Mackay's will, and all he wished to know was the probable amount. There was on that assumption no misrepresentation. The defenders stated truthfully what they expected the amount would be on that footing. At most, even if the defenders are held to have represented that Mrs Musgrave and Mrs Sutherland were legally entitled to the shares in question, that was no more than an expression of opinion, of the soundness of which the pursuer had as good means of judging.

Lastly, the transaction was acted on, and after two years the pursuer asks to have it set aside because he now finds out what he should have discovered sooner, namely, that the arrestments attached nothing.

On the whole matter I agree that the action should be dismissed as irrelevant.

The Court recalled the interlocutor reclaimed against, and dismissed the action.

Counsel for the Pursuer and Respondent —Jameson, K.C. — M'Lennan. Agent — S. F. Sutherland, S.S.C.

Counsel for the Defenders and Reclaimers —Campbell, K.C.—Laing. Agents—Laing & Harley, W.S.

Wednesday, January 28.

SECOND DIVISION.

COATS' TRUSTEES *v.* COATS.

Succession—Vesting—Direction to Divide on Death of Widow—Annuity to Widow made a First Charge on Estate—Vesting of Estate in Excess of Sum Required to Secure Annuity—Ineffectual Postponement of Payment.

A testator by his will directed his trustees to pay an annuity to his widow, and directed that the balance of the income of his estate should be divided equally among his children, and that on the death of his widow his estate should be equally divided among them. The testator's moveable estate was valued at £469,900, and a sum not exceeding £150,000 was sufficient to secure the widow's annuity. *Held* that the right to the capital of the trust estate vested in the children *a morte testatoris;* that the postponement of payment of the capital, except in so far as necessary to secure the widow's annuity, was ineffectual, and that the trustees, subject to that exception, were bound now to distribute the capital among the children.

Miller's Trustees v. *Miller*, December 19, 1890, 18 R. 301, 28 S.L.R. 236, and *Yuill's Trustees* v. *Thomson*, May 29, 1902, 4 F. 815, 39 S.L.R. 668, *applied.*

Succession — Trust — Option of Buying Heritable Estate at the Death of a Liferentrix — Option of Buying Heritable Estate not Subject to Liferent—Period at which Options Exercisable.

A testator by his trust-disposition and settlement provided, 6th, that his estate of S should be liferented by his widow, and 7th, "at the death of my wife" that his children in order should have the option of buying S "as it then stands" at a specified price, and failing his children that it should be sold and the price added to his general estate; and 9th, that the estate of L should be offered to his children in turn, also at a specified price, and failing his children he made the same provision as in the case of S. *Held* (1) that the option of buying S could not be exercised immediately, but was limited to the testator's children alive at his widow's death; and (2) that the words "at the death of my wife," with which the seventh purpose opened, did not govern the ninth purpose, and that accordingly the option of buying L fell to be exercised immediately.

George Coats, of Staneley, Paisley, died on 9th October 1901, survived by his widow and by two sons, both major, Peter Herbert Coats and Ernest Symington Coats, and two daughters, one married and the other a minor.

Mr Coats died possessed of (1) the estate of Staneley, Paisley; (2) a field adjoining the Staneley estate, purchased by the truster in 1896 from Mr John A. Brown, starch manufacturer, Paisley; (3) the estate of Lounsdale, Paisley; (4) one-half *pro indiviso* of a dwelling-douse at Innellan, called Lilybank; and (5) moveable estate of the net value of £469,900.

On 16th September 1901 Mr Coats, who was ill for some months before his death, executed a trust-disposition and settlement whereby, having in the first place given directions for securing a marriage-contract provision of an annuity of £300 to his wife, he directed his trustees as follows:—"(*Second*) Besides the above, my trustees are to pay my wife four thousand pounds a-year as long as she lives, and this is to be a first charge on the balance of my estate. (*Third*) The balance of the income of my estate to be divided equally among my children. (*Fourth*) On the death of my wife my estate to be equally divided among my four children. (*Fifth*) In the event of the death of any of my children (being married) without leaving any family, the widow or widower to be liferented in their portion. (*Sixth*) My wife to be liferented in my house Staneley, and also in Lilybank, Innellan, in so far as it belongs to me. (*Seventh*) At the death of my wife my son Peter Herbert, or failing him my son Ernest Symington, to have the option of buying Staneley as it then stands, including silver-plate and everything else, for the sum of fifteen thousand pounds, and my share of Lilybank, Innellan, for the sum of fifteen hundred pounds; failing them my daughters to have the same option; and failing them the properties to be sold and the money put into my general estate; my brother Peter, of course, to have first option of buying Lilybank. (*Eighth*) The field last bought from John A. Brown between Staneley and Lounsdale to form part of Staneley, and to be

included in the price — fifteen thousand pounds—already mentioned. (*Ninth*) The estate of Lounsdale to be offered in turn at the cost price of eight thousand pounds, which sum is to be added to my general estate, to my sons Peter Herbert and Ernest Symington, or failing them to my daughters, or failing them to be sold and proceeds treated as above stated."

Questions having arisen as to the true meaning of the truster's settlement, a special case was presented for the opinion and judgment of the Court.

The parties to the special case were—(1) the trustees under his settlement; (2) the truster's eldest son Peter Herbert Coats; and (3) the truster's son Ernest Symington Coats, the elder daughter with the consent and concurrence of her husband, and the younger daughter with consent and concurrence of her curators.

In addition to the facts narrated above, the case stated that the sum required to secure the widow's annuity would not exceed £150,000.

The questions of law for the opinion and judgment of the Court were—"(1) Has the right to the capital of the trust estate vested in the second and third parties *a morte testatoris*, or is vesting postponed till the death of the testator's widow? (3) If vesting has taken place, are the first parties entitled or bound to distribute among the second and third parties now the capital of the trust so far as not required to secure the widow's provisions? (4) Can the option of electing to purchase Staneley and Lilybank at the widow's death under the seventh purpose be validly exercised now, or is the option limited to the truster's children alive at the widow's death? (6) Does the option to purchase Lounsdale under the ninth purpose fall to be exercised now, and are the first parties bound to convey Lounsdale to the purchaser immediately on payment of the price, or is the exercise of said option postponed until the widow's death?"

The contention of parties were as follows:—With regard to vesting and payment of the capital of the trust estate, the first parties contended that vesting was postponed until the death of the widow, and that no distribution could take place before that event. The second and third parties contended that vesting took place *a morte testatoris*, and that immediate division might be made among them of the balance of the capital after setting aside a sum sufficient to secure the widow's annuity.

The second party contended that though the seventh purpose of the settlement could not be carried out until the death of the widow he was entitled to exercise the option therein conferred upon him immediately for himself and his successors. The third parties contended that this option was exercisable only at the widow's death, and was confined to the truster's children then surviving.

The first parties maintained that the option of purchasing Lounsdale could not be exercised until the period of division. The second and third parties maintained that this option fell to be exercised immediately, even though vesting and distribution should be held to be postponed.

Argued for the first parties—There was no gift apart from the direction to divide, and therefore no vesting until division—*Bryson's Trustees* v. *Clark*, November 26, 1880, 8 R. 142, 18 S.L.R. 103. If vesting was not postponed distribution could not be postponed—*Yuill's Trustees* v. *Thomson*, May 29, 1902, 4 F. 815, 39 S.L.R. 668; therefore postponment of vesting was necessary to protect the rights of widows or widowers under the fifth purpose of the settlement, in which the truster necessarily referred to children predeceasing his widow, he himself being on his deathbed when he executed his settlement.

Argued for the second party—The destination to "my four children" was equivalent to a nomination destination, and vesting took place *a morte testatoris*—*Matheson's Trustees* v. *Matheson's Trustees*, February 2, 1900, 2 F. 556, 37 S.L.R. 409. The presumption in favour of immediate vesting was fortified by the consideration that the truster's widow was an annuitant, not a liferentrix — *Pursell* v. *Newbigging*, May 10, 855, 2 Macq. 273; *Waters' Trustees* v. *Waters*, December 6, 1884, 12 R. 253, 22 S.L.R. 176. The case satisfied the test of *Miller's Trustees* v. *Miller*, December 19, 1890, 18 R. 301, 28 S.L.R. 236, and *Yuill's Trustees* v. *Thomson*, *cit. sup.*, and the trustees were bound to distribute the estate immediately so far as not required to secure the widow's annuity.

Counsel for the third parties adopted the argument of the second parties on the question of vesting and distribution.

The arguments of parties on the other questions in the case sufficiently appear for the purposes of this report from their contentions as stated above.

At advising—

LORD JUSTICE-CLERK—The opinion that I have formed upon the first question in this special case is, that it was the intention of the testator that the provisions which he made by his settlement for his four children should vest in them at his death, but that payment should be postponed until the death of his widow should she survive him, the purpose being to secure her in the liferent annuity which he declared she should receive. It is one of the facts of the case that when a capital sum has been set apart amply sufficient to secure the widow's annuity there is a very large surplus over. The children therefore claim that in accordance with recent decisions they are now entitled to receive this surplus, and I am of opinion that this contention is well founded, and that accordingly the first alternative of the first question must be answered in the affirmative, and the third question in the affirmative.

As regards the questions relating to the heritable properties, the provisions of the settlement in regard to Staneley and Lily-

bank are provisions which under the terms of the deed can only come into operation on the death of the widow, who is given a liferent interest. Therefore any question in regard to these properties appears to be premature. As regards the property of Lounsdale there is no liferent interest interposed, and therefore I am of opinion that the directions to the trustees in regard to it fall to be carried out now.

I would therefore propose that the sixth question be answered affirmatively as regards its first alternative.

LORD YOUNG concurred.

LORD TRAYNER—The questions here presented for determination do not appear to me to be attended with any difficulty. I have no doubt that the capital of the trust estate vested in the second and third parties *a morte*. There is nothing in the testator's will to indicate an intention to postpone vesting. If that is so, then, subject to the securing of the widow's rights the persons in whom the capital is vested are entitled, according to recent decisions, to immediate payment of that which is vested in them. With regard to the estate of Staneley and Lilybank I think the option conferred by the testator on his children respectively and in order cannot be exercised until the widow's death. Until that event happens it cannot be ascertained which of the testator's children will be alive and entitled to exercise the option. Nor can it be ascertained whether any child will be disposed to give the testator's price for the estate "as it then stands." Its value at that date will be a material element in deciding any of the children whether the option should be exercised or not. Besides the express words of the will are that "at the death of my wife" the children should have the option. They have no right to any option at an earlier period. The estate of Lounsdale stands in a different position. There is no restriction in regard to it as to the time at which the option to purchase may be exercised. The will appears to me to contemplate an immediate exercise of the option, and failing any of the children desiring to purchase the property at the price fixed the estate should be immediately sold and the price realised added to the general estate for distribution as directed. I would answer the question accordingly.

LORD MONCREIFF—In regard to the first six heads of Mr Coats' settlement I think there is no doubt that as regards intention he intended that the provisions in favour of his four children should vest *a morte testatoris*, but that their shares of capital should not be paid until the death of his wife. The result, however, of the recent authorities is that, as regards division of capital, the intention of the testator cannot be fully carried out. The only trust purpose to be secured by retention of capital being the payment of an annuity of £4300 a-year to the widow, while the trustees are undoubtedly entitled and bound to set aside a sum amply sufficient for that purpose, they will be bound, having done so, to accelerate the term of payment and divide the balance of the capital among the children.

The seventh and eighth purposes stand in a somewhat different position. Looking to their terms they cannot, I think, be properly carried out until the death of the widow, who is liferented in Staneley and part of Lilybank.

The ninth purpose, which relates to the sale and purchase of the estate of Lounsdale, in which the widow has no interest, can be carried into effect now.

The Court answered the first alternative of the first question, and the third question, the second alternative of the fourth question, and the first alternative of the sixth question in the affirmative.

Counsel for the First Parties—Jameson, K.C.—A. S. D. Thomson. Agent—J. Murray Lawson, S.S.C.

Counsel for the Second Party——Campbell, K.C.—M'Lennan. Agents—Thomson, Dickson, & Shaw, W.S.

Counsel for the Third Parties—A. Moncrieff. Agents—R. R. Simpson & Lawson, W.S.

Thursday, January 29.

FIRST DIVISION.

[Lord Pearson, Ordinary.

BALFOUR MELVILLE *v.* DALZIEL.

Parent and Child—Right of Administration—Minor—Right of Father—Petition for Recal of Curator Appointed to Minor's Estate.

Circumstances in which the Court *refused* a petition presented by a minor and by his father for the recal of the appointment of a *curator bonis* appointed to the minor's estate.

This was a petition presented by Evan Whyte Melville Balfour Melville, son of and residing with James Heriot Balfour Melville, W.S., Edinburgh, with consent and concurrence of the said J. H. Balfour Melville, and by the said J. H. Balfour Melville, praying for the recal of the appointment of Mr John Dalziel, C.A., who in May 1899 and May 1900 was appointed factor *loco tutoris* to the said Evan Balfour Melville, *quoad* his interest in an entailed estate known as Strathkinness, which his father, the heir of entail in possession, was proposing to disentail, and also *quoad* a small property called the Den, which belonged to the ward in fee-simple. As there had been separate appointments in reference to each estate, separate petitions for recal were presented.

Answers were lodged for Mr Dalziel, submitting that in the circumstances the prayer of the petition should not be granted.

A remit was made to Mr Charles Young, W.S., who made a report to the Lord Ordinary.