1865.
March 21st, 23rd, and 24th.

PURSELL, ... APPELLANT.
ELDER, ET AL., ... RESPONDENTS.

Intermediate Income.—Under a testamentary trust settlement, the intermediate income of the heritage, as well as of the personalty, though not expressly disposed of, was held to accompany the principal.

Per the Lord Chancellor: The intermediate income both of the real and personal estate follows the capital; and there will result a trust for accumulation.

The Thellusson Act.—The accumulation in excess of that permitted by this statute will go to the next of kin.

In this case Mr. *Rolt* and Mr. *Anderson* appeared as counsel for the Appellant, Sir *Hugh Cairns* and Mr. *Neish* for the Respondents.

The points are very plainly enucleated by the following opinions.

Lord Chancellor's opinion.

The LORD CHANCELLOR (*a*):

My Lords, the scheme of the trust deed is that the *universitas* of the real and personal estate is first vested in a trustee absolutely. Then follows a declaration of purposes to which portions of the income are to be applied for a limited duration. The truster makes over the whole of his real and personal estate to his nephew, whom he had already named as his trustee. The *corpus* of the estate is given to him "in trust for the ends and purposes after mentioned." The effect is that he is to hold the entirety of the estate and all the income resulting therefrom for the trusts and purposes subsequently declared. Whatever portion of the income is not required for the purposes declared, down to the event on which the trustee is

(*a*) Lord Westbury.

to be denuded, would remain in his hands for the purpose of being given over together with the *corpus*.

If this deed of settlement had been an English will, I apprehend that from the period of the decision in *Genery* v. *Fitzgerald* by Lord *Eldon* (*a*), 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. Real estate was indeed supposed to be subject to a different rule, having regard to the rights of the heir (*b*). Lord *Eldon*, however, held that where the testator had declared his intention that the real and personal estate should not be separated, and where he had given the united mass subsequently to a particular individual, that ought 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 from the terms of the gift over, that it was the true intent and meaning of this truster that the whole intermediate surplus income of the real and personal estate should accompany the principal when the gift over of that principal took effect.

But this consequence arises, that the surplus income

(*a*) Jacob, 468.

(*b*) Lord Chancellor Macclesfield said it was the rule of the Court to give the turn of the scale in favour of the heir. 3 Atkins' Rep. p. 689.

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Lord Chancellor's opinion.

remaining in the hands of the trustee until the ultimate disposition takes effect must be invested, and the proceeds and dividends of the 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, my Lords, inasmuch as the testator died in 1814, and as the event upon which this disposition over took effect did not occur until 1839, there would occur a period, *plus* the period of accumulation, allowed by the Thellusson Act (*a*). With respect therefore to all the income accruing during that period of excess, it would follow, from the operation of the Thellusson Act, that there would be an intestacy and consequently a resulting trust for the next of kin of the truster.

(*a*) The famous Thellusson Act, 39 & 40 Geo. 3. c. 98. (1800), was passed to prevent limitations and dispositions which had the effect of withdrawing capital from circulation and keeping near relations of a settlor or testator in indigence, absolute or comparative, in order to augment the fortunes of some remote and unascertained descendants. To curb this not unusual propensity of vain and silly testators and settlors, the statute forbids the accumulation of income for any longer term than the life of the grantor or settlor, or twenty-one years from the death of any such grantor, settlor, divisor, or testator, or during the minority of any person living, or in *ventre sa mère* at the death of the grantor, divisor, or testator, or during the minority only of any person who, under the settlement or will, would for the time being, if of full age, be entitled to the income so directed to be accumulated. But the Act does not extend to any provision for payment of debts, or for raising portions for children, or to any direction touching the produce of timber or wood. Any direction to accumulate income which may exceed the period thus allowed is valid to the extent of time allowed by the Act, but void so far as this time may be exceeded. The Thellusson Act was always applicable to Scotland as to *personal* estate, but contained a proviso that it should not extend to *heritable*. This proviso, however, was repealed by the 11 & 12 Vict. c. 36. s. 41, and it was enacted that the Thellusson Act should in future apply to heritable property in Scotland.

The practical result, therefore, 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 is made by operation of the Thellusson Act. It is due to the Court below to say that this point connected with the Thellusson Act was not raised there. It was overlooked until the case came to your Lordships' House.

Lord Chancellor's opinion.

I therefore move your Lordships that the Interlocutors complained of be affirmed, with a declaration to be incorporated in the judgment in respect of the operation of the Thellusson statute.

Lord Cranworth's opinion.

Lord CRANWORTH:

My Lords, 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's opinion.

Lord KINGSDOWN:

My Lords, I entirely concur.

JUDGMENT.

It is *Declared*, That in respect of the income of the personal estate, in the proceedings mentioned, from the expiration of twenty-one years from and after the death of the truster, James Warroch, in the proceedings mentioned, down to the date of the death of Euphemia Warroch, also in the proceedings mentioned, the same, and the trust for the accumulation thereof, was in excess by the operation of the statute 39 & 40 Geo. 3. 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 the cause; and, with this declaration, it is *Ordered* and *Adjudged*, That the said Interlocutors complained of in the said Appeal be and the same are hereby affirmed.

GRAHAM & WARDLAW—HOLMES, ANTON, TURNBULL, & SHANKEY.