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*

said A in all my landed property, plate, furniture, &c., always to be understood with the burden of all my annuities, legacies, and debts."

HELD (affirming judgment), *That A's right was not thereby reduced to a liferent, but that she remained fiar, B's right being merely a substitution in the event of A's death without issue.*

This was an action by Lady Sempill (and husband) to have it found and declared, that the pursuer took a right of fee under the trust settlement and other relative writings of the deceased Miss Collins Austin, and that the trustees were bound, after fulfilment of the trust purposes, to denude in her favour, and convey to her in fee the whole residue, heritable and moveable, of the estate belonging to the deceased.

This claim was resisted both by the trustees, and by Miss O'Reilly a grandniece of the testatrix, who maintained, that under one of the testamentary writings, she was the fiar of the residue, the pursuer's right being reduced to a mere liferent, or, at all events, that the pursuer could not so deal with the estate as to defeat her (Miss O'Reilly's) rights.

The testatrix died on 15th June 1852. She left a trust deed dated in 1833, afterwards superseded. In 1845 she executed another trust deed (superseding the former one) in favour of Sir Archibald Alison, sheriff of Lanark, John Russell, P.C.S., Andrew Murray of Murrayshall, and Alexander Smith, W.S., as trustees for certain purposes. The deed, after setting forth various purposes, proceeded thus:—"And, in the last place, my said trustees shall make over or convey the free residue and remainder of my estate and effects to and in favour of such person or persons, or shall hold, apply, and employ the same to and for such uses and purposes as I have directed and appointed, or shall hereafter direct and appoint, by any writing under my hand, at whatever time the same may be executed by me, *etiamsi in articulo mortis*, which shall be valid and effectual if written and signed by me as aforesaid, though deficient in the usual legal formalities; and failing any such appointment, the said free residue shall belong and be made over to my own nearest heirs and assignees whomsoever."

In the interval between these two trust deeds, Miss Austin executed various testamentary writings in the shape of codicils and letters of instructions to her trustees. One of these was as follows:—"*Bellwood, September* 1840.—To Andrew Murey of Murreyshall; to Archibald Alison, sheriff, Glasgow; to Jhon Russell, writer to the signet, Edinburgh.—Gentleman,—I have written my settlement, having duley considered the contents of it; and I hope and expect that yow, gentleman, as men of honour and good Christians, will Religious pay attention to my last request. I recommend and wish my respected agent Alexr. Smith, W.S., taken into the trust, thowgh not either *appointed* or mentioned in my settlement. I also reqwest, and most particularly desire, that there may be no cavilling or disputing about my settlement, written by myself, althowgh it may chance, in some trifling respects, not be according to *Law*, my wish and intention, I think, is quite plain, and my friends, who I have appointed my trustees, I mwch esteem; but if aney difference of opinion should occor, I beg to recommend Mr. Alexr. Blair, Bank of Scotland, to be consulted, whose high sense of honor, and steadey good principles, I have a high opinion of. But my friends, who are appointed my trustees, I very much esteem; and I trust, when I am no more in this world of strife and care, that they will attend to my last injunctions and wishes; and recommending yow all, gentlemen, to a Mercyful God and all sufficient Savior, who knoweth the hearts of all his children, I am most Sincerely and Truly your affectionate friend, COLLINS AUSTIN." [Addressed on the back thus]:—"To Andrew Murry, Esqr. of Murryshall; to Archd. Alison, Sheriff, Glasgow; to Jhon Russell, Esq., W.S.; to Alexr. Smith, Esq., W.S., Woodlands, 18 York Place."

Another paper, also written by the testatrix herself in September 1840, contained various legacies, and concluded in these terms:—"And I direct and appoint my trustees and executors named in my trust deed and settlement, April eighteen hundred and thirty three, or any other deed to be executed by me, to pay and make over the whole residue of my estate and effects, heritable and moveable, after deduction of my debts, legecys, and anveties, and all expenses attending the management of the said trust, or any other trust by me, to my dear cousin, the Right Honourable Sempill or Baroness Sempill, daughter of the late Hugh Lord Sempill, and her heirs and assenees, who I hereby appoint to be mey sole residerey legitee; and I preserve full power to myself to alter or revoke these legecys and anueties, in whole or in part, at any time of my life, and even on deathbed; and I dispense with the delivery in the consent to the registration hereof in the books of Counsel and Session, or any other Court, therin to remain for preservation, and constitute procwtators for that purpose, in witness whereof subscribe these presents, written by myself, and the preceding pages, at Bellwood, parish of Glencourse, Midlothian, September eighteen hundred and forty, before these witnesses.

COLLINS AUSTIN.

"Hector Law, witness.

John MacVean, witness."

The following codicil, on which the question at issue mainly turned, was also written by the

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[1] See previous report 15 D. 789; 25 Sc. Jur. 469. S. C. 2 Macq. Ap. 288; 27 Sc. Jur. 391.

testatrix with her own hand:—"*Bellwood, 22d of July eighteen hundred and forty one years.*—Codicil to my last Will or settlement.—As there is no prospect now of my dear cousen, the Right Honble Lady Sempill, having a child, I depone and bequeeth as her successor my grandniece, Collins S. O'Reilly, youngest daughter of the late Willm. P. O'Reilly, surgeon in the 56 and other regements, to succeed the said Right Honble Lady Sempill in all my landed property, plate, furniture, &c., always to be understood, with the burden of all my anwityes, also legecys, if not already paid, and debts I may be due."

There was also a second codicil, also holograph of the testatrix, in the following terms:—"*Bellwood, May eighteen hundred and forty six.*—2d Codicil to my Will or Settlement.—I the before designed Collins Austin, in virtue of the foresaid reserved powers in my trust deed, do hereby recall or revoke from the Right Honble Barroness Sempill, that part of my landed property, my house in Edinr. sitwated in 15 Manor Place, with all the furniture, bed and table linen, and one half of my silver plate; and I do hereby bequeeth the same property to my grand niece, Collins S. O'Reilly, always to be understood with the bed and table linnen, and one half my silver plate.—Written myself.

"COLLINS AUSTIN."

These settlements and writings were all registered in the books of Council and Session on 26th June 1852.

The Court of Session held that Lady Sempill's right of fee had not been restricted to a life-rent by the codicil.

On appeal it was maintained that the judgment of the Court of Session should be reversed, because—1. The testatrix having framed her testamentary settlements upon the footing of a formal trust deed, with directions to the trustees, these directions must be construed liberally, and not strictly or technically; and everything must be ordered to be done by the trustees which may have the effect of fulfilling the truster's intentions. 2. Because, under the second codicil, or letter of instructions, a material change was effected upon her settlements, and the appellant was thereby constituted a legatee as to the residue, with a direct claim upon the trustees to be secured in the succession to the residue after Lady Sempill's death, and for that purpose to have everything done by the trustees that could accomplish the object, under their power, to hold the subjects, or otherwise. 3. Because, according to the judgment of the Court below, the will and intention of Miss Austin has been plainly defeated, and the appellant's rights as a legatee have been placed entirely within the power and pleasure of Lady Sempill, who is made as completely mistress of the whole residue in question, as if her claim to it had depended upon the first codicil alone, before it was so materially altered or qualified by the second codicil, and as if no rights whatever had been created in favour of the appellant, or no trust had been constituted to carry these into effect.

The judgment was supported on the following grounds:—1. That the respondent Lady Sempill having, under the deed of September 1840, been constituted fiar and residuary legatee of the property of the testatrix, her right must be held to subsist, there being no recall or revocation of her right as fiar. 2. The codicil of May 1846 is confirmatory of the subsisting rights of the respondent to all the property other than the property embraced within it.

Solicitor-General (Bethell), and *Anderson* Q.C., for the appellant.—The simple question here is—What was the intention of the testatrix? and we are not to embarrass ourselves with technical language, for the testatrix used words in their popular sense, and the very object of her resorting to the machinery of a trust was to avoid any technical difficulties in carrying out her intention. If there is a conflict, therefore, between the technical and the popular sense to be attributed to a word, the latter should be adopted. The majority of the Judges have said the technical rule must be followed, viz., that this was a series of substitutions, but we say the meaning of the testatrix should be held to overbear the feudal construction. The word "successor" used in the second codicil, obviously denotes that the appellant was made a creditor, and entitled to succeed on the death of the respondent. It is not necessary to define what kind of interest Lady Sempill took under this second codicil. It most resembles a conditional fee, for if the appellant had predeceased her, then the respondent would be entitled to the fee. But, at all events, the object of the testatrix was, that the respondent should not be able to defeat the succession of the appellant. There are abundant authorities in favour of a liberal construction of trust deeds, and directions to trustees.—*M'Nair* v. *M'Nair*, Bell's 8vo. Cases, 546; *Seton* v. *Seton's Creditors*, Mor. 4219; *Mein* v. *Taylor*, 5 S. 779, and 4 W. S. 22; *Sprot's Trustees* v. *Sprot*, 6 S. 833; *Campbell* v. *Campbell*, 14 S. 770; *Dennistoun* v. *Dalgleish*, 1 D. 69; *Stirling* v. *Stirling's Trustees*, *ibid.* 130; *Forrest's Trustees* v. *Martine*, 8 D. 304; *Suttie* v. *Tod*, 8 Sc. Jur. 442.

Rolt Q.C., *Patton* and *Fleming*, for the respondent, were not called upon.

LORD CHANCELLOR CRANWORTH.—My Lords, this is a case which I think admits of no reasonable doubt; and though, perhaps, it is too much to say so, since two of the learned Judges in the Court of Session were of a contrary opinion, still I am clearly of opinion that the majority of the Judges in the Court below came to a correct conclusion. It is said on the part of the appellant, that if the words which the testatrix had used were to be construed in their technical

sense, there would have been no doubt that Lady Sempill had been made an unlimited fiar; but then it is also said, that when the words were used by the testatrix not in their technical sense, a different rule of construction applies. It is no doubt true, that in some cases where a testatrix acts as her own conveyancer, a somewhat different rule of interpretation is applicable, but the doctrine even then is always this, that where a testator has used words which are not ambiguous, you must give to such words their natural meaning, unless you find from other parts of the will that he intended an opposite meaning to be given to such language. Now, in the present case, one might, no doubt, conjecture that the sense in which the testatrix used the words in these codicils was not their technical sense, still, at best, that can only be a conjecture upon which no Court can safely rely.

By the first instrument, namely, that of September 1840, the testatrix clearly makes Lady Sempill an absolute owner of the residuary estate; and under that absolute ownership she might, for example, have worked the mines of the land, which as a mere liferentrix she could not do; there is no dispute about that. Then, afterwards, in the codicil of 22d July 1841, the testatrix uses these words:—"As there is no prospect now of my dear cousin The Right Honourable Lady Sempill having a child, I depone and bequeath as her successor my grandniece Collins S. O'Reilly, youngest daughter of the late William P. O'Reilly, surgeon in the 56th, and other regiments, to succeed the said Right Honourable Lady Sempill in all my landed property, plate, furniture, &c., always to be understood with the burden of my annuities," &c.

It is said that the effect of this is, that Miss O'Reilly is appointed legatee of the residue, and that Lady Sempill is only to have a life estate. But that is not the meaning of the language which she has used. According to the law of Scotland these words are capable of a strict interpretation, and amount simply to this, that whereas by the former instrument the heirs of Lady Sempill would have succeeded to the estate on her death, by the latter instrument Miss O'Reilly is substituted as the person to succeed instead of those heirs. But, then, that only means, that if Lady Sempill shall do no act to defeat the destination of the property, Miss O'Reilly will be the next taker. It was a mere *spes successionis* in Miss O'Reilly, which may or may not be of much value; it, no doubt, always is of some value, but it did not prevent Lady Sempill from exercising all the rights of ownership with regard to the property. I can see no reason whatever for holding, that the testatrix meant anything else than what the language in its technical sense clearly imports. I therefore move your Lordships that the interlocutors in the Court below be affirmed.

LORD BROUGHAM.—My Lords, I have no doubt as to this case any more than my noble and learned friend. I must say that I cannot go along with the two learned Judges in the Court below in holding that the meaning of the testatrix was to give Lady Sempill only a life estate. I think it is quite conceivable that she might mean just what the words in their technical sense import. I think it would be a very dangerous thing for the law of Scotland, and also for the law of England, if we were to put any other construction on these three instruments than that which has been put upon them by the Court below; and I differ altogether from my right honourable and learned friend the Lord Justice Clerk, when he says, as he does, at the commencement of his opinion—"This is a case entirely by itself, and the decision of it cannot affect any other." On the contrary, I think it is by no means a case by itself, and if we were to decide against the opinion of the majority of the learned Judges in the Court below, we should soon hear of other cases being litigated, which would shew that it would by no means be so understood by the profession.

LORD ST. LEONARDS.—My Lords, I also agree with my noble and learned friends, and have no doubt that the Court below came to a correct conclusion. The Lord Justice Clerk seems to me not to have accurately defined what the interest was which he conceived Miss O'Reilly to take under the instrument of 1841, and what was the interest which Lady Sempill was to take under the same instrument. He appears not to have followed the other Judge in that respect, in considering that the fee originally given to Lady Sempill was cut down to a mere liferent. But he did not, as I understand his judgment, define what the interest clearly was, that she was to take, and therefore it would be one of the greatest difficulties which this House would have to contend with, if they decided that what Lady Sempill took was not an absolute right, but that there was a substitution created by the second codicil. That difficulty arose in this House, and was very much considered in the case of *Wright* v. *Atkyns*, 1 V. & B. 313; 19 Ves. 299; 1 T. & Russ. 143. In that case there was a devise to Mrs. Atkyns in fee, with a hope and confidence, which was held to amount to a trust, that after her decease she would dispose of the estate to the testator's family. Sir William Grant held that that cut down the fee into a life estate, and he therefore granted an injunction against Mrs. Atkyns' cutting timber. That case, after some years, came before Lord Eldon, and he affirmed that decision. After it had been acquiesced in for some years it was brought before this House, and the House held that it was impossible to say that Mrs. Atkyns had not all the rights of a person entitled to a fee, even if she were bound, at her death, to dispose of the fee to the family according to the direction of the will, and therefore they reversed the order, and sent it back to the Court of Chancery. Lord Eldon, upon the

new bill filed by the persons who were the heirs at law, then gave her leave to cut timber as tenant in fee, but she was to account for the timber, paying the produce into Court, or giving security. Now upon that, what is exceedingly unusual took place. There was a second appeal in the same session upon that second decision of Lord Eldon's, and it was reversed; and Mrs. Atkyns' right to cut timber was declared by the House, which right she exercised. That is one difficulty that you have to avoid—that where you attempt to cut down an actual fee simple to a lesser estate, you must take care that you do not infringe upon rights which, as incident to the estate in fee, the granter intended the grantee to have, or the devisor intended the devisee to have. For although there may be a disposition over,[1] yet it may not be a disposition over which would cut down the previous estate to a mere life estate, impeachable as common life estates are.

My Lords, in this case there was a clear technical fee given to Lady Sempill. It embraced the whole estate, and the ground upon which the case was argued in the Court below could not hold for a moment in the discussion here; that upon some technical words the trustees were to retain the property, and then a certain interest was to rise over.[2] There is no such technicality as that to govern the rights of the parties. By the first instrument the trustees who took the entire estate were directed to pay and hand it over to Lady Sempill, the consequence of which was, that they must have denuded themselves altogether of the estate upon her requisition; and she must have taken the entire estate.

Then comes the second instrument. It is singular enough that that is dated only a year after the first. By the first instrument the estate was given to Lady Sempill, her heirs and assigns; and then the second instrument proceeds upon this ground—that all hope of issue has ceased, in the view of the testatrix, as regards Lady Sempill. It was rather quick to come to that conclusion between the end of one year and the beginning of another. But that conclusion she came to, and for that reason she does not revoke the gift to Lady Sempill; but she proceeds to deal with the succession to that estate. What does that mean? Does not it mean that she knew that a child of Lady Sempill's would take the estate, or what was given to the heirs and assigns? She said, There will not be a child to take; then I, myself, will appoint a successor. A successor to what? Why, to the interest that Lady Sempill had. And what was that interest? Why, the entire interest. It was the right of succession. The estate was not removed out of Lady Sempill. The fee was not cut down in that way, but what a child would have taken in the contemplation of the testatrix, that was to go to Miss O'Reilly as the successor in the place of the child. How was she to take it? Why, just as the child would have taken it. And how would the child have taken it? Why, simply as the substitute pointed out by the testatrix, and subject to the disposition of Lady Sempill herself. It is as plain as possible. What is the objection which is raised? The objection to it is, that it does not amount to a certainty of gift to Miss O'Reilly. How can it do so, according to the law of Scotland? It is the case of every common substitution, and therefore, if you are not at liberty to say that in every case of common substitution there must be an absolute settlement, with fetters and prohibitions, which we do not find here, how are you to cut it down in this case? There were two circumstances, neither very unlikely to happen, in which it would have been effectual. If Lady Sempill had died in the lifetime of the testatrix, Miss O'Reilly would have taken the estate; or, if Lady Sempill had thought fit not to alter the destination, she would have taken it. There was not, therefore, an ineffectual gift. There cannot be a greater error than to argue that this is a case in which there was no gift. According to the construction of the majority of the Judges, there was an effectual gift—as effectual as the law of Scotland could make it. Then that gift is subject by the law of Scotland to be defeated by the testator—just as a tenant in tail in this country may defeat those in remainder. And what then? It is a consequence of the law which is incident to the estate which is given. I am of opinion, therefore, that this case admits of not the slightest doubt, and that the decision of the Court of Session should be affirmed.

Interlocutors affirmed, with costs.

Appellants' Agent, James Carnegie, W.S. — *Respondents' Agents*, Pearson and Robertson, W.S.

[1] *i. e.*, a disposition with substitutions.

[2] *i. e.*, to arise in the substitute.