause, and on the said objections and answers,
" finds, that the event of Mrs. Margaret Porterfield or
" Buchanan, one of the annuitants, to whose benefit the
" proceeds of the trust estate were in the first instance

" they were nearly confined to the payments made upon certain bills
" said to be prescribed, and the mode of charging interest on the one
" side of the account, and allowing interest on the other. But, as there
" may be some other questions, the Lord Ordinary has thought it proper
" to make the remit to the accountant, in such general terms as to
" embrace every thing. He has no belief, however, that the accountant
" will find it necessary to make up an entirely new state of accounts,
" though it is proper that the whole should be checked, and the result
" must be brought out in conformity to the judgments of the Lord
" Ordinary, the Court, and the House of Lords. There is, of course,
" some law involved both in the questions regarding the bills and
" the mode of stating interest. But so much depends on the facts,
" that it is better to see the precise state of them before deciding
" any thing.

" 7. A point of some difficulty was in the end debated before the
" Lord Ordinary, viz., in what manner the expense of management of
" the trust estate should be charged against the fund, that is, whether
" against the capital or against the annual produce of that capital. It
" is clear enough that the expression in the trust deed, 'the residue of
" 'the proceeds of my funds and estate,' means the residue of capital,
" after the subjects are converted into money, or at any rate, the residue
" of the stock of the estate after the appointed deductions are made
" from it, and so the House of Lords have understood it. And there-
" fore it is very clear that all the expense incurred in bringing it into
" that state must be charged against the capital of the fund, according
" to the express terms of the deed and the judgment of the House of
" Lords. But the difficulty, which was not at all under the view of that
" House, or at all contemplated in the particular finding, is, that there
" was an heritable estate, which could not in any view be sold in an
" instant, and which was not in fact sold for many years, and the material
" question relates to the expense of managing that estate in the mean-
" time. It is not a simple point. On the one hand, the only clauses
" of the deed which relate to the expenses of the trust, suppose them to
" be deducted, before the residue of the estate is to be struck, the
" whole interests and dividends of which are to be paid to the annuitants,
" until the full annuities be paid; and it is not at all an ordinary case
" of life-rent and fee, but a case of special annuities, appointed to be
" paid preferably. On the other hand, the state of the matter to which
" the words plainly apply, is not that which occurred: there is no
" mention of rents at all; and, therefore, assuming that the trustees did
" their duty, and that still the sale of the lands was unavoidably, or, at

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" appropriated, having died before the testator, had not " the effect of vesting in the residuary legatees any " right over the portion of the capital of the estate or " its proceeds, which must otherwise have been laid out " for securing an annuity of 200*l.* to her during her " life, except in so far as there might be, during the " lives of the two surviving annuitants, Mrs. Fothring- " ham and Mrs. Paterson, a surplus of the annual pro- " ceeds of the whole estate, after paying in full to the " said two annuitants the annuities of 400*l.* each, pro- " vided to them in conformity to the findings herein- " after expressed: Finds, that the full security and " payment of these annuities constituted a primary and " preferable burden on the whole residue of the trust " funds and estate, after deducting the sums necessary " for paying and satisfying the testator's debts and obli- " gations, the expenses of the trust, the legacy of 500*l.* " to Mrs. Alexander, and the two legacies of 1,000*l.* " each payable to George and Thomas Patersons; and " finds, that until the said annuities were fully satisfied, " so far as the whole interests, dividends, rents, or

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" least in bonâ fide, delayed, the rents can only come in place of interest " or dividends, by inference and construction, by a necessary implication " of intention. Taking this to be the fair and just result, the question " is, whether it can be more than the free rents, after deducting the " ordinary and necessary annual expenses of management that can be " so taken. On the whole, the Lord Ordinary has come to be of " opinion, that the rents cannot be reckoned as surrogatum for interest " or dividends, till after deducting the ordinary expenses required for " producing those rents; but that all extraordinary charges occurring " must be deducted from the capital, when ultimately realized. He " understands that the state of the trustees is made up in some degree " on this footing. But being sensible that there will be difficulty in " the adjustment, he has instructed the accountant to exhibit in a " distinct form all the particulars to be charged the one way or the " other."

" profits of the said free fund or estate might be suffi-
" cient for that purpose, no tangible or divisible surplus
" fund could arise, during the lifetime of the two an-
" nuitants, which could be claimed by the residuary
" legatees: Finds, that in determining what shall be
" considered as the residue of the said trust estate, and
" what shall be considered as the interest, dividends,
" rents, or produce of such estate, primarily appropri-
" ated to the payment of the said annuities, the whole
" expenses incurred in realizing or endeavouring to
" realize and convert into money the various subjects
" constituting the trust estate, or in changing the secu-
" rities thereof, must be deducted from the gross capital:
" Finds, that the ordinary annual expense of managing
" the trust estate, including the ordinary expense of
" management and uplifting the rents of the heritable
" estate while unsold, must be deducted from the gross
" annual rents or profits thereof; but finds, that all
" extraordinary expenses brought upon the trust estate
" in the course of such management, such as the expense
" of processes for the division of a commonty, or for
" augmentation of minister's stipends, or any similar
" expenses, must be deducted from the capital stock of
" the estate: Finds, that in so far as there may have
" been at the death of Mrs. Fothringham any arrears
" of the said annuities outstanding and unpaid to her or
" to Mrs. Paterson, to the utmost extent to which the
" free proceeds of the funds and estate, estimated in
" conformity to the judgment of the House of Lords
" and the above finding, were adequate, in the annual
" produce thereof, to the full payment of the said an-
" nuities, such arrears must be paid in preference to
" any claim by the residuary legatees; and finds, that

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" in case there may have been a surplus of the said " annual produce beyond the payment of the said an- " nuities in any one year or more years, preceding the " death of Mrs. Fothringham, such surplus must be " applied to make up any deficiency thereof in other " years of the said period: Finds, that a portion of the " capital stock or money previously appropriated to the " security and payment of the said two annuities, but " which has been set free by the death of Mrs. Foth- " ringham, one of the said annuitants, must, so far as " necessary, be laid out for securing to Mrs. Paterson, " the surviving annuitant, in conjunction with the re- " maining sum already invested, the full payment of her " said annuity of 400*l.* during all the years and terms " of her life, posterior to the term for which the annuity " to Mrs. Fothringham was last payable; but in respect " that the purpose of the payment of the said annuities " in full is provided for solely by the investment of " capital sums sufficient to yield an equal amount in " the proceeds thereof, and that it is expressly declared " in the trust deed, that in the event that 'the residue " ' of the proceeds of my estate shall not be sufficient " ' for yielding the foresaid annuities hereby settled,' &c. " the testator's ' meaning and intention ' is, that the " residue, whatever it may be, shall be invested, and the " interest or dividends thereof paid to the annuitants, in " the proportions of their several annuities: Finds, that " there is no warrant in the trust deed for applying any " part of the capital of the trust estate for making up " any deficiency in the said 'proceeds' thereof, for pay- " ing the emerging annuities as they fell due during " the lives of the annuitants respectively; therefore " finds no claim competent to Mrs. Paterson, or to the

" executors of Mrs. Fothringham, for sums alleged to
" be due as arrears of annuities falling due prior to
" Mrs. Fothringham's death, in so far as it may appear
" that the whole interest, dividends, or profits of the
" free proceeds of the estate being insufficient for the
" payment of the full annuities were paid to them, or
" may be payable under the previous finding of this
" interlocutor, proportionally, according to the terms
" of the trust deed: Finds no sufficient or relevant
" ground set forth in the process for impeaching the
" management of the trustees in the exercise of the
" discretion committed to them, with regard to the time
" and manner of bringing the heritable property, com-
" posing the chief part of the trust estate, to sale: and
" finds, that the trust accounts as between the pursuer,
" as surviving trustee, and the objectors, as residuary
" legatees, must be settled and adjusted in this process,
" on the footing of the sale and previous administration
" having been in this respect duly conducted; and,
" before further answer, at the desire of both the
" parties, remits the whole accounts of the pursuer to
" Mr. William Moncreiff, accountant in Edinburgh,
" with instructions to consider the accounts as made up
" by the accountant employed by the pursuer, with the
" vouchers thereof, and the revised objections and re-
" vised answers for the parties, having in view the
" points of law determined by the Lord Ordinary's
" former interlocutor, adhered to by the Court, so far
" as the same has been affirmed by the House of Lords,
" and by the judgment of the House of Lords itself,
" and also having in view the findings of this inter-
" locutor, with power to him to call for all explanations
" from the parties which he may think necessary, and

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" for inspection of whatever books he may require for " enabling him to make a satisfactory report on the " matters still in dispute, and to report to the Lord " Ordinary how far the account produced exhibits a " just and true account of the pursuer's intromissions " with the trust estate and funds, according to the " principles laid down in the said interlocutors and " judgment; and in case it shall appear to him that " it is in any respects insufficient or unsatisfactory, to " state particularly the objections which arise to it, and " the grounds of them, and in general, having regard " to the said state of accounts, as reported by the " accountant to the pursuer, to report to the Lord " Ordinary what is the just and true state of the " account between the pursuer and the parties severally " interested in the trust estate; and further instructs " the accountant, that in framing his report, with " reference to the expenses of the trust management, " under the findings of this interlocutor, he do exhibit " in a distinct form the particular articles of expense " which are charged severally against the capital and " against the yearly rents, interest, or dividends of the " said trust funds and estate; and recommends to him " to prepare his report as soon as circumstances will " enable him to do so."

Both parties reclaimed, insisting respectively on the points above stated. The Court (6th June 1840) pro-

Judgment of Court, 6th June 1840.

nounced the following interlocutor: — " The Lords, " having advised the reclaiming notes for the parties, " and heard counsel thereon, alter the interlocutor of " the Lord Ordinary, in so far as it finds no claim " competent to Mrs. Paterson for sums alleged to

" be due as arrears of annuities falling due prior to " Mrs. Fothringham's death, in so far as it may ap- " pear that the whole interests, dividends, or profits of " the free proceeds of the estate, being insufficient for " the payment of the full annuities, were paid to " Mrs. Fothringham and Mrs. Paterson, or may be " payable under the previous finding of the Lord " Ordinary's interlocutor, proportionally according to " the terms of the trust deed; and find that Mrs. Pa- " terson is entitled to payment of the whole arrears of " annuity due to her out of the interest, dividends, or " profits of the free proceeds of the whole trust estate " accruing during her own lifetime; quoad ultra, " adhere to the interlocutor reclaimed against, and " refuse the desire of both reclaiming notes, reserving " all questions of expenses, and decern."

Miss Casamaijor and others appealed.

It was admitted by both parties, in the argument at the hearing, that a questio voluntatis, depending upon the terms of the trust settlement, was to be decided. The Court had to a certain extent differed from the interlocutor of the Lord Ordinary; his Lordship himself, in the Inner House, at the same time having changed the opinion he had stated in the Outer House. It was admitted that there was no authority in the text writers or decisions in the law of Scotland which could assist in the decision of the points in dispute. The grounds of the judgment and declaration by the House are stated in the following opinion delivered by the Lord Chancellor.

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Ld. Chancellor's Speech.

LORD CHANCELLOR.—My Lords, This case, which has unfortunately been the subject a second time of appeal to your Lordships' House, raises a question of some difficulty, from the obscurity of the mode of expression which has been adopted by the author of the trust deed upon which the question arises. With regard to the former appeal, I will only observe that nothing that was decided upon that occasion will have the slightest reference to the present appeal. It regarded totally different interests and different parts of the trust deed. The questions now for consideration, therefore, are totally unaffected by any thing which was decided by this House, or by the Court of Session, upon the former occasion.

The circumstances which gave rise to the present questions are shortly these:—Provision was made in this trust deed for three annuities; and, subject to the interest of those annuities, a gift was made to certain persons who were entitled to the residue of the estate. The testator, it appears, had three sisters; one sister died before his own death. The provision was, that the property should be sold, and the proceeds invested in sufficient sums to provide for the payment of those annuities.

Now, one question raised was, whether the amount which would have been necessary to provide for the annuity of the sister who predeceased was, or was not, applicable to a fund for the payment of the other annuities; or whether it was to go immediately to those who were to take in remainder upon the death of the annuitant. But the short answer to that claim is, that the annuity having lapsed by the previous death of

the legatee, at the moment of the death of the author of the trust there was no such annuity and no such legacy. That sum, therefore, was a fund applicable to pay those legacies and annuities which remained. The legacies and annuities which remained were the two annuities of 400*l.* to each of the surviving sisters. The deed, therefore, must be read and construed as if there were no such disposition in it. Upon that point there does not appear to be any difficulty whatever; and I apprehend it to be quite clear that the Court of Session were right in holding that the property which existed at the time of the testator's death was applicable to pay the two annuities of 400*l.* each.

But, my Lords, the difficulty arose here. The testator had directed the property to be sold, and out of the proceeds of the sale sufficient sums to be invested to answer those two annuities and the legacies. His death took place many years ago, and the property was not sold. It remained in the character of land, and produced an income which it appears, for the first year after the death, was more than sufficient to pay the annuities of 400*l.* to the two sisters, but which at a subsequent time did not produce sufficient to pay those two annuities. Nothing however was done; no sale took place; no application was made by the annuitants to have a sale; no application was made by the residuary legatees to have a sale; but the property remained as land for several years. To the extent of the income of the land, whatever was produced after paying the prior charges was paid over to the annuitants, leaving at first a surplus, and subsequently not producing enough to pay the annuities. Then one of the annuitants died — one of

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the sisters died; and the surviving sister makes this claim, which has been recognized by the Court of Session (the Court of Session differing in this respect from the opinion first expressed by the Lord Ordinary), namely, that the surviving sister has not only a title to the income which may arise from one half of the property which was devoted to the payment of that annuity, but that she has a title, as against the moiety released by the death of the sister, to the arrears of the annuity which were not paid out of the proceeds of the land at the time of the testator's death. Another claim was made, that the surplus income which arose in the first year after the death of the testator is also applicable to pay the subsequent deficiencies. The Court, however, have decided that this is a privilege belonging to the surviving sister alone; and that the representatives of the sister who is dead are bound to take that which the estate produces, and have no claim against any part of the property for the payment of the deficiency.

I cannot but think that there has not been quite that accurate attention paid by the Court below to the terms in which this property is devoted to the payment of the annuities, and in which it is afterwards given over, which might have been bestowed upon it, and which, if understood in the sense in which I understand them, would have prevented all the difficulty which has arisen in the Court below in dealing with those minute parts of the case, inasmuch as, according to the construction which I put upon this instrument, there is no room left for raising those minor points. It is clear that the testator contemplated two events. It is clear that he contemplated an immediate sale. He directs an immediate sale;

and it is contrary to his intention, and contrary to the expectations he entertains, that an immediate sale should not take place.

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Perhaps before I advert to the particular language used in this instrument, I may recal to your Lordships recollection the rule which has been established in this country, after some difficulty and some doubt, but which is now fully recognized, and which is the only rule by which questions of this sort can be determined with any thing like certainty, or any thing like justice to the parties. It frequently happens that what a testator contemplates does not take place; he intends land to be converted into money, or money to be converted into land, and he gives directions accordingly, and those directions are not acted upon; and after many years having passed, the question arises how the interests of the parties are to be arranged; not entirely according to the directions of the testator, because he has given no directions with respect to the state of circumstances that has arisen, but how the intentions of the testator are best to be carried out with regard to the state of circumstances which has arisen subsequently to his death; because of necessity the Court must adopt some course of arranging the interests of the parties. You cannot arrange them exactly as the testator intended, because the facts are different from what he contemplated. The Court is therefore under the necessity of adopting some course with reference to the intention of the testator, and with reference to what is just between the parties.

My Lords, I allude to the doctrine laid down in the case of Sitwell v. Bernard, in 6 Vesey, 520; and there are many other cases in which a similar difficulty has

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occurred. In that case the testator intended that all the monies should be converted into land. That was the declared intention of the author of the trust disposition; and contemplating that to take place, and intending that to take place soon after his death, and intending to impose upon the parties claiming under his will a motive to stimulate them to carry his intentions into effect, he gave the whole of his estate in trust, and directed his income to accumulate till land should be purchased; he directed the money to be invested in land, and then gave a tenancy for life, with remainder over, in the land to be purchased. Many years elapsed, and no land was purchased; the property remained, as the testator had left it, in the shape of money, and the question arose what was to be done with it. It was quite contrary to the testator's declared intention that any party should derive any benefit from the fund so long as it remained in the shape of money; but the Court held, that as it had remained in the shape of money, and there had never been a conversion of it, it was necessary to adopt some middle course, in order not to defeat the obvious intention of the author of the gift, namely, that the tenant should derive some benefit; and the Court directed the accumulation to cease after the expiration of the first year after the death of the testator, considering that a reasonable time within which the intentions of the testator ought to be carried into effect, and directed the income of the fund so existing to be paid to the party who was tenant for life of the land; thus departing from the terms of the author of the gift, but doing that which, under all the circumstances, appeared to be most consistent with his intention.

Now in this case there is a direction to convert the

land into money; and when converted into money, after setting apart funds to meet the amount of the annuities of 400*l.* a year each, the surplus was in so many words given over to the legatees. Now it is obvious, that by not converting the land into money the chance which the testator contemplated, of the proceeds of the estate being more than was necessary to meet the annuities, and of there being therefore a fund applicable to the immediate payment of the residuary legatees, would not come into operation, because it could never be ascertained that there was any such fund, and therefore there could be no such claim enforced till after the sale took place, and therefore, to an extent, they were disappointed and postponed. Those who claimed the annuities had reason to be content, because it was immaterial to them whether the annuities came out of the land, or out of the money, provided there was sufficient. So long, therefore, as a sufficient income came out of the land, they received what it was intended they should receive. But when that income failed, and the produce of the estate was not sufficient to pay the annuities, they had the remedy in their own hands; they might then have insisted upon the execution of this trust, and upon the sale of the estates, in order that they might have the benefit of having a fund which probably would have produced more income in the shape of money than whilst it existed in the shape of land, in order to pay the annuities which the land was to pay. But they took no such step. They received the income of the land so far as it would go; they permitted the property to remain in the state in which the testator had left it, but which he had directed to be changed into another

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form, for the purpose of securing the payment of the annuities.

The question therefore is, whether, independently of the particular terms of the gift to which I have adverted, if there had been more doubt upon those terms than in my opinion there is, the fair justice of the case between the parties would not be to act upon the rule established in Sitwell v. Bernard[1] and the other cases, that if the parties chose to permit the property to remain, contrary to the intention of the testator, in the state in which he left it, but which he had directed to be changed, they should take it for better or for worse in the situation in which they leave it, and are not entitled at a future time to pay themselves in full, to the prejudice of those who, if the property had been converted at the time the testator directed, might, at least, have had a chance of having a share in it, and who in all probability would at that time have had a share. Therefore, independently of the particular provisions of this deed, I should have thought that justice between the parties would have been, to let them receive such income as the land would produce until the period of conversion, and to give them no title as against either the future income of the fund, or as against the capital of the fund that has not been converted, for the purpose of paying the deficiency of the fund.

Your Lordships will permit me to call your attention to the extraordinary consequence of yielding to this claim. The first year after the death of the testator the land produced more than enough to pay the annuities.

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[1] 6 Ves. 520.

Now, supposing there was 200*l.* more than enough to pay the annuities, the claim is that that surplus fund is to be held liable to make good the deficiency in any future year; now a deficiency might not occur for twenty or thirty years, the land might have been sufficient to keep down the annuities, and only just sufficient, or it might have produced more. Then was that accumulating income to be held de anno in annum by the trustees, because perchance twenty years hence the land might not produce sufficient to pay the annuities; and yet, according to the claim made by these annuitants, that would be the consequence. If they have a claim of lien to answer future deficiencies, the trustees would not then be warranted in paying it over to the legatees. In what a situation then would the legatees be? They are entitled immediately to receive the surplus of the fund beyond what is necessary to pay the annuities; but they would be prohibited from receiving the surplus beyond what is necessary to pay them; and the funds are to be retained during the continuance of the lives of the annuitants, in order to meet the possible chance, more or less remote, of the land not being sufficient to pay the annuities. It seems quite impossible that such a construction should be adopted, leading to such extravagant consequences. In point of fact there has been no one year in which a surplus has been found beyond the first two or three years; but that makes no difference in principle; it only shows how extravagant the proposition would be to consider the annuitants as entitled to the surplus of one year in order to meet the deficiencies of future years.

But when we come to see what it is that the testator has directed upon the face of this deed, it appears to me

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that these considerations may be thrown out of view, because, as I construe this instrument, it is this: Upon the sale of the estate, if the funds were sufficient to secure the annuities of 400*l.*, an event which undoubtedly the testator contemplated, then there would be capital sums invested sufficient for that purpose, and then any surplus of the proceeds of the estate and those capital sums so invested, when made tangible, as the expression is, by the death of the annuitants, were to be paid over to the residuary legatees. But the testator had the prudence not to confine his view to that event only, because he contemplated the possibility of the proceeds of the sale of the estate not being sufficient to secure the whole amount of those annuities; and he then directs that in the event of there being no surplus, the whole of the proceeds of the sale, after paying the prior charges, shall be invested, be the amount what it may; and that the income arising from that fund, which is assumed to be inadequate to pay the amount of 400*l.* a year each to the sisters, shall be divided between the sisters, and in the same proportion in which they would be entitled to the full income, provided it had been sufficient to pay the annuities; and then, upon the death of each of the annuitants, either the whole fund which shall have produced sufficient to pay the 400*l.*, or the amount of the fund whatever it might be, should in that event be paid over to the residuary legatees.

Now if that be the construction of the deed, then it excludes all the other questions, because the event then has happened: a deficient fund exists, not sufficient to pay the whole of the annuities. Upon the death of one of the annuitants, that portion of the fund which was set apart to answer that annuity is to go over to the

residuary legatees; then what claim can the surviving annuitant have against the income of the other moiety to keep down the annuity which had fallen into arrear? It is quite obvious that there cannot be both claims. If it is liable to keep down the deficiency of the fund to pay the annuity, then it cannot go over to the residuary legatees. If then the construction of this instrument be, that supposing the fund be inadequate to the payment of the annuities, yet upon the death of one of the annuitants the capital of the fund is to go over to the residuary legatees, then all claim of the surviving annuitant to that released portion of the fund must necessarily fail, according to the construction I put upon this deed. It is also free from the argument which was pressed at the bar, and which seems to have been rather assumed in the Court below, namely, that in the event of the fund being sufficient, it was not to be divided into different investments to answer the different annuities, but was to remain in one fund, and the annuities to be charged upon that gross fund. Now, if the testator has directed that, upon the supposition of the fund not being sufficient upon the death of one of the annuitants, the fund answerable to that annuity shall go over, it is not very material whether the fund was to remain as one aggregate fund, or whether the fund was to be divided; though undoubtedly the intention would be more manifest if it appeared upon the face of the instrument that the fund, even in that case, was to be divided, and to be set apart to answer the annuities of the remaining annuitants. According to the construction I put upon this instrument, however, he has directed, in case of deficiency, the fund itself to be appropriated according to the shares and proportions to

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which the annuitants would have been entitled had there been a sufficient fund. The case is the same—there is no difference in the result—as if he had directed that the share—whether a divided share or an undivided share—applicable to the annuity of one of the sisters, was to go over, in the event of the death of that sister, to the residuary legatee, and not to be a fund to make good the annuity of the surviving annuitant, to the extent of forming a fund which might be adequate to the purpose.

Now before the particular words are considered, there is another part of the instrument only necessary to be adverted to, for the purpose of showing how much it was in the contemplation of the author of the deed that the property might not be found adequate or nearly adequate to pay those annuities of 400*l.* a year and the legacies. He directs, in a subsequent part of the deed, that two legacies of 1,000*l.* each should be paid, according to the construction of this instrument, in priority to the application of the funds to secure the annuities; that is to say, if the residue amounts to a certain sum (15,000*l.*), then the two legatees were to have 1,000*l.* each; but if the residue was under 15,000*l.* and not less than 8,000*l.* then they were to have 500*l.* each. He contemplated, therefore, the possibility of that event, and he also contemplated that there might be less than 8,000*l.*, and then they were to have no legacy at all. Now I will suppose that it was exactly 8,000*l.*; if it came exactly to 8,000*l.* then the two legatees were to have 500*l.* each; they therefore were to have 1,000*l.* out of the 8,000*l.*, 7,000*l.* remaining to answer annuities of 1,000*l.* a year. It is quite clear, for it runs through the whole instrument, that he contemplated not only the

case of there not being enough to pay the 1,000*l.*, but of there being a fund very inadequate indeed to meet those charges. With that present to his mind, and guarding against both alternatives, he makes this provision: he directs the property to be sold, and further, "in the "event that after payment of my debts, fulfilment of "the obligations in which I may stand bound at the "time of my death, payment of the expenses attendant "on the execution hereof, and of the 500*l.* to my said "sister Mrs. Alexander, the residue of the proceeds of "my funds and estate shall not be sufficient for yielding "the foresaid annuities hereby settled on my said "sister," (he had before provided for there being sufficient, he now provides for there not being sufficient,) "then it is my meaning and intention that the residue, "whatever it may be, shall be vested and laid out, and "the interests or dividends arising therefrom be paid "unto and divided among my three sisters, Mrs. Foth-"ringham, Mrs. Paterson, and Mrs. Buchanan, during "their respective lives, in the same proportions, and "exactly in the same terms in every respect as above "pointed out with respect to the full annuities of 400*l.*, "400*l.*, and 200*l.*"

Now here he directs not merely that the annuities shall be paid in those proportions, but he directs that in case of a deficiency the residue shall be invested, and the income paid in the same proportions and exactly in the same terms. How is that direction to be complied with? Why, if there were but two (as the annuities were equal) sums to be invested, and equal annuities to be paid, whether the sum amounted to only 2,000*l.* or to what was sufficient to pay the annuities of 400*l.* a year, was perfectly immaterial. Whatever it was the sisters

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were to share it equally between themselves. The intentions of the testator and his directions were applicable to the one case as well as to the other, the only difference being that the income of the sisters would depend upon the amount of the fund. In no other respect were the directions of the testator to be varied by the circumstance of the estate producing more or less money. That is the principal direction, and then he goes on: "And I do hereby direct my trustees to regu- "late themselves accordingly."

Then comes the fifth provision which gives the fund over: "In the event of there being any of the pro- "ceeds in my said funds and estate remaining, after "setting apart capital sums sufficient to yield the three "annuities of 400*l.*, 400*l.*, and 200*l.*, as above spe- "cified, then I hereby direct my said trustees to pay "such surplus, together with the capital sums so to be "set apart for answering the foresaid annuities, as and "when such capital sums become tangible by the "deaths of the said annuitants respectively." Here, so far he has provided for the event of the capital being sufficient to meet the annuities, and he has directed what is to be done with the surplus, if any, together with the capital sums invested, when they become tangible by the death of the annuitants. Now he is about to provide for the other contingency of the fund being inadequate for this purpose: "or, in the event of there "being no surplus, then the capital sums, whatever their "amount may be, so to be vested and laid out as afore- "said, as and when such capital sums become tangible "as aforesaid." Then what is the second alternative? He has presented us with two alternatives. In the early part of the instrument he has directed the investment

of capital sums sufficient to answer the purpose of the annuities; and if there be not sufficient, he has directed an investment of the residue, whatever it may be, to answer the annuities, pro tanto. Then, in the gift over, he says, "If there be a surplus, the surplus, "together with the capital sums so invested, when "become tangible by the death of the annuitants, is to "go over, or, in the other event of the funds invested "not being sufficient to pay the annuities, then the "capital sums become tangible by the death of the "annuitants are to go over."

That is precisely what has happened, although the property has not been sold and the money not invested. It has been hitherto an inadequate fund; and it cannot be contended, that if the estate had been sold, and had produced a fund inadequate to pay the annuities in full, that if in that event the residuary legatees had been entitled to one half of the residuary fund on the death of one of the sisters, they would not be entitled to one half of the fund when it is not converted into money. If that could not be contended, in the event of the fund being invested, it is quite clear that it could not be contended in the present circumstances of the fund not being invested. If the right construction of the sentence be, that, in the event of the fund being deficient, there nevertheless shall be an investment of the fund, whatever it may be, to answer the annuities pro tanto, then the whole is intelligible. But if that be not the right construction, it is not very easy to understand or to decide the meaning of the terms of the instrument. But how does that affect the claims of the annuitants? The fund is answerable to pay the annuities equally. Each annuitant, therefore, is entitled to

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an half, whether it exists as one fund or whether it is divided. It is difficult to see how that can affect the claim of either of the annuitants to receive out of the future income of the other what shall remain unsatisfied by the produce of the estate. Whether the one construction or the other be correct, I apprehend that the testator has sufficiently declared that the parties, if they cannot get the whole amount of the annuities, must take the income which the fund will produce, whatever it may be; and that, upon the death of one of the annuitants, the fund which thus becomes tangible shall go over to the legatees; and with that declaration your Lordships will probably think it right to vary the interlocutor which has been appealed from. The better way will be to declare that to be the construction which your Lordships put upon this instrument, and to refer it back to the Court of Session to apply that to the interlocutor to be pronounced.

This case presents some difficulty. In the first place, with regard to the interlocutor of the Lord Ordinary, which is left untouched by the Court, except so far as it is altered with regard to Mrs. Paterson's claim to future arrears of the annuity, I am not quite sure that I entirely follow the provisions of that interlocutor. The expressions are not sufficiently distinct to enable me to understand how far the learned judge intended to go; for instance, the second finding finds, "that the full security and payment of these annuities "constituted a primary and preferable burden on the "whole residue of the trust funds and estate, after "deducting the sums necessary for paying and satis-"fying the testator's debts and obligations, the expenses "of the trust, the legacy of 500*l.* to Mrs. Alexander,

" and the two legacies of 1,000*l.* each payable to " George and Thomas Patersons." That is perfectly correct, according to my view of the case, if it is confined to each year; but it appears to me impossible, from the language used, to ascertain whether the learned judge meant to confine it to each year, or whether he meant to say that the fund is answerable during the whole continuance of the trust to make good those annuities. If that be the meaning, then I differ from the learned judge.

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[*Mr. Attorney General.*—My Lords, if I may humbly suggest, it would be very important that your Lordships should make an express declaration in your order upon that subject.]

Lord Chancellor.—It will be quite explicit if the House declare the true construction of the instrument to be: that although the income was inadequate to pay the annuities, upon the death of one of the annuitants one half of the fund went over to the residuary legatees; and it precludes the possibility of the income of that fund being applicable to any other purpose.

[*Lord Advocate.*—Also to find (which was not done) that Mrs. Paterson, the surviving annuitant, is entitled only to the income of one half of the fund from the death of Mrs. Fothringham.]

[*Mr. Attorney General.*—That would follow.]

Lord Chancellor.—The Lord Ordinary thought that neither of them took it. When it came before the Court, they were of opinion that Mrs. Paterson was entitled to payment of the whole arrears of the annuity due to her. But it appears to me that it will be quite free from all doubt, if the House declare that during the continuance of the trust, the annuitants

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can only divide the income of the estate as far as it will go, and that upon the death of one of them the share which was invested to secure the payment of that annuity went over to the residuary legatees. That would exclude all the other questions; and I think the better way will be to make these declarations, and then to refer it back to the Court of Session to apply them.

Judgment.

The House of Lords ordered and adjudged, That the interlocutors complained of in the said appeal be and the same are hereby reversed and altered, to the extent necessary to give full effect to the following declaration; viz. that it is declared, that Mrs. Fothringham and Mrs. Paterson were entitled to payment of their annuities of 400*l.* each, only so far as the free annual proceeds of the trust fund, during the year for which such annuities were payable, were sufficient for the payment thereof; but that when in any one year the free proceeds exceeded in amount the said two annuities of 400*l.* each, such excess belongs to and became divisible among the residuary legatees; and that upon the death of Mrs. Fothringham, one half of the capital of the trust fund became divisible among the residuary legatees; and that from the death of Mrs. Fothringham, Mrs. Paterson is entitled to the free income in each year of only one half of the capital of the trust fund; but in any one year when such free income exceeds 400*l.*, such excess shall belong to the residuary legatees: And it is further ordered, That the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this declaration and judgment.

RICHARDSON and CONNELL — SIMPSON and COBB, Solicitors.