to the benefit of another person or company, but it was an arrangement with reference only to the railway itself, and there was no infringement, in point of fact, of the benefit of Hampton in Arden in the way which has occurred in this case. But in this case the result is, that the coal owners are damaged, no doubt very seriously, by the course which has been taken by this company, and the decision of your Lordships will give them authority to do this.

I thought it right to state my view, and I have done so for the purpose I have mentioned. The company will do well to consider whether they should make those tolls more equally between the parties; and I must say, stepping out of my judicial course, that if they should have occasion to come before parliament, I cannot doubt that, under the circumstances, your Lordships will do that justice which, it appears to me, is not now done.

The *Solicitor-General* asked that the House would take the course it took in *Johnston* v. *Beattie*, 10 Cl. & Fin. 52, where the learned Lords were equally divided, and instead of moving that the appeal should be dismissed, the consideration of the case was adjourned.

LORD ST. LEONARDS.—It is impossible to do that.

Solicitor-General.—It amounts otherwise to a complete denial of justice. That was the course there taken, and there was a re-argument.

Interlocutors affirmed.

Appellant's Agents, Walker and Melville, W.S.—*Respondent's Agents*, Gibson-Craig, Dalziel, and Brodie, W.S.

MAY 10, 1855.

JOHN PURSELL, *Appellant*, v. Mrs. NEWBIGGING and Others, *Respondents.*

Vesting—Trust—Construction—Death of Annuitant—*By a trust deed and settlement it was provided, that certain annuities should be paid to the truster's two sisters and his niece, the share of a deceaser being declared divisible among the survivors equally. After payment of the annuities, it was provided that the annual free produce of the trust funds should belong to the truster's nephew; that on the niece's annuity amounting to £40, the nephew should grant a bond binding himself in payment to her of that sum yearly, and, on her decease, of £800 to her children, and failing issue of her body, to himself; and that, "after executing the purposes of the trust," the residue of the trust estate should belong to the truster's nephew and the heirs of his body; whom failing, to the truster's niece. The nephew having predeceased the niece and another of the annuitants, without having executed any bond:*

HELD (affirming judgment), *That the fee of the residue of the trust estate became vested in him before his death.*[1]

The late George Warroch, by disposition and settlement dated 21st June 1799, disponed to James Warroch his brother, and failing him by decease, to Dr. John Warroch Pursell his nephew, or such of them that should happen to survive him, and accept of the trust, and the heir of the survivor, his whole property, heritable and moveable, for these purposes:—1. Payment of debts, &c. 2. Payment of annuities of £25 each to his sisters Ann and Euphemia Warroch, of an annuity of £20 to Dr. John Warroch Pursell, during the life of James Warroch, and of £20 to Catherine Paxton Pursell, subsequently Mrs. Gowan, sister of Dr. Pursell, during her life; declaring, that in case of the decease of any of the annuitants, the annuities provided to those deceasing should belong to the survivors equally,—it being provided, however, that Mrs. Gowan's annuity should in no event exceed £40 sterling by the falling in of the annuities; and that, after payment of the annuities, the annual free produce of the trust funds should belong to James Warroch himself during his life. 3. It was provided, that on the decease of James Warroch, Dr. Pursell should, besides the above annuities to each of the truster's sisters, pay to them equally £20 sterling yearly, and failing any of them by decease, it was provided, that the share of those deceasing should belong to the survivors equally, and that, after payment of the annuities, the free annual produce of the trust funds should belong to Dr. Pursell. 4. That so soon as Mrs. Gowan's annuity should amount to £40, and which sum it was never to exceed, Dr. Pursell should execute a bond binding himself to make payment to her of the annuity of £40, in full of her share of the trust funds, and to make payment after her death of £800 to any child or children lawfully procreated of her body; and failing such issue, it was provided, that the bond should be taken to Dr. Pursell, and his heirs whatsoever, whom failing, to the truster's own

[1] See previous report 15 D. 489; 25 Sc. Jur. 317. S. C. 2 Macq. Ap. 273: 27 Sc. Jur. 386.

nearest heirs and assignees; and for security of the payment of the annuity and sum of £800, Dr. Pursell was taken bound to infeft his sister, for behoof of herself and children. 5. After executing the purposes of the trust, it was provided that the free residue of the trust funds should pertain to Dr. Pursell and his heirs whatsoever, whom failing, to Mrs. Gowan and her heirs whatsoever, whom failing, to George Warroch's own nearest heirs and assignees whatsoever.

George Warroch died on 16th July 1803, without issue; and James Warroch having declined to accept of his trust, George Warroch's estate, heritable and moveable, was, down to the time of his death, managed by Dr. Pursell.

Dr. Pursell, who survived James and Ann Warroch, died in April 1835, without issue, and, although Mrs. Gowan's annuity had reached £40, he had failed to execute the bond for £800. He left a disposition and trust deed, dated 26th March 1822, whereby he disponed to trustees and executors all his heritable and personal estate, and specially certain subjects therein described, for the following purposes:—1. Payment of debts, &c. 2. For payment of the annual free proceeds of his trust estate to his father and mother, or the survivor. 3. On the death of the longest liver of his father or mother, his trustees were directed to make payment of the free proceeds to Mrs. Gowan, his sister. 4. At the first term after his sister's decease, he directed his trustees to divest themselves of the trust estate, and convey it to the heirs of her body; and in the event of failure of such issue, his trustees were directed, at the first term after his sister's decease, to denude of the trust funds, and pay them over to the children of his three cousins, Sarah Gee Warroch or Hunter, Barbara Warroch or Steel, and Catherine Warroch or Strange, in the shares therein mentioned.

Messrs. Auld and Smith, two of the trustees named, accepted Dr. Pursell's trust.

Mrs. Gowan made up titles to the heritable property left by George Warroch, as his heir at law, and was infeft therein. She died in October 1849 without issue, Euphemia Warroch having predeceased her.

Dr. Pursell's trustees raised an action of multiplepoinding, declarator and exoneration, stating that they were desirous to convey and pay over the residue of Dr. Pursell's trust estate, and any balance in their hands that might be held to belong to George Warroch's trust estate, to the party or parties entitled thereto. The heritable estate of George Warroch was not included in the revised condescendence of the fund *in medio*, the raisers stating that that heritable estate was, at her death, vested in Mrs. Gowan in fee simple.

Thereupon Mrs. Newbigging and others, the beneficiaries, or representatives of beneficiaries, under Dr. Pursell's trust deed, raised a summons against John Pursell, Mrs. Gowan's heir at law, and Dr. Pursell's trustees, concluding to have it found and declared, that whether the titles made up by Mrs. Gowan to John Warroch's heritable estate, were made up for the purpose of vesting the subjects in herself, as trustee for behoof of the beneficiaries under Dr. Pursell's trust deed, or with the view of evacuating the destinations in the trust deeds of George Warroch and Dr. Pursell, John Pursell, her heir at law, was bound to convey the subjects for distribution in terms of Dr. Pursell's trust deed; and that the subjects belonged to the pursuers; and in case of John Pursell's refusal so to convey, the summons contained a conclusion for decree of adjudication of the subjects, and of reduction of Mrs. Gowan's titles.

Steel and Elder raised a summons of declarator to have it found that the residue of George Warroch's estate, so far as it consisted of heritage, never vested either in Dr. Warroch or Mrs. Gowan, and now belonged to them as his heirs at law.

The two declarators were conjoined.

The Second Division adhered to the Lord Ordinary's interlocutor, which was as follows:—"Finds that, according to the sound construction and true meaning of the late George Warroch's trust disposition and deed of settlement, dated 21st June 1799, the fee of the free residue of the trust funds became vested in the now deceased Dr. John Warroch Pursell: Finds that the right which had so vested in the said Dr. John Warroch Pursell was effectually conveyed by his trust disposition and deed of settlement, dated 26th March 1822, for behoof of the beneficiaries therein named: Finds that a title to the heritable subjects formerly belonging to the said George Warroch, was made up in fee simple by the late Catherine Paxton Pursell or Gowan: Finds that the defender John Pursell, who is her nearest and lawful heir, is bound to convey over the foresaid heritable subjects for distribution, in terms of the said Dr. John Warroch Pursell's trust disposition and deed of settlement: Therefore, in the declarator at the instance of Grace Steel or Newbigging and others, repels the defences for Elder and Steel, and the defences for John Pursell; and, to the extent of the above findings, decerns and declares in terms of the conclusions of the action: And in the declarator at the instance of Elder and Steel, sustains the defences, and assoilzies the defenders from the conclusions of the action, and decerns; reserving to the pursuers to move for farther findings, if necessary, in terms of the alternative conclusions of the first declarator; and in the mean time reserves all question of expenses."

On appeal Pursell pleaded that the interlocutor of the Court of Session should be reversed—1. Because, according to the sound construction of the deed of settlement, the beneficial interest in the residue never vested in Dr. Pursell but in Mrs. Gowan, (formerly Catherine Paxton

Pursell,) and now belongs to the appellant as her representative. *Dill* v. *Earl of Haddington*, 2 Rob. Ap. 311; *Ramsay* v. *White*, 11 S. 786; *Maxwell* v. *Wylie*, 15 S. 1005. 2. Because the purposes of the trust, exigible after the death of James Warroch, which were not fully implemented during the lifetime of Dr. Pursell, came to an end during the lifetime of Mrs. Gowan, whom the appellant represents as heir.

The respondents answered, that—According to the sound construction of the trust deed, the free residue of the estate vested in Dr. Pursell, and was distributable in terms thereof.

Rolt Q.C., and *Anderson* Q.C., for the appellant.—The beneficial interest in the residue of this estate was never vested in Dr. Pursell, but became vested in Catherine Pursell. The question turns chiefly on the 5th clause of the trust deed. The trust endured till the death of Euphemia Warroch in 1839, while Dr. Pursell died in 1835. He thus failed before the trust purposes were executed. The true rule of construction is well stated by Lord Cottenham in *Dill* v. *Earl of Haddington*, 2 Rob. Ap. 311; and we contend no other construction can be given to the 5th clause than what we assert. All the modern cases, both in England and Scotland, tend to shew that such deferred rights, depending on survivorship, vest only after the event occurs at which the right became available.—*Buchanan* v. *Downie*, 8 S. 516; *Richardson's Trustees* v. *Cope*, 12 D. 855; *Johnson* v. *Johnston*, 2 D. 1038; *Neathway* v. *Reed*, 17 Eng. Jur. 169; *Macdonald* v. *Bryce*, *ibid.*, 335. The construction of the 5th clause, taken by itself, is sufficiently clear that the trust was to come to an end before the estate vested in Dr. Pursell, and the other parts of the deed confirm this view. The settlement was a trust, and the intervention of a trust such as this, it is well known, suspends the vesting of all ulterior interests. The other side, in substance, contend, that this was a trust for the trustee's own behoof, which is all but absurd. The purpose of the testator was to secure the payment of certain annuities, and a capital sum of £800; and it is obvious this was to be done, not by making his trust disponee full proprietor of the estate conveyed, but proprietor under a limited title. It may be said that there are contrary presumptions to be drawn from other parts of the deed, but these must be very clear before the Court will adopt them. It has not been shewn by the other side at what period the vesting took place. The judgment of the Court below proceeds on some vague assumption that Dr. Pursell was a favoured individual. The question, how far the subsistence of annuities affects the question of vesting, was considered in *Nicolson's Trustees* v. *Nicolson*, 13 D. 240; *Scott* v. *Scott*, 7 Bell's Ap. 148; but these were cases of bequests to third parties, whereas here it was a bequest to the sole trustee. In short, all the other parts of the deed corroborate the view maintained by the appellant. As the purposes of the trust were not fully implemented during Dr. Pursell's lifetime, the estate vested in Catherine Pursell, who fully made up her titles, and the appellant represents her as heir.

Solicitor-General (Bethell), and *R. Palmer* Q.C., for the respondents, were not called upon.

LORD CHANCELLOR CRANWORTH.—My Lords, this case may appear to your Lordships at first somewhat complicated. It certainly is not, at the first blush, quite clear and intelligible, but I must confess, that from the first moment that I fully comprehended it, I have not entertained the slightest doubt on the subject. The question is—at what time the interest in this estate vested in Dr. John Pursell, or on what event which happened during his life the terms of the deed intended it should vest in him.

The gift is to trustees, and the objects of the trust are, in the *first* place, To pay the debts of the testator—a trust which has been kept out of view in the argument. *Secondly*, To pay certain annuities to certain individuals, or the survivor of them, and, subject to the payment of those debts and annuities, for the benefit of James Warroch in his lifetime, and at his death the annuities are to be increased in a certain manner, and after that the estate is given to Dr. John Pursell. The brother, Dr. Pursell, being the survivor, came into possession in 1814, and enjoyed the property till his death. The question is—whether, during this time, the estate had vested in him or not.

The argument is, that, because there were certain trusts to pay certain annuities, by some supposed rule of Scotch law bearing analogy to the rules of English law, this estate was not to vest in him, unless he lived after the time when all these annuities had ceased to be payable. Of course it is competent to a testator or settler to make a settlement so framed, but there is no reason for saying, because the testator intended to charge his property with reference to the amount of annuities of £40 a year, and certain other annuities, that therefore the estate was not to go to any one until those annuities had ceased. If that had been his intention, it might have been clearly expressed, and might have been carried into effect.

Now there must be some rule in the law of Scotland, as there is in our Courts a rule very familiar to your Lordships, with reference to cases in which there is a fund or estate left to a party or a succession of parties during their lifetime, and afterwards to other survivors or children. The question has frequently arisen, whether the children are such as shall answer the description given at the death of the person who speaks. Originally, I think, the ruling of the Courts was, that they were to be children living at the time of the death of the testator. Certainly that has been a good deal modified. The meaning is now generally assumed to be that

which common sense suggests, viz., the meaning of the person who speaks. I do not think, however, that that rule applies to this case, for I put it to the learned counsel who argued the matter on behalf of the appellant, what construction he put on the following clause :—"After executing the purposes of the trust, the free residue of the trust funds shall pertain and belong to the said Dr. John Warroch Pursell and the heirs whatsoever of his body." And Mr. Anderson said fairly enough,—"I interpret that to mean, that they are to pay the funds to Dr. John Pursell when the purposes of this trust have been performed." As it turned out, forty years elapsed before these purposes were performed. To whom, then, are the funds to go? To the heir at law, clearly, so much as was undisposed of. The argument of Mr. Anderson is, that there was no gift at all; that you are to regard this as a trust, subject to what is called in England a life estate, or in Scotland a burden of the life estate; and that Dr. Pursell did not take it until the death of the annuitants. And that is not all. According to their theory he is not to take it till all the debts are paid.

The case appears to me to lie in so very narrow a compass, when looked at closely, that I think I should not be justified in making further observations upon it, except to advert to one or two of the authorities, to shew that they are utterly inapplicable to this case. This is the case of an annuity, but suppose it were a liferent; £40 a year is given to the liferenter, and £800 is set apart to go to the children, after the death of the liferenter. The liferent is given to one party; the capital of £800, after the death of Catherine Pursell, is to go to a certain class of persons who are named. Then the question is—does it mean persons answering to that description on the death of the settler, or on the death of the liferenter? I should say, upon principles analogous to those which are acted upon in our Courts in England, it would mean those who were alive at the death of the liferenter.

In *Johnston's case* there was £25, which was called an annuity given to the niece of the settler, and £500 was set apart, which, upon the death of the niece, was to be given to a certain class of persons. The question was—does that mean a class who were alive at the death of the settler, or at the death of the liferenter? Of course it was held to mean persons alive at the death of the liferenter, and that a sum was to be set apart to meet and provide for the event there contemplated.

But it appears to me, that, although this doctrine of suspending may be made applicable to the case of an annuity as well as to that of a liferent, it requires much stronger language to satisfy your Lordships that there was an intention to suspend in the case of an annuity than in that of a liferent. It would be preposterous to contend, that, because Dr. Pursell was to pay £40 a year to his sister during her life, therefore he was to have no enjoyment whatever of this property, and there was no gift to him at all except subject to the interest of the liferenter. It appears to me that the appellant has contended for something which is untenable. To suppose that this property was to be kept suspended until all the debts and all the annuities were paid, seems preposterous. Not only no principle leads to such a conclusion, but there are no authorities which, in my opinion, ought to influence your Lordships to disturb the interlocutor of the Court below, carrying out the express intention of the words of this instrument. I shall therefore move your Lordships that the interlocutor of the Court below be affirmed.

LORD ST. LEONARDS.—My Lords, I certainly have laboured under very great difficulty, notwithstanding the elaborate argument at your Lordships' bar, to discover what the point is, that is attempted to be insisted on in this case. I take it that it is only sufficient to glance at this will to see, that there ought never to have been an appeal brought to this House on the points which have been so elaborately argued.

As to the intention of the testator, no man can entertain the slightest doubt. It is the clearest, the most explicit will, that it is possible for a man to make without using technical expressions. He gives the property for life, subject to a certain annuity, and leaving another person to succeed, he gives that person during the life of the tenant for life an annuity, and when the tenant for life dies, he directs the increase to be paid by the person whom he meant to succeed to the estate. The idea is so fixed in his mind, that, before he has given him the property to enable him to pay the annuities, which are to be increased on the death of the tenant for life, this successor, Dr. Pursell, is directed to pay these annuities, and then the donor directs that the surplus "shall pertain and belong" to Dr. Pursell. Supposing the will had stopped there, what possible doubt could have arisen, that Dr. Pursell would have taken the entire fee, subject to the conditional limitation over, and subject to the annuities? Now, does anything that follows weaken that? On the contrary it strengthens it, for Dr. Pursell is directed, if an annuity should amount to more than £40 to one of the surviving annuitants, himself to become bound for the payment of that annuity, and to secure it on the property of the donor—the property in settlement or any other property. How could you fix a personal obligation on a man to secure an annuity of £40 a year, and £800 to the children, unless you had first given to that man some property which would enable him to perform the obligations which you impose upon him? Independently of the question as to the time at which the £40 a year became payable, the £800 was to be paid at all events. There is no question about that. Suppose that the amount had never reached

more than £38 a year, no one can doubt that the £800 must have been secured to the children. The donor meant that Dr. Pursell should, when he came into possession of this property, secure the £40 a year to the annuitant, and the £800 to the children; and he knew so perfectly what he was dealing with, that, knowing that the £800 might not become ultimately a charge on this property, he gives the £800 over to Dr. Pursell, in case there should be a failure of the children of the annuitant. Then he declares, in the clearest terms, that when these trusts are performed, Dr. Pursell shall take the annuity. The words are in so many terms, "that, after executing the purposes of the trust, the residue shall pertain and belong to Dr. Pursell and the heirs of his body," and then with limitations over.

Now, let us consider for a moment what might have happened on the death of the tenant for life. The moment the tenant for life dies, under the direction here, in so many words in this instrument, Dr. Pursell would have taken (at all events that must be conceded) so much of the property as was not exhausted by the annuities. No one will dispute that it is given to him in so many words. There is no contingency. Are you to divest him of that because the fund increases? Are you to take away that which has already become not a charge, but beneficial enjoyment? Suppose the annuity had been £90 a year, and the rental £100, then Dr. Pursell would have had instantly £10 a year. There is no failure as to that, except failing the heirs of his body. The appellant at your Lordships' bar cannot take it. It is vested, beyond a doubt, in Dr. Pursell. It is not given over. What are the appellants to contend for? Is it that, because there is an annuity which might or might not, in the lifetime of Dr. Pursell, have attained the sum of £40 a year, therefore there is to be no vesting? No vesting of what? Of so much as would represent the annuity. How much is that? Which part of the estate will you have? Will you have a charge, or will you have the fee itself? It is perfectly absurd. There is nothing to rest the argument upon. As regards the intention of the donor, there is not the slightest doubt about it.

The creation of this trust in no respect alters the construction of the instrument. I think it might rather strengthen the view which I would advise your Lordships to take of this case, because the same person is made a trustee who is to take the beneficial interest in the property. He is made a mere trustee with clear definite rights, and your Lordships never can, by the law either of the one country or of the other, alter that beneficial interest.

Cases may arise in which, when you are dealing with the conveyance of trust property, you may so decide the event in which the trustee is to denude himself of the property, as to shew that you meant that person to be left out at the time the particular act is done. But there is nothing of the sort in this disposition. On the contrary, personal obligations are imposed on Dr. Pursell, which prove that he was at once to take the fee of this property, in order to enable him to answer those obligations, or to repay himself the money that he might expend.

In this country an argument might formerly have been raised on the point that has been addressed to your Lordships, but happily all these questions have been set at rest for more than a century. What my noble and learned friend said is true enough, that during the argument the learned counsel never touched the question of the debts. If their argument is good for anything, it goes to the question of the debts. If that argument could be maintained, this trust could not have arisen in favour of Dr. Pursell until the debts had been paid.

There seems to me no doubt as to what has been the law of England for a number of years upon this subject. I think this is a case which does not admit of the shadow of a doubt. It is a case which I was surprised to hear so elaborately argued, because it does not admit of argument. And I believe it is impossible for the House to look at it without immediately coming to the conclusion, that the decree of the Court below should be affirmed, with costs.

Interlocutor affirmed with costs.

Appellant's Agent, James Carnegie, jun., W.S.—*Respondents' Agent*, Robert Oliphant, S.S.C.

MAY 25, 1855.

Mrs. COLLINS S. O'REILLY and Husband, *Appellants*, *v.* The BARONESS SEMPILL and Husband, *Respondents.*

Succession—Fee and Liferent—Substitution—Testament—Construction—*A testatrix gave the whole residue of her property, heritable and moveable, to A, her heirs and assignees, and appointed her to be her sole residuary legatee. By a subsequent codicil, written with her own hand, the testatrix declared her will as follows:—"As there is now no prospect of my dear cousin A having a child, I depone and bequeath as her successor my grandniece B to succeed the*