[HEARD 26*th February*—JUDGMENT 14*th August*, 1850.]

DAVID SCOTT, ESQ., of Brotherton, with consent of H. SCOTT, and others, *Appellants.*

JAMES R. SCOTT, ESQ., and others, *Respondents.*

Legacy.—Vesting.—When a gift is to a class of persons or an individual, to be ascertained at a future period, those who may answer the description at an earlier period, cannot, by arrangement among themselves, anticipate the period fixed, and exclude those who, on its arrival, would then be entitled to take.

UPON the 20th day of November, 1834, James Scott executed a trust disposition and settlement of his whole heritable and moveable means and estate, excluding his lands of Brotherton, for payment of his debts and of such legacies and annuities as he might give, by any addition to that deed, or by any separate deed, to be afterwards executed by him, declaring that if the estate conveyed were not sufficient for these purposes, the surplus of the debts and legacies should be a real burden upon his lands of Brotherton. Of equal date with the foregoing deed, Scott executed a disposition and settlement of his lands of Brotherton in favour of his brother David Scott, the Appellant, in liferent, and James Robert Scott, his nephew, the Respondent, and the heirs of his body and other substitutes in fee, under burden of such of his debts and legacies as might not be provided for and paid by the means and estate conveyed by the first mentioned deed, declaring, "that in case Mrs. "Anna Maria Tulloh or Scott, mother of the said James Robert "Scott, shall be alive at the time of the death of the said David "Scott, my brother, and be then a widow, and her said son

" shall be then alive, and shall be in right of the fee of the said " estate, then, and in that event, I hereby burden the said lands " and others, and the said James Robert Scott, and the other " heirs above mentioned, in payment to the said Mrs. Anna " Maria Tulloh or Scott of a free yearly annuity of 100*l.* ster- " ling, payable at two terms in the year, Whitsunday and " Martinmas, by equal portions, the first half year's annuity to " become payable at the first term of Whitsunday or Martin- " mas, which shall happen three months after the death of the " said David Scott, my brother; and thereafter the said annuity " to continue to be payable out of the said lands and others " during the life of the said Mrs. Anna Maria Tulloh or Scott, " or so long as she remains a widow."

On the 22nd day of September, 1835, Scott executed a deed of appointment, whereby he directed his trustees to pay, *inter alia*, " To my brother David's family, subject to his dis- " tribution among them, 13,500*l.* sterling; and failing of his " making any other division, to be divided as under:—To " Hercules Scott, his only son, 3000*l.*; and to each of his " seven daughters the sum of 1500*l.*" The deed declared:— " The above legacies to be payable as under, viz., those be- " queathed to my brother David's family, subject to his distri- " bution, as above mentioned, to bear interest from the first " term of Whitsunday or Martinmas after my death; but in " the event of the said David Scott, my brother, surviving me, " and succeeding to the liferent of my estate of Brotherton, the " interest of these legacies is not to be due or payable by my " trustees or executors, but by the said David Scott, during his " life, at the rate of four per cent. per annum; and the term " of payment of the principal sum is to be postponed till the " first term of Whitsunday or Martinmas after the said David " Scott's death, or as soon thereafter as conveniently may be, " without rendering it necessary for the heir succeeding to " Brotherton to sell or dispose of any part of the same, but to

SCOTT *v.* SCOTT.—24th July, 1850.

" bear interest from the said David Scott's death, at four per " cent. per annum, till paid;" And " whereas there is at pre- " sent due to me (the testator) by the said David Scott a sum " of money, amounting to 11,439*l.* 17*s.* 2*d.*, for which he " granted me his note, dated the 1st day of July, 1826, payable " on demand, besides a considerable balance of interest due " thereon, I hereby require and appoint this debt, or such part " of it as shall be due and resting owing at the time of my " death, shall be applied in payment of the legacies bequeathed " by me to the said David Scott's family, in manner before " mentioned. All the other legacies hereby bequeathed shall " become due and bear interest at four per cent. per annum, at " and from the term of Whitsunday or Martinmas first after " my death: And in case of any residue being left in the " hands of my said trustees, after the purposes of the trust " shall be fulfilled, I hereby appoint the same to be made over " and paid to my nearest relations then alive. And as it was " the declared intention of my deceased sister, Helen Scott, to " have left to the family of the said David Scott, my brother, " the house and garden at Morningside, near Edinburgh, which " belonged to her; but as no valid conveyance was executed by " her thereto, the title to the said house and garden was com- " pleted in the person of my deceased brother, Archibald Scott, " as heir-at-law of my said sister, with the view of thereafter con- " veying the property for behoof of the children of my said " brother, David Scott, agreeably to my sister's intentions; but " these intentions not having been carried into effect during the " said Archibald Scott's lifetime, the right to the said house " and garden has now devolved upon my nephew, James " Robert Scott, as heir-at-law to his said father; therefore, I " hereby recommend to the said James Robert Scott, my " nephew, and his guardians, upon a title to the said house and " garden being completed in his person, to fulfil the intentions " above referred to, by conveying to the children of the said

" David Scott, equally amongst them, the foresaid house and " garden at Morningside, with the rents thereof falling due and " received subsequent to the death of the said Archibald Scott, " his father, in so far as they may not have been placed to the " said David Scott's credit by me; and in the event of this " recommendation not being acted upon, and of the said house " and garden at Morningside not being conveyed to the family " of the said David Scott, my brother, then, and in that event, " I leave and bequeath to the family of the said David Scott " an additional provision of 700*l.* sterling, equally amongst " them, bearing interest from the time that the rents of these " subjects shall have ceased to have been applied for behoof of " the said David Scott or his family, in lieu of the said house " and garden: And which additional provision I hereby " declare to be a real burden upon my said lands and estate of " Brotherton, in terms of the provisions and conditions con- " tained in the disposition and settlement of that estate executed " by me."

The trustees accepted of and acted under the trust until the month of April, 1845, when they brought an action of multiplepoinding and exoneration against the several parties entitled under the deeds which have been detailed.

The Appellant lodged a claim in this action, wherein he averred that the whole debts and general pecuniary legacies of the testator had been paid; that the legacy to his own family had been secured for their benefit, and they had given the trustees a formal discharge of it; that the personal estate had been more than sufficient for payment of the debts and legacies; and that there was a considerable surplus of both real and personal estate in the hands of the trustees. This surplus the Appellant claimed as the sole nearest relative alive at the time of the testator's death.

The Respondent also lodged a claim in the multiplepoinding, in which he did not deny the facts alleged by the Appellant, but

claimed to be entitled to the surplus real property in the hands of the trustees; and in the event of his being alive at the death of the Appellant, an equal share of the surplus moveable property along with the other nearest relations of the testator who might be alive at that time, or at least in that event an equal share with the nearest relations then alive, of all the surplus real as well as personal property.

Mrs. A. M. Tulloh or Scott likewise lodged a claim in the multiplepoinding, asking that an adequate portion of the trust funds might be set apart to secure payment of her annuity of 100*l*., in the event of its becoming payable.

The Appellant, in support of his claim, pleaded:—

"1. The claimant being the sole nearest relative of the "truster alive at the time of his death, and the purposes of the "trust being fulfilled, according to the sound meaning and legal "construction of the trust-deed and other testamentary writings "of the truster, the claimant is now entitled to the whole residue "of the trust-estate, in terms of his claim.

"2. The said competing claimant has no legal right or "interest under any of the truster's testamentary deeds to resist "a present winding-up of the trust and surrender of the residue "of the trust-estate to the claimant, in terms of his claim. And "Mr. James Robert Scott's plea on this head is contrary to the "sound construction and legal meaning of the truster's deeds."

The Respondent, on the other hand, pleaded:—

"1. The truster having directed that the interest of the "bequest left to David Scott's family should be paid by David "Scott during his life, if he should survive the truster, and "succeed to the liferent of the estate of Brotherton; and having "farther expressly postponed the payment of the bequest till "David Scott's death, he clearly contemplated a continuance of "the trust till then, and the trustees are not entitled to termi-"nate the trust and make over the residue before that event,

" whereby the rights and interests of the claimant and others " would be inverted and frustrated.

" 2. In the event of the claimant being alive at the death " of David Scott, and the whole purposes of the trust being " then fulfilled, the claimant is entitled to an equal share of the " residue which may then remain in the trustees' hands, along " with the other nearest relations of the truster who may also be " alive at that time."

The cause was reported by the Lord Ordinary to the Court upon cases for the parties. Upon advising these papers, and hearing Counsel, the Court, on the 18th June, 1847, pronounced the following interlocutor, which was the subject of the appeal:

" Find that, according to the sound construction and true " meaning of the trust-deed, and other testamentary writings of " the truster, the claimant David Scott, is not, in the circum- " stances set forth in the record, entitled to the residue in the " hands of the raisers, forming the fund *in medio:* Therefore " repel the claim of the said David Scott; find that the residue " does not fall to be paid over till the death of the said David " Scott, and must then be paid over to the parties who at that " time shall be the nearest relations in life of the testator."

, The *Lord Advocate*, and *Mr. Turner*, and *Mr. Rolt*, for the Appellant, cited the case of Maxwell *v.* Wylie, 15 *S.* 1011, to show that the circumstance of his being a liferenter did not raise any presumption against the Appellant being entitled under the deeds to a share of the residuary estate; and the cases of McNiven's trustees *v.* McNiven, 19 *Scot. Jur.*, 529; Robertson *v.* Davidson, 9 *S.* and *D.*, 152; Fotheringham, *Mor.* 12,991; Magendie *v.* Carruthers, 2 *Bell's Illus.*, 516, to show that the trustees were not bound to keep up the trust until the death of the Appellant.

Mr. Bethell, *Mr. Anderson*, and *Mr. Elliott*, for the Respondent.

Scott *v.* Scott.—24th July, 1850.

Lord Brougham.—My Lords, in this case, the whole controversy between the parties turns upon the construction to be put on the trust-deed of Mr. Scott, of Brotherton. The estate of Brotherton was conveyed in liferent to his brother David; and a legacy was given to David's children. The residuary interest, which is somewhat material, I shall have occasion to refer to, as throwing light upon the construction to be put upon the deed,—but I pass that over for the present.—The principal of the legacy was made payable at the brother's death, afterwards the testator executed a trust-deed whereby he conveyed to his trustees all his property, except the estate in liferent to his brother David previously disposed of. By this trust-deed he directed certain legacies to be paid and he appointed the residue in these words, which are material. "After the purposes of the trust shall be fulfilled, the residue "to be paid to my nearest relations then alive."—The brother was the nearest relation alive at the time of his death; the trustees having already fulfilled all the purposes of the trust except the payment of the principal and the legacy to the brother's children. A family arrangement was however then made by which the children discharged the trustees in respect of their claim for that legacy, and the brother David then claimed the residue as being the nearest relation alive, contending that the word "then" applied to that time—that the event had arisen to which the word "then" in the deed applied.—The question, therefore, for your Lordships to consider is, what is the true construction to be put upon this clause in the deed?

Upon examination of this deed it appears to me, and to my noble and learned friend who heard the case with me—the late Lord Chancellor, (who agrees entirely in the opinion that I am now about to give to your Lordships,) that it is not a case upon which the Court is at liberty to speculate upon the intention of the maker of it; to argue or to conjecture upon the probability

of his having intended one thing or another from the other parts of the instrument. Such reasoning, and such inference, ought never to have place where the terms are distinct and positive, and incapable, *per se*, of more than one construction, unless indeed some known rule of law intervenes. To the other parts of the deed you have no right, as a general principle of construction, to resort, in order to discover the intention of one part of the deed, when you perceive that the terms in which that one part is couched are clear, positive, and distinct, and of themselves incapable of more than one construction.

The subject of the gift here is the residue "after the "purposes of the trust shall be fulfilled" of which David Scott, the brother, was one of the trustees, and the direction is, that such residue left in the hands of the trustees shall be made over and paid to his (testator's) "nearest relations then alive." To what does this word "then" refer? That is the question.—The last antecedent is, "after the purposes of the trust shall be "fulfilled." What are those purposes? Were they to be fulfilled in the lifetime of the brother David? for if not, David could not be the person to take, because he could not be the nearest heir "alive" when the purposes of the trust were fulfilled.

Now, of these trusts, the most important was to pay a legacy to David's family—but to be subject to his distribution. Upon this legacy, interest was to be paid from the truster's death, but if David survived, he was to pay the interest, if in possession of the estate of Brotherton, and the time of payment of the principal money was "to be postponed till the first term of "Whitsunday or Martinmas after the said David Scott's death "or as soon thereafter as conveniently may be without rendering "it necessary for the heirs succeeding to the estate of Brotherton "to sell or dispose of any part of the same, but to bear interest "from the said David Scott's death at four per cent. per annum "until paid." During David's lifetime therefore, the legacy was not to be paid; and until such payment, the trust was not

fulfilled; consequently David could not be the heir, living at the time of the fnlfilment of the trusts, which is really the whole question.

The Appellant contends that the trusts have been fulfilled, by David and his existing family agreeing amongst themselves as to the distribution of the legacy. But this assumes the Appellant's construction to be correct, for unless "David's "family" mean the family as it existed at the truster's death, and unless the "heir then living" mean "heir" living before David's death, the parties to this arrangement are not all the parties interested. If a gift be to a class or to an individual by a description which cannot be ascertained till some future time, or future event, those who may answer the description at an earlier period cannot by any arrangement among themselves, exclude those who may become entitled at such future time or upon such future event happening.

The direction to apply the debt due to the truster from David in payment of his legacy cannot affect the question, that direction being to pay the legacy in manner beforementioned. The cases referred to in which the parties to take "hereafter" were ascertained can have no application. All parties who can be entitled, concurring, the period of the distribution may no doubt be anticipated.

I am, therefore, my Lords, clearly of opinion, and my noble and learned friend entirely concurs with me, that in this case the interlocutor appealed from was right and ought to be affirmed, and I therefore move your Lordships to affirm the interlocutor of the Court below.

It is Ordered and Adjudged, that the said petition and appeal be, and is hereby dismissed this House, and that the said interlocutor therein complained of, be, and the same is hereby affirmed: And it is further Ordered, That the costs incurred by the said Appellant and

SCOTT *v.* SCOTT.—24th July, 1850.

Respondent in respect of the said appeal be paid out of the fund *in medio*: And it is also further Ordered, that the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just, and consistent with this Judgment.

RICHARDSON, CONNELL, and LOCH—SPOTTISWOODE and ROBERTSON.