LORD ADAM—I am of the same opinion. It is very clear that this is not an interlocutor pronounced by the Lord Ordinary as provided for in the 27th section of the Act, and it therefore follows that a reclaiming-note under the 28th section is not competent.

LORD M'LAREN—If I had been considering the question of practice which the Lord Ordinary has disposed of, I should not have had the smallest hesitation in making a remit to Mr Campion, if I believed him to be the most suitable person, without asking the consent of the parties; because in this interlocutor the direction to remit to an engineer is merely administrative, and a proposal to remit to an unnamed person can never fetter the discretion of the Court when the actual remit comes to be made. But I agree with your Lordship that this reclaiming-note is not competent, because the leave of the Lord Ordinary has not been obtained as required by the statute. I mentioned my impression about the authority of the Lord Ordinary in order that Mr Salvesen's clients may not think that they have suffered any prejudice by the circumstance that their agent had not taken the necessary steps to have obtained the Lord Ordinary's leave.

LORD KINNEAR—I agree with your Lordship that the reclaiming-note is incompetent for the reasons which your Lordship has stated.

The Court refused the reclaiming-note as incompetent.

Counsel for Pursuers and Reclaimers—Salvesen. Agents—Graham, Johnston, & Fleming, W.S.

Counsel for Defenders and Respondents—Johnston. Agents—A. & G. V. Mann, S.S.C.

Thursday, June 28.

SECOND DIVISION.

ROSS'S TRUSTEES *v.* ROSS.

Succession—Vesting—Period of Payment—Effect of Wife's Repudiation of Testamentary Provisions by Husband.

A truster directed his trustees to pay to his widow an annuity during all the years of her life and as long as she remained unmarried, and "on the death or second marriage of my said wife" he appointed his trustees to realise the residue of his whole estate, and to pay one-half to his brother W. R. and divide the other half equally among the three children of his late brother C. R., and "in the event of the said W. R. dying before the period of payment, which shall be the period of vesting," not leaving lawful issue, the whole residue of the testator's estate was to be divided equally among the children of C. R. or the survivors and their issue *per stirpes*. The testator further provided and declared that the interests of the residuary legatees should vest in them "at and only upon the arrival of the period when the residue of my estate falls to be realised and divided."

The widow repudiated the annuity provided for her, and took her legal rights.

Held (*diss.* Lord Young) (1) that the widow's repudiation of the annuity had not the effect of hastening the period of payment of residue to the residuary legatees, and that the periods of vesting and of distribution did not arrive until the death or second marriage of the widow; and (2) that the trustees were bound to accumulate the income of the residue until the period of distribution.

Muirhead v. *Muirhead*, May 12, 1890, 17 R. (H. of L.) 45, *followed.*

Douglas Ross died on 23rd March 1892, leaving a trust-disposition and settlement dated 2nd October 1889. By the trust-deed he conveyed his whole estate, heritable and moveable, to trustees. After making provision for the payment of debts, sick-bed and funeral expenses, and certain legacies, the testator in the third purpose of the deed directed his trustees "to make over to my wife Christina Cunningham or Ross, as her absolute property, the whole household furniture and plenishing of every description belonging to me at the time of my decease; and to pay her an annuity of £50 sterling per annum during all the years of her life so long as she continues to remain my widow, which sum of £50 stg. per annum shall be paid to her in such proportions and at such times as my trustees may think proper or necessary, and shall be held to be in full satisfaction to her of all claims she may have against my estate; and in the event of my said wife marrying again, said annuity of £50 stg. shall be discontinued. Fourthly, On the death or second marriage of my said wife, I direct and appoint my trustees to realise the whole residue and remainder of my estate, heritable and moveable, real and personal, and to pay and divide the same between my nephew William Ross, son of my late brother William Ross, who shall be entitled to one-half, and the other half shall be equally divided among the said Charles Ross, John Ross, and Jessie Ross, the children of my late brother John Ross, and in the event of the said William Ross dying before the period of payment, which shall be the period of vesting, not leaving lawful issue, then the whole residue of my estate shall fall to and be divided equally among the said Charles Ross, John Ross, and Jessie Ross, and the survivors or survivor of them and their respective issue, the issue in each case being entitled to the share which their parent would have been entitled to on survivance; and I provide and declare that the interests of the residuary legatees shall vest in them at and only upon the arrival of the period

when the residue of my estate falls to be realised and divided."

The testator was survived by his wife. She claimed her legal rights as his widow, and the amount to which she was legally entitled was paid over to her by the trustees. Charles Ross predeceased the testator without issue.

In these circumstances a question arose as to the disposal of the residue of the trust-estate. The trustees maintained that they were bound to hold the residue for the benefit of the residuary legatees who might survive the death or second marriage of the testator's widow.

William Ross, John Ross, and Mrs Jessie Ross or Stoney maintained that the testator's widow having claimed and been paid her legal rights, the period of vesting and of division and payment of residue had arrived.

For the decision of the point a special case was presented to the Court by (1) Mr Ross's trustees, (2) William Ross, John Ross, and Mrs Jessie Ross or Stoney, and (3) the children of William Ross, John Ross, and Mrs Jessie Ross or Stoney.

The questions at law were—"(1) Are the second parties, in respect that the testator's widow has claimed her legal rights, entitled now, and without waiting till the death or second marriage of the testator's said widow, to have the residue of the testator's estate divided and paid to them in the proportions provided by his said trust-disposition and settlement? (2) If the trustees are bound to hold until the death or second marriage of the truster's widow, are the said residuary legatees entitled to periodical payment of the income thereof until the occurrence of such death or second marriage, or must it be accumulated?"

Argued for the first and third parties—By the special terms of the will the period of vesting and payment of residue could not arrive till the death or second marriage of the widow. The case was ruled by *Muirhead* v. *Muirhead*, May 12, 1890, 17 R. (H. of L.) 45. Indeed, the present case was more favourable, because the testator had specially directed that the period of vesting was to be the period of payment. Eventual interests had also in this case to be safeguarded, and therefore the trustees were bound to hold the estate till the period of distribution mentioned in the deed—*Hughes* v. *Edwardes*, July 25, 1892, 19 R. (H. of L.) 33. The trustees were also bound to accumulate the income of the residue till the date of payment.

Argued for the second parties — The repudiation by the widow of her testamentary provisions under the husband's will had hastened the vesting and period of payment. It was obvious that the only object that existed for postponing the date of payment till the death or second marriage of the widow was to provide for the payment of the annuity to the widow. According to the will, vesting was to take place on "the arrival of the period when the residue of my estate falls to be realised and divided." If the Court decided in favour of their contention, that period would have arrived. The case of *Muirhead* could be distinguished from the present case, as in that case there was a distinct direction to accumulate the income till the wife's death. Even if it was held that the period of payment had not arrived, the second parties were entitled to payment of the income of the residue until the period of payment of the residue arrived.

At advising—

LORD JUSTICE-CLERK—In view of the case of *Muirhead*, I do not think we can dispose of the first question otherwise than by deciding that the term of payment has not arrived.

As to the second question, I am of opinion that the income must be held to be in the same position as the capital. The first alternative of the question must be answered in the negative, and the second in the affirmative.

LORD YOUNG—I do not think the case is by any means unattended with difficulty. I should rather have been disposed, irrespective of the authority of *Muirhead* and *Hughes*, to think that the payment was postponed till the death or second marriage of the widow, only because the death or second marriage of the widow was contemplated by the testator as the sole events which would terminate her annuity in the event of her surviving him. But these two dates could not possibly have been fixed upon by the testator with any intelligent purpose of determining the particular relations who were to take the capital, because the two events have no connection with the determination of such a matter. The only intelligible explanation of these periods having been taken, as fixing the terms of payment to the residuary legatees, is, that the testator knew that on either of them his estate would be available for division, and unburdened of the annuity which exhausted the income. But a third event has occurred which has left the estate free, viz., the repudiation of the provision by the widow, and her claiming her legal rights.

It is suggested that the amount required to satisfy the legal rights of the wife will make a hole in the estate which might be filled up by accumulating the income during her lifetime. But the amount of filling up would depend upon whether the widow married a second husband or not, as the moment she married again the period of distribution would have arrived.

It is therefore impossible to attribute to the testator in fixing the death or second marriage of his wife as the period of distribution, the purpose of determining who were to be the objects of his bounty. I should have been disposed to think that it was clear to ordinary understanding, that the postponement of the division of the estate to the two periods named was made in order to secure the payment of the annuity. I can conceive no other purpose. If that is the only purpose the testator

had in view, I think the good sense of the thing is that the period of distribution is hastened by the wife having repudiated the settlement and claimed her legal rights. For my part I should also be disposed to hold it to be also the law, the law generally being supposed to be in accordance with good sense. But your Lordships think that the case is ruled by prior decisions, and that we must follow these authorities.

LORD RUTHERFURD CLARK—I think the case of *Muirhead* is an absolute rule, and we must follow it.

I am not at all sure that the testator did not mean to make the period of distribution depend upon the second marriage of his widow. It is evident that if she took her annuity there could be no vesting during her lifetime as long as she remained unmarried, but the moment she married a second time the term of payment arrived. So by the very form of the deed the period of distribution depends on the second marriage of the widow.

LORD TRAYNER was absent.

The Court answered the first question in the negative and the first alternative of the second question in the negative, and the second alternative in the affirmative.

Counsel for First Parties—Crabb Watt. Agents—Mackenzie & Black, W.S.

Counsel for Second Parties—Wilson—Guy. Agents—Clark & Macdonald, S.S.C.

Counsel for Third Parties — Younger. Agents—Clark & Macdonald, S.S.C.

Saturday, June 30.

FIRST DIVISION.

DRUMMOND'S FACTOR, PETITIONER.

Judicial Factor—Nobile Officium—Power of Sale by Private Bargain failing Public Roup—Petition for Confirmation of Sale by Private Bargain without Public Exposure.

A judicial factor who had obtained power from the Court to sell certain heritable property by public roup at an upset price of £9750, and failing such sale, to sell by private bargain at a price not less than the upset price, without exposing the property to public roup, sold it for £9800 by private bargain with the approval of all the creditors. A petition for approval of the sale was *refused.*

Opinions expressed that it was within the power of the Court to grant the prayer of the petition.

The judicial factor on the trust-estate of Drummond Brothers applied to the Court for power to sell certain heritable subjects at 82 George Street, Edinburgh, belonging to the factory.

Upon 19th October 1893 the Lord Ordinary authorised the judicial factor to expose them for sale by public roup, after due advertisement, at the upset price of £9750, and if not sold at or above said upset price, to re-expose the same for sale by public roup, after due advertisement, at such reduced upset price as the Accountant of Court might fix, or to sell the same by private bargain at a price not less than that at which they had been publicly exposed for sale.

The judicial factor duly advertised the property, but did not expose it for sale by public roup, and in May 1894 sold it by private bargain for a sum of £9800. All the heritable creditors, including postponed bondholders who would not receive any part of their debt, approved of the sale, and Mr Hippolyte Blanc, architect, reported that in his opinion the transaction was a judicious one. The purchaser, however, was apprehensive of the validity of the title he would get, and accordingly the judicial factor presented a petition praying the Court to approve of the sale. Along with the petition he lodged a report by the Accountant of Court, saying that in his opinion the factor's acting in selling by private bargain might be approved of.

Upon 23rd June 1894 the Lord Ordinary (Low) having heard counsel for the factor and for the purchaser, reported the case to the First Division.

"*Opinion.*—The petitioner is judicial factor upon a trust-estate. In May 1893 he obtained authority from the Court to sell certain house property in George Street, Edinburgh, belonging to the trust by public roup at the upset price of £9750, and if the property was not sold at or above that price, to re-expose it for sale at such reduced upset price as the Accountant might fix, or to sell the property by private bargain at a price not less than that at which it had previously been publicly exposed.

"The petitioner, before he had exposed the property for sale by public roup, received a private offer to purchase it at the price of £9800. He accepted the offer, and has now presented the present application for approval of the sale. The Accountant of Court reports in favour of the application being granted.

"The purchaser appeared, and referred to a judgment of the First Division in petition *Clyne*, June 5, 1894, in which it was held that although trustees might obtain authority from the Court to sell, they could not first conclude a contract of sale and then ask the approval of the Court. The purchaser in this case is quite willing to implement his contract, but he contended that in view of the decision referred to, it was doubtful whether the Court had power to confirm the sale, and he naturally desires to have an unimpeachable title.

"The parties asked that the case should be reported to the Inner House, and as it raises a question of importance not only to the parties, but in regard to the administration of trust-estates in the hands of judicial factors, the Lord Ordinary has thought it right to do so.