adjusted, and that being so, it is impossible to say that the contract was complete.

Lord Deas—I am clearly of the same opinion. The two first letters, which fix the price, could only be thought to conclude the contract of sale on the footing of it being agreed that Ranken should fix everything else. It is plain from Ranken's letter of the 24th June 1867, that he on the part of the incorporation did not agree to that being the interpretation of these two letters. I think he was right. He probably did not wish to take on himself the fixing of everything but the price, for he says, "the conditions of a sale will fall to be arranged with your agent or yourself and me, the nature of the title, the conditions under which the property is held, the term of entry when you are to have right to the succeeding rents, &c., being all first explained, and made matter of distinct agreement. So soon as we come to an understanding on these points, I shall call a meeting of the incorporation for instructions to close with you," &c.

It is clear from that that there was no concluded contract. I have read all the subsequent letters to see if there was any point of time when there was a final contract, and I can find none. When you come to consider the writings of 30th November 1867, you find Adam & Sang saying, "We now think it would be desirable to get this transaction put into a more formal shape, and therefore we would be glad to hear from you at your earliest convenience in answer to our last letter and memorandum."

Ranken's answer to that is in his letter of 2d December 1867, where he says, "Mr Allan declines to remove at Whitsunday. From the terms of the proposed agreement between the Bakers' Incorporation and Mr Hay, this seems a matter that more concerns him than them, as he takes the responsibility of any of the tenants maintaining possession, notwithstanding the efforts of my clients to remove them." And then, in his last letter of 21st January 1868, he says, "The minute of sale should now be immediately adjusted and executed."

A great many things had been proposed in addition to the original draft minute. The only thing to fix these was the minute of sale. Even after the death of Hay, on 10th February 1868, he says, "You have taken part yourselves, I think, in all the subsequent correspondence and negotiation, and will therefore be able, from your own knowledge, to inform Mr Hay's representatives how the negotiation between him and the Bakers stood at his death."

We are not to go into the question of the relative importance of things as to which the parties are not agreed. It is clear that these remain open —very much from Ranken's zeal for the interest of his client. He wished, very properly, not to commit his client. The result is that he is free at a time when he might wish to be bound.

Lord Ardmillan and Lord Kinloch concurred.

Agent for Pursuer—Thomas Ranken, S.S.C.

Agents for Defenders—Adam & Sang, S.S.C.

Saturday, November 28.

HUTTON'S TRUSTEES *v.* COATES AND OTHERS.

Trust — Annuitant — Vesting — Postponed Payment. Terms of trust-deed on which *held* that a share of residue did not vest in a residuary legatee who survived the testator but predeceased the last of several annuitants, but became intestate succession, falling to the next of kin of the testator as at the date of his death.

Dr Hutton of Calderbank died in the year 1837, leaving a widow but no children. By his trust-disposition and settlement he directed his trustees to pay an annuity to his widow, and also an annuity to each of his two sisters Catherine and Ann Hutton. He farther directed payment of two specific legacies, after which he appointed his trustees, "after the payment of the foresaid annuities to the said Mrs Ann Eliza Youlle or Hutton, and my sisters before named, to accumulate whatever balance or surplus may remain of the annual produce or proceeds of my estate into a capital or principal sum, to be divided with the residue of my estate, among the parties after named, after the decease of my said wife and sisters, and the survivor of them; upon the occurrence of which event, but not till then, I appoint my said trustees or trustee to collect, realise, and convert into money my whole outstanding means and estate of every description hereby conveyed or accumulated by them, my lands and others before mentioned excepted, and to distribute and divide the prices and proceeds of the same to and among the parties after named, in the following shares and proportions, viz., to each of the foresaid Major James Watkins and John Watkins, two-eighth parts or shares of the said residue and reversion of my means and estate; to each of my nieces, Mary Ann Watkins or Wilson, spouse of the foresaid James Wilson, sheriff-clerk of the county of Edinburgh, Christian Watkins, wife of William Watkins, son of Watkins of Shotton, in the county of Salop, and Jean Watkins or Howison, wife of the foresaid James Howison, residing at or near Douglas, one-eighth part or share of the residue or reversion of my said means and estate, and to my grand-niece Mary Ann Watkins, daughter of my nephew the late Hutton Watkins, sometime in the service of the Honourable the East India Company, another one-eighth part or share of the residue or reversion of my said means and estate: Declaring always, as it is hereby specially provided and declared, that in the event of any of the parties before named, who shall be entitled to a share of the residue or reversion of my estate, predeceasing the period when the same shall be made, but leaving issue of his or her body lawfully procreated, such issue shall be entitled to the portion or share which their father or mother would have been entitled to had he or she been alive; and the share accruing to such issue, in the event of there being more than one child left, shall be divisible equally among them share and share alike, it being my desire that the residue of my means and estate provided to the parties before named, or their heirs, be payable or divisible among them *per stirpes* and not *per capita*; and which said division of my means and estate I direct and appoint my said trustees or trustee to make accordingly, so soon as can be done by them conveniently after the decease of the whole of my said wife and sisters before named."

Ann Hutton died in 1851; Catherine Hutton in 1857, and the widow, the last liferentrix, in 1864.

Christian Watkins, one of the residuary legatees, died in 1852 intestate and leaving no issue, and a question now arose as to the share of residue which was destined to her *nominatim*, and which formed the fund *in medio* in the present action.

The trustee under the mutual settlement of Catherine and Ann Hutton claimed the whole of the

fund *in medio*, on the footing that by the predecease of the legatee the share destined to her fell to be treated as intestate succession, and went to Catherine and Ann Hutton as the next of kin of the testator at the time of his death.

Mrs Howison and Mrs Wilson, grand-nieces of the testator, and two of the next of kin of Christian Watkins, did not oppose the claim of the Misses Huttons' trustee, being beneficiaries under the mutual settlement of these ladies, and taking more benefit by the trustee being successful than in any other way; but alternatively, they claimed each one-fourth, on the footing that the share vested in Christian Watkins.

Colonel Watkins and John Watkin's trustees, stated alternative claims, their principal claim being on the footing of the share having vested, as in that case they would take benefit under an agreement between them and Christian Watkins.

Mrs Ryley claimed one-tenth, on the footing that the share was intestate succession, falling to the next of kin of the testator, as at the date of the death of the last liferenter.

The Lord Ordinary (ORMIDALE) sustained the claim of Misses Huttons' trustee, adding this note:—"The only question discussed before the Lord Ordinary was—Whether the fund *in medio*, being an eighth share of the residue of the estate of Mr Hutton, vested *a morte testatoris* or not till the period of division and distribution of that residue? In finding that the fund *in medio* did not vest till the latter period, the Lord Ordinary has been regulated by what he thinks must be held to have been the intention of the testator, as manifested by his deed of settlement, according to its true construction.

"The last purpose of the testator's settlement is that which requires to be chiefly considered. The testator there directs his trustees, after payment of certain annuities to his wife and sisters, to accumulate the surplus, and divide it, as well as the whole residue of his estate, amongst various persons, according to certain shares; one-eighth share whereof, being the fund *in medio*, he destined in the first instance, to Mrs Christian Watkins. Not only does the testator direct that the whole surplus of his estate, after satisfying the annuitants, should be accumulated and converted into a capital sum, to be, along with the rest of his estate, divided 'after the decease of my said wife and sisters, and the survivor of them;' but he specially declares that, in the event of any of the parties before named, who shall be entitled to a share of the residue or reversion of my said estate predeceasing,'—not the testator, but 'the period when the same shall be made,' that is, according to the Lord Ordinary's reading, not his own death, but the period when the residue or reversion is made up or ascertained so as to be capable of division,—'leaving issue of his or her body lawfully procreated, such issue shall be entitled to the portion or share which their father or mother would have been entitled to had he or she been alive.' There is thus a substitution or destination over, and otherwise such an indication of the testator's intention that, in accordance therewith, the Lord Ordinary thinks that he has had no alternative but to find that the share in question did not vest till the period of division and distribution. Altough the terms of the settlement in the case of *Young* v. *Robertson* were somewhat different from those of the settlement in the present case, the Lord Ordinary thinks that the conclusion he has arrived at here is supported by the reasoning which appears to have influenced the Court of last resort in that case, as reported in 4 M'Queen. p. 314. And he is also of opinion that the case of *Laing* v. *Barclay*, 20th July 1865, 3 M'P. 1143, which was cited to him at the debate, is a precedent to some extent in point.

"If the Lord Ordinary is right so far, and as Mrs Christian Watkins left no issue, it follows that the eighth share of the residue in question destined for her, and which is now the fund *in medio* in this process, falls to be treated as a lapsed legacy, and as such devolves on the next of kin or representatives of the testator, not as at the period of division and distribution of his estate, as was contended for by some of the competing claimants, but as at the time of his death—*Lord* v. *Colvin and Others*, 15th July 1865, 3 M'P. 1883."

Colonel Watkins and John Watkin's Trustees reclaimed.

MACLEAN (CLARK with him) for John Watkin's Trustees.

Solicitor-General (MILLAR) and R. V. CAMPBELL for Hutton's Trustee, respondent.

SPITTAL for Mrs Howison and Mrs Wilson.

At advising—

LORD PRESIDENT—It is not necessary to call for an answer. The considerations in favour of vesting have been well stated by Mr Maclean, but they have not made much impression on my mind.

The Lord Ordinary has stated some reasons of weight in support of the conclusion at which he has arrived, but I think there is another reason which he has not mentioned. The plan of this settlement is, that there shall be certain annuities paid out of the income of the trust-fund; and during the continuance of these annuities, or of any one of them, there is to be an accumulation of the surplus of the estate so as to make part of the capital for ultimate distribution. It is not until the ceasing of the last annuity that the division is to be made. That is rather an unusual scheme of settlement, and suggests this consideration, that the testator had no intention that any one should have an immediate benefit except the annuitants and these parties to whom certain small legacies were bequeathed. As to the capital, it was plainly his intention to postpone any benefit from it until a distant period.

The other Judges concurred.

Agents for Hutton's Trustee, and for John Watkin's Trustees—Wilson, Burn & Gloag, W.S.

Agents for Colonel Watkins—Ronald & Ritchie, S.S.C.

Agents for Mrs Wilson and Mrs Howison—M'Kenzie, Innes & Logan, W.S.

Saturday, November 28.

SECOND DIVISION.

THOMSON *v.* FRASER.

Process—Proof—Print—Manuscript Copy for Process. Observations by the Court on the practice of making a manuscript copy of proof for the process when the proof is already in print.

In this case, which came before the Court upon a reclaiming-note against an interlocutor of the Lord Ordinary fixing an issue, their Lordships appointed the proof to be taken before one of themselves, instead of before a jury; and, in the course of their observations, took occasion to animadvert upon a practice which prevails to a large extent in regard to such proofs—the practice, viz.,