actions only, seems to me to impute to them an intention which is as absurd as it is undiscoverable upon the face of the proceedings. On the whole, therefore, I quite think with my noble and learned friend, that these interlocutors cannot stand, and that the defenders in the action ought to have been absolved.

LORD KINGSDOWN.—My Lords, I am of the same opinion as my two noble and learned friends, and I think that it is unnecessary to say anything further.

Mr. Anderson.—My Lords, we have paid money over under an *ad interim* execution. We shall get an order that the money so paid shall be returned, so that we may get back what we have paid? I do not ask the expenses.

LORD CHANCELLOR.—You cannot have expenses, but you will get back what you have paid.

Interlocutors reversed.

Appellants' Agents, Loch and Maclaurin, Westminster; Scarth and Scott, W.S., Leith.—*Respondent's Agents*, Dodds and Greig, Westminster; W. Peacock, S.S.C., Edinburgh.

MARCH 24, 1865.

JOHN PURSELL and Others, *Appellants*, *v.* WILLIAM ELDER and Others, *Respondents.*

Trust—Undisposed of Income—Trust for Accumulation—*W., by trust settlement, gave his whole estate, heritable and movable, to trustees on trust to pay debts and annuities, and at a certain event, which occurred 25 years after his death, disponed the residue to P. There was no express disposition of the intermediate income.*

HELD (affirming judgment), *That the testator having united the whole property in one mass, the income was to be accumulated and to go with the residue as an accessory thereof.*

HELD (further), *That the Thelusson Act having restricted the power of accumulation to 21 years, the income for four years was undisposed of, and went to the next of kin.*

Liferent by Implication—Trust—Construction—*W., by trust disposition, gave the interest of £3000 to G., and the residue of his estate to P., and then said, "and failing G. and P., without children of one or other of them, the property hereby conveyed to them shall devolve on S."*

HELD, *That the words "property hereby conveyed to them" did not confer by implication a liferent upon G. in the residue given to P.*

Faculty—Liferent with Power of Disposal—Ownership—Married Woman—*W., in his trust disposition, gave to G., then unmarried, the liferent of £2000; whom failing, to her children at her death; whom failing, to P. Some years afterwards G. having then been married, but having no issue nor the prospect of any, W., by codicil, said, "I reverse that clause, and commit to G.'s discretion the sole and ultimate disposal of the £2000."*

HELD, *That though, if G. had been* sui juris, *this would have been an absolute gift of the ownership, yet as she was a married woman, and the alteration was made to meet the case of her having no children, she did not acquire the ownership, but merely had the faculty of appointing the £2000.*

Appeal—Competency—Appeal without Reclaiming to Inner House—*Certain interlocutors pronounced by the Lord Ordinary not having been reclaimed to the Inner House:*

HELD *incompetent to appeal against them to the House of Lords.*

Expenses—Success of Appeal on Small Point—*An appeal to the House by the claimant on a trust estate was successful in one small point not raised in the Court below; but as the appellant was indebted to the trust estate, and in any event this debt must have exceeded the claim, and the Court below had ordered the claimant to pay expenses,*

HELD, *The order of the Court below as to expenses ought not to be disturbed.*[1]

This was an appeal from various interlocutors of the Second Division as to the construction of the trust disposition of James Warroch.

The trust disposition and settlement, dated 1805, (after giving all his estate, heritable and

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[1] See previous reports 19 D. 71: 29 Sc. Jur. 34. S. C. 4 Macq. Ap. 992: 3 Macph. H. L. 59: 37 Sc. Jur. 394.

movable, to his nephew, Dr. John Warroch Pursell, physician in Liverpool, in trust—(1) To pay his debts; (2) to pay a sum of £50,) proceeded as follows:—"*Tertio*, For payment of the following annuities, viz. £50 sterling yearly to Ann Warroch, my eldest sister, spouse to John Pursell, some time baker in Canongate, now in Prestonpans, during all the days of her life, and £30 sterling yearly to the said John Pursell, during all the days of his life; to my sister, Euphemia Warroch, £50 yearly, during all the days of her life; to Catherine Paxton Pursell, my niece, £50 sterling yearly while unmarried, and if married with the approbation of her parents and brother, to be paid £1000 sterling of dowry, and £100 for clothing and trinkets, and the annuity above granted to cease and terminate, but reserving to her such other provision as may hereafter be directed by this deed; to Dr. John Warroch Pursell, my nephew and trustee, £130 sterling yearly during the existence of the annuities hereby granted; . . . and upon the decease of Ann and Euphemia Warroch, my sisters, and of John Pursell, my brother-in-law, I hereby give and grant to Catherine Paxton Pursell, my niece, an increase of £50 annually, making her annuity thereafter £100 sterling annually, if not married, but if clothed with a husband, she shall remain in the precise situation in which she is placed by a prior clause of this deed, until the deaths of Sarah Gee, Barbara, Elizabeth, and Catherine Warrochs, my cousins german, when the annuities will be reduced to £20 sterling annually at the utmost, by the survivancy of Sarah Hunter and Margaret Steel, my second cousins: Therefore, upon that event, I hereby dispone and make over my whole real and personal estate to my nephew, Dr. John Warroch Pursell, physician in Liverpool, under burden of the remaining £20 annually of annuities, or of such sum as it may happen to be at the time, together with payment to Catherine Paxton Pursell, his sister, my niece, of the legal interest on £3000 sterling annually, at two terms in the year, if unmarried, or if married, and that no dowry was given with her, but if £1000 has been paid, as allowed by a former clause in this deed, then and in that case, she is only to receive the interest of £2000 sterling, or such other sum as shall, with the money given with her, amount to £3000 sterling as here destined to her use, and for the benefit of her offspring; but declaring hereby, and excluding herefrom, the *jus mariti* of any husband the said Catherine Paxton Pursell may marry, from any concern with the said money, or with the interest arising therefrom, hereby providing and declaring, that the same shall not be attachable for the debts of her husband or otherways than for her own particular debts, debts contracted for her support and clothing, the same being destined by me to secure to her the necessaries of life, under proper management on her part; and for that purpose it is hereby declared, that no other receipt than one by herself singly, shall be a sufficient acquittance for the interest of the money hereby assigned to her for her necessary subsistence during her life, and at her death the principal sum shall devolve upon her children in wedlock, share and share alike; whom failing, it shall fall to and belong to the said Dr. John Warroch Pursell; and in regard his legal heirs are not my natural heirs, it is hereby provided and declared, that failing the said Dr. John Warroch Pursell and Catherine Paxton Pursell, who are equally near to me, without leaving legitimate children by one or other of them, the property hereby conveyed to them shall devolve upon, and belong to the children of my cousins german, Sarah Gee, Barbara, and Catherine Warrochs above designed, in the manner following, viz.:—That to the number of persons remaining in life at the time there shall be added one, in order to bestow upon Sarah Hunter, my second cousin, of whom I have a high opinion, and entertain a deep regard, a portion double to that of any of the others. For example, suppose the number remaining in life to be seventeen, by adding one it is made eighteen, into which number of parts my whole estate shall be divided, and the said Sarah Hunter be entitled to two eighteenth parts or shares, leaving one eighteenth share to each of the other persons, without distinction of sex; and in regard that great doubts and difficulties might arise between my heirs above described and the legal heirs of my said nephew and niece by their father's side, in the event of their deaths at a distant period without leaving legitimate children, which to prevent, I do hereby order, direct, and oblige my said nephew and niece, and the survivor of them, to preserve my account book in the order it shall happen to be at the time of my death, in order to ascertain the amount of my personal estate, which shall be estimated at the value put on it by me at my last balance, after deduction of my lawful debts, funeral expenses, and the several sums above disponed or assigned by me, but in which none of the annuities are meant to be comprehended."

The testator executed a codicil, dated 1812, as follows:—"I, James Warroch, author of the foregoing deed, having taken the same under my revisal, and considering that my niece, Catherine Paxton Pursell, now Gowan, has, since the date thereof, been comfortably married, but without issue, under which circumstance that part of my fortune destined to her use is by said deed to devolve ultimately upon my heirs at law upon her decease, but in consideration of the bountiful provision made for her by her husband, in the event of his death, and his tender affection towards her, I reverse that clause, and hereby commit to her discretion alone, as she may hereafter see cause, the sole and ultimate disposal of £2000 sterling, as by the foresaid deed provided," &c.

James Warroch, the testator, died 1814. Dr. Pursell died 1835. Sarah Gee Warroch,

Barbara Warroch, and Catherine Warroch all predeceased Dr. Pursell. Elizabeth Warroch, the survivor of the four annuitants, died 1837. Euphemia Warroch, sister of testator, died 1839. Mrs. Catherine Paxton Pursell or Gowan died intestate 1849, and the appellants were her next of kin. The respondents were the children of Sarah Gee, Barbara, and Catherine Warroch.

The Court of Session pronounced various interlocutors as to the construction of the trust disposition.

The appellants, in their *printed case*, contended for a reversal of the interlocutors, for the following reasons :—1. Because according to the sound construction of the testamentary writings of James Warroch, the beneficial interest in his estate vested in Mrs. Catherine Paxton Pursell or Gowan. 2. Because the estate never devolved upon and belonged to or became vested in the children of the testator's cousins, Sarah Gee, Barbara, and Catherine Warroch, now represented by the respondents. 3. Because the free surplus income of the trust estate from the date of testator's death until the term of vesting formed no part of the residue. 4. Because assuming, that the children of the testator's cousins german took the general estate, heritable and movable, of the testator, their interest did not become vested till the death of Mrs. Gowan in 1849, and the income of the estate undisposed of so far as not applied in payment of the annuities was the income from the death of the testator in 1814 till that event. 5. Because, on the assumption, that the income was not undisposed of from the testator's death, but was the subject of accumulation until the right to the *corpus* became vested, the income, from the period of twenty one years after the testator's death, belongs to the testator's next of kin. 6. Because even if it should be held, that Mrs. Gowan had no beneficial interest in the general residue of the estate, the sum of £2000 mentioned in the settlement vested in her as a special legacy, and belonged to her in property, with interest from the death of the testator. 7. Because an absolute power of disposal without any destination over constitutes, by the law of Scotland, a right of property even though it be annexed to a right of liferent. 8. Because it is consistent with the settlement and with the law of Scotland to hold, that Dr. Pursell had obtained a vested interest in the testator's estate.

The respondents in their *printed case* contended, that the interlocutors were right, and ought to be affirmed.—1. Because the appeal was incompetent—48 Geo. III. c. 151 ; *Hunter* v. *Duff*, 6 W. S. 212 ; *Clyne's Trustees* v. *Dunnet*, M'L. & Rob. 39 ; 6 Geo. IV. c. 120, § 15 ; 13 and 14 Vict. c. 36, § 11. 2. Even if there be now a right to appeal, the Lord Ordinary was right in holding, that the residue of the estate did not vest either in Dr. Pursell or Mrs. Gowan, but, at Euphemia Warroch's death in 1839, vested in the children of Sarah Gee, Catherine, and Barbara Warroch. 3. That Mrs. Gowan had no right to the surplus income accruing prior to the vesting, which income fell to be added to the residue. 4. That Mrs. Gowan had only a liferent interest in the provision of £2000, with a further faculty of *mortis causâ* disposal of the fee.

Rolt Q.C., and *Anderson* Q.C., for the appellants.—1. According to the construction of the will, the beneficial interest in James Warroch's estate vested in Mrs. Gowan, and never became vested in the children of the testator's cousin german Sarah Gee. The clear intention of the testator was to devise his estate to Mrs. Gowan in failure of her brother, Dr. Pursell, that family being preferred above the rest. The language of the gift of £2000 to Mrs. Gowan's issue, whom failing, to Dr. Pursell, implied, that she, as well as Dr. Pursell, was to take the fee of the estate. The words "property hereby conveyed," can only mean the whole real and personal estate, for no other had been conveyed ; and, therefore, the testator recites as having done by a prior part of the deed, that which he supposed himself to have done, viz. instituted Mrs. Gowan conditionally on her surviving her brother, Dr. Pursell. If the general intention is clear, the law will imply words to complete the sense—*Adams* v. *Adams*, 1 Hare, 540 ; *Grant* v. *Grant*, 13 D. 805. 2. The free surplus income, from the time of testator's death till the term of vesting, formed no part of the residue. The trust deed contains no direction as to this income. It is not enough, that the whole estate has been conveyed to a trustee, if no direction is given as to the disposal of the residue. There was no direction as to the income except only to hold it for annuities, but he never contemplated the fact, that the annuities would not absorb the income. Moreover, the word 'residue' is not used in the will, so that the income could not be conveyed under that head —*Turnbull* v. *Cowan*, 6 Bell's Ap. 222. In *Graham* v. *Templar*, 3 W. S. 48, intermediate rents not being disposed of were held not to pass as accessories of the lands, and so went to the heir at law. It could not be said here, that the will blended the heritable and movable estate together. 3. As to the period of vesting, assuming, that Mrs. Gowan was not entitled as conditional institute on the death of Dr. Pursell, the time of such vesting of the estate in the children of Sarah Gee was not the death of Euphemia Warroch in 1839, but the death of Mrs. Gowan in 1849. The will says, "failing Dr. Pursell and Mrs. Gowan without leaving legitimate children by one or other of them." This must mean the death of Mrs. Gowan, if she had no children. The surplus income between 1814 and 1849 was therefore undisposed of. Even if the income was to be accumulated, the Thelusson Act, which applies to Scotland, (*Lord* v. *Colvin*, 23 D. 111,) would prevent more than twenty one years' income being accumulated, and therefore ten

years' income would be undisposed of if the period of vesting was 1849, or four years' income if the period of vesting was at 1839. 4. Even if Mrs. Gowan had no beneficial interest in the general residue, she was entitled to the sum of £2000, for an absolute power of disposal without any destination over amounts to an absolute gift even though annexed to a liferent—*Hutton's Trustees*, 9 D. 639; *Ralston* v. *Hamilton*, 22 D. 1442; 4 Macq. Ap. 397, *ante*, p. 1135. A liferent with absolute power of disposal is full property—*Baillie* v. *Clark*, 23d Feb. 1809, F. C.; *Hyslop* v. *Maxwell*, 12 S. 413; *Rollo* v. *Rollo*, 5 D. 455; *Alves* v. *Alves*, 23 D. 712. The same is the law of England—*Haig* v. *Swiney*, 1 S. & St. 487; *Southouse* v. *Bate*, 16 Beav. 132; *Nowlan* v. *Walsh*, 4 De G. & Sm. 584; *Re Maxwell's will*, 24 Beav. 246.

Sir H. Cairns Q.C., and *Neish*, for the respondents.—Part of this appeal is incompetent, inasmuch as the interlocutors of the Lord Ordinary had not been reclaimed against to the Inner House—48 Geo. III. c. 151, §§ 15, 16; *Bartonshill Coal Co.* v. *M'Guire*, 3 Macq. App. 300, *ante*, p. 785; *Gemmell* v. *M'Allister*, 4 Macq. 449, *ante*, p. 1150; 6 Geo. IV. c. 120, § 15; 13 and 14 Vict. c. 36, § 11.

Therefore it must be taken as correct, that the estate of the testator never vested either in Dr. Pursell or Mrs. Gowan, but only in the children of Sarah Gee at the date of Euphemia Warroch's death in 1839.

But assuming the questions to be open, then the estate never vested in Dr. Pursell or Mrs. Gowan. It was only after the death of the annuitants, that the property was disponed to Dr. Pursell, and as he predeceased Euphemia Warroch, there was no vesting. The same is true as to Mrs. Gowan. As to the surplus income, it is well settled, that when heritable and movable property is put into one mass, the income goes with the principal. That is the law of England since *Fitzgerald* v. *Fitzgerald*, Jacob, 468, and is also the law of Scotland.

Mrs. Gowan had not the absolute property of the £2000, but merely a faculty to appoint it, which she did not exercise. The whole language is consistent only with the construction, that it was a faculty, and not the property itself, that was conferred—*Morris* v. *Tennant*, 15 D. 716; *Alves* v. *Alves*, 23 D. 712.

LORD CHANCELLOR WESTBURY.—My Lords, this appeal, which has been presented to your Lordships in a case I am sorry to say of great complexity, and much protracted litigation, raises several questions which require to be determined upon the true construction of the will of the testator, or (adopting the language of the Scotch Law, in which it is right to speak,) upon the deed of settlement of the truster.

Now the first question, that arises upon the construction of that deed, relates to what is called the free income, that is, the surplus income of the real and personal estate of the truster from the time of his death down to a particular period, at which the whole *corpus* of the real and personal estate is given over by the terms of the deed.

The scheme of the disposition of the trust deed is this, that the *universitas* of the estate, the entirety of the real and personal estate, is first vested in a trustee absolutely. Then follows a variety of limited purposes to which portions of the income of the trust estate are to be applied by the trustee—annuities, and other sums of money which would have a limited duration. And the truster then goes on to declare, that when the annuities are reduced to two, amounting in the whole to I think £20 per annum, then, upon that event, he dispones and makes over the whole of his real and personal estate to his nephew, whom he had already named as his trustee.

It is material to observe, that in the gift of the *corpus* of the estate to trustees, in the commencement of the deed, it is given to him in trust for the ends and purposes after mentioned. The effect of that disposition is, that he is to hold the entirety of the estate, and all the income resulting therefrom, for the trusts and purposes subsequently declared by the deed. There is undoubtedly a gift of the entirety of the estate for the purpose of dispositions which are the subject of the will.

Now the effect of that, according to the natural and ordinary rule of interpretation, would be this, that whatever portion of the income of the trust estate is not required for those limited purposes, which are declared up to the event on which the trustee is to be denuded of the whole of the real and personal estate, would remain in the hands of the trustee for the ultimate purpose, that is, the purpose of being given over together with the *corpus* of the real and personal estate.

Now there is nothing that I am more unwilling to do than to apply English decisions as the guides or authorities for the interpretation of the Scotch law. But yet when there is in England a principle established, which is exactly correspondent and analogous to the principle of the Scotch law equally established with regard to the same description of deed of settlement, there may be much benefit, certainly no prejudice, but probably much assistance, derived from observing how that principle has been applied to the analogous purpose of construing a will in England, and from using those English decisions as analogous cases for the purpose of deriving therefrom some assistance in the application of the same principles to the same kind of instrument, namely, a will made in Scotland.

Now, if this deed of settlement had been an English will, I apprehend that, from the period of the decision of *Genery* v. *Fitzgerald*, by Lord Eldon, Jac. 468, and which occurred, if I recollect

rightly, about the year 1819 or 1820 (1822), down to the present time, the whole tenor of the English decisions upon wills of that description has been, that the intermediate income both of the real and personal estate follows the capital as an accessory, and is given over to the individual to whom that capital is given at a subsequent time. The rule with regard to personal estate has been always of that character.

With regard to real estate originally, it was supposed, that that was subject to a different rule, having regard to the rights of the heir, and that the intermediate income, if not expressly given away, should not be taken away from the heir. Lord Eldon, however, asks this most pertinent question, whether, if the testator has united the real estate and the personal estate in one mass, amalgamating the two together, thereby declaring his intention that they shall not be separated, and has given that united mass subsequently to a particular individual, that ought not to be accepted as evidence of an intention, that the intermediate income of the real estate should go in the same manner in which confessedly the intermediate income of the personal estate would go. Following, therefore, the principle of the law of England, and taking the same rule to prevail in Scotland, namely, that you are to follow out the intention of the truster, I have no difficulty in finding from the introductory words of the will and the language of the will in the gift over, that it was the true intent and meaning of this truster, as that intention is to be collected from the words he has used and the dispositions he has made, that the whole intermediate surplus income of the aggregate mass of real and personal estate should accompany the principal when the gift over of that principal took effect, and that all the surplus rents and profits, not required for the immediate purposes declared by the will, should be added to the *corpus*, and go along with it to the heir.

That would undoubtedly be the rule in England, and upon the same principle it seems to have been held to be the rule in Scotland, and I think it is plain, that it is to be applied to the interpretation of this trust deed upon the ordinary principles of construction. But then, that is attended with the consequence, that of course the surplus income remaining in the hands of the trustee until the ultimate disposition takes effect must be invested by the trustee, and if invested by the trustee, the proceeds and dividends of that investment must follow the principal. And, therefore, of necessity, from the character of the gift, there will result in law, though it be not declared in the deed, a trust for accumulation.

Now, it appears, that by the effect of subsequent legislation the Thelusson Act has been made applicable to Scotland, but it would not be applicable with regard to this will, which took effect before the period when that Act was made applicable to real estate in Scotland. But it is applicable with regard to future personal property, and the consequence, therefore, is this, that inasmuch as the testator died in the year 1814, and as the event upon which this disposition over took effect, did not occur until 1839, there would occur a period *plus* the time allowed by the Thelusson Act with respect to all the income accruing during that period of excess. It would follow from the operation of the Thelusson Act, that there would be an intestacy, and consequently a resulting trust for the next of kin of the truster. The operation and effect of that upon the interlocutors, I will endeavour to state to your Lordships presently, when I come to the question of expenses which has been raised by the counsel for the appellant.

The practical result, therefore, of this view of the case will be to affirm the interlocutors of the Court below so far as they have declared that the income of the estate accompanied the principal, with that deduction only which I have already mentioned which is made by the application of the Thelusson Act. It is due to the Court below to say, that this point connected with the Thelusson Act was not raised there. It appears to have been entirely overlooked until the case was brought by way of appeal to your Lordships' House.

The next point raised by the appellant is this, that granting, that the free income accompanied the principal, yet it is contended, that upon the event which occurred in the year 1839, namely, the gift which was then to take effect in favour of Dr. Pursell, that in reality Dr. Pursell being dead, Mrs. Gowan, who is the sister of Dr. Pursell, was entitled under the will to a life estate by implication, and the contention accordingly is, that, it being granted, that this event was the period of time at which the disposition over took effect, yet, in the events which have happened, it took effect in favour of Mrs. Gowan and not in favour of the children of the cousins of the testator, in whose favour the Court below have found the disposition to take effect.

That introduces an intricate question, because it was contended by the respondents at the bar, that that point was not open upon the pleadings, inasmuch as it was said, that the reclaiming note presented to the Inner House from the interlocutors of the Lord Ordinary did not embrace this point, and, that, consequently, that part of the decision of the Lord Ordinary had been submitted to, and was finally *res judicata*.

I will endeavour to explain to your Lordships as concisely as I can the manner in which that question stands. It appears to stand thus: Several interlocutors had been pronounced in the year 1855, which declared two things—*first*, that the period when the disposition over took effect was the death of Euphemia Warroch; and the interlocutor also declared, that on that event happening the estate vested in the children of the cousins german of the testator. It was

afterwards discovered, that previously to the pronouncing of those interlocutors one of the parties interested in the estate had died abroad, and, that consequently there was a defect of parties, which rendered those interlocutors objectionable on that account. It became necessary, therefore, to cite other parties in lieu of the individual who was dead. And then the interlocutors were all completed by three interlocutors pronounced on one and the same day by the Lord Ordinary, all of which bear date on the 14th June 1856.

Now, of these three interlocutors, which were nothing but repeated orders, the first which is set out declared, that the estate vested upon the death of Euphemia Warroch, and then it declared, that the beneficial interest in the residue of the trust estate devolved upon and belonged to and became vested in the children of the testator's cousins german, Sarah Gee, and Barbara and Catherine Warroch.

The third interlocutor of that date, namely, of the 14th June 1856, finds, that the beneficial interest in the residue of the trust estate of James Warroch which by final interlocutor has already been found to have devolved upon and belong to the children of the truster's cousins german, Sarah Gee, and Barbara and Catherine Warroch, became vested in them at the death of Euphemia Warroch, who died on or about the 15th of February 1839.

Your Lordships will therefore do me the favour to observe, that these two interlocutors involved and included these two determinations—first, that when the disposition over took effect, it took effect immediately in favour of the children of the cousins german, and secondly, that it did take effect upon the death of Euphemia Warroch.

Now we find, that a reclaiming note had been presented by the present appellant in the month of November 1855, and that reclaiming note did not quarrel with the two findings that I have mentioned to your Lordships. But after the pronouncing of the order, which I have just mentioned, of the 14th June 1856, another reclaiming note was presented, which went further than the original reclaiming note of November 1855, and your Lordships will find it thus stated: The appellant presented, that is to say, he presented on 3d July 1856 a reclaiming note against the first and third of the interlocutors of date 14th June 1856. And then, upon advising that reclaiming note, the Lords of the Inner House find, that the reclaiming note for William Elder and others, dated 12th June 1855, has been withdrawn; and they find also, that the reclaiming note for John Pursell, the present appellant, and others, dated 3d July last, has been departed from, in so far as relates to the question of vesting, and is only insisted in as to the question of free income and of the provision of £2000.

Now the question of vesting, as I have shewn from the first and third interlocutors reclaimed against, involved two things, first, the time of vesting, and secondly, the persons in whom the estate became vested. And it appears, that when the appellant presented his second reclaiming note against what I will call the revised interlocutors, he withdrew from the consideration of the Court so much of that reclaiming note as complained of anything affecting the question of vesting. And inasmuch as those two interlocutors had dealt with that question of vesting almost entirely, your Lordships will find, that both those interlocutors were withdrawn from the consideration of the Inner House. That being the state of the case, I have no difficulty in advising your Lordships, that it would not be competent to the appellant at the bar to raise the question which he now seeks to raise, namely, that, at the time when the estate vested, it did not vest, as the Lord Ordinary declared it did, in the children of the testator's cousins german, but that it vested in Mrs. Gowan by virtue of the life estate which she took by implication.

But it may be more satisfactory to the appellant, and certainly will be to your Lordships—lest there should be any possibility of misapprehension with regard to the meaning of the words in this interlocutor, or with regard to the contention of the appellants—it may be more satisfactory on that very ground if I examine for a moment the argument upon which this allegation of an estate for life by implication in Mrs. Gowan is rested, and if your Lordships shall concur with me in thinking, that those arguments are without any foundation.

Now, in order to understand that argument, I must remind your Lordships, that the whole mass of real and personal estate is given over in the event of the death of Euphemia Warroch, that is, on an event which is answered by her death—it is given over to Dr. Pursell, but under certain burdens, first, the burden of the remaining annuitants, and then, secondly, subject to the burden of payment to his sister Catherine, who afterwards was Mrs. Gowan, of the legal interest on £3000 sterling, subject to a reduction of that sum in the event of £1000 having been given as a dowry to Mrs. Gowan previously to this event. And then it went on to declare, that she should receive the interest on that sum of £2000, with a clause excluding the *jus mariti* of any husband whom she might marry. And after giving her a power to give discharges for the income, the truster by this deed declares, that at her death the principal sum shall devolve upon her children in wedlock, share and share alike, whom failing, it shall fall to and belong to Dr. Pursell, her brother. And then he goes on with a clause which is applicable to both the subjects of disposition, namely, the £2000, of which the interest is given to her, and the residue of the entire of the real and personal estate, which is another subject, and the words are these: "And in regard his legal heirs (that is, the heirs of Dr. Pursell) are not my natural heirs, it is hereby provided and declared,

that failing Dr. Pursell and Catherine Pursell, who are equally near to me, without having legitimate children by one or other of them, the property hereby conveyed to them"—(now I think your Lordships will pause for a moment on those words, to ask what property had been conveyed to them)—"conveyed to them jointly"—nothing had been conveyed to them respectively: two subjects had been, namely, the subject of the £2000 given to Mrs. Gowan, and the subject of the whole residue of the real and personal estate to Dr. Pursell. Therefore the property hereby conveyed to them is a short mode of describing the two subjects, and the words must be understood on the principle *reddendo singula singulis*. He goes on: "the property hereby conveyed to them shall devolve upon and belong to the children of my cousins german, Sarah Gee and Barbara and Catherine Warroch." It would be impossible to raise any sound or reasonable doubt upon the interpretation of those words. Nothing is there given by any kind of implication to Mrs. Gowan. These are words, the import of which is abundantly answered by taking them to denote the thing which is actually given to Mrs. Gowan; and if the words have a proper subject which exhausts their meaning, it would be contrary to all principle to give them by implication a meaning beyond that subject which they properly denote, and to which, therefore, they ought to be properly applied.

I cannot therefore advise your Lordships, that there is any foundation whatever for the argument, that by the operation of these words, Mrs. Gowan took *ultra* the £3000 or the £2000, as the case might be, an estate for life by implication in the whole *corpus* of the real and personal estate. Whether, therefore, you rely upon the fact, that it has been finally decided, and that therefore the question cannot now be brought up by appeal, or whether you concede the possibility of again reagitating the question, I think we arrive equally by both courses at this conclusion, namely, that Mrs. Gowan is not entitled, and cannot now be heard to contend that she is entitled, to any estate for life in the property.

Another question now remains upon the will, which is the question as to the ultimate ownership of the sum of £2000—the events that have happened being these, that Mrs. Gowan married, and had died subsequently without having had any children. Your Lordships will observe upon the face of the will, that the gift to Mrs. Gowan could be thus rendered—shortly adopting for a moment, as more habitual to our use, English phraseology—a grant to Mrs. Gowan for her separate use for life, with remainder to her children. But if she had no children, then there is a gift over ultimately to the heirs of the testator, that is to say, to the children of his cousins german. In that state of things the testator makes his codicil.

I beg your Lordships' pardon for having omitted to refer to one argument which was used by the appellant upon the estate by implication of Mrs. Gowan; and with the permission of your Lordships I will advert to it for a moment, interrupting for the present the course of my observations. In addition to what I read to your Lordships, some argument was rested by the appellant on the fact, that the testator, in the later part of his will, gives a directory provision to this effect, that his nephew and niece, that is, Dr. Pursell and Mrs. Gowan, should preserve his account book in the state it should happen to be in at the time of his death, in order to ascertain the amount of his personal estate, which should be estimated at the value put upon it by him at his last balance, after deduction of his lawful debts, etc. The argument founded upon that, which is a very slight one in fact, was this, that inasmuch as he directed this to be done by his nephew and niece, namely, to keep an account of the entirety of the estate, the niece must be inferred from that direction to have had in the mind of the testator some interest in the *corpus* of his personal estate which he died seised of, or else she would not have been included in this direction to keep an account. I could not advise your Lordships to infer anything like a gift to the niece from such a direction. The purpose of that direction is quite answered by reference to the fact, that the niece was to have £2000 charged upon the entirety of the estate. And, it being an encumbrance upon the entirety of the estate, she had an interest, no doubt, as well as the disponee of that entirety, in keeping the accounts of what the entirety of the estate consisted, seeing that her legacy was a charge thereon.

I now revert again to the £2000, and having stated to your Lordships the disposition made of that by the will, the manner in which the question now arises as to the ownership of the £2000 appears upon the codicil. The codicil appears to have been made by the truster after Mrs. Gowan had married. By his will he had guarded her against her husband, excluding altogether the *jus mariti*. He now adverts in the codicil to the fact, that she has been comfortably married, but is without issue, and he says, "under which circumstance that part of my fortune destined to her use is by said deed to devolve ultimately upon my heirs at law upon her decease, but in consideration of the bountiful provision made for her by her husband in the event of his death, and his tender affection towards her, I reverse that clause, and hereby commit to her discretion alone, as she may see cause, the sole and ultimate disposal of £2000 sterling." The question that arises upon these words is shortly this, whether the words "placing the £2000 at the sole and ultimate disposal of Mrs. Gowan," are words that give her an estate, in the sense of declaring, that she shall be the absolute owner, or whether they are words that confer upon her a faculty only, or a power of disposing of that property in the sum of £2000, to whomsoever she shall think fit.

Then, inasmuch as she died not leaving a family, not having any children, and without having exercised that faculty, it becomes a material question, whether the words can be regarded as indicative of ownership, and not of a power of disposition—an estate and not a faculty. I confess I was at first very much struck with the fact, that the ultimate disposition to the heirs or next of kin of the testator was reversed, and as that was reversed it would almost seem to follow, that the words which *primâ facie* import a faculty must from the reversal of the interest of the next of kin be understood as conferring an estate or absolute ownership. But upon further examination of that subject I do not think that the reversal of that clause warrants any such inference, because Mrs. Gowan might have died without children as Dr. Pursell did. And then the £2000 would have sunk into the estate, not for the benefit of the heirs, the gift to whom was reversed, but for the immediate benefit of Dr. Pursell. But again, on examination of the whole matter, with reference also as well to Scotch authority as to English authority, I apprehend the distinction will be found to be this: If an estate or a sum of money be given to an individual who is *sui juris*, without words of limitation or a declaration of the extent of his ownership, but with words indicative of the intention of the testator, that he should have the absolute *jus disponendi*, then, in any case, those words are to be taken as indicating an intention, that he should be the absolute owner. Thus, if I give an estate to A B to do therewith as he pleases, to give to such persons as he shall think fit, and to deal with it at his will and pleasure, all those expressions are nothing more than a form of denoting absolute ownership and the intention to give absolute ownership. But if a gift is made to a *feme covert* and provision is made for her children, and then these words are annexed to the gift, that in the event of her having no children the property is committed to her discretion alone, as she may thereafter think fit to deal with it, those are words which, having regard to the reference to her discretion, and to the cause for the exercise of that discretion, and to the fact, that they are annexed to a gift made to a *feme covert* who is not *sui juris*, must, I think, in conformity with every principle, and, so far as I know, in conformity with every authority, be held to amount only to an indication of intention, that the *feme covert* shall have a power of appointment or of disposition, and not to be indicative of an intention, that the *feme covert* shall become the absolute owner; and the reason of that appears to be derived from the order and the character of the bequest, as well as from the particular language, because the testator appears in the words he has used to have reference to this, that if she had no children, yet, as she was well and comfortably married, he gives her a power to be exercised according to her discretion of dealing with the property, leaving it to her will and pleasure, and to her discretion, whether she will give it to her husband or to any other person that she might think proper. But the words appear to me, in conformity with the opinion of the majority of the Judges below, to be indicative of the gift of a power of disposition, and that they are not to be taken as equivalent to the expression of absolute ownership. With regard, therefore, to that sum of £2000, inasmuch as there was no disposition of it upon Mrs. Gowan dying without having any child, it sunk into the *corpus* of the trust estate for the benefit of the persons to whom that *corpus* was given.

I have yet further to deal with another point which was raised at the bar, namely, the question as to the expenses, and that arises in the following way: There is an interlocutor which refuses expenses, so far as the claim related to the question of vesting, and it refused expenses also so far as it related to the claim by the personal representative of Mrs. Gowan to her interest in the personal estate.

Now it was contended at the bar—*first*, that it was wrong, in a case of this nature, where the Court had to construe a will of some difficulty of construction, to give expenses at all; *secondly*, it was argued, that as the Court was wrong in part of its decision with regard to the interest of Mrs. Gowan's representatives, the question of expenses ought not to have been decided against them. On the other side, it was said, and said I believe very correctly, that in reality Mrs. Gowan's estate was found to be indebted to the trust estate of the truster in a sum of money which, whatever the result of the claim of the present representative might be, would more than equal any fruit or proceeds of that claim, even if the claim were successful; and the respondents carried that point to such an extent, that even if I could have advised your Lordships to have upheld the appellants' title to the *corpus* of the £2000, yet that probably would not have turned the balance in the present case against Mrs. Gowan in favour of her personal representatives. But the question of expenses is only legitimately before your Lordships as incidental to the merits of the case. It is undoubtedly true, as I have already observed, that to a certain extent your Lordships will be prepared, I think, to declare, that the personal representatives of Mrs. Gowan are entitled to take something more than they have yet got. Because, if the operation of the Thelusson Act be that which I have described, then the income of the personal estate, during the four years of excess beyond the legal period of accumulation, will be divisible into two parts, and to one of those parts the present appellant will be entitled. But at the outside it is impossible, that that can amount to more than two or three hundred pounds. And therefore it is utterly impossible, having regard to the figures here, that that can have the effect of turning the balance against Mrs. Gowan's representatives.

I cannot, therefore, advise your Lordships to alter in any respect the interlocutor upon the

question of expenses; and considering that this point, with respect to the Accumulation Act, was not brought to the notice of the Court below, but was mooted here for the first time, although it be successful, inasmuch as that success is so very small, that it can have no practical effect upon the state of the claims between the parties, I do not think, that that trifling alteration of the interlocutor should at all induce your Lordships to treat this appeal upon any other principle than the ordinary principle in such a case of dismissing it with costs.

I therefore move your Lordships, that the interlocutors of the Court below be affirmed, with this variation, namely, a declaration, that, in respect of the income of the personal estate from the expiration of 21 years after the death of the testator down to the time when Euphemia Warroch died, the same, and the trust for the accumulation thereof, was in excess by the operation of the Statute, and that the income falls to the next of kin of the testator; and that the appellant would be entitled to the one half of that income in the account to be hereafter taken in the cause. With that variation, or rather with that addition, I must humbly advise your Lordships to affirm the interlocutors, and to dismiss the appeal, with costs.

LORD CRANWORTH.—I will only say, that I entirely concur with the whole of what has fallen from my noble and learned friend on the woolsack, and that I think I should be only wasting your Lordships' time if I said more upon the subject.

LORD KINGSDOWN.—I entirely concur.

Interlocutors affirmed, with a variation and addition, and appeal dismissed with costs.

The *declaration* in the *order* of the House was as follows: "Declared, that in respect of the income of the personal estate from the expiration of 21 years from and after the death of the truster, James Warroch, down to the death of Euphemia Warroch, the same and the trust for the accumulation thereof was in excess by the operation of the Statute 39 and 40 Geo. III. c. 98, and that the income falls to the next of kin of the said truster, and that the appellant is entitled to the one half of that income in the account to be hereafter taken in this cause."

Appellants' Agents, W. Officer, S.S.C., Edinburgh; Grahames and Wardlaw, Westminster. —*Respondents' Agents*, L. M. Macara, W.S., Edinburgh; Holmes, Anton, Turnbull, and Sharkey, Westminster.

MARCH 31, 1865.

ROBERT ADDIE and Others, *Appellants*, *v.* HENDERSON and DIMMACK and Others, *Respondents*.

Railway—Use of Railway—Servitude—Feu Contract—Ownership—*B, the superior, in his feu contract with his vassal A, granted a perpetual servitude and privilege of using a railway, which lay on B's lands, to A for the use of his feu. B reserved the minerals, stipulated that A was to lay down and maintain the rails, and empowered A to double the rails, with a proviso, that if B used the railway, the rent paid by A should be reduced, and if B's tenants used it, they should contribute to the expense of maintaining the line.*

HELD (affirming judgment), *That B was not divested of his ordinary right of ownership of the railway, and that he could grant liberty to third parties to use the railway.*[1]

By feu contract, executed in 1840, Mr. Buchanan of Drumpeller, father of, and represented by, the defender, Mr. Buchanan, feued to Addie, Miller, and Rankin, ironmasters, represented by the pursuer, Robert Addie, 23 acres of land or thereby, "but excepting always from this disposition, and reserving to the said Robert Carrick Buchanan, and his heirs and successors whomsoever, the whole coal, ironstone, and fireclay connected therewith, and other metals and minerals on the said lands," for payment of a certain feu duty to Mr. Buchanan "and his foresaids."

The pursuer averred, that Addie, Miller, and Rankin took this feu for the purpose of carrying on there their business as ironmasters, which was extensive, and required facilities of transit for the raw material on the one hand, and the manufactured pig iron on the other, and, accordingly, various stipulations were made in the feu contract with the view of securing means of transit by canals or railways to the Monkland Canal on the north of the feu, and to the Monkland and Kirkintilloch Railway on the east of the feu, through Mr. Buchanan's lands, which intervened between the pursuer's feu and the canal, and between the feu and the Monkland and Kirkintilloch Railway.

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[1] See previous report 2 Macph. 41; 35 Sc. Jur. 18. S. C. 3 Macph. H. L. 30: 37 Sc. Jur. 414.