Counsel for the Defender—Low — Graham Murray. Agents—Tods, Murray, & Jamieson, W.S.

Friday, December 23.

SECOND DIVISION.

[Lord Fraser, Ordinary.

LATTA (MUIRHEAD'S FACTOR) *v.* CRELLIN AND OTHERS.

Succession—Payment, Acceleration of—Widow's Repudiation of Settlement.

A truster directed his trustees to pay his wife, if she survived him, an annuity during her life, and to give her the liferent of a house, and, after making arrangements in regard to his business, directed his trustees to "draw the revenue of all my estate not above disposed of during the life of my said wife, and to accumulate the revenue, after paying my wife's said annuity, with the principal." The deed then provided that "as soon after the death of my said wife as convenient" certain heritable subjects should be conveyed to three of his children, and that the residue should be divided equally amongst his children. It was declared that if any of the truster's children predeceased the term of payment their provisions should lapse and become part of the residue, unless the predeceasing child left lawful issue, in which case such issue should succeed to the parent's share. The widow repudiated the settlement, and obtained her legal rights of terce and *jus relictæ*. *Held* that the children's provisions vested *a morte testatoris*.

Charles Muirhead died upon 23rd May 1865, and was survived by his wife, two sons, Charles and James, and two daughters Mrs Agnes Muirhead or Christie, and Mrs Jessie Muirhead or Carter or Crellin.

By his trust-disposition and settlement, dated 18th June 1861, he conveyed his whole heritable and moveable property to the trustees and executors therein named for certain specified purposes. These trustees either predeceased the truster or declined to act. On 14th July 1876 Mr John Latta, S.S.C., Edinburgh, was appointed judicial factor on the trust-estate. After directing his trustees to pay an annuity to his wife, and give her the liferent of a house, and after making arrangements with regard to the carrying on of his business after his death, the truster directed his trustees as follows:—"*Fourth*, My said trustees are hereby directed to draw the revenue of all my estate not above disposed of during the life of my said wife, and to accumulate the revenue after paying my wife's said annuity with the principal. . . . *Sixth*, As soon after the death of my said wife as convenient, my said trustees are hereby directed to dispone, assign, convey, and make over to my daughter Jessie Muirhead or Carter . . . (*first*) my house, main-door, North Charlotte Street; and (*second*) the other just and equal half *pro indiviso* of my said dwelling-house and stable in Young Street, Edinburgh." By the *Eighth* purpose it was provided — "All the foregoing purposes being satisfied, I direct my said trustees to realise the whole residue and remainder of my means and estate, and . . . as soon after my wife's death as convenient . . . to divide the residue, and to pay over and divide the same as follows, viz., one just and equal fourth part or share thereof I direct my said trustees to pay over to my said son Charles Muirhead, another just and equal fourth part or share thereof I direct my said trustees to pay over to my daughter Jessie Muirhead or Carter, another just and equal fourth part or share thereof I direct my said trustees, in their option, to pay over to, or invest for behoof of, my said daughter Agnes Muirhead, exclusive of the *jus mariti* or right of administration of any husband to be after the date hereof married by her, and the remaining fourth part or share thereof I direct my said trustees to invest in their own names, on such securities as they may approve of, for behoof of my said son James Muirhead in liferent, for his liferent use only, and to his lawful children equally among them, share and share alike, and their respective heirs in fee: . . . And if any of my children predecease the term of payment of their provisions under this deed, the said provisions shall lapse and become part of the residue of my estate, unless in the event of the predeceasing child or children leaving lawful issue, in which case such lawful issue shall succeed equally among them to the provisions their parent would have received had that parent survived the term of payment foresaid; and in the event of the predeceasing child dying without lawful issue, and that child's provisions becoming part of the residue of my estate, my said trustees are directed to divide the residue of my estate into as many shares as I have children surviving the said term of payment, or children who, though dead, have left lawful issue, and to pay over, divide, and invest the same in the proportion of one share to each surviving child, and one share to the children of each deceasing child who has left lawful issue."

On the death of Mr Muirhead his widow elected not to accept of the provisions in her favour in the trust-deed, and claimed her legal rights of *jus relictæ* and terce. A sum of money was paid to her in settlement of her *jus relictæ*, and she granted a discharge of the same. She was paid yearly a sum in lieu of her terce until 23rd August 1886, when she accepted a bond of annuity for £60 by her three surviving children (Mrs Crellin being then dead), and granted a discharge, dated 31st August 1886, of her claim for terce, and also of all her claims as widow of Charles Muirhead.

Mrs Jessie Muirhead or Carter was married to James Crellin in January 1866, and by her antenuptial contract of marriage she conveyed to trustees all sums that she might be entitled to under her father's settlement. On 2nd July of that year she executed a will, by which she left to her husband James Crellin all the estate belonging to her not previously conveyed by the marriage-contract. She died upon 10th December 1866, and there were no children of the marriage. James Crellin died on 20th January 1885, leaving several children by a former marriage.

The amount accumulated in terms of the fourth purpose of Mr Muirhead's trust-deed

amounted to a sum of £14,500 or thereby. On 23rd May 1886 the period of twenty-one years from the death of the truster expired, and the provisions of the Thellusson Act (39 and 40 Geo. III. c. 98) came into operation, by which the factor was not entitled further to accumulate the balance of the revenue, but was bound to pay the revenue over to the parties having right thereto. As the widow and children were desirous of having the estate wound up, this action of multiplepoinding was brought upon 6th December 1886 for that purpose.

Among others, a claim was lodged for James B. Crellin, a son of James Crellin by a former marriage. He claimed, as executor and representative of his father, the share of the trust-estate of Charles Muirhead which was carried by Mrs Crellin's settlement.

He pleaded—"(1) Upon a sound construction of the trust-disposition and settlement of the deceased Charles Muirhead the provisions in favour of his children vested in them at the date of his death, or, at all events, the special provisions in favour of Mrs Crellin vested at that date. (2) *Separatim*, the repudiation by Mrs Muirhead of her liferent provisions under her husband's trust-deed accelerated the period of vesting and distribution of the trust-estate, and in that respect was equivalent to her death. (3) The claimant being the executor and legal representative of his father, the late James Crellin, who was the residuary legatee of Mrs Crellin, is now entitled to the share of the trust-estate of the said Charles Muirhead carried by Mrs Crellin's settlement.'

Claims were also lodged for the judicial factor, Charles and James Muirhead, and Mrs Christie.

The plea maintained by these claimants against James B. Crellin was—"(2) Upon a sound construction of the late Mr Muirhead's trust settlement, no right to the heritable subjects therein specified, nor to the shares of the residue of the said estate, vested in the beneficiaries, nor are they entitled to conveyance or payment of the same during the lifetime of the truster's widow."

The Lord Ordinary (FRASER) on 10th June 1887 repelled the claim for James B. Crellin.

"*Opinion.*—The Lord Ordinary is of opinion that the time for distribution of this estate and for putting an end to the trust has arrived. No doubt this would not have been the case if the provisions of the trust-deed had been allowed to take their natural course. The period of division was appointed to be at the death of the truster's widow, and that widow is still alive. Until that event happened the trustees were appointed to hold the property and pay the widow her annuity, and to accumulate the balance of the income, but the scheme as framed by the truster was not allowed to take effect. The widow refused to accept the provisions in her favour under the will, and claimed her legal rights of terce and *jus relictæ*, which were accorded to her. The *jus relictæ* was at once paid up, and *quoad* the terce she continued to draw it down to 31st August 1886, when by an arrangement with the beneficiaries she discharged it. Consequently there is no reason for keeping up this trust any longer so as to protect the provision in her favour. Nor is there any other good ground for doing so arising out of any of the provisions of the deed. It is true that the truster has directed that the income of his estate shall be accumulated by a clause in the following terms—'My said trustees are hereby directed to draw the revenue of all my estate not above disposed of during the life of my said wife, and to accumulate the revenue after paying my wife's said annuity with the principal. This direction has now become inoperative in consequence of its falling within the prohibition enacted by the Thellusson Act, for on the 23rd of May 1886 a period of twenty-one years from the death of the truster expired, and the provisions of the Thellusson Act (39 and 40 Geo. III. c. 98) came at once into operation. Now, although the truster has said that the estate is not to be divided until the death of his wife, this must in the circumstances be held to mean that it is not to be divided until her interest in it has ceased, which it has now done by the discharge. There is no object now in keeping up the trust and no interest to protect, and consequently the trust is at an end—*Annandale and Others* (*Macniven's Trustees*) v. *Macniven and Others*, June 9, 1847, 9 D. 1201; *Pretty and Others* v. *Newbigging and Another* (*Hunter's Trustees*), March 1, 1854, 16 D. 667.

"In regard to the daughter of the truster, Mrs Jessie Crellin, nothing vested in her, and therefore nothing was transmitted by her to her husband, or through him to his executor. She died before the widow had discharged her claim of terce, and she has died before the widow of the truster. It is immaterial therefore to consider which of these periods shall be adopted as the period of vesting. But it is contended on behalf of James Crellin, who claims through her, that the period of distribution must be held to be the date of the widow's repudiation of the conventional provisions in her favour, which was shortly after her husband's death on 23rd May 1865, while Mrs Crellin survived till 10th September 1866. The Lord Ordinary is unable to accept this view, which would certainly defeat the provision for accumulation which was quite lawful for the period of twenty-one years, and would give to the immediate children of the truster a right which he did not intend them to possess, at least during that period. He provided that in the event of their not surviving the period of distribution their share should go to their children, a provision that would be defeated by holding that the money could be distributed immediately upon the widow's repudiation of the conventional provision in 1865."

James B. Crellin reclaimed, and argued—The widow had here repudiated the settlement, and elected to take her legal rights. In consequence of her repudiation, vesting took place *a morte testatoris*. The direction to accumulate did not prevent this, as there was the same direction in the case of *Lucas' Trustees* v. *The Trustees and Patrons of The Lucas Trust*, February 18, 1881, 8 R. 502; *Annandale* v. *Macniven*, June 9, 1847, 9 D. 1201; *Alexander's Trustees*, January 15, 1870, 8 Macph. 414; *Maxwell's Trustees* v. *Maxwell*, November 24, 1877, 5 R. 248; *Cathcart's Trustees* v. *Heneage's Trustees*, July 13, 1883, 10 R. 1205.

Argued for the other claimants — Vesting did not take place until the death of the widow, and her repudiation of the settle-

ment did not operate so as to accelerate the period of vesting. The real purpose of the trust was to have any revenue over and above the annuity payable to the widow accumulated and divided among the children at the widow's death, and if it was to be held that vesting took place *a morte testatoris*, then there could be no accumulation. The heritable property could not have been divided until the widow executed a discharge of her terce — *Bryson's Trustees* v. *Clark*, November 26, 1880, 8 R. 142; *Elder's Trustees*, March 10, 1881, 8 R. 593; *Robertson* v. *Davidson*, November 24, 1846, 9 D. 152; *Alexander's Trustees, supra cit.*

At advising—

Lord Justice-Clerk—In this case some important questions are raised. The main question between the parties is one which has occurred in many cases. It concerns the accumulation of income directed to be made by the settlement of the truster, and the acceleration of the period of payment. In this case the wife repudiated the provisions in her favour in her husband's settlement many years ago, and claimed her legal rights, and those she obtained. She claimed her terce, and obtained it. But after the lapse of many years she entered into an arrangement with her husband's trustees, and the terce was commuted for an obligation that does not enter into the present controversy. I do not mean to go into the terms of the settlement. There was ample provision made for the widow, but as she betook herself to her legal provisions there is no need to consider the event which did not arise, of her abiding by the provisions in her husband's will. The question we have to consider is, whether the death of the wife is still to continue as the date at which the children's provisions vest and are payable, or is the effect of her repudiation tantamount substantially, in the interpretation of the settlement, to her death?

The Lord Ordinary has given effect to the contention with which we are familiar, that vesting took place at the time when the widow relieved the estate of terce by the arrangement to which I have referred. I have come to the opinion that if the repudiation by the wife is equivalent to her death in the sense of the settlement, that must have full effect, and consequently that the provisions with which we are here dealing must receive full effect as having vested *a morte testatoris*. I need not go into the decisions upon this matter. The principle is a very obvious one, and has received effect in a great many cases. It is simply this, that where there are provisions in favour of a wife, and the term of payment of the provisions in favour of the children is postponed until the death of the wife, a repudiation of those provisions, and a claim by her of her legal rights, will operate as her death in construing the deed, if the postponement is substantially solely for the wife's interest. I think it has been settled, on the one hand, that if the testator arbitrarily fixes a period for vesting and payment of the provisions, or if when there is a postponed term of payment there is a clear and manifest intention to postpone irrespective of the wife's interest, then although the wife betakes herself to her legal rights that will not operate as her death would. On the other hand, it has been clearly decided by the case of *Annandale*, 9 D. 1201—and I know of no authority to the contrary—that where the plain object of the postponement is clearly the interest of the wife, and she betakes herself to her legal rights, the effect of that is to accelerate the period of payment as if she had died. There are cases that I have before me that make that quite clear. The case of *Annandale* has been repeatedly referred to, and it has always been upheld. But the case of *Annandale* referred to personal property. The settlement there, in so far as it referred to heritage, was reduced *ex capite lecti*. The question therefore related solely to moveable property. In the case of *Alexander's Trustees*, 8 Macph. 415, however, it was distinctly decided that the subsistence of the terce did not interfere with the rule. It was held that as it appeared from the deed that the truster had postponed the period of division to the date of the widow's death for no other purpose than to give effect to the provisions in her favour, which had lapsed, the period had arrived for dividing the residue, and that the subsistence of the legal burden of terce was no impediment to the division. The same rule was applied in the later case, in 8 R. 502, arising out of the Lucas Trust, where it was held, on the repudiation of the settlement by the widow, that the trustees and patrons of the Lucas Trust were entitled to a conveyance of residue.

In that case, according to the rubric, the Court "held, on the widow's repudiation of the settlement, that the trustees and partners of 'The Lucas Trust' were entitled to an immediate conveyance of the residue, subject to existing and contingent interests." That is the principle, and the Lord Ordinary has substantially given effect to it. But he thinks that as long as the terce subsisted there was a bar to the principle receiving effect. I think the case I have quoted shows that that is not so. Therefore I am of opinion that this settlement must be construed on the footing that the wife's repudiation was equivalent to her death, and that consequently the provisions in question vested a *morte testatoris*. There are one or two expressions in the settlement that might appear at first sight to create some difficulty. In particular there is a declaration that none of the beneficiaries who predecease the widow, unless they leave issue, are to have any interest in the succession. But I do not see that that can operate against the view that I have stated. Therefore my opinion is that we should recal the Lord Ordinary's interlocutor and find that these provisions vested *a morte testatoris*. The result will not be difficult to work out, looking to the position in which the case stands.

Lord Young—I think the case is attended with difficulty, but upon the whole I have arrived at the same conclusion with your Lordship. I do not know how I should have decided the case myself but for the prior decisions, but I think the decision your Lordship proposes is in accordance with the prior decisions. If we were not bound by these I should have thought there was a great deal worth considering in the doubt suggested by Lord Fullerton in the case of *Annandale*.

Lord Craighill—I agree in the opinions which have just been expressed, and have little to add. The question in dispute between the parties is in

regard to the interpretation of the will of the late Mr Muirhead, who died so long ago as 1865. His widow repudiated the provisions of his settlement immediately after his death, but parties proceeded with the administration of the estate on the assumption that the death of the widow was the time when the beneficiaries under the will acquired a vested interest in their provisions, and when it behoved that the estate should be realised for distribution. Shortly, however, before the raising of the action some of those interested took up a different view, and the point now to be decided is, what is the true import of the will. Had the widow accepted of the provisions which were left to her no controversy could have arisen. The words used by the testator are plain enough. She was to have her annuity, and until her death the rights of other beneficiaries could not vest, because in every case the death of the widow was specified as the time at which the rights conferred by the settlement were to take effect. The interest of those who predeceased either fell into residue, or transmitted to those who had been conditionally instituted. But the widow repudiated her testamentary provisions, betaking herself to her legal rights, and the consequence was that her annuity ceased, and the only impediment to vesting which was apparently in view of the testator was then removed. What is now to be decided is, whether the death of the widow, which was in the view of the testator, or the lapse of her annuity by her repudiation of her conventional provisions, was to be the period of vesting. The question is one of difficulty, and but for the decisions of the Court in the cases of *Annandale* and *Alexander's Trustees*, to which reference has been made, I should have found it difficult to adopt the latter period as the date of vesting. It is always more or less unsafe to depart from the words of a will where these are plain. The risk which is encountered is the making of a new will in place of merely interpreting the words of the testator as we find them in the deed. Whatever conclusion we adopt we must be sure that it is the will of the testator in the one case as well as in the other. Reading the will as a whole, I think the inference is that the death of the widow was specified only because that was the period at which, according to the anticipation of the testator, her annuity would cease. This, I think, is shown by the fourth purpose of the trust-deed, whereby his trustees are "hereby directed to draw the revenue of my estates not above disposed of during the life of my said wife, and to accumulate the revenue, after paying my wife's said annuity, with the principal." Thus the payment of the annuity was assumed to be coincident in point of duration with the life of the widow, and but for this consideration her death, so far as we can see, would not have been chosen as the period at which the rights of the other beneficiaries were to become effectual. An earlier period—the lapsing of the annuity—would have been chosen, and accordingly it is only reasonable, I think, to conclude that the termination of the annuity was the end of the time during which the vesting was to be in suspense. This is certainly a reasonable interpretation, and as the presumption is for vesting at the earliest period compatible with the purposes of the trust, and as there are decisions the authority of which has never been questioned, to the effect that the repudiation is the same in its consequences upon the other trust arrangements as the death of the beneficiary would have been, my opinion has come to be that the date of the repudiation is here the date of vesting.

The interlocutor of the Lord Ordinary ought to be altered so that effect may be given to the views of the Court, and the cause remitted to the Lord Ordinary that such order as may be necessary for carrying out the testamentary arrangements of the trust consistently with what has now been decided may be pronounced.

Lord Rutherfurd Clark—I think we must follow the decisions.

The Court pronounced this interlocutor:—

"The Lords having heard counsel for the parties on the reclaiming-note for the claimant James Basil Crellin against Lord Fraser's interlocutor of 10th June last, Recal the said interlocutor: Find that the right to the provisions made by the truster Charles Muirhead in his trust-disposition and settlement vested in the beneficiaries on his death; and with this finding, remit the cause to the Lord Ordinary with instructions to proceed therein as accords: Find all the claimants entitled to payment out of the fund *in medio* of the expenses incurred by them respectively as between agent and client," &c.

Counsel for James B. Crellin—Gloag—Low. Agents—Macandrew, Wright, Ellis, & Blyth, W.S.

Counsel for James Muirhead—Asher—Watt. Agent—Robert Denholm, S.S.C.

Counsel for the Judicial Factor and for Charles Muirhead and Others—Sol.-Gen. Robertson—Blair. Agent—George M. Wood, S.S.C.

Saturday, December 24.

FIRST DIVISION.

MINTY AND OTHERS, PETITIONERS

Succession—Trust-Deed—Presumption of Life Limitation (Scotland) Act 1881 (44 *and* 45 *Vict. cap.* 47), *secs.* 4 *and* 8.

A testator directed his trustees to pay the revenue of his whole estate to his son and daughter, with "full power to pay such part of the principal sums or stock of my estate to my son and daughter at any time my said trustees may think proper, ... but my said son and daughter shall have no right to demand payment from my said trustees of the said principal sum and stock of my estate, or any part thereof, it being my wish and intention that my said trustees shall have full and discretionary power either to pay the whole or part of my estate to them, or to withhold the same from them altogether." There was then a declaration that in case of the death of the son