380, where the facts of the case are fully narrated.

The second party, Sir Thomas Kirkpatrick, appealed against the judgment of the Court of Session in so far as it negatived his right to a legacy of £1000 in addition to half the residue; and the fourth parties, the legatees, appealed against the judgment in so far as it negatived their right to interest from the date of the testator's death, and limited the application of the marginal note "all free of legacy-duty" to the servants' legacies, opposite to which it occurred.

The third party, Mr Bedford, who was one of the two residuary legatees, was respondent in the first appeal, and, with Sir Thomas Kirkpatrick, in the second also.

In moving the judgment of the House—

LORD CHANCELLOR—These appeals raise three separate questions, the first raising one question only. Sir Thomas Kirkpatrick claims a legacy of £1000 as having been given to him by the will. The words of the will are "to Roger Kirkpatrick . . . . the sum of £2000, and to each of his brothers the sum of £1000." If one stopped at those words, the matter would not admit of argument, for Sir Thomas was one of seven brothers of Roger. There is nothing ambiguous or equivocal in the words. Unless, therefore, some other part of the will takes away this legacy, it must stand good as a legacy to Sir Thomas. The only reason given for taking it away is that the appellant has also a gift of half of the residue, and it was argued at the bar that this was a case of double gifts, and that one only could be allowed. In my opinion it is not at all a case of double gifts, nor anything like it. Why should they not both stand? The case of double gifts has not the remotest bearing on the matter. To construe this will as has been done in the Court below is nothing less than to make a new will for the testator, which no Court has any right to do. A Court has no business to interpolate and introduce words in order to alter what is clear and precise. The conclusion of the Court below could not be sustained without doing violence to the will, and the decision must be reversed, and the respondent must pay the costs of the first appeal.

As to the second point, namely, whether the legacies bear interest from the date of death—it is admitted that that is the general rule in Scotland. But it was argued that the legacies were payable only out of the heritable estate, and when that estate was sold. This is an entire mistake. The legacies are payable out of the saleable estate, which includes both heritable and moveable. There is nothing to restrict the legacy to the proceeds of the real estate. The general rule therefore applies, that interest is due on the legacies from the testator's death at five per cent., and the decision of the Court below must be reversed.

As to the third point, namely, whether the words on the margin, "All free of legacy-duty," apply to all the legacies, it might have been doubted whether those words were altogether free from uncertainty, and whether they ought not to be disregarded. But certainly if they are to have effect, then there is no reason for confining them to the servants' legacies. The construction that the words apply only to servants' legacies adopted by the Court below is a most arbitrary construction. It is impossible so to limit the words. And in this third point also the Court below has come to a wrong conclusion. The second appeal must therefore be sustained, and the interlocutor reversed, but in the second appeal the costs will come out of the estate.

LORD O'HAGAN and LORD SELBORNE concurred.

Appeals sustained.

Counsel for Second Party—Hastings, Q.C.—Dauney—Low. Agent—J. C. Stogdon.

Counsel for Third Party—Kay, Q.C.—G. R. Gillespie. Agents—Grahames & Wardlaw.

Counsel for Fourth Parties—Southgate, Q.C.—Readman. Agents—J. & J. Graham.

COURT OF SESSION.

Tuesday, January 28.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

FLEMINGS (MALCOLMS' ASSIGNEES), AND OTHERS *v.* M'LAGAN AND OTHERS (FRASER'S TRUSTEES).

Title to Sue—Trust—Decree of Declarator of Right Subject to Contingency.

A testator made bequests in favour of his four children (two sons and two daughters) and their issue, of annuities of £100 each, the share of such of them as might die without legitimate issue to revert to the survivors, and to be equally divided amongst them in addition to the above. He appointed his brother universal residuary legatee. To meet the provisions a sum of £12,000 was invested under a deed of arrangement entered into between the beneficiaries, the residuary legatee, and certain trustees who were appointed for the purposes of the administration of the fund. The fund was divisible in terms of the will into four portions of £3000 each, which were appropriated to payment of the annuities. The two sons died unmarried and intestate. One of the daughters was unmarried, and aged sixty-one; the other was a widow, aged fifty-nine, with an only son of twenty-six, who was unmarried.

In these circumstances, an action was brought by certain parties who were in right of the residuary legatees' interest in the £12,000 for declarator of absolute right in them to certain portions of the fund. They called the residuary legatee, the two surviving daughters, the son of the married daughter, and the trustees themselves. The latter alone entered appearance, and contended that as the sums referred to were not then distributable, and the vesting of them was contingent, the action was premature.

Held (diss. Lord Young) that decree might be granted as craved with regard to the two shares of £3000 which had been destined to the sons, but that as such a decree would

not be *res judicata* against parties who might ultimately have right to the other portions of the fund, it could not be granted with regard to these—Lord Ormidale proceeding upon the assumption (Lord Gifford declining to do so) that the trustees represented and were entitled to bind those who did not appear.

This was an action of declarator at the instance of John Fleming and James Brown Fleming, writers in Glasgow, William Malcolm's assignees, and William Quilter, the trustee upon the estates for liquidation by arrangement of Malcolms & Company, &c., and on the separate estates of William Malcolm and Samuel Smythe Malcolm, against William Thomas Fraser, late of Skipness, in the county of Argyle, Miss Eliza Fraser, Mrs Mary Fraser or Nichol, and James Thomas Nichol, as also against Peter M'Lagan of Pumpherston, M.P., and others, trustees under a deed of arrangement and settlement, dated 3d January 1842, between the deceased William Fraser the younger, of Liverpool, the said Miss Eliza Fraser, the said Mary Fraser (afterwards Nichol), William Fraser of Hillside, in the shire of Fife, of the first, second, third, and fourth parts, and William Fraser of Hillside and others of the fifth part.

By his last will and testament, dated September 1, 1834, Thomas Fraser, therein designed of the county of Inverness, but late of Demerara, and then of Lodge Lane, England, who died on 4th August 1835, bequeathed to his four natural children William, Thomas, Eliza (a defender), and Mary, now Mrs Nichol (a defender), £100 a-year each, and he declared that in case of the death of any one of them the £100 should be annually paid to his or her lawful child or children until the youngest child should attain the age of twenty-one years, when the capital sum of £3000 should be paid to such a child or children, excluding any further claim whatever on his estate; but that such of them as might die without legitimate issue such share of £100 was to revert to the survivors of his children, and to be equally divided among them in addition to the above legacies; and the will finally contained the following provision:—"After all my just debts are paid, I give and bequeath all the rest of my property, and everything I am possessed of whatever, to my brother William Fraser of Plantation Helena, Demerara."

Thomas, the second of the testator's children, died intestate and unmarried on 11th June 1839. On 3d January 1842 a deed of arrangement and settlement was entered into between the three surviving children of the testator, of the first, second, and third parts; William Fraser of Hillside, Fife, of the fourth part; and William Fraser of Hillside, and others, of the fifth part. It proceeded on the narrative that Thomas Fraser by his last will and testament had made the already-mentioned bequest in favour of his four children; that Thomas Fraser (the younger) had died on 11th June 1839, intestate and without ever having been married; and that William Fraser the younger, Eliza Fraser, and Mary Fraser had then respectively attained the age of twenty-one years, and that William Fraser the younger was then living unmarried and in a state of unsound mind; and that doubts had arisen as to the construction of the above-recited bequests, and otherwise in reference to the same will and to the claims of William Fraser the younger, Eliza Fraser, and Mary Fraser, and their issue respectively, upon the estate of the testator; and that in order to avoid litigation and expense it was agreed by and between the various parties already named that William Fraser of Hillside should appropriate the bequests of the will, and for that purpose should invest £12,000 in the names of himself and of Richard Mackenzie and others, the trustees of the deed of arrangement, on Government or real securities, to be holden by the trustees for the trust purposes, and subject to the provisions concerning the same in and by the deed of arrangement; and that £12,000 had accordingly been charged by William Fraser on his estate of Hillside, by way of mortgage, to the trustees already named, at 4 per cent. per annum, until Whitsunday 1855, when by the terms of the mortgage the £12,000 would become payable to the trustees; the three surviving children drawing in the meantime the additional income thus created above the £400 specified in the will, but with and under the declarations and conditions specified therein; and that it had been determined that the trusts of the £12,000 should be declared in manner and to the effect thereinafter appearing, and that it had been agreed that William Fraser the younger should be named a party to the deed in order to the execution thereof by him if he should become competent in that behalf, and that the same should be absolutely binding on the several other persons, parties thereto, and their respective heirs, executors, administrators, and assigns, notwithstanding William Fraser the younger might never execute the same. The deed of arrangement (although the subscribing parties to it were resident in Scotland, and although tested according to the law of Scotland), was in the English form. The trust purposes were that the trustees should pay and divide the whole yearly income of the trust money equally among William Fraser the younger, Eliza Fraser, and Mary Fraser, during their respective natural lives, and after their deaths, for such trust and purposes as according to the true construction, intent, and meaning of the will would then satisfy the bequests of the £100 and £3000 respectively therein contained, and so that until the time of the decease of the survivor of the three children the whole yearly income arising from the £12,000, notwithstanding it might exceed £400, should be applicable in equal fourth parts in the same manner in which the several annual sums of £100 each would have been applicable.

Subsequently certain new trustees were by various deeds of assumption and assignation assumed, including Mr M'Lagan, M.P., and others.

By testamentary settlement, dated May 7, 1849, William Fraser of Hillside, then of Skipness, gave, bequeathed, disponed, and assigned to his eldest son, the defender William Thomas Fraser, and the heirs whomsoever of his body, his whole heritable and moveable property, subject to certain bequests and legacies therein mentioned, and appointed William Thomas Fraser his sole executor.

William Thomas Fraser's estates were subsequently sequestrated, and the pursuers of this action brought it upon the footing that they were vested in his rights by a series of assignations and transmissions which it is unnecessary to specify.

William Fraser the younger died insane and

unmarried in 1877. Eliza Fraser and Mary Fraser or Nichol were born in 1813 and 1815 respectively. The former never married; the latter had an only child James Thomas Nichol, who was at the date of the summons in his twenty-sixth year.

The summons concluded for declarator "that the sole right and title to and beneficial interest in the fee of three sums of £3000 each, amounting together to the sum of £9000, being portions of the sum of £12,000 held by the defenders as trustees aforesaid, invested under the said deed of arrangement and settlement to meet annuities of £100 sterling to each of the now deceased William Fraser, the now deceased Thomas Fraser, and the said Eliza Fraser, bequeathed to them by the last will and testament of the late Thomas Fraser, their father, on or about the 1st day of September 1834, have vested in the defender William Thomas Fraser; or otherwise that as regards the £3000 applicable to the annuity of the defender Eliza Fraser, that she has never been married, and is now past the years of child-bearing, and that the fee of the said sum of £3000 has vested in the defender the said William Thomas Fraser, or at least that upon decree to the above effect being obtained, the fee of the last-mentioned sum of £3000 shall vest in him; and further that Mrs Mary Fraser or Nichol is now past the age of child-bearing, and that in the event of the defender James Thomas Nichol predeceasing the defender Mrs Mary Fraser or Nichol his mother, William Thomas Fraser will become entitled to and have vested in him the sole right to and beneficial interest in the fee of a further sum of £3000, being the remainder of the sum of £12,000, and further that the pursuers, as assignees and in right of William Thomas Fraser, have now right to the extent of an equal half each to all the right, title, and interest which William Thomas Fraser had, has, or may have in the fee of the four sums of £3000 each; and further, and in any view that the pursuers have full right to sell and dispose of, assign, and convey all William Thomas Fraser's reversionary right and interest in the fee of the four sums of £3000 each; but under reservation always to the defender William Thomas Fraser of all right competent to him in the balance, if any, of the price or prices that may be obtained therefor after deducting the sum of £2400 with interest thereon at the rate of 10 per centum per annum from 14th February 1877." &c. It was averred by the pursuers that William Thomas Fraser, as his father's universal legatee, became absolutely entitled to his residuary property, including his right and interest in the £12,000.

The pursuers' averments as to the vesting of the fund were as follows:—The fee of one of the sums of £3000 vested in the late William Fraser of Hillside upon the death of Thomas Fraser the younger in 1839. Further, upon the death in 1877 of William Fraser the younger, the fee of another £3000 vested in William Quilter as trustee, and is now vested in the pursuers. Further, as Eliza Fraser has never been married, and is now past the years of child-bearing, the fee of another £3000 has vested in the pursuers, or at least they are entitled to have it found and declared that she has never been married and is now past the years of child-bearing, and that upon their obtaining decree to that effect the fee of the last-mentioned sum of £3000 shall vest in them. Further, they are entitled to obtain decree finding and declaring that in the event of James Thomas Nichol predeceasing his mother without leaving lawful issue, Mrs Nichol being now past the years of child-bearing, the fee of the fourth and last £3000 will, on the death of the longest liver of the sisters, vest in the pursuers; and further, in the event of James Thomas Nichol predeceasing his mother and leaving lawful issue, the fee of the £3000 will, notwithstanding, vest in the pursuers.

No defences were lodged for Miss Fraser or for Mrs Nichol or her son. The trustees alone appeared to defend.

They averred that no such declarator as was asked could be obtained during the lives of the annuitants, and that even if the Court were disposed to entertain the action for this purpose, the right of the pursuers was by no means clear, and that the defenders would not be in safety to recognise the pursuers' claim unless it were established in an action to which all parties having adverse interests were called. They further averred that the next-of-kin of the testator should have been cited, as they under one interpretation of the will must be held to have a reversionary interest in the estate.

It appeared that in a multiplepoinding raised in 1871 by Mr Dalgety, the trustee upon William Thomas Fraser's sequestrated estate, against the creditors of William Thomas Fraser, an interlocutor was pronounced by Lord Rutherfurd Clark, Ordinary, on 29th January 1878, ordaining the sale of the reversionary interests of Mr Fraser in this £12,000, pursuant to an order, dated 13th July 1877, pronounced by the Master of the Rolls giving authority for such sale.

The pursuers pleaded—"(1) Upon a sound construction of the last will and settlement of the testator Thomas Fraser, of the deed of arrangement and settlement of 1842, and of the testamentary settlement of the late William Fraser libelled, the right to the fee of two of the sums of £3000 in question has become vested in the pursuers. (2) In respect that the defender Eliza Fraser has never been married, and is past the years of child-bearing, the fee of another of the said sums of £3000 has vested in the pursuers, or at least will so vest upon their obtaining decree declaring that she has never been married and has passed the said age. (3) The pursuers are entitled to have it found and declared that upon a sound construction of the said last will and settlement they will be entitled to the fee of the fourth and last sum of £3000 in the event of the defender James Thomas Nichol predeceasing his mother, and that whether he shall leave issue or not."

The defenders pleaded—"(1) The action should be sisted until all necessary parties have been called. (2) In respect there is at present no distributable fund, and that the foresaid capital sum will not vest in any one until the death of the survivor of Thomas Fraser's children, the pursuers are not entitled to decree of declarator as craved. (3) Assuming that the action is competently brought while the two annuitants are in life, then, on a sound construction of Thomas Fraser's will, Mr William Fraser was only constituted general legatee of the testator's estate other than the said fund of £11,951, 3s. 10d. (4) On a sound construction of the said settlement, the gift there made to the children in life-

rent and to their respective issue in fee imported a fee in the liferenters. (5) Mr William Fraser having died before the capital sum can in any view be held to have vested, his right lapsed, and he had not the capacity to transmit any right to the fund in question to his son as testamentary representative. (6) In respect that the interest of Mr William T. Fraser, as well as his father's interest, is contingent, it did not vest in him, and did not pass to his trustee in bankruptcy, and the pursuers have therefore no title or interest in the fund in dispute."

The Lord Ordinary (RUTHERFURD CLARK) pronounced the following interlocutor:—

"*Edinburgh*, 31*st October* 1878.—The Lord Ordinary . . . repels the first six pleas-in-law for the defenders Peter M'Lagan and others, the trustees under the deed of arrangement and settlement dated 3d January 1842: Finds and declares (1) that the sole right and title to and beneficial interest in the fee or reversion of two sums of £3000 or thereby, each being portions of the sum of £12,000 or thereby held by the defenders the said Peter M'Lagan and others, as trustees foresaid, to meet the annuities of £100 sterling bequeathed to each of the now deceased William Fraser and Thomas Fraser by the last will and testament of the late Thomas Fraser their father, formerly of the county of Inverness, afterwards of Demerara, and thereafter of Lodge Lane, England, dated on or about the 1st of September 1834, has vested in the defender William Thomas Fraser; (2) Finds and declares that the fee or reversion of the £3000 or thereby held by the said trustees to meet the annuity of the defender Eliza Fraser will, in the event of her decease without leaving a lawful child or children or the lawful issue of such surviving her at the date of her death, belong to the defender William Thomas Fraser; and (3) on the motion of the pursuers, continues the cause as regards the sum of £3000 held by the said trustees to meet the annuity bequeathed by the said Thomas Fraser to Mrs Mary Fraser or Nichol; (4) Finds and declares that the pursuers James Brown Fleming and John Fleming, on behalf of Montgomerie and Fleming as assignees and executors, creditors of the late William Malcolm and William Quilter as trustee, as mentioned in the summons, are at liberty and have full right and title to sell and dispose of, assign, and convey all and whole the said William Thomas Fraser's reversionary right and interest in the fee of the said first-mentioned three sums of £3000 each or thereby as assignees, and in right of the said William Thomas Fraser, and have, subject to the reservation after mentioned, now right to the extent of an equal half each to all the right, title, and interest which the said William Thomas Fraser had, has, or may have in the fee of the said three sums of £3000 each or thereby, but under reservation always to the defender the said William Thomas Fraser, or others in his right, of all right competent to them or any of them in and to the balance, if any, of the price or prices that may be obtained therefor after deducting the sum of £2400, with interest thereon at the rate of 10 per centum per annum from 14th February 1877, and the said William Quilter's foresaid costs of his relative application to the Master of the Rolls to be taxed by the Taxing Master of the Court of Chancery in London, as between solicitor and client, and the expenses of process to follow hereon, and of and incident to the sale of the said reversionary interests, but under the declaration that the purchaser or purchasers from them of the said reversionary interests shall have no concern with the application of the said price or prices thereof, but shall be fully exonered and discharged of the same by the simple receipt thereof by the pursuers, and decerns: Finds the defenders entitled to expenses hitherto incurred by them out of the trust funds as the same shall be taxed by the Auditor.

"*Note.*—The pursuers have been found by decree of the Court of Chancery to be in right of the estate of William Thomas Fraser, and have brought this action in order to clear their title to certain immediate or reversionary interests which he is said to possess under the will of his uncle Thomas Fraser, dated 1st September 1834.

"By that will Thomas Fraser bequeathed an annuity of £100 to each of his four illegitimate children, William, Thomas, Eliza, and Mary Fraser, and £3000 to the children or issue of each of them. The annuity of any deceaser passes to the survivors; but there is no similar provision as regards the capital.

"The residue of the estate was bequeathed to the testator's brother William Fraser, and his interests were transmitted to his son William Thomas Fraser.

"In 1842 an agreement was entered into by which four sums of £3000 each were settled in trust to secure the interests conferred by Thomas Fraser on his children and their issue. The trustees acting under this trust are the only parties who have made appearance.

"The first question which was raised by the defenders was that all parties interested had not been called, and they specified first the next-of-kin of Thomas Fraser, the testator; and second, Mr A. J. Russell, W.S., in whom they say that the reversionary interest of William Thomas Fraser is vested. With respect to the latter point, it seems sufficient to say that the Court of Chancery has already held that the pursuers are in right of that interest.

"As regards the first point, the Lord Ordinary is of opinion that it is not necessary to call the next-of-kin of the testator. He bequeathed his residue to his brother, and any lapsed legacy would of necessity fall into residue.

"By the death of William and Thomas Fraser, the sons of the testator, without issue, two legacies of £3000 have lapsed and have fallen into residue. It follows that if Eliza Fraser shall die without issue, the legacy of £3000 bequeathed to her children will share the same fate.

"It was argued by the defenders that the children of Thomas Fraser took a right of fee in the sum of £3000 each. In the opinion of the Lord Ordinary there is nothing to support that view.

"They further maintained that the action was premature, inasmuch as there was no fund available for immediate distribution. But the pursuers are entitled, and indeed bound, to realise the estate of William Thomas Fraser, and it appears to the Lord Ordinary that they are entitled to ascertain their interest in the two sums of £3000 each bequeathed to the children of William and Thomas Fraser, which are only subject to the annuities granted to their surviving sisters. He also thinks

that he may in the circumstances give a conditional decree applicable to the £3000 bequeathed to the children of Eliza Fraser. But he is not disposed to deal with the remaining £3000. For not only is Mary Fraser (now Mrs Nicol) alive, but she has a son. The pursuer did not press the point."

The defenders, the trustees, reclaimed.

At advising—

LORD ORMIDALE—In this case the pursuers as in the right of William Thomas Fraser, the disponee, as well as the eldest son of William Fraser of Hillside, the residuary legatee of the testator Thomas Fraser, the construction of whose will in some particulars is the subject of dispute, concludes for declarator to the effect that the fee of certain sums of money, part of the estate of the testator, now held by the defenders, is vested in them. The defenders, on the assumption that they are bound to protect, as I think they are, the funds entrusted to them, resist the pursuers' conclusions on a variety of grounds. But their contention, as I understood it at the debate, came to this, that as the sums referred to are not at present distributable, and as the vesting of them is postponed, conditional and contingent, the action is premature and incompetent. In aid of this contention the defenders also suggested rather than argued that the will in question being an English instrument any judicial proceeding involving its construction ought to be taken, not here, but in England. Not only, however, is there nothing in the record either in the defenders' statement or pleas to support this suggestion, but it appears to me to be quite groundless in itself, there being nothing technical in the will—nothing but what this Court can interpret for itself. It is therefore of no moment that the will may have been written and subscribed in England, although that is not instructed, while it is not disputed, but on the contrary it appears to be conceded in the record, that the maker was a domiciled Scotchman.

The question whether the action is premature and incompetent in respect the funds are not at present distributable, and the fee is postponed and conditional or contingent, is really the only one requiring attention. Now, in regard to the funds not being at present distributable, I apprehend there is nothing in that circumstance looked at by itself, and I did not understand the defenders to maintain that there was. What they relied on was that the vesting of the fee is postponed and conditional or contingent, and that any judgment which could now be pronounced regarding it would not be *res judicata* against the parties who may have right to it when the time comes for its distribution.

In order that the case of the defenders as so maintained may be duly appreciated, it is necessary to keep in view that the funds in question, amounting altogether to about £12,000, are, in accordance with the testator's will, divisible into four portions of £3000 each, having relation to his four illegitimate children (two sons and two daughters), who are named by him. Two of these children—his sons William and Thomas—died some time ago intestate and childless, neither of them having been married. In regard to the two sums of £3000 each, with the annual income thereof, in which these two deceased sons of the testator had an interest, I apprehend the contention of the defenders is clearly untenable, for in regard to them the will of the testator, as I read it, is no longer conditional or contingent. The sons William and Thomas were to have £100 each annually during their lives, and on their respective deaths this £100 is destined to their children; but as they have died childless, the two sums of £3000, capital and interest, appropriated for them falls into residue, and now belongs to the pursuers as in right of the residuary legatee William Fraser of Hillside. But however clear this may be, as the defenders have denied and disputed it the pursuers were, I think, entitled to have their right judicially established and declared, as concluded for in the present action. The suggestion upon which the defenders seemed to rely in regard to the two sums of £3000 just referred to—that under the provision in the will that "such of them" (meaning the testator's two sons) "as may die without legitimate issue, such share of £100 to revert to the survivors of my children, and to be equally divided amongst them in addition to the above legacies"—does not in my apprehension give them any support. Both of the daughters have been called as defenders, and one or other of them as the survivor will take the £100, and it is plain, I think, notwithstanding the somewhat awkward and defective manner in which this part of the will is expressed, that nothing more was intended to go to the survivor. So far therefore as these two sums of £3000 each and relative interest are concerned, all the necessary parties—not only the trustees under the deed of arrangement, but the testator's two daughters Eliza Fraser and Mrs Nichol, as well as Lieutenant Nichol, the only child of the latter—have been duly called as defenders. It is true that neither of the daughters have appeared to defend, being, I doubt not, quite satisfied that their interests would be sufficiently protected by the trustees under the deed of arrangement. Accordingly these trustees have defended the action, and have expressly stated in their seventh plea-in-law that they "are bound to protect the fund."

The other two sums of £3000 each destined by the testator to his two daughters Eliza and Mary (Mrs Nichol) are differently situated, for the ladies are themselves still both alive, and although it may be extremely improbable, as I think it is, that they will have further issue, still as it is in the limits of possibility that they may, and as under the will such children would in their own right have an interest in the two sums in question, the vesting of these portions of the fund may be said to be as yet not only postponed but also conditional or contingent. And as in this view the parties who, in the very improbable event to which I have referred, would have right to the two sums of £3000 in question neither are nor could have been made parties to the action, any decree which can now be pronounced would not be *res judicata* against them. The principle of decision in the case of *Harvey* v. *Harvey's Trustees*, June 28, 1860, 22 D. 1310, seems therefore to apply to these two portions of the fund, and as regards them I have for this reason to propose that the interlocutor of the Lord Ordinary should be altered to the effect of making it deal with the £3000 appropriated to the testator's daughter Eliza and her children in the same way as it deals with the £3000 appropriated to his daughter Mary. It is not, however, without hesitation that I have

come to this conclusion, but I have done so in deference to the principle given effect to by the unanimous judgment of the Court in the case of *Harveys* v. *Harvey's Trustees*, 22 D. 1310. In regard however to the other two sums of £3000, I can see no reason for doubting that the judgment of the Lord Ordinary has been rightly pronounced. To come to any other conclusion would, I think, be tantamount to refusing to give effect to an action of declarator in circumstances where, as it appears to me, it is calculated to serve a legitimate and useful purpose. I venture to make this observation in conformity with what is reported to have been said by Lord Brougham in the course of his judgment in the case of *Earl of Mansfield* v. *Stewart* (3 July 1846, 5 Bell's App. 160)—"I cannot close my observations in this case without expressing my great envy as an English lawyer of the Scotch jurisprudence, and of those who enjoy under it the security and the various facilities and conveniencies which they have from that most beneficial and most admirably contrived form of proceeding called a declaratory action. Here you must wait until a party chooses to bring you into Court; here you must wait until possibly your evidence is gone; here you have no means whatever in 99 cases out of 100 of obtaining the great benefit of this proceeding. In Scotland you have that benefit; and a more remarkable instance of its beneficial tendency does not exist in my recollection than the present litigation." These observations of Lord Brougham are, I think, in a great measure applicable to the present case.

Lord Gifford—The object of this action is to declare the rights of the pursuers in a certain sum of £12,000 sterling, which is vested in the defenders as trustees, and to declare that the pursuers have right thereto, or to four separate equal parts thereof, amounting to £3000 each or thereby. This £12,000 is a part of the estate of the deceased Thomas Fraser, of the county of Inverness, Scotland, and late of Demerara, who died so long ago as 4th August 1835, leaving a last will and settlement dated 1st September 1834, and which regulates the distribution of his estate. By this will, which is in the English form, the testator made certain provisions for his four illegitimate children—William, Thomas, Eliza, and Mary—and for their issue, and he bequeathed various other legacies, and he appointed his brother William Fraser of Plantation Helena, afterwards designed as William Fraser of Hillside, in the shire of Fife, to be his universal residuary legatee. The sums set apart to meet the provisions in favour of the testator's four illegitimate children and their issue amounted to £12,000, and this sum, which was secured over Hillside, came ultimately, by a variety of deeds, to be vested in the present defenders, Mr M'Lagan and others, who now hold it subject to certain small deductions simply as trustees for the parties entitled thereto under the will of Thomas Fraser, the original testator, who died in 1835. The pursuers claim to be in right of William Fraser of Hillside, the residuary legatee under Thomas Fraser's will, and they set forth that they are vested in William Fraser's rights by a somewhat complicated series of deeds and transmissions. The sufficiency of these transmissions is not admitted on record, but it is unnecessary to examine the details, for no specific objection is taken thereto by any of the parties to the present action, and the sufficiency of the pursuers' title seems to have been recognised by the decree of the Court of Chancery on 13th July 1877. I assume in the meantime, and in the absence of any objection, that so far as regards the sum of £12,000, which may be called the fund *in medio*, the pursuers stand in the full right and place of the deceased William Fraser of Hillside, the residuary legatee of his brother Thomas Fraser, under the will of 1834.

The pursuers, having this character, are now desirous of selling their reversionary rights and interests in the said sum of £12,000, or in any of the equal fourths thereof, amounting to £3000 each. The capital sum vested in the defenders as trustees is not presently distributable, for it is liferented or used in order to produce an annuity or to secure an annuity to the two survivors of the four children of the testator, who at present draw equally between them the annuity of £400, if not the whole accruing interest of the fund. But the pursuers say, that although the capital of the fund is not yet payable, it has fully vested in them as in right of the residuary legatee—at all events that certain portions of it have so vested—and they seek to declare their absolute right thereto as against certain parties, called as defenders, who have set up and insisted in, or who may insist in, competing rights thereto. The pursuers say that rights adverse to the pursuers have been asserted or may be asserted in the fee of the said sum of £12,000. In particular, they say that the fee or part of the fee has been claimed or may be claimed by the two surviving children of the testator, Miss Eliza Fraser and Mrs Mary Fraser or Nichol, and they expressly set forth that Lieutenant James Thomas Nichol, the only child of Mrs Nichol, claims the fee of the whole fund, subject only to the contingency of sharing it with any lawful children who may yet be born to Miss Eliza Fraser or to Mrs Nichol. Miss Fraser is now sixty-one and Mrs Nichol is fifty-nine years of age. It is also said that any children whom Lieutenant Nichol may yet have may be interested in the fee of the fund.

Now, to settle these questions, or some of them, and with the view of clearing so far as possible the pursuers' title, they have brought this action of declarator, and they have called as defenders not only the trustees in whose hands the fund *in medio* is, but also the two surviving children of the testator, Miss Fraser and Mrs Nichol, Lieutenant Nichol, who is Mrs Nichol's only son, and William Thomas Fraser, the son of Mr Fraser of Hillside, the residuary legatee. The only parties, however, who have appeared as defenders are Mr M'Lagan and others, the trustees and holders of the fund *in medio*, and accordingly Miss Fraser, Mrs Nichol, and Lieutenant Nichol must be held as not objecting to the pursuers obtaining decree of declarator as concluded for.

The trustees, the only defenders, have submitted a variety of pleas in defence. They have no real interest in the questions raised excepting to be kept safe in their administrative capacity as trustees, and although they have stated upon record pleas relative to the merits of the question and affecting the vesting of and the right to the capital sum of £12,000, yet in the argument which was submitted to us in this Division they

declined to argue these questions on the merits, and contented themselves with pointing out as *amici curiæ* possible questions which might arise, and with maintaining that any decision of these questions was premature until the death of the longest liver of the two surviving children of the testator Miss Fraser and Miss Nichol. They urged that either or both of these ladies might in the views of law, and notwithstanding their age, still have children, and that until this condition was purified by their death no decision as to the vesting of the fee was competent, and they asked the action to be dismissed as premature.

The point so raised is not very well or clearly stated upon record, but assuming it well raised, I am of opinion that the contention of the trustees is not well founded. I am of opinion that this action of declarator is a perfectly good action so far as Miss Fraser, Mrs Nichol, and Lieutenant Nichol are concerned, and that the pursuers are entitled to insist therein as against these parties, and against the trustees for their interest. I think the pursuers are entitled either to try the question with Miss Fraser, Mrs Nichol, and Lieutenant Nichol, or if these parties decline to appear, then to obtain decree in absence against them in common form. They have not appeared, and I am for affirming the judgment of the Lord Ordinary so far as regards the two sums of £2000 each from which was derived the two annuities left originally to the deceased William and Thomas Fraser. I concur with your Lordship in the chair that to this extent the interlocutor should be varied. I am prepared to decide against the trustees on the only plea on which they have ultimately insisted, namely, the plea that the action is premature. I do not think the action is premature. On the contrary, I think the action is quite competent, and I may add quite suitable for the purpose in view. It may be that any decree which can be pronounced in this action will not be binding on absent parties, and still less on parties not yet born; but that cannot be helped, and such emerging claims can never be foreclosed. The mere possibility of unborn claimants, however, will not render it incompetent to declare rights in the fund as in a question with actually existing competitors for the fee of the fund.

The process of declarator whereby rights may be fixed and declared, although they are not capable of instant enforcement, is a very valuable process, and is deeply rooted in the law of Scotland and in the practice of the Supreme Court, and I should be very slow to do anything calculated to diminish its usefulness in cases to which it is truly applicable. No doubt it is liable to abuse, and may sometimes be resorted to where it is really inapplicable. I do not think, however, that the present case is an instance of an abuse of it. On the contrary, I think that the process as brought is fairly and rightly applicable to the circumstances in question, and in particular to the rights or possible rights of Miss Fraser, of Mrs Nichol, and of Lieutenant Nichol. If, indeed, it could be truly said that the real and only purpose of the present action was to declare that children not yet born would have no right to the fund *in medio* if and when they should be born, I should hold at once that an action having no purpose but that was incompetent, but if the action goes further, if it calls as defenders the existing parties all *sui juris* and all in this country, and seeks to have it declared that they have no existing right to the fee of a particular fund or subject, that is a perfectly competent action, and it will not make it incompetent to suggest that possibly there may be unborn children who when born may in their own right have an interest. The competency of the action as against the defenders actually called is, I think, undoubted. Lieutenant Nichol is said to claim the whole fee as his own as in competition with the present pursuers, subject only to the contingency of having to share it with any children whom his mother and aunt may yet have. I cannot doubt that he might declare his right against the present pursuers, and that the present pursuers if called as defenders could not have objected to the action on the ground that his maiden aunt, now sixty-one, or his widowed mother, aged fifty-nine, might possibly yet have children. Or suppose that the two ladies, Miss Fraser and Mrs Nichol, had raised a declarator that not only the liferent but also the fee belonged to them, I think that action would have been quite competent to them against the present pursuers, who are the rival competitors for the fee. But when a competition arises between two existing parties as to which of them has right to an actually existing fee, if an action of declarator is competent to one of the parties it must be equally so to the other. Either party may raise any question which is between them as to existing and actual right. If Lieutenant Nichol and his mother and aunt had appeared in the present action, and defended it upon its merits, each or all of them claiming the fee in preference to the residuary legatee, would it have been possible to have turned the action out of Court as incompetent? But if competent with parties defenders who appear and litigate, the action will not become incompetent merely because such defenders fail to appear. The competency must be decided on the summons as it stands, and not upon the circumstance that some of the defenders may not choose to appear. A defender may no doubt name a plea, but his absence will not set up a plea which he has not stated.

I am unwilling to give any opinion upon the merits, for the simple reason that they have not been argued before us, and that I am only going to pronounce a decree as in a question with the trustees who are the only compearers. Possibly this decree will be of no effect against non-compearers. In disposing of the action as it stands, I only look to the will of Thomas Fraser, dated 1st September 1834, so far as it is necessary to understand and decide the question of competency, and I read it to this limited effect. Now, while of course it is conceivable that the possible children yet unborn of Miss Fraser and Mrs Nichol might state a claim to the fee of the £12,000, it is very difficult even to imagine any reasonably hopeful ground on which such claim could be founded. Of course I lay out of view the £3000 which effeirs to Mrs Nichol's original annuity, as to which the Lord Ordinary has given no judgment, and I also leave out of view the other fourth or the other £3000 relative to Miss Fraser's annuity. Possibly Lieutenant Nichol or his mother or Miss Fraser may be entitled to the fee of these two-fourths, and all this is quite open and untouched by the Lord Ordinary's interlo-

cutor as now to be varied. But on what ground can he or any yet unborn children claim the fee of the two sums of £3000 which provided the original annuities of William and Thomas, who both died without issue. That fee is not destined at all by the will, and even if it were held (a hardly possible case) that it were to go along with the annuities which it produces, it is destined not to the issue of the children at all, but to the survivors of the children, that is, to Miss Fraser and Mrs Nichol, who are now the sole surviving children. Any plea which future possible children could state is certainly and at present stateable by Lieutenant Nichol, and he declines to appear. As I am not determining *causa cognita* the construction or effect of the will, I abstain from saying more. I think the pursuers are entitled to decree as pronounced by the Lord Ordinary, with variation or alteration as suggested by your Lordship.

Lord Young—William Fraser of Hillside, who died in 1877, was executor and residuary legatee of his brother Thomas (who died in 1835), and obtained grant of administration of his will from the Probate Court of Canterbury. It may be assumed that he completely executed the will except only as regarded certain legacies to the four legitimate children of the testator and their issue, which from their terms were incapable of being immediately satisfied. To meet them the sum of £12,000 might possibly be required, but not more under any circumstances. The executor accordingly appropriated this sum to answer these legacies—vesting it in trustees, secured by bond over his estate in Scotland. The terms of the trust are contained in the trust-deed of arrangement referred to on record, and exactly follow the will for the execution of which it was created. No express provision is made for the event of a surplus remaining after answering the legacies, but this is immaterial, as any such surplus will, on the doctrine of resulting trust, revert to the trustee (William Fraser) or those in his right, which is obviously what was intended.

The pursuers, relying on the titles referred to on record, allege that they are now in the right of William Fraser with respect to any such reversion, and wishing to sell their right have raised this action, in which they ask the Court to affirm their title and negative certain prior claims which it is suggested may possibly be made, whereby, if well founded, the subject of the reversion would be exhausted or its value diminished. Their interest is manifest and legitimate—for any doubt about their title or apprehension of prior claims affecting the value of their right will or may prejudice them in the market. The action accordingly is unobjectionable, provided all parties having interest in the subject-matter of it are before the Court or have been duly called. For it is not doubtful that, according to the practice of the Court, an apprehended dispute or question regarding the validity or priority of almost any legal right may be anticipated and adjudicated upon in a declarator before it actually arises—provided all parties interested, or who may be interested, can be, and in fact are, duly called.

Now, the only defenders who have appeared, and consequently the only parties besides the pursuers before the Court, are the trustees of the £12,000. The pursuers also called William Thomas Fraser (son of William of Hillside), said to be furth of Scotland; Eliza Fraser and Mrs Nichol—two of the illegitimate children of the testator Thomas—and James Thomas Nichol, the son of the latter; but they have not appeared, and are not parties before us. With respect to them the action is undefended, and the pursuers may, if they see fit, enrol it in the Lord Ordinary's undefended roll for decree in absence, although it is probable they may not, any more than myself, think that such decree would be worth the guinea it would cost them to ask for it, or even a farthing.

But with the trustees of the £12,000, who are the only parties before us, it does not occur to me how we can now adjudicate on any question not relating to the custody and security of the money. When the period of payment comes, they will be bound to pay to those having right, and if there are disputes, these will be tried and decided between the disputants whose claims conflict—the trustees having no more title or interest to interfere in the controversy than a banker with whom the money was deposited would have.

The pursuers ask us to certify their title by a decree affirming its validity, but this we cannot do otherwise than by way of adjudicating, *causa cognita*, between the pursuers and some one disputing their title, and having or professing to have an interest to do so—in which case certainly we could pronounce on their pretensions as well or ill founded. But the trustees, who are necessarily quite indifferent on the subject, only suggest for our consideration that the proper contradictor in this matter is William Fraser's legal representative, who not being before the Court, or represented by them as the guardians of his interest in this matter, cannot be affected by a decree against them.

Again, the pursuers ask us to negative the pretensions of J. T. Nichol, and to affirm their own "contrary" pretensions, and this is obviously the main purpose of the action. Here the trustees being quite indifferent and disinterested on the subject, respectfully suggest that the questions thus sought to be raised now, will, if they ever really arise, have to be tried between the pursuers and the parties who alone can join in raising them, viz, the children or grandchildren of the two annuitants now in life and who shall survive the longest liver of the two. If there are none, the anticipated questions will not arise, and if there are, their rights cannot be affected by any decree in this action. In other words, no question between them and the pursuers can here be tried and decided. The only answer which the pursuers make to this is, that their own contention is so certainly and clearly right, and anything that can be suggested or conceived to the contrary so manifestly untenable and absurd, that it is really not worth while waiting for the proper contradictors who, if here, could urge nothing worthy of serious consideration. Now, the view which the pursuers take of their right on the one hand, and of anything that can possibly be alleged against it on the other, may be very sound and encouraging not only to themselves but also to those whom they invite to purchase it. But if, not content with that confidence, they ask the Court to recommend their right as a marketable commodity by judicially negativing objections which, it is apprehended, may be made to

it, I cannot, for my part, permit them to say that these objections which they make the subject of their declarators are so absurd that we may negative them in the absence of those from whom it is apprehended they may come. It is not our province to give a legal opinion in favour of a right or against objections to it otherwise than by decree pronounced *causa cognita* between the proper parties, and operative accordingly.

The pursuers are at liberty to sell their right as it is, and to put a purchaser in their place. No one seeks to hinder them. It may be impossible, for aught I know, that Eliza Fraser or Mrs Nichol, can yet bear children, but if so, the pursuers and their purchaser must rely on the impossibility. If there be a possibility we cannot exclude it by a decree of declarator which would be falsified by the birth of a child. Again, if children shall exist and survive, it may be as certain as the pursuers allege it to be that they will have no right beyond the capital of the annuity of their respective parents. But here also the pursuers and their purchaser must rely on their own certainty —for we cannot decree anything judicially against such children. It might be otherwise if the trustees represented them, or even the guardians and defenders of their possible interests in the matter, but this they are not any more than the Bank of Scotland would be were the trust money deposited there, or a judicial factor appointed to hold it for whom it might concern.

It is perhaps superfluous to say that I do not express, and indeed have not formed, an opinion adverse to that of the Lord Ordinary on any of the matters he has decided, against which indeed very little was urged in argument before us, and that the conclusion at which I have arrived is quite consistent with that opinion being so sound that the contrary is *prima facie* unarguable. That conclusion is, that the defenders before us are not parties between whom and the pursuers the questions proposed to us can be decided to any effect whatever, so that a decision of them by us now, though it would take the form of a decree, would in truth be only a legal opinion binding nobody. This must be so, unless the Court shall hold, which I for my part cannot concur in doing, that the defenders now before us represent, and for all the purposes of the action bind, all persons who when the period of payment comes have, or may contend that they have, interests adverse to the rights which the pursuers now ask us to declare. There may indeed be no such persons, but it is the suggestion of the pursuers that there may be, and it is on this suggestion that they base their action, and ask the Court to relieve them of their apprehensions—not of course by a mere legal opinion, but by a decision against all such persons, assuming of course (in my opinion erroneously) that the defenders represent and are entitled to bind them. I do not inquire whether or not the defenders or any of them who have been called but failed to appear have any interest or made any pretensions which the pursuers are entitled to have negatived as against them. These defenders are not before us now, and the pursuers may, if they please, proceed against them as in an undefended cause.

I have listened with attention to the views which your Lordships have expressed. Those of your Lordship in the chair proceeded on the assumption that the defenders who have appeared and are now before us represent and are entitled in this action to bind all those, including the possible but yet unborn children of the two surviving annuitants, who may eventually be interested in the various matters on which the pursuers ask our judgment. On this assumption I cannot say that I should differ from the result at which your Lordship has arrived. But Lord Gifford entirely agreeing with me in repudiating this assumption, on which your Lordship rests your judgment, nevertheless concurs in the result of that judgment, but with a qualification which I must regard as strange, viz., that the decree to be pronounced shall have no effect whatever as a decree *in foro* and *causa cognita* beyond determining that the action is competent to the effect of entitling the pursuers, if so minded, to take decree in absence against the defenders who have not entered appearance, to the limited extent which your Lordship has suggested. I will not attempt to criticise this idea, which, in truth, I fail to comprehend, except only in so far as it indicates that Lord Gifford thinks the decree to which he assents will be worthless—a view of it in which I entirely concur. It is indeed the conclusion at which I had arrived, and on the same ground, viz., that the only defenders before us have no interest in the subject-matter of the action, and do not represent any persons, born or unborn, who have, or may hereafter have, such interest. I only differ from Lord Gifford in this—that I think we ought not to pronounce a worthless decree. As for defenders called but not appearing, I have already pointed out that we are not concerned with them, and cannot limit or affect in any way such right as the pursuers may have to take decree in absence against them. I am of opinion that with respect to the defenders before us the action ought to be dismissed, and with expenses against the pursuers.

The Court pronounced the following interlocutor:—

> "The Lords having heard counsel on the reclaiming note for Peter M'Lagan and others against Lord Rutherfurd Clark's interlocutor of 31st October 1878, Recal the said interlocutor in so far as it relates to the £3000 appropriated to produce the annuity provided to the testator's daughter Eliza Fraser: In regard to that sum, continue the cause in the same manner as has been done by the Lord Ordinary with regard to the £3000 appropriated to the testator's daughter Mary Fraser or Nichol: *Quoad ultra* adhere to the interlocutor reclaimed against: Find the defenders entitled to expenses since the date of the Lord Ordinary's interlocutor out of the trust-funds, and remit to the Auditor to tax the same and to report, and decern."

Counsel for Pursuers (Respondents)—J. A. Crichton. Agent—H. B. Dewar, S.S.C.

Counsel for Defenders (Reclaimers)—M'Laren—Robertson. Agents—H. & H. Tod, W.S.