stand, your Lordships have merely decided this;—you have reversed the interlocutor under which the three documents only were admitted to probate as being the will, but your Lordships do not pronounce that all the documents are testamentary; that falls within the operation of the remit—that goes back to the Court below to determine. We have not at all had that issue raised, and your Lordships would be exercising original jurisdiction if you were to decide that. Your Lordships have had brought before you this simple proposition—Do these three instruments constitute the will? The Court below said, Yes; your Lordships say, No, they do not; but you consider that the other instruments are to be taken into account, and must be left entirely to be determined by the Court below.

Mr. Anderson.—There were two opinions below. The Lord President and the minority were of opinion that all the writings together formed the will; the other opinion that the Judges held was, that the two last documents only formed the will, to the exclusion of the first five documents. Your Lordships have adopted the opinion of the minority.

LORD TRURO.—The Court below held that the four earlier documents were revoked, and that the testament consisted of the three last documents. The House is of opinion, that neither of those four documents was revoked. If the House had thought that some of the documents were revoked and some were not, the question might fairly arise; but upon the case as it is now before the House, it appears to me that the House is called upon to say whether the conclusion is right, which was adopted below, that the four earlier documents, or any and which of them, were revoked. The House is of opinion that none of them was revoked.

Mr. Bethell.—Your Lordships will pardon me a moment. It was not the opinion of the minority that all the other documents remained unrevoked; some differed as to the number which should be admitted.

LORD TRURO.—Will you read me any part of the cases which bears that out, because it has escaped my attention. I think you will find that the effect of what the minority of the Judges say is, that none of the documents was revoked, but that they constituted the testament. I may be mistaken, but so I read it.

Mr. Bethell.—Then we must take it so; if that be so, it will be much better to have it so decided.

LORD TRURO.—It is desirable; for I see other questions that probably may find their way here under these wills—quite enough at all events; therefore I should be very unwilling that this same question should be again opened in addition to the other questions.

Interlocutor reversed.

First Division.—Lord Robertson, *Ordinary*.—Dunn and Dobie, *Appellant's Solicitors*.—Spottiswoode and Robertson, *Respondents' Solicitors*.

JUNE 28, 1852.

ANNE and MARY MURRAY, *Appellants*, *v.* DR. JAMES GRANT and others, (Trustees and Executors of Mrs. Agnes Barclay or Bell), *Respondents*.

Testament—Statute 1617, c. 14—Executor's share—Dead's Part—Legacy.

HELD (affirming judgment), *that the statute* 1617, *c.* 14, *is not in desuetude, and that executors are entitled to one-third of the free executry, if not otherwise disposed of, deducting therefrom their respective legacies; and that, notwithstanding that specific legacies are given to them by the will.*[1]

Misses Murray having appealed against the interlocutor of 29th November 1849, they contended that it ought to be reversed for the following reasons:—1. Because the act 1617, founded on by the respondents, was not intended to confer any benefit upon executors, but to restrict the claims which they could make at common law. 2. Because it was clear on the face of the deeds, that the testatrix never intended her executors to have any farther beneficial interest except to the extent of the £200 which she bequeathed to each of them expressly as executors.

The *respondents* in their *printed case* supported the judgment on the following grounds:—1. Because, as the question was exclusively to be determined by the law of Scotland, the right of executors, in circumstances similar to those in which the respondents are placed, is precisely what has been given effect to in the Court of Session. 2. The question as to the rights of executors in similar circumstances was determined by the case of *Nasmyth*, 17th February 1819, F.C.

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[1] See immediately preceding report. See previous reports, 12 D. 201; 22 Sc. Jur. 35. S. C. 1 Macq. Ap. 178: 24 Sc. Jur. 561.

Kelly Q.C., and *Rolt* Q.C., for appellants.—The fair result of all the authorities is this, that by the law of Scotland as well as of England, and all civilized countries, where persons have power to dispose by will, the governing principle is the intention of the testator, which is to be ascertained and collected from the will itself. This intention may be evinced in various ways, and may be either express or implied. If the will shews that the property is to be taken by the executor in a fiduciary character, then he becomes trustee for the next of kin. But whenever personalty was disposed of by will, and, after all the legacies were satisfied, there still remained a residue, and nothing in the will shewed how this was to be bestowed, then, by the common law of both England and Scotland, the right to take it attached to the executors. It was incidental to their character as executors, to take that residue for their own use. But there were in both countries various ways by which this residue would be taken from the executors and given to the next of kin, as may be seen in *Mapp* v. *Elcock*, 3 H. L. C. 492; 2 Phillips, 793. That case shews, that if the testator either declare a trust, or make a gift to the executor of a part of the estate, this exhibits an intention inconsistent with the incident of the office, and, by so doing, destroys it. The common law of England was altered by 1 Will. IV. c. 40, and that of Scotland by a statute 1617. The latter, instead of giving the executor the whole of the residuary estate, gave him only one third; but, in both countries, it is still the law, that whenever an intention is manifested, no matter how, that the executor should take in trust only, then the effect is, to make the executor a trustee.

[LORD CHANCELLOR. — Do you understand the Judges in Scotland to have held that the law of both countries was the same except so far as altered by statute? Or does the law of Scotland pay no regard to the intention of the testator to the extent of one third of the dead's part?]

The Judges seem not to have been correctly informed as to the principle on which the equity courts here proceed. We hold that the courts of Scotland were always guided by a regard to the intention, as the courts are here; and that, in this case, whether the executors were trustees or not, is a question of intention.—*Lowndes* v. *Lowndes*, 4 Burr. 2246. The *onus* lies on the executors to prove they are not trustees. Now in the present case, the legacies are given to the executors without reference to their character as such, because they are not appointed to that office at the time of the legacies being given; but, in the same instrument, the testatrix expressly reserves power to name both executors and a residuary legatee by any future instrument. And in the same drawer, at her death, was found along with this will, a document carrying out this intention, and appointing executors, while she never appointed any residuary legatee—thereby shewing, that she considered the persons occupying the one character as distinct from those occupying the other.—*Braddon* v. *Farrand*, 4 Russ. 87. At common law, therefore, the executor would clearly take the property in a fiduciary character, the trust being implied by his separate appointment, and by his receiving a remuneration for his trouble. Now, the statute merely recognizes the right attached to the office, where there is no reason to suppose the testatrix contemplated giving the residue to any particular person. But it is a clear test of the testatrix's intention that the executors were not to take the residue here, that she gave them a specific legacy.—2 Blackstone, 32—7; *Mapp* v. *Elcock;* Roper by White, 1686; Cases in Chancery, 87. It would clearly be absurd to say—"I give £200 to him, who is nevertheless to take the whole." The principle of construction is the same in all countries, and is so in Scotland.—Stair, 3, 8, 30; Ersk. 3. 9. 5, 26; Dirleton's Doubts, 124; Mackenzie's Scots Acts, Art. Stat. 1617, c. 14; and in Stair, 3, 8, 53, it is expressly said—"That act was made, not to better, but to restrict executors." Yet at first the statute seems to have been misunderstood, and a few cases occurred before its true meaning was set right.—*Forsyth* v. *Forsyth*, Durie, 239; M. 3923; *Wilson* v. *Laird of Tinto*, M. 3924; *Moncreiff* v. *Moncreiff*, 1 Br. Sup. 371; *Paton* v. *Leishman*, M. 3925. All these cases establish, that whatever is to be collected from the will as the intention of the testator is to prevail.

[LORD CHANCELLOR.—In each of these cases, there seemed to be an entire disposition?]

Yes. It is true they were cases of express legacies, where the testator had disposed of the whole of his property, and therefore it could not be his intention to give the executors any part to their own use; yet the principle is the same, because the executors did not take, simply because such was the intention exhibited. It is immaterial whence the intention is collected; and in this respect the statute made no difference, as Lord Gosford observes respecting *Paton* v. *Leishman*. The statute 1617 means plainly this, not that, where a legacy is left to the executor *qua* executor, and as a sole remuneration for his trouble, but where it is left to him independently of his character as executor, that then he shall not lose the benefit of counting it as part payment, &c. To hold otherwise, would be to make the statute, not a restriction, but an extension of the common law. This is the first time this point has come before this House; and it is remarkable that, since 1617, in no case has it been determined that the executor takes the residue in the circumstances here supposed. There is a case, *Nasmyth* v. *Hare*, 17th February 1819, F.C., which the other side will rely on; but it proceeds on principles that cannot be recognized by this House—and, besides, the judgment was set aside on the ground that the will was invalid, and therefore the point was not dealt with at all. The question there was not viewed, as it ought to have been, as

one solely regarding the intention of the testator; for Lord Robertson there expressly said, "It was not one of intention, but of rights by law of executors,"—a most extraordinary doctrine. In that case, a fiduciary character had been stamped on the executors, and yet the Court held that the executors took to their own use. It was a case against all principle. The Judges below, however, treated the present also as a question where intention was not to be regarded, and, in doing so, seemed to misconceive the principles on which our courts of equity proceed. Thus Lord Jeffrey plainly laid it down, that there is a distinction between the express and the implied intentions of a testator; but we totally deny that any such distinction is known in law. The same Judge also views the statute 1617 as making a new provision which formerly did not exist.

[LORD CHANCELLOR.—He means the executors don't take absolutely by law, but by virtue of statute. This appears from his comparing the circumstances to cases of bankruptcy.]

We do not rely on the plea, that the statute 1617 is in desuetude.

Bethell Q.C., and *Anderson* Q.C., for respondents.—It is a gratuitous assumption, that the equitable doctrines of the law of England prior to 1 Will. IV. were identical with those of the common law of Scotland prior to 1617. There is no trace of such doctrines in the law of Scotland, and the statute 1617 expressly negatives the supposition. Indeed, even in England, the doctrine of resulting trusts is entirely of modern origin. The earliest trace of a decision tending to it is in 1710, but it was not well expounded till 1765. It may be true enough, therefore, that the intention of the testator is important; but so is the meaning of the statute 1617. That statute gives a right to the executor to take his third of the residue of the dead's part. It is a statute of distributions, dealing with the undisposed goods of the testator. All the cases cited in Mor. Dict. 3923—5, only establish, that if the testator have bequeathed all his personal estate, the executors can take nothing—a proposition we do not deny;—but they also establish this, that the executors have a claim of right to one third of the residue, which is not bequeathed away, "as for their charges."—Hope's Min. Pract. 124, and note; Dirleton's Doubts, p. 50; Stair, 3, 8, 30.

[LORD CHANCELLOR.—Both those passages seem to make the office remunerative.]

Still the share is given by virtue of the statute, which goes on the presumed intention of the testator.—Stair, 3. 9. 5, 26; Ersk. 3, 9, 26; Mackenzie's Scots Acts, 350; and Works, vol. ii. p. 329. The point arose, but was not decided, in *Finnie* v. *Lords of Treasury*, 15 S. 165. It is of no importance here how *Stoddart* v. *Grant* is decided.

[LORD CHANCELLOR.—The effect will vary in point of strength. You say there is nothing in any of the testamentary documents to exclude the operation of the statute?]

We do. The other side contend, that the executors here are struggling to attain the character of residuary legatees; but the question is simply this, whether, since the testatrix has never exercised the power of naming residuary legatees, the law, which puts executors on the same footing as next of kin, does not assign to the executors the statutory share of one third, the next of kin taking the other two thirds. In the first deed, the testatrix named residuary legatees, and this, it is said, shewed her intention to exclude the executors; but the reason would have been, under that deed, that she had already given the whole residue to another person. But as the circumstances now stand,—because she did not leave the law to take its effect in 1828, is no reason why she should not do so 20 years after. It is said the appointment of executors to carry her will into execution is held in England to exclude the claim of the executors; but that is no reason for holding the same to be the law of Scotland. Thus, in England, where the testator uses the words, "*I entreat* Mr. A. to act as my executor," this excludes the latter from taking to his own use; whereas it is not so in Scotland. So we admit, that in England, when a legacy is given to the executor, this makes him a trustee *quoad ultra;* but, in Scotland, the statute 1617 expressly shews, that the taking of legacies by an executor does not incapacitate him from taking his third. When an executor is therefore by *law* entitled, how can the mere reservation of power to appoint residuary legatees exclude this right? The next of kin are creatures of the law, and so are executors by virtue of their nomination by the testatrix. We are ready to stake this question on the language of the Scottish statute; it expressly contemplates the case of legacies given to an executor *eo nomine*, as well as *ratione officii.* It is in fact a statute of distributions; hence it is quite futile for the other side to say, that the statute does not apply where there is anything *ex facie* of the will sufficient to rebut the presumption, that the executor is to take to his own use. The effect of this argument would be, to revoke the statute altogether. We do not deny that the executors here are trustees; but they are trustees for themselves, as well as the others beneficially interested—Bell's Principles; and as to one third of the residue, they are created by the statute parliamentary legatees, and take *proprio jure.* But the case of *Nasmyth* v. *Hare* sets this matter at rest. It is a mistake to say that that case was appealed. There were two actions, but the one involving the present point was never touched by any appeal, (see 1 Sh. Ap. 71,) and it stands to this day unreversed, having been acted on and recognized for 30 years. Ivory's Ersk. 3, 9, 26; Brodie's Stair; Macallan's Ersk.; Bell's Prin.;—all these recent writers refer to that case as one expounding the statute 1617.

Kelly in reply.—There is no authority in the law, either of Scotland or England, that the governing principle is not the intention of the testatrix, except the case of *Nasmyth* v. *Hare*; and I admit, if that case, which rejects intention as of no use, is to be held sound, there is an end of this question. It was said that the appeal in that case went on another ground; yet still, that this point was nevertheless present to the mind of the Judges, appears from what Lord Eldon says—1 Shaw's Ap. 71. It is said the statute 1617 is a statute of distributions, and that "intention" goes for nothing. But will it be said, that if a testator say in a deed—"I appoint A and B my executors, but they are not to be residuary legatees, as I intend to appoint such in a future instrument,"—and if the testator die without so appointing residuary legatees,—that nevertheless it is the same thing as if he had said at first, "the executors are to be my residuary legatees"?

[LORD CHANCELLOR.—Yes, unless it is an operative trust.]

At law, the executor must take everything, and we must go to a court of equity to recover the legacy, and there alone the question can arise. But equity follows law. Equity does as to personalty what law does for real property. If, then, the intention be vaguely indicated, surely it is as much an intention as if it had been clearly and expressly set forth. There can be no valid ground for any distinction between an intention clearly expressed, and vaguely expressed.

[LORD CHANCELLOR.—But they say that it is not by the will of the donor at all that the executor takes, but by statute,—that equity excludes the next of kin as well as executors,—and that here there is no intent one way or the other.]

But we do not admit that the intent is neither one way nor another. The statute does not say, if the will leave a legacy to the executor as executor, that the question of intention is open.

[LORD CHANCELLOR.—How is your argument less applicable to next of kin than to executors? Suppose the testator to have said—"It is my intention that neither my executor nor my next of kin take the residue," and yet appoint no residuary legatee: Here the intention would be clear enough; but would the parties be prevented, notwithstanding, from taking their statutory shares?]

No doubt the operation of law would be, to make these parties take; but it would rather be a case of intestacy, where, of course, no intention at all has been indicated. We do not deny that there are cases where the executor is to take, but it is only where there is nothing in the will to shew the intention of the testator to have been the other way.

LORD TRURO.—My Lords, in this case, the same will which is the subject of *Stoddart* v. *Grant*, (*supra*, p. 122), comes under your Lordships' consideration. This is a point arising out of the summons of multiplepoinding raised by the executors with the view of obtaining a decision upon various points, and among others, upon this point. There is a large sum, which in Scotland is properly described "the dead's part," undisposed of; and the question raised upon the present appeal is simply this, whether an executor under a Scotch act of parliament passed in 1617 is entitled to one third of "the dead's part," even though it may be satisfactorily collected from the contents of the will, that the testatrix did not intend that the executors should take more than the special legacies which she had left them. On the other hand, it is contended that the statute positively and distinctly gives to the executors one third of the "dead's part," perfectly irrespective of the intention of the testator, except the intention is expressed by the disposition of the residue; and if any expression of intention, which leaves the residue undisposed of, leaves it under the operation of the statute, that by the operation of that statute the executors are entitled to a third. That, my Lords, is the question in this appeal.

I will call your Lordships' attention to the terms of the statute, which you are called upon to apply to this case. It was passed in 1617, and is very short—(reads statute.) Now, my Lords, you can seldom find an act of parliament which presents less difficulty of construction than the present one. In the first place, it has the virtue of being very short; and, in the next place, it is expressed in very plain terms. The executors are to account to the next of kin, reserving only a third of the defunct's part, all debts being first paid and deducted.

My Lords, it appears to me that the question which is brought before your Lordships has arisen out of that to which the learned Judges below have referred, namely, attention being too much directed to the state of the English law, as in contradiction to the Scotch law. Your Lordships are aware, that the old rule of law was, that executors, by virtue of their appointment as executors, became the universal legatees, and that they were trustees only to the extent to which they were made trustees by the bequest of legacies, but they retained to themselves all that was not specially disposed of. That was very early found to be so inconsistent with the supposed intention of individuals who had relations, and who left property undisposed of, that the Courts in this country who had that branch of the law to administer, held, that if you could discover from the will that it was not the testator's intention that the executor should take in a case where the property was undisposed of, it should not go to the universal legatee, the executor, but should go to the next of kin. There is no doubt that originally the executor must have taken from an idea that by his appointment he was intended to take;—and I suppose, therefore, that it was considered as not inconsistent with that principle, that if you could find by the will that

the general intention which was to be inferred from the nomination of the executors was qualified by the particular contents of the will, you were in fact giving effect, according to its intention, to the rule of law. It must be admitted, however, that this mode of construing wills led to very considerable inconveniences, and also led to that which so often follows where a decision is to depend upon construction, and upon discretion,—and decisions occasionally took place to which it would be very difficult to yield assent. I mean, that circumstances and parts of wills were relied upon as establishing a negative intention on the part of the testator—that is, the intention that the executor should not take. Many circumstances were relied upon which have not at all times commanded assent. The rule at last became pretty well understood. In the course of time, so much litigation had arisen, that the cases might be arranged in classes almost, and it was held that a legacy to an executor, under some circumstances, was evidence of the testator's intention that the executor should not take more. But, then, that was open to this —it must be given to them, not generally, but in their character of executor, so as to import that it was all that was intended they should by virtue of that character take. When a legacy was given to them, naming them as executors, a different conclusion would follow from that which would be drawn where it was a general legacy given to them. And so, where legacies of a different amount were given to different executors, there the Courts did not hold that those legacies were evidence of the testator's intention, that the executors should not take more; but if a legacy of the same amount was given to several executors, a different conclusion was drawn.

This went on for a considerable period, till, as your Lordships are perfectly aware, at last, the legislature finding that justice was not satisfactorily administered by casting upon the next of kin the burden of shewing that the testator entertained an intention adverse to the executors taking more, and that there was so much uncertainty attending it, the recent statute was passed which changed the *onus*, and now the law requires the executors to shew affirmatively, from the contents of the will, that the testator intended them to take more. In Scotland, it seems they escaped the litigation to which I have referred by the effect of this statute, for it was passed so long ago as 1617, and contains the express declaration which I have read. I find that in every text book that I have been enabled to see or to hear of, this statute is referred to as a distinct authority for giving one third of the dead's part, without any qualification, and the Scotch lawyers are in the habit of looking to it as the proper guide for their judgments. There is not to be found, at least I have not been able to find, a single sentence which tends to impose any qualification whatever upon the general enactments of the statute.

Undoubtedly the statute is open to the remark, that it begins by stating, that executors have taken contrary to the intention of the testator, and by declaring that that construction of the office of executor was contrary to law, to conscience, and to equity; and yet the statute follows by giving them one third absolutely, irrespective of the intention of the testator,—not, indeed, using the words "irrespective of the intention," but giving it absolutely. And further, there is this strong circumstance,—having given them one third absolutely without any qualification whatever, the statute adds, that they shall take also legacies if legacies be given to them, albeit they exceed the amount of one third of the dead's part,—and if they fall short, they shall take them as part of the third;—thus, by statutory authority, rejecting the conclusion, which in this country had been drawn from the fact of legacies being given to executors, that that imported that the testator intended that they should take no more than the legacies—rejecting that by the express provision that it should have no such effect.

Then, my Lords, what is the rule by which you should construe the statute? The case must often have occurred, but it does not appear that any question arose till a comparatively recent period. Your Lordships are aware, that on 17th February 1819, a case occurred of *Nasmyth* v. *Hare*, in which a question arose in a remarkable way, presenting the question in the most distinct form which I think can be imagined. In that case, the testator had by his will given certain legacies, and then he disposed of the residue to a given individual. He left no "dead's part," but he disposed of the whole. The residuary legatee died during the life of the testator; the legacy therefore lapsed, and the executors claimed one third of that residue. It was the subject of a good deal of discussion in Scotland, and the Judges unanimously held at that time, that whatever might be argued from the effect of the previous disposition of the residue to an individual other than an executor, as to the testator's intention, it was perfectly irrelevant to the consideration of their right, which right did not depend upon the intention of the testator expressed in any other way than by an absolute disposal to somebody else taking effect, and therefore the executors were entitled to one third. The case underwent considerable discussion. There is only one remark which tends in any degree to weaken its authority, and that is, that circumstances occurred which prevented an appeal to this House against that decision. The question of the validity of the will arose, and came before this House upon appeal. This House held the will to be altogether invalid, and that put an end to the question as to the construction of this statute, coupled with the residuary bequest, because the residuary bequest was disposed of by the will being held altogether invalid, and no question has arisen since.

Now, my Lords, what is the rule by which your Lordships should be governed in construing

this very old statute? It is most simply laid down, I think, by *Tindal* C. J. in *Warburton* v. *Loveland*, 2 Dow & Clark, 500, where he states, that "where the language of an act of parliament is clear and explicit, effect must be given to it whatever may be the consequences, for in that case the words of the statute speak the intention of the legislature. If in any case a doubt arises from the words themselves, we must endeavour to solve that doubt by discovering the object which the legislature intended to accomplish by passing the act." But then he goes on to say, that we must not do that by referring to some ambiguous clause in the act, in order to construe that which is manifest, or which is more clear than that which is referred to. Now, here, no part of the enactments of the act are at all inconsistent. The question arises, whether you can argue from the preamble that such an ambiguity exists as to create doubt of the enactment? I do not apprehend you can do any such thing. Where, as *Tindal* C. J. says, the language is ambiguous, you may resort to the other parts of the act, as you may to other parts of any instruments which it is your judicial duty to construe, to find what the meaning of the authority was that has used that language. But in no part of this act does it appear to me that there is any ambiguity. And I have before remarked, that you find that that act is mentioned in almost every text-book and authority from the period when it was passed down to the present time—and it is universally stated as a general proposition, that after the passing of this statute, the executor, instead of taking the whole of the "dead's part," is to take one third—it is generally added, "for his trouble in executing the will," or, "in respect of his office of executor." But I have not been able to find the slightest passage in any one book, nor has one been referred to at the bar, in which any doubt was raised on this question; and what I have before stated I must repeat, that the arguments here, like the arguments advanced in Scotland, turn mainly upon what would be the construction of this statute with reference to the English law. But it is quite clear, and the Judges expressed themselves very strongly upon it, and nothing whatever has been brought before the House at all tending to break in upon the perfect accuracy of the view that they took, viz. that the principles administered in the courts of equity in England have never found a place, or been adopted, in Scotland.

My Lords, this case of course must be decided by the law of Scotland. Here is a statute in plain and explicit terms—here is a distinct authority upon the construction of that statute in a much stronger case than the present. There is no authority on the other side. The question therefore is, what is our judicial duty with reference to an act of parliament plain and express in its terms, without anything being brought to bear upon it, except some general reasoning and some general speculation with reference to what may be supposed to have been the ancient state of the law of Scotland prior to that statute, as to which I have not been able to find any account whatever, and I can only take it from the act of parliament—that is to say, that there had been a construction adopted with reference to the office of executor, which had given the executor the whole, which was considered contrary to law, good conscience, and equity. If it was contrary to law, good conscience, and equity, that they should take the whole, I have been unable to discover what by law, before that statute, they were entitled to take. Whether that had been a subject of discussion or doubt, there are no means of discovering that I am aware of; but it appears that it was the subject of statutory legislation in order to put an end to all questions of the same nature. And I think your Lordships would be laying down a precedent which might be productive of considerable inconvenience, if, where the language of a statute is perfectly plain and definite, you were to raise doubts and difficulties, not from the language of the statute, but from some general reasoning which is borrowed from a state of the law which you suppose to be more or less analogous.

My Lords, the Scotch law appears to have been uniform and consistent, and to have been different from the English law. It seems to me, therefore, that the main arguments which your Lordships had the advantage of hearing from the bar, learned and able as they were, were arguments rather tending to shew the difficulties which might by possibility arise if this were the case of an English statute, and to be decided by the English law,—though I am not sure that that would be the case, for the statute is so plain, that if it had occurred in England, I think such difficulties could not have arisen. It is hardly a possible case, because, if such a statute had existed, those decisions which have been made, and possibly the arguments at the bar, could not have existed at all, for it is by those decisions that the argument is sought to be sustained.

I therefore propose to your Lordships to affirm the interlocutor which has been pronounced under the authority of this statute. It is no part of the duty of the Court to refer to the will to ascertain anything with reference to the dead's part—beyond this, to discover whether the testatrix has disposed of that dead's part. If the testatrix has disposed of it, it must go *qua* that disposition; if she has not disposed of it, whatever else she may have done, will place it in precisely the same position as if a testator were to say, "I do not intend my heir-at-law to take my freehold estate."

There was a circumstance which was pointed out by one of the learned counsel at the bar (Mr. Anderson), in a way which struck me as entitled to considerable weight—viz. that it was in the nature of a new statute of distributions, which gave to the executor one third in common with

the next of kin, who both stood in the same position, viz. claiming to benefit by the undisposed of residue. I therefore submit to your Lordships, that the sound rule of construction is to adhere to the unambiguous words in the statute, and to apply the law of the country in which that statute passed, to the construction of that statute; and, therefore, I move your Lordships that the interlocutor of the Court below be affirmed.

LORD BROUGHAM.—My Lords, I had not the advantage of hearing any part of the arguments in this case. Nevertheless, I have made it my business, as it was my duty, to look into the cases and into the arguments of the Court below, and the opinions of the learned Judges. Their view of this case is quite unanimous, and I am clearly of opinion from my perusal of those documents, and my looking into the statute 1617, that your Lordships could not reverse this unanimous judgment of the Court below, without, in the first place, overruling the case of *Nasmyth* v. *Hare*, and which, though it never had the sanction of affirmance of your Lordships upon appeal, as stated by my noble and learned friend, yet has stood for upwards of 30 years the undisputed expositor of the act 1617, in the Scotch law. But, independently of the authority of that case, your Lordships, in overruling that case, and in reversing the present judgment, would be also doing the next thing to repealing the act 1617. I therefore am entirely of opinion with my noble and learned friend, that this appeal should be dismissed, and the judgment of the Court below affirmed. I do not think if the act 1617 had been *in ipsissimis verbis* a new statute, we could have come to another conclusion.

Mr. Bethell.—My Lords, as I understand it, in the case of *Stoddart* v. *Grant*, *supra*, we have agreed, with your Lordships' approbation—as we find that that was the rule adopted in the Court below—that the costs of the appellant and respondents there should come out of the fund *in medio*. But with regard to this case which is a personal quarrel, if I may so call it, between the executors and the appellants, the appellants, who are very different from the parties in *Stoddart* v. *Grant*, seek to take away from the executors that which the statute gives them,—therefore I must ask your Lordships to dismiss this appeal with costs.

LORD BROUGHAM.—What was done with the costs below in this case?

Mr. Bethell.—They were not given out of the fund.

Solicitor-General Kelly.—The costs were allowed.

LORD TRURO.—I think that this is a case in which costs should be allowed. It is the construction of an act of parliament; and as parties have had no opportunity of bringing before the House the construction of this statute, which has a very extensive application, I think it reasonable that they should take the opinion of the House, and it does not strike me as a case in which the appeal should be dismissed with costs.

Interlocutor affirmed.

First Division.—Lord Murray, *Ordinary*.—Spottiswoode and Robertson, *Appellants' Solicitors*. Connell and Hope, *Respondents' Solicitors*.

JUNE 28, 1852.

MISSES AGNES and MARY BROWN, Plaintiffs in Error, *Appellants*, *v.* HER MAJESTY'S ADVOCATE-GENERAL, Defendant in Error, *Respondent*.

Legacy Duty—Conveyance Inter Vivos—Testament—Statutes 48 Geo. III. c. 149; 55 Geo. III. c. 184—*Five sisters executed, in* 1825, *a deed whereby they assigned, disponed and conveyed over, "from us and our heirs severally, to and in favour of each other, and to the heirs and assignees of the last survivor," their whole heritable and moveable property, effects, means and estate, then belonging or which might belong to them. On the death of one of the granters, the Crown, treating the deed as of a testamentary nature, claimed duty on the estate of the lady as personal succession, and the Court of Exchequer found for the Crown.*

HELD (reversing judgment), *that the clauses of the deed imported that it was a conveyance* inter vivos, *and not of a testamentary nature.*[1]

Five sisters living in Scotland, (two of whom are the appellants,) executed the following deed in 1825:—"We, Grace Brown, Agnes Brown, Euphemia Brown (since deceased), Mary Brown, and Jessie Brown (since deceased), do, for the love, favour, and affection, &c., hereby assign, dispone, convey, and make over, from us and our heirs severally, to and in favour of each other, and to the heirs and assignees of the last survivor, all lands, heritages, tacks, steadings, rooms, possessions, heritable bonds, wadset rights, decreets and abbreviates of adjudication, and grounds and warrants thereof, together with all and sundry goods, gear, debts, sums of money, body clothes, wearing apparel, rings, jewels, and other paraphernalia, and, in general, the whole

[1] S. C. 24 Sc. Jur. 565.