should be entitled to receive from his surviving partner for several years did not belong to the widow as income but fell as capital into residue. The first three of these decisions do not appear to me to have any material bearing upon the present case, but the third (*Freer's Trustees* v. *Freer*) affords material support to the view that such a payment as the surviving partner of the truster agreed to make, and did make, is not in the nature of income but of capital.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court answered the first question in the affirmative, the second question in the negative, the third question in the negative, and the fourth question in the affirmative.

Counsel for the First and Second Parties — H. Johnston, K.C.—Chree. Agents — E. A. & F. Hunter & Company, W.S.

Counsel for the Third Parties—Wilson, K.C.—Constable. Agents—Bruce, Kerr, & Burns, W.S.

Counsel for the Fourth Party—Dewar. Agent—W. C. L. Stark, S.S.C.

HOUSE OF LORDS.

Tuesday, November 24.

(Before the Lord Chancellor (Halsbury), Lord Macnaghten, Lord Shand, Lord Davey, Lord Robertson, and Lord Lindley.)

M'CULLOCH'S TRUSTEES *v.* MACCULLOCH.

(*Ante*, March 14, 1900, 37 S.L.R. 535, and 2 F. 749.)

Succession—Trust—Payment—Vested pro indiviso Share of Residue — Payment Postponed till Period Fixed by Testator —Ulterior Purposes—Liferent and Fee—Entail Amendment (*Scotland*) *Act* 1868 (31 *and* 32 *Vict. c.* 84), *sec.* 17.

A testator directed his trustees on the death of his wife to hold the residue for behoof of his children in liferent, and equally among them and their lawful issue in fee, and on the death of all his children to divide his estate among the children of his sons and daughters *per stirpes*. He directed that if any of his children died leaving issue, such child's share of the income should belong to such issue. The son of one of the testator's sons, who was dead, attained majority after the death of the testator's widow, and thereupon claimed payment of one-third of the residue. Two of the testator's children were still alive and had issue. It was admitted that a share of the residue had vested in the beneficiary who now claimed payment. He based his claim (1) upon the terms of the settlement, and also (2), when the case was argued in the House of Lords, upon the 17th section of the Entail Amendment (Scotland) Act 1868, he having been born after the death of the testator, and the testator having died after the passing of that Act.

Held (*aff.* judgment of the Second Division) that he was not now entitled to payment or conveyance of any part of the residue, in respect (1) that the testator intended the residue to remain unsevered until the death of the last survivor of his children, and that the interests of the other present and ultimate beneficiaries might be prejudiced by severing the estate now; and (2) that the case was not within the provisions of section 17 of the Entail Amendment (Scotland) Act 1868, because the beneficiary claiming payment was not a liferenter but a fiar.

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, *approved*, but *explained* and *distinguished per* Lord Davey.

Haldane's Trustees v. *Haldane*, December 12, 1895, 23 R. 276, 33 S.L.R. 206, *approved per* Lord Davey.

Expenses—Special Case—Interpretation of Trust-Disposition and Settlement.

One of the parties to a special case as to the effect of a trust-disposition and settlement having unsuccessfully appealed to the House of Lords against a unanimous judgment of the Second Division, the House of Lords *found him liable* in the expenses of the appeal.

This case is reported *ante ut supra*.

The second party (Bertram Douglas Macculloch) appealed to the House of Lords.

In addition to the contentions maintained by him in the Court of Session the second party contended that he was entitled to payment of one-third of the residue under the provisions of section 17 of the Entail Amendment (Scotland) Act 1868 (quoted *infra*).

Counsel for the first parties (respondents) was only called upon to reply to the argument upon the statute.

In answer to the second party's contention upon the statute, it was argued for the first parties that section 17 did not apply, in respect (1) that the second party was not a liferenter but a fiar, and (2) that the section could not apply to the effect of prejudicing the rights of third parties.

The Entail Amendment (Scotland) Act 1868 (31 and 32 Vict. c. 84), sec. 17, enacts as follows:—"From and after the passing of this Act it shall be competent to constitute or reserve, by means of a trust or otherwise, a liferent interest in moveable and personal estate in Scotland in favour only of a party in life at the date of the deed constituting or reserving such liferent; and where any moveable or personal

estate in Scotland shall by virtue of any deed dated after the passing of this Act (and the date of any testamentary or *mortis causa* deed shall be taken to be date of the death of the grantor, and the date of any contract of marriage shall be taken to be the date of the dissolution of the marriage) be held in liferent by or for behoof of a party of full age born after the date of such deed, such moveable or personal estate shall belong absolutely to such party, and when such estate stands invested in the name of any trustees such trustees shall be bound to deliver, make over, or convey such estate to such party." . . .

At delivering judgment—

LORD CHANCELLOR—In this case I am wholly unable to see any reason why the judgment of the Court in Scotland should be disturbed. I speak simply of the construction of this will. I decline absolutely, as in many other cases, to enter into the question of what would be the construction of other wills under other circumstances even if the same words occur in them. Here all the words seem to me to be intelligible only upon one hypothesis. The testator has intended that the estate should be kept together, and that until the period of distribution, which he has himself ordained to be that which the will discloses, there should be the payment of the income to each of the persons entitled. It is enough to decide my view upon this matter that in the events which might have occurred the trustees would have paid so much that by so doing they would have withdrawn from the whole of the estate the power of giving their aliquot part to each of the persons entitled to it for the time being, so that when the period of distribution which the testator contemplated had ultimately arrived the distribution of the whole of the estate would not have been that which he determined and expressly directed by his will. To my mind that is enough, without reference to any authority, to establish the proposition that you must adhere to the words of the testator, because there are ulterior purposes to be served upon the arrival of the period of ultimate distribution.

That is to my mind sufficient to answer the question in this case, and therefore I move your Lordships that this judgment be affirmed and this appeal be dismissed.

I have not thought it necessary to go into the question of the statute, because, for the reasons which Mr Campbell has given, it appears to me that the statute has nothing to do with this question; this is not one of the cases to which the statute applies.

With reference to the costs, your Lordships are, I think, of opinion, and I accordingly so move, that inasmuch as this was a unanimous judgment, and under the circumstances which have been disclosed to the Court the parties might well have been contented with the judgment of the Court below, the costs of this appeal should follow the ordinary course, that is to say, the appellant must pay the costs that he has incurred by the unnecessary litigation which he has promoted and maintained.

LORD MACNAGHTEN—I am of the same opinion.

LORD SHAND—I am of the same opinion. Notwithstanding the able argument of my friend the learned Solicitor-General I am clearly of opinion that the judgment complained of is sound and should be affirmed. The case is one in which I think it is clear that there are ulterior purposes to be served with reference to other beneficiaries by the direction which the testator has given to wind up and sever and divide the estate only on the death of all his children. If the appellant's view were to receive effect, the surviving daughter of the testator might be prejudiced pecuniarily during her lifetime, and the grandchildren might be prejudiced in their right to receive their share of the estate ultimately.

LORD DAVEY—I am of the same opinion. I think this case must be determined upon the construction of the words of this will. The gift on which this question turns forms the 16th purpose of the will; that has been read to your Lordships and referred to by my noble and learned friend who has preceded me. I think it is clear that the testator intended that the estate should remain *in globo* till the event which he points out, namely, the death of all his children, and that in the meantime until then the income of the whole of the estate regarded as a *corpus* in itself should be divided in third shares, in the events which have happened, between the beneficiaries. That appears to me to be a totally different form of will from any which your Lordships have had before you where the testator directed an immediate severance of the shares of his children when the children came into question and there were declared trusts of severed aliquot portions of the estate. It seems to me also a different case from a case in which the testator has given fixed amounts to some of the children and the residue to another or to others of the children, and where the estate remains *in globo* for the purpose of securing that certain fixed sums shall be forthcoming when they are wanted.

I wish to point out that a third of the income of the *corpus* of the estate is not by any means the same as the income of a severed portion of the estate, because a severed portion of the estate, unless it be all in cash, which this estate is not, might mean certain securities which according to what the learned Solicitor-General suggests would be allocated to the severed one-third in this case; and as to those securities, although the division may be the justest possible at the present time, it does not by any means follow that the remaining portions of the estate which are left undivided will represent the values upon which they are assessed at the present time, or that the income of the undivided portion of the estate will always represent two-thirds of the income of the *globus* of the estate

which is left undivided. That seems to me to be an effective answer against the appellant's construction.

I desire to say for myself that I think the case of *Miller's Trustees* v. *Miller*, December 19, 1890, 18 R. 301, 28 S.L.R. 236, which has recently been confirmed in the Court of Session in the case of *Yuill's Trustees* v. *Thomson*, May 29, 1902, 4 F. 815, 39 S.L.R. 668, was decided upon a sound principle, but I do not think that that principle has anything to do with the present case. That principle is this—that where a man gives an estate in fee and then attempts to clog it by some disposition for the fiar's benefit, that provision is repugnant to the idea of an estate in fee and is therefore void. That has nothing whatever to do with fixing the period of time at which the testator may direct the share of the estate to be ascertained. If it is ascertained and given to a fiar, the fiar is entitled to receive it although the testator may postpone the period until he has attained the age of 24 or 25 or some other time. But in the present case the difficulty of the Solicitor-General is this—that he has no present right to receive the share of the estate, and that the share of the estate to which he is entitled cannot according to the directions of the will be ascertained until the death of the ladies.

In the same way I do not think, with all deference to the Inner House, that the case of *Haldane's Trustees* v. *Haldane*, December 12, 1895, 23 R. 276, 33 S.L.R. 206, has anything to do with the present case either. I think that case was decided on a perfectly sound principle. There were three children I think; the testator gave to one of them £18,000 and to two others £8000, and then divided the residue. There appears to have been some doubt whether the estate at the time of the distribution pointed out by the testator would be sufficient to provide all the legacies. Of course the one legatee would not be entitled to receive his legacy at once and leave possibly a deficient fund to provide the legacies for his sisters. The observations which are quoted in the appellants' case from the judgment of my noble and learned friend, who was then the President of the Court of Session which decided that case seem to me to explain entirely what the decision really was in that case.

Therefore I think on the words of this will the decision is perfectly right.

With regard to the statute, Mr Campbell has made it perfectly plain that the statute has nothing to do with this case. The statute apparently (I express no opinion upon what may be the construction of it) converts a person with a limited interest into one holding a larger interest, and says that the trustees, notwithstanding any directions to the contrary in the will, are to transfer his share to him; but it says nothing at all as to the time when it is to be transferred, nor is there anything in the statute which in the least degree overrides any apt and competent provisions in a will for the purpose of fixing the period.

LORD ROBERTSON—I entirely agree.

LORD LINDLEY—So do I. As regards the costs I do not know whether in Scotland any question will arise, and whether if the appeal is simply dismissed with costs the costs will come out of the estate. We do not intend that. As I understand the Lord Chancellor's view the appellant is to pay the costs himself.

Appeal dismissed with costs.

Counsel for the First Parties (Respondents)—Campbell, K.C.—Cullen. Agents—John Kennedy, W.S., Westminster—Bell & Bannerman, W.S., Edinburgh.

Counsel for the Second Party (Appellant)—Solicitor-General for Scotland (Dundas, K.C.)—Craigie. Agents—Graham, Currey, & Spens, Westminster—Strathern & Blair, W.S., Edinburgh.

Tuesday, November 24.

(Before the Lord Chancellor (Halsbury), Lord Macnaghten, Lord Shand, Lord Davey, Lord Robertson, and Lord Lindley.)

EARL OF GALLOWAY *v.* DOWAGER COUNTESS OF GALLOWAY.

(*Ante*, October 30, 1902, 40 S.L.R. 82, and 5 F. 48.)

Entail—Provisions—Widow—Free Yearly Rental — Deductions — "Burdens" — Upkeep — Management — Restriction of Widow's Annuity — Statute — Construction—Entail Provisions Act 1824 (*Aberdeen Act*) (5 *Geo. IV. c.* 87), *sec.* 1.

In a petition presented by an heir of entail in possession for the restriction of a liferent annuity granted by his predecessor to his widow under the Entail Provisions Act 1824 (Aberdeen Act), *held* (*aff.* judgment of the Second Division) that the petitioner was not entitled, for the purpose of calculating the amount of the annuity as allowed by the Act, to deduct from the gross rental the expenses of (1) upkeep of estate buildings and fences, and (2) management and superintendence of the estate.

This case is reported *ante ut supra.*

The petitioner and reclaimer, the Earl of Galloway, appealed to the House of Lords.

Counsel for the respondent, the Dowager Countess of Galloway, were not called on.

At delivering judgment—

LORD CHANCELLOR—The question here at issue is a very narrow one and the considerations that apply to it appear to me to lie within very narrow limits. The language of the statute is, I think, remarkable. The cardinal words are in the proviso—"Provided always that such annuity shall not exceed one-third part of the free yearly rent of the said lands and estates where the same shall be let, or of