

months annually at a high rent to a family of respectability, has dilapidated the manse, or that he is applying it otherwise than for the purposes of a dwelling-house. The pursuers aver that the manse has not been declared free, but the defender states in the record that it has been virtually so ever since his entry; that he has improved the premises by means of the rent which he has received; and that he will put no difficulty in the way of the heritors having it declared free. The Lord Ordinary does not feel called on to give any opinion whether the heritors would be entitled to prevent the defender from completely inverting the possession of the manse, and from using it in a way which would be injurious. All that he has decided is, that, on the facts averred by them, the heritors are not entitled to the decree concluded for. He considers that the letting of the manse complained of is not beyond the powers of the defender as minister of the parish, and that the heritors are not entitled to prevent him from doing so. The Acts above referred to, under which the minister has right to his manse, are not adverse to such letting. The Act 1563, c. 72, only ordains 'that na parson, vicar, nor uther ecclesiastical person, set in few or lang tackes, onie of their mansees or gleibes pertaining to the saidis kirkes, without special license and consent of the Queen's Grace in writ.' The Act 1572, c. 48, also provides—'Quilkes manse and acres of land, sa marked and designed as said is, it sall not be leasum to the ministers or readers, present or to cum, to sell, annalie set in few or tackes, or to put ony in possession of the samin in prejudice of their successors; bot the samin to remain alwayes free to the use and easement of sik as sall be admitted to serve and minister at the said kirk.'

"There are some averments in the record which seem to imply that the defender does not duly discharge the duties of his parish during the two months that he lets his manse, and that the pursuers seek to remedy this by preventing him from letting the manse during these months. The Lord Ordinary considers that such averments are not relevant in the present case, and that he can take no cognisance of them. If the heritors conceive that the defender neglects the duties of his cure, the church courts, which can alone take cognisance of that matter, are open to them."

The pursuer reclaimed.

The Solicitor-General (CLARK), FRASER, and SCOTT, for them.

WATSON and ASHER for respondent.

At advising—

LORD JUSTICE-CLERK—I am not prepared to differ from the result at which the Lord Ordinary has arrived. By adhering to his interlocutor we do not resolve several of the questions which were argued before us. The summons is of a very comprehensive kind, and substantially concludes for declarator that the minister is not entitled to let his manse on any excuse or pretence whatever. A minister is subject to certain ecclesiastical and civil conditions. He owes a duty to the presbytery and a duty to the heritors. I must assume in this case that he has performed his ecclesiastical duties. His duty to the heritors is to maintain the fabric of the manse in proper repair, and if he does not do so the heritors have right to interfere. But there is no allegation here of injury to the building. Assuming, then, that these two elements, neglect of ecclesiastical duty and injury to the building, are out of the case, have the heritors any right to

pursue the declaratory conclusions? They have no title to do so beyond the interest they have in the preservation of the manse; and there is no injury that is alleged.

I do not say that a minister can alienate his manse or let it from year to year. I can conceive a case in which the manse had become quite unsuitable for the residence of the minister, and it may be that in such circumstances it might not be illegal for him to let it. But on the legality of such a proceeding I give no opinion.

It was argued for the pursuers that the minister stood in the same position in regard to the church and churchyard as in regard to the manse and glebe; they were provided to him as a public officer, and were held by the heritors as trustees. I cannot conceive rights more distinct. The minister has no patrimonial interest in the church and churchyard. He has a limited right of proprietorship in the manse and glebe. As administrator for himself, and as representative of a series of incumbents, he may vindicate his right against all the world. The heritors, on the other hand, have no right to the manse and glebe. Their duty is to provide a suitable manse, and to repair it when it falls into decay, the minister being bound to execute all ordinary repairs.

I am satisfied that this action was a superfluous interference with the rights of the minister. It is not desirable that he should be always on duty, and if the presbytery dispense with his attendance the heritors have no right to interfere. If the minister has the opportunity of change of residence, it is good for his parish that he should be able to take advantage of it.

LORD COWAN concurred.

LORD BENHOLME—I concur. It was argued that church, churchyard, manse and glebe, were all in the same position. That is a great mistake. The church and churchyard have been given for the benefit of the congregation—the one for the benefit of the souls of the congregation, the other for the repose of their bodies. No one but the clergyman of the parish has any beneficial interest in the manse and glebe. No doubt the heritors are entitled to look after them so far as their own interests are concerned, and also on behalf of any successor in the benefice. If it had been pretended that their interests were prejudiced their title to object would have emerged. But they come forward seeking to prevent the minister doing what may be of important advantage to him, and cannot prejudice them. It is not of importance to himself alone that he should have a change of air for his health—it is of advantage to all the parish.

LORD NEAVES concurred.

Agents for Pursuers—Wotherspoon & Mack, W.S.

Agents for Defender—Adamson & Gulland, W.S.

Friday, December 15.

#### FIRST DIVISION.

MRS M. A. MENZIES OR CAMPBELL (NOW CLARKE) AND OTHERS (CAMPBELL'S TRUSTEES) v. CAMPBELL'S TRUSTEES AND OTHERS.

Trust—Construction—Succession—Intestacy—Accumulations. Where a testator had left his

whole heritable and moveable estate to trustees, directing them (1) to hold the heritable estate during his widow's lifetime for her life-tenant use; (2) to realise his moveable estate, and invest it in land or heritable securities, and to hold the same during the lifetime of his nephews and nieces, and the longest liver of them; (3) after the death of his widow, and until the death of the longest liver of his said nephews and nieces, to accumulate the annual rents and produce of his said heritable estate, and also of his realised moveable estate, however invested; and (4) after the death of his widow, and of the longest liver of his said nephews and nieces, to execute a deed or deeds of entail of his heritable estate, and also of lands and heritages to be purchased with the proceeds of his moveable estate, and with the accumulations arising from the rents and produce of his heritable estate, "or from previous rents, interests, and annual produce, as said is."

*Held*, in a competition between the trustees, the widow, and the heirs *ab intestato* both in heritage and moveables, for the free rents and produce of the moveable estate accruing between the date of the testator's death and that of his widow,—that the said free rents and produce were disposed of by direct implication, and that therefore the claim of the heirs *ab intestato* must be rejected; and that it was clearly the testator's purpose that they should be accumulated as well before the widow's death as after it (she being handsomely provided for both by the deed and otherwise); and that therefore the trustees' claim must be preferred to the widow's.

This action of multiplepointing was raised by Mrs Maria Anna Menzies or Campbell (now Clarke) and others, testamentary trustees of the late William Gunning Campbell, Esquire of Fairfield. The nature of the questions involved is thus stated by the Lord Ordinary (GIRFORD) in the Note to his interlocutor:—"The fund *in medio* in this case consists of the surplus income of the personal estate of the late William Gunning Campbell, after deducting all burdens and charges affecting the same, and that for the period from 24th November 1857, the date of Mr Campbell's death, to 31st December 1869. The amount of the fund *in medio*, as at 31st December 1869, is £2734, 0s. 2d., conform to the condensation by the trustees, which was duly approved of on 28th October 1870.

"The question in the present process is, To whom does this surplus income belong, and how is it to be applied? And this question turns upon the construction and effect of the trust-disposition and settlement and codicils of the late William Gunning Campbell."

The clauses of the said trust-disposition and settlement and codicils most material to the decision of this question are as follows:—"The conveyance in trust of the truster's whole heritable and moveable estate was declared to be for the following purposes, viz.—In the first place, for payment of debts, certain legacies and annuities. "In the second place, after payment of all the debts, legacies, and annuities left by me, and the necessary expenses of the execution of this trust; and which debts, legacies, annuities, and expenses I hereby direct to be paid or provided for out of my moveable and personal estate, my said trustees shall hold the free annual income of my said estate

of Fairfield and others hereby disposed, after deduction and payment of minister's stipend, &c., and also after deduction of the sum of two hundred and fifty pounds sterling per annum, in order to meet and pay the annuity of that amount provided to my said wife by our contract of marriage, dated the 17th day of March Eighteen hundred and forty-five, for the use and behoof of the said Mrs Maria Anna Menzies or Campbell, for her life-tenant use after my decease; and I direct my said trustees and executors accordingly to allow and pay to the said Mrs Maria Anna Menzies or Campbell, my wife, the free annual residue of my said heritable estate during her lifetime, after my decease; and I also direct and appoint them to allow her the free life-tenant use and enjoyment of my house of Fairfield, and offices thereto belonging, and of the furniture and whole other moveable effects therein. In the third place, my said trustees, so soon as convenient after the decease of the said Mrs Maria Anna Menzies or Campbell, and after the decease of the longest liver of my nephews and nieces, sons and daughters of my late brothers Charles Hay Campbell and Napier Campbell, shall execute a deed of entail of the lands and others before disposed, so far as undisposed of by me, and of such other lands as shall belong to me in fee-simple," in terms of certain deeds of entail referred to. "In the fourth place, upon my death, or as soon thereafter as conveniently may be, my whole moveable or personal estate (but excepting the household furniture, plate, paintings, prints, and whole other moveables in my house of Fairfield, and which my said trustees may, if they shall deem it proper and expedient so to do, hand over to the institute or heir of entail for the time, to be held and retained for the use and behoof of himself and the succeeding heirs of entail in the said lands and estate of Fairfield and others), shall be sold and disposed of by my surviving and accepting trustees, and converted into money, and by them the free proceeds thereof shall be laid out and invested (at once or from time to time) either in the purchase, in their own names as trustees foresaid, of such lands and other heritages as my said trustees may in the exercise of a sound discretion deem suitable and proper for being entailed as after mentioned, or upon heritable security or securities, also always in their own names as trustees foresaid,—all to be held and retained by them during the lifetimes of my said nephews and nieces, sons and daughters of my late brothers Charles Hay Campbell and Napier Campbell, and during the lifetime of the longest liver of my said nephews and nieces. In the fifth place, my said trustees are hereby appointed and enjoined, and they shall, from and after the decease of my said wife, and during the lifetimes of my said nephews and nieces, sons and daughters of my said two brothers Charles Hay Campbell and Napier Campbell, and during the lifetime of the longest liver of my said nephews and nieces, retain and accumulate, according to their discretion, the free rents, interest, and annual produce that may arise during the period between the death of my said wife (or my own death, if she shall predecease me), and the death of the longest liver of my said nephews and nieces, from my said lands of Fairfield and others foresaid, herein specially described, and hereby disposed, and also from the said lands and others hereby appointed to be purchased, and also from the said investments on securities of the monies arising from my personal or moveable estate, means, and

effects, appointed to be realised and for the purpose of accumulation, my said trustees shall, if they see fit, and from time to time, according to their own discretion, lay out and invest the said free rents, interest, and annual produce arising during the said period between the death of my said wife (or my own death, if she shall predecease me), and the death of the longest liver of my said nephews and nieces, upon heritable securities, in their own names as trustees foresaid. In the sixth place, upon the death of my said wife, and of the longest liver of my said nephews and nieces, or as soon thereafter as conveniently may be, my said trustees shall call up and realise the monies invested on securities as aforesaid, in so far as not previously called up and realised, and with the proceeds thereof, and with any accumulations of the rents and produce arising from my said lands of Fairfield and others, or from previous rents, interest, and annual produce as said is, my said trustees shall, as soon as they may deem it expedient and beneficial so to do, purchase in their own names, as trustees foresaid, such farther lands and heritages as they, in the exercise of a sound discretion, may deem suitable for being entailed, either along with my lands of Fairfield and others foresaid, or separately, and of which lands and other heritages so to be purchased by my said trustees with the monies arising from the produce of my said moveable estate, and from the various accumulations aforesaid, I hereby direct, appoint, and ordain my said surviving and accepting trustees, with all convenient speed, to execute a deed or deeds of entail," in terms of the said deeds already referred to.

The Lord Ordinary, in the Note already referred to, proceeds as follows:—"There are four claimants to the surplus income forming the fund *in medio*:—(1) Mr Campbell's trustees claim the whole fund for the purpose of accumulating the same, and ultimately applying the same in the purchase of lands, to be entailed in terms of the settlements. (2) The truster's widow Mrs Campbell, now Mrs Clarke, claims the whole fund, as falling under the liferent, express or implied, created in her favour by the truster. (3) Captain Leveson G. A. Campbell of Fairfield, the heir-at-law of the truster, claims the whole fund, as being undisposed of by Mr Campbell's settlement, and being heritable *destinatione*, and thus falling to the heir-at-law *ab intestato*; and (4) Captain Campbell and Mrs Hunter, the next of kin of the truster, claim the fund, if held to be moveable, as falling to them *ab intestato*.

"The Lord Ordinary, after the debate, thought it right that the case should be intimated to a fifth possible claimant, viz., the party who would be the heir of entail in possession if the entail were now in operation, and who had not been cited or called as a defender. This was done; a curator *ad litem* appointed, and the minor and his curator have now lodged a minute declining to make any separate claim, but insisting in that made by the trustees.

"The whole parties interested are thus in the field. The decision of the question is necessary for the guidance and exoneration of Mr Campbell's trustees, who have quite properly brought the present action."

The trustees, the first claimants above mentioned, pleaded—" (1) According to the sound construction of the trust-deed, the income of the personal estate constituting the fund *in medio* ac-

cruing since the death of the truster must be applied for the ultimate purpose of the trust, viz., to the acquisition of lands to be entailed. (2) According to the sound construction of the trust-deed, the income derivable from the estate accruing between the truster's death and that of his widow must be accumulated by the claimants, his trustees, and applied by them for the ultimate purpose of the trust above mentioned."

Mrs Maria Anna Menzies or Campbell, now Clarke, the truster's widow, the second claimant, pleaded—" (1) The whole estate of the truster being disposed of by the trust-deed, and there being no direction to accumulate until after the death of the wife, there is thus granted in her favour an implied liferent of the whole estate, except in so far as the same may be expressly destined to other purposes. (2) The residue of the personal estate, after payment of debts, expenses, legacies, and annuities, being heritable *destinatione*, was heritable in the intention of the truster in so far as the liferent of the widow is concerned; and she is entitled to the liferent of the whole residue of the estate, that entire residue being heritage in the sense of the trust-deed, or at all events falling under the description of 'estate disposed' by that deed. (3) In the event of the trustees retaining moveable estate in their hands sufficient for the purpose, they were bound to pay the claimant's annuity of £250 a-year out of the moveable estate as well as the other annuities."

Captain Campbell, the third claimant, as heir-at-law, and also as one of the next of kin of the truster, pleaded—" (1) The income arising from the moveable estate of the truster between the date of his death and the death of his widow being undisposed of by his will, the same falls to be taken up by his heir *ab intestato*. (2) The said moveable estate being expressly directed to be applied by the trustees in the purchase of lands to be entailed, the income arising therefrom falls to the truster's heir-at-law. (3) In the event of its being held that the said income is moveable, the same will fall to the next of kin of the truster. (4) In terms of the said trust-deed, the annuity of £250 provided to the truster's widow by her marriage-contract falls to be paid out of the income of the estate of Fairfield; and no grounds are stated for making the same a charge upon the fund *in medio*. (5) The claimant, as heir-at-law of the truster, is entitled to be preferred to the whole fund *in medio* in terms of his claim, or at least he is entitled, as one of the truster's next of kin, to be preferred to a share thereof along with the other next of kin."

Mrs Catherine Campbell or Hunter, the fourth claimant, as one of the next of kin of the truster, pleaded—" (1) The income arising from the moveable estate of the truster between the date of his death and the death of his widow being undisposed of by his will, the same falls to be taken up by his next of kin *ab intestato*. (2) The income from the said estate being moveable, the same falls to the next of kin of the truster. (3) The claimant, as one of the truster's next of kin, is entitled to be preferred to a share of the fund *in medio* along with the other next of kin."

The Lord Ordinary pronounced the following interlocutor:—

"Edinburgh, 13th July 1871.—The Lord Ordinary having heard parties' procurators, and having considered the closed record, claims of parties, minute for Leveson Granville Campbell and his curator *ad litem*, and whole process, ranks and prefers the

claimants, the accepting and acting trustees of the deceased William Gunning Campbell, to the whole funds *in medio*, in terms of their claim No. 12 of process; repels the whole other claims to the said fund *in medio*, and decerns; finds no expenses due in the competition to or by either party as against the competing parties, but finds and declares that the trustees of the said William Gunning Campbell shall be entitled to payment out of the fund *in medio* of their whole expenses of raising and bringing the action into Court, of adjusting the fund *in medio*, and of the expenses incurred by them in the competition, as the same shall be taxed by the Auditor of Court, to whom remits the account, when lodged, to tax and report."

"*Note.* . . . . After full argument and consideration, the Lord Ordinary is of opinion that Mr Campbell's trustees must be preferred to the whole fund *in medio*, to be applied by them to the ultimate purpose of the trust, namely, the acquisition of lands to be entailed in terms of the settlements. He has therefore preferred the trustees in terms of their claim, but as the question was a fair one to try, he has not found the unsuccessful claimants liable in expenses. The trustees will retain their whole expenses out of the fund *in medio*.

"The grounds of the Lord Ordinary's judgment are shortly the following:—

"(1) He is of opinion that the question is entirely dependent on the terms of Mr William Gunning Campbell's settlements. It is a *questio voluntatis testatoris*. What did the testator intend should be done with the surplus income of his moveable estate? and this intention must be gathered from the terms of his trust-disposition and settlement and codicils, read as a whole.

"It may be true that the testator may not have directly provided for the case which has arisen. He may not have contemplated that there would be any surplus income, such as that now in question, and here, as in many cases, it may be difficult to gather from the testator's words his will in reference to a matter which was not presented to his mind. Still, there is no alternative. The duty of the Court is to get at the testator's will through his testamentary writings, read in the light of surrounding circumstances, which are fairly and fully disclosed in the present case. Extrinsic and parole proof of the testator's intention is inadmissible, and was not asked by any of the claimants in the present case.

"(2) Mr Campbell's testamentary writings form a universal settlement of his whole estate, heritable and moveable. There is a universal and unlimited conveyance to his trustees of this whole estate, heritable and moveable of every description, and his whole estate is conveyed for the purposes specified in the deeds. There is no exception; Mr Campbell certainly did not intend to die intestate in reference to any portion of his estate, or in reference to any part of the income arising therefrom. It is true intestacy may arise even under a universal settlement, by reason of special provisions therein. But intestacy in such cases is never to be presumed, and can only be reached when it is the necessary and unavoidable result of the directions or provisions of the deed.

"(3) Where residuary legatees are appointed, or where there are, either in form or in substance, provisions which amount to a disposal or appointment of residue, the residuary legatees, or the parties interested in the residue, will always in

*dubio* be preferred to the heir-at-law, or to the next of kin of the testator *ab intestato*. On this principle, lapsed legacies fall, not to the next of kin, but to residuary legatees, even where the residuary bequest is only of residue, after deducting all legacies. In short, the testator is presumed, unless a contrary construction be absolutely unavoidable, to prefer the parties and the objects mentioned in his settlement to his heirs or next of kin *ab intestato*, whom it is the very object of his settlement to exclude. It is unnecessary to refer to cases or authorities in support of this general principle, for it was not disputed. The whole argument turned upon the special terms of Mr Campbell's settlements.

"(4) The Lord Ordinary is of opinion that the terms of these settlements exclude the claims both of the truster's heir-at-law and of the truster's next of kin.

"The object of the truster may be generally stated thus:—He wished to make certain liferent and other provisions for his widow, and for certain other persons, to whom he bequeathed legacies or annuities; and after his widow's death, and after the death of all his nephews and nieces, he wished to create an entail and found an entailed estate, consisting of his lands of Fairfield and others, and of other lands to be acquired, with the whole accumulated residue of his means and property, all to be entailed and settled upon the series of heirs specified in the deed. This seems to the Lord Ordinary to be the short result of the whole settlements. The detailed provisions and directions are somewhat complicated, but, reading them together, their effect seems to be as now stated. Whatever was not required for the special and preferential purposes of the trust, was to go to enhance the entailed estate, the creation of which was the testator's ultimate purpose.

"In this view, the Lord Ordinary thinks that the claims both of the heir-at-law and of the next of kin are inadmissible. There is no undisposed of residue, either for the heir-at-law or for the next of kin. The testator did not die intestate as to any part of his estate, either capital or income, and there is no difficulty in disposing of the whole income forming the fund *in medio* under one or other of the purposes of the trust.

"The Lord Ordinary will immediately advert to the special terms of the settlement, as, in his opinion excluding both the widow's claim and that of the heirs-at-law; but, apart from all specialities, he thinks the heirs-of-law, both in heritage and in moveables, are completely cut off by the general conception and obvious meaning of the whole settlement.

"(5) If the Lord Ordinary is right in holding that the truster's heirs *ab intestato* are excluded, both by the general purpose and by the special terms of the settlement, it becomes unnecessary to consider whether, supposing the fund *in medio* intestate succession, it would go to the heir-at-law or the next of kin. The Lord Ordinary thinks it can be claimed by neither.

"He may add, however, that in case he should be wrong in the view now taken, and in the event of the fund *in medio* being held undisposed residue, he could not hold it to be heritable *destinatione*. This would be to make it both testate and intestate at once under the same deed. If the direction to purchase heritage applies to it, then it must be heritage, the rents of which go to make up, like other investments, the ultimate entailed estate."

If intestate succession at all, its character must be fixed at the testator's death, and being the proceeds of his moveable estate, the Lord Ordinary thinks it must be held to be moveable succession. This point, however, need not be further considered.

"(6) The Lord Ordinary thinks that the widow, the only other claimant, is excluded by the special terms of the settlement, and by the limited and precise character of the provisions made to her by the truster.

"The widow's provisions are, first, her jointure under the marriage-contract of 17th March 1845; and second, in addition thereto, the lifeferent of the free annual residue of the truster's heritable estate, the lifeferent of the house of Fairfield, and of the furniture and moveables therein. It is quite inconsistent with these provisions to give the widow, in addition, the lifeferent of the testator's free moveable estate. This is not given to her by the deed, either expressly or by implication, and yet that is virtually what she claims in the present process. It is impossible to construe a bequest of the lifeferent of heritable estate as including a lifeferent of the moveable estate also, especially when the heritable and moveable estates are dealt with in the deeds throughout separately and distinctly, with separate precise directions regarding each.

"(7) The great argument urged, and with great force, both by the widow and by the next of kin, is, that there is no direction to accumulate the free proceeds of the moveable estate during the widow's life; that such an accumulation is not to begin until after the widow's death; and that, consequently, free income accruing during the widow's life is not to form part of the ultimate entailed estates, but must be otherwise disposed of.

"Now, without denying the force of the argument, the Lord Ordinary is of opinion that, even if the deed had stood absolutely without any direction to accumulate the free income of the moveable estate, such direction must be presumed from the purposes of the trust. The truster wanted everything to be entailed which was not needed for his preferential or primary bequests. A direction to apply moveable estate at a particular time in the purchase of lands to be entailed, necessarily means moveable estate, with accrued interest or income. The interest or income is just an accessory of the principal.

"But the trust-deed does not leave this matter to a mere inference. The Lord Ordinary reads the settlement as expressly directing the income of the moveable estate to go with the principal.

"By the fourth purpose, the whole moveable or personal estate is directed, 'upon my death, or as soon thereafter as convenient,' to be sold and disposed of (excepting the furniture, &c.), and the proceeds laid out or invested, either in the purchase of lands suitable for entailing, or on heritable securities, all to be held and 'retained by them during the lifetimes of my said nephews and nieces, sons and daughters of my late brothers, Charles Hay Campbell and Napier Campbell, and during the lifetime of the longest liver of my said nephews and nieces.' This is a precise direction, and the Lord Ordinary thinks that the moveable estate sold, or the securities representing it so to be held and retained, includes not only the securities themselves, but the interest accruing thereon. It would be a very forced construction to read the provision as a direction to hold the principal sums secured only, but not the interest, or to hold the

lands purchased, but not the rents. Principal and interest, lands and rents together, are to be held and retained till the time appointed. Here it is worthy of notice that the widow is not mentioned at all. The time fixed is the death of the longest liver of the testator's nephews and nieces, and this is the time when accumulations are to be invested and the entail ultimately settled.

"In entire accordance with this view, the sixth purpose of the trust provides, that on the death of the widow, and of all the truster's nephews and nieces, the trustees are to call up all sums lent on security, and with the proceeds thereof, and with the 'accumulations of rents and produce arising from my said lands of Fairfield and others, or from previous rents, interest, and annual produce,' to buy more land to be entailed as aforesaid. Now, the expression 'previous rents, interest, and produce,' must mean previous to the accumulation of Fairfield rents, &c., and as Fairfield is lifeferented by the widow, the word previous must refer to accumulations during the widow's life. But such accumulations can only be accumulations from the moveable estate, and thus the Lord Ordinary finds here almost an express direction to accumulate the free moveable income. The same result is reached on comparing the other clauses of the deed, although the inference is probably less direct.

"On the whole, the Lord Ordinary has come to be pretty clearly of opinion that the free moveable income must be applied in exactly the same way as the free moveable estate, and this necessarily leads to the judgment he has pronounced.

"(8) A farther question will almost certainly ultimately arise under the provision of the Thellusson Act, which prohibits accumulation for more than twenty-one years, or for a longer term than the life of the settlor, or the minority of any person living at the settler's death. This question, however, does not arise in the present process. The accumulations from 1857 to 1869 are undoubtedly lawful; the illegality will not commence at soonest before November 1878; and it is unnecessary to decide now what class of heirs or next of kin will then take the accumulations struck at by the statute."

Against this interlocutor the widow Mrs Clarke reclaimed.

Lord-Advocate (YOUNG) and J. CAMPBELL SMITH for her.

Authorities cited—Blackstone, book ii, 1, 20 (Stephen's ed., i, 621); *Cockshott v. Cockshott*, 20 Jan. 1846, 2 Collier, 432; *Roe v. Summerset*, 5 Burr. 2608, and Blackstone's Rep. ii, 692; *Blackwell v. Bull*, 1 Keen, 176.

Solicitor-General (CLARK) and FRASER, for the trustees, referred to *Douglas v. Douglas*, Dec. 21, 1843, 6 D. 318; *Humphreys*, Jan. 14, 1867, 4 Law Reports, Eq. Ser. 475, and 6 Jarman, 3d ed., 497; *Sturgis v. Campbell*, June 19, 1861, 23 D. 1128, and 3 Macph., H. of L., 70; *Purcell v. Newbigging*, Nov. 25, 1856, 19 D. 71.

MILLAR, Q.C., and BLAIR, for Captain Campbell, the heir at law. Authorities—*Dick v. Gillies*, July 4, 1828, 6 S. 1065, Weir, 2 Macph. 1006; *Sommerville's Trustees v. Gillespies*, July 6, 1859, 21 D. 1148.

ADAM for Mrs Hunter, one of the next of kin. Authorities cited—*Cowan v. Turnbull's Trustees*, June 13, 1845, 7 D. 872, and H. of L., 6 Bell's Ap., 222; *Lord v. Colvin*, Dec. 7, 1860, 23 D. 111 (Lord Curriehill's opinion).

At advising—

LORD PRESIDENT—My Lords, the question decided by the Lord Ordinary arises on a construction of the settlement of the late Mr Campbell of Fairfield, the fund *in medio* being the free income of the testator's personal estate from the 24th November 1857, when he died, until the 31st December 1869, and the leading question is, Whether the free income of the personal estate during that period is undisposed of by the settlement, or, if disposed of, whether it belongs to the testator's trustees for the purposes of the settlement, or to his widow, as falling under a liferent to which she is entitled by that deed? If it be undisposed of, there arises the question, Whether it belongs to the heir-at-law, or to the representatives *in mobilibus*?

The leading question—whether it is disposed of or not—depends, I think, entirely upon the construction of the settlement, as indicating the intention of the testator. In this no general question of law is involved, nor is there any special rule of law applicable to the point, except the very common-place one, that effect is in the first place, and above all things, to be given to the will of the testator. Now, it is material at the outset to consider what is the general purpose of the settlement. The testator conveys to trustees his entire estate, heritable and moveable, and the leading object in view is to create the largest entailed estate which he possibly can out of the materials at his disposal. There are, however, certain other peculiarities which we must not omit to notice. For instance, he, at one and the same time, left to his widow a most handsome jointure, and also manifested an extreme objection to all his nephews and neices, being at pains to exclude them under all possible circumstances from the succession. Excepting his widow's liferent provision, and some other unimportant legacies and annuities, nothing is to come into the enjoyment of any beneficiary until the death of the last survivor of these nephews and neices. It is true that statutory enactment may interfere with the accomplishment of this desire, but such was the testator's wish nevertheless. Now, keeping this fact in view, let us consider the different purposes of the settlement. The first purpose is not merely the ordinary one for payment of debts and funeral expenses, but it is also for the payment of certain legacies and annuities, not large indeed, but various. The second purpose relates to the provision in favour of the widow. On this I have no remark to make, excepting to say, that the widow's liferent interest is expressly restricted to the estate of Fairfield, and to the use of the house and furniture therein, at Fairfield. The lady had a separate provision out of another entailed estate. This it was not necessary to mention, but between the two she was left amply provided for.

It is desirable to consider the third and sixth purposes together, because both come into operation at the same point of time, that is, after the decease of the widow and the longest liver of the nephews and neices. Neither the third nor the sixth can be carried into execution until both these events occur. But when they do, the testator directs, in the third purpose, that his trustees shall execute a deed of entail of the lands and others before disposed, "so far as undisposed of by me, and of such other lands as shall belong to me in fee-simple," in favour of a series of heirs, and under fetters and restrictions carefully detailed. In the sixth purpose he gives directions to his trustees, at the same

time, to lay out, if they have not already done so, the whole proceeds of his moveable estate, with any accumulations of the rents of his lands of Fairfield and others, or of previous rents, interest, and annual produce, on the purchase of other lands and heritages, to be entailed in the same manner and upon the same series of heirs as he before directed in the third purpose regarding the lands of Fairfield. He contemplates that these entails may possibly be made in one deed, but, at the same time, he recognises the possible necessity of two or more deeds of entail. And, accordingly, he speaks in this purpose of "a deed or deeds of entail." But in whatever form his wishes are carried out, there can be no doubt, taking the two purposes together, that his intention was that the whole estate is to be settled on the same series of heirs, and be subjected to the same fetters, and to form one united entailed estate. So far the testator's intention is perfectly clear, and the time at which these two purposes are to be carried out is distinctly fixed at the death of the widow and the longest liver of the nephews and neices.

But the two intermediate purposes, the fourth and fifth, depend upon a different event, or events. The fourth purpose is to receive effect "on my death." The fifth upon "the decease of my said wife, and during the lifetimes of my said nephews and neices." They are to be carried into execution therefore at quite different times from the third and sixth purposes. Now, what he provides in the fourth purpose is this, that upon his death, or as soon thereafter as conveniently may be, his whole moveable and personal estate should be sold and disposed of, and the free proceeds laid out and invested, either in the purchase of lands and heritages, to be afterwards entailed as already mentioned, or on heritable security, all to be held and retained by the trustees during the lifetime of his said nephews and neices, and the longest liver of them.

Now, it is on the consideration of this clause chiefly that this question depends. His personal estate is to be converted into money, and then that money is to be invested in land, or landed securities. Nothing is said expressly in the clause about the disposal of the free annual income. The widow consequently says that the proper implication from the clause, taken in connection with the preceding one bestowing on her a liferent of the heritage, is to give her a liferent of the whole estate, heritable and moveable. I think that claim may be disposed of, in the first place, without difficulty. It may be observed that the trustees are directed to hold and retain the said moveable estate, when realized and invested as aforesaid, either in land or heritable securities, during the lifetime of the nephews and neices, and the longest liver, but not during the lifetime of the widow. The absence of that direction appears to me very material in the question, for where a liferent is intended to be given to a widow, the ordinary and natural direction to the trustees is to hold the estate during the lifetime of said widow, and not of any other third party or parties. This is studiously omitted, because the time during which the trustees are directed to hold is carefully specified. The estate of Fairfield, which is given to the widow in liferent, is specially directed to be held during the widow's lifetime; they are not to entail it during her life, even if the last survivor of the nephews and neices should predecease her. But here, supposing the last survivor of the nephews and neices to prede-

cease the widow, the direction to hold and retain would determine; there would be no longer any direction to retain at all. This creates a very strong presumption against the claim of the widow to the liferent of this realised moveable property, and this presumption is strengthened by the fact that she is otherwise amply and liberally provided for, and that there are no indications from any other part of the deed that the testator intended to give his widow a liferent of this part of his property also. The whole implications, such as they are, are directly against the claim of the widow. But then, if the widow is not to get the liferent, what are the trustees to do with the annual proceeds of these funds? The nephews and nieces are certainly to get none of them. And the alternative is just this, either that the income is to be accumulated, or that it is undisposed of, and must go to the heirs *ab intestato*.

Now, there is a very strong argument in favour of the latter view, deducible from the terms of the fifth purpose. Because after the decease of the widow, and during the lifetime of his said nephews and nieces, there is an express direction to the trustees to accumulate the free rents and produce both of the estate of Fairfield and of the lands or securities purchased with the proceeds of the moveable estate. The inference attempted to be drawn is, that for the previous period between the truster's own death and his widow's, it was not his intention that his trustees should accumulate the produce of his moveable estate, or its equivalent in land or landed securities. This is a strong argument, but it is not conclusive. Keeping in view the ultimate purpose in the mind of the testator, which was to create as extensive an entailed estate as possible for the future enjoyment of certain heirs of entail, carefully excluding those who now claim as heirs *ab intestato*, we see that if these interests or annual produce are held to be undisposed of, they must go exactly to the very parties whom the testator wished most to exclude. And, notwithstanding the speciousness of this argument, I think there are strong presumptions on the other side, that whatever his moveable estate might yield when realised and reinvested, it was *de futuro* to form one great *corpus* to be invested in land for the purpose of being entailed. And his purpose was constantly disclosed throughout the deed to make this entailed estate as large as possible. I therefore come to the same conclusion as the Lord Ordinary, that the produce of this moveable estate was intended, even during the lifetime of the widow, to be accumulated, just as after her death. I confess I do not receive much confirmation in this view from the words in the sixth purpose, commented upon by the Lord Ordinary. I think the phrase one of very doubtful meaning, especially in the clause in which it occurs. And it is as likely to refer to accumulation under the fifth clause as to the implied accumulation under the fourth. But, quite independently of this argument, I think there is ample evidence throughout the whole deed to lead us to the conclusion that it was the intention of the testator to accumulate this income of his moveable estate during his widow's lifetime. That intention is so far restrained by law, but so far as that special law does not apply it must receive effect.

LORD DEAS—I find it impossible to read this deed and have any doubt that the heir-at-law is effectually excluded from all claim upon the suc-

cession; that the truster not only conveys his whole heritable and moveable estate that he died possessed of to trustees, but that he also disposes of the whole of that estate. There is no room for alleging intestacy as to any part of it. The only question comes to be, Whether the widow is entitled to the whole annual produce of the estate during her life, or whether her liferent is limited to the heritable estate? Now, as your Lordship has said, the widow is very amply provided for. Her limited annuity, under her marriage-contract, is converted into a general liferent of the whole landed estate, which he conveyed under the name of the lands of Fairfield and others. It is very clear from the following clause, occurring towards the end of the deed,—“And I declare that the increased provisions which I have, by the liferent conferred on my said wife, made for her beyond those previously granted in her favour by our contract of marriage, were not made till long after I had satisfied myself of her deserts, and been deeply indebted to her for her unintermitted love and affection,”—that he knew what he was doing, and felt that the provision he was making was ample. Well, then, the trustees are to hold all this property for the purposes of the trust. And, looking at the deed as a whole, I can have no doubt that the testator's fundamental object was to create as large an entailed estate as possible. The only doubt that arises is with regard to the rents and produce arising from the moveable estate during the widow's life. Between the death of the widow and the last survivor of the nephews and nieces, there is an express direction for its accumulation, but there is no such express direction to accumulate during her life. As to the argument adduced by the Lord Ordinary from the words occurring in the sixth purpose of the deed, I confess I give more weight to it than your Lordship. The truster speaks of an accumulation “of the rents and produce arising from my said lands of Fairfield and others”—that is, an accumulation between the date of the widow's death and that of the last survivor of the nephews and nieces. He then adds, “or from previous rents, interest, and annual produce, as said is.” I do not see how it is possible to refer this to any other thing than annual produce previous to the last mentioned period—that is, previous to the widow's death. The only difficulty arises from the insertion of the words “as said is,” which, I confess, are not very intelligible. But everything else in the deed is so strongly in support of the presumption in favour of the trustees that, independently of this passage, I am quite able to agree with your Lordship and the Lord Ordinary.

LORD ARDMILLAN—I agree with your Lordship that the heirs *ab intestato* have no interest here. I think that no part of the property is undisposed of, and that, where the conveyance in trust is universal, on no light grounds could we come to the conclusion that any part is undisposed of. The presumption is that the truster has given his trustees power to accumulate all the free produce not otherwise disposed of. I have therefore no difficulty in repelling the claims of the heir-at-law.

A different case is made in favour of the widow. I am not prepared to say that the presumption is against the widow. If, on reading the deed as a whole, I find that the truster's intention is not to limit the widow's liferent to a particular fund or part of the estate; and if the deed itself contain

grounds for implying that the interest of other parties does not emerge until the widow's death, then I should conceive the presumption in favour of the widow. But I do not think there are any Scotch authorities which state the doctrine of implication in so broad a manner as to lead to the conclusion that, when the fee of a fund is suspended till the death of any person, a purpose must be implied to give that person a life interest of the fund. There is no such general implication. There may be special circumstances raising it, such as the case in which the widow remains otherwise unprovided for. But these circumstances do not exist here.

**LORD KINLOCH**—The question now raised relates to the application of the annual proceeds of Mr Gunning Campbell's moveable estate, from his death in 1857 to the end of 1869. I am of opinion that the Lord Ordinary has come to a right conclusion in holding that these belong, along with the capital of that estate, to his *mortis causa* trustees, for the purpose of purchasing lands to be entailed on a defined series of heirs.

It tends to the solution of this question to fix, in the first instance, as I think the Court may do without difficulty, that Mr Campbell's widow has no right to any part of these funds. I think that this follows clearly from the terms of the trust-deed. A right could only be derived to the widow through words of direct bequest, or an implication so clear as to be equivalent. I perceive none such in the deed, but directions wholly to the contrary. I consider the widow limited by the most express words to the "free annual income of my said estate of Fairfield and others hereby disposed," she also obtaining the life interest of Fairfield House and the furniture. There can be no doubt as to what is comprehended in "my said estate of Fairfield and others hereby disposed." It comprises simply the lands given under that general name which form the subject of previous disposition in the deed. It cannot, by any stretch of construction, or on any but a mere fanciful theory, be made to comprehend the annual proceeds of the moveable estate, or the produce of any investments on which the funds belonging to that estate are laid out.

The inquiry then comes to be, what is to be done with the annual proceeds of the moveable estate in a question with Mr Gunning Campbell's heir or executor *ab intestato*? In other words, are these annual proceeds disposed of by the settlement, and how? Or are they undisposed of residue to fall to the legal representatives? This question is, in my apprehension, to be determined by soundly construing the particular deed in question. The case of any other deed cannot aid in solving the case of this one, except, at the utmost, by furnishing illustrations or analogies which may go to aid the construction. The intention of the testator, in the particular deed, is, as it appears to me, the only legal rule of decision.

It is undoubted that Mr Gunning Campbell directed the capital of his moveable estate to be employed in the purchase of lands to be entailed. He does so in express terms, the moveable estate being, under the fourth purpose of the trust-deed, to be realised as soon after his death as conveniently might be, and afterwards employed in such purchase, although the execution of the intended deed of entail was not to take place till after the death, not merely of Mr Campbell's wife, but of

certain nephews and nieces specifically mentioned. In the meanwhile the moveable estate, being converted into money, shall, it is said, "be laid out and invested at once, or from time to time, either in the purchase in their own names, as trustees foresaid, of such lands and other heritages as my said trustees may, in the exercise of a sound discretion, deem suitable and proper for being entailed as after mentioned, or upon heritable security or securities, also always in their own names as trustees foresaid, all to be held and retained by them during the lifetime of my said nephews and nieces." I think the fair meaning of this direction is, that not only the sums invested, but the annual proceeds from such investments, shall be retained in the hands of the trustees till the time, and for the purpose, of the intended purchase. It is often the only fair inference from a direction to set aside certain funds for a particular purpose, that the intermediate fruits from these funds go along with the capital for the intended purpose. Nothing being said to the contrary, I think that such is the fair inference deducible from the terms of the fourth purpose of this trust-deed.

There follows the fifth purpose of the trust, but this, as I read it, contains nothing at variance with the provisions of the fourth purpose just referred to. Under this purpose the testator primarily refers to the rents of Fairfield and others to arise after his wife's death, and before the death of the last surviving nephew or niece. These proceeds are to be accumulated for the intended purchase, "and" (it is added) "also from the said lands and others hereby appointed to be purchased, and also from the said investments on securities of the monies arising from my personal or moveable estate." The instruction to accumulate all these during the period posterior to the death of his wife, does not, I think, in the least interfere with the prior instruction, as I read it, to retain and accumulate the proceeds of the moveable estate from the period of his own death downwards. Each fund, I think, still retains its own separate period of accumulation.

Finally, under the sixth purpose Mr Campbell directs his trustees, at the death of his last surviving nephew or niece, to call up and realise the securities on which the moveable estate was invested, and to purchase the lands to be entailed "with the proceeds thereof, and with any accumulations of the rents and produce arising from my said lands of Fairfield and others, or from previous rents, interest, and annual produce, as said is." Combining this clause with those going before, and reading the whole, not after a strained literal interpretation, but according to a fair construction of the testator's meaning, I arrive without any doubt at the conclusion that the proceeds of the moveable estate, from Mr Gunning Campbell's death downwards, were not undisposed of residue, but were expressly directed to be retained and accumulated with the capital of that estate for the purchase of the lands to be entailed.

I am therefore of opinion that the interlocutor of the Lord Ordinary should be affirmed.

The Court adhered, and refused a motion, on the part of Mrs Clarke and the heirs-at-law, that the expenses of all parties should be paid out of the fund *in medio*, on the ground that the process really had been raised for the guidance and direction of the trustees, and could not have been prosecuted unless they had appeared as contradictors.



Agents for the Trustees—Tait & Crichton, W.S.  
Agent for Mrs Campbell (now Clarke)—Alexander Stevenson, W.S.

Agents for Captain Campbell—Hunter, Blair, & Cowan, W.S.

Agents for Mrs Hunter—A. & A. Campbell, W.S.

Saturday, December 16.

FORBES V. ADAIR.

*Appeal—Competency—Civil or Criminal—Medical Act, 1858 (21 and 22 Vict. c. 90)—Summary Procedure Act, 1864 (27 and 28 Vict. c. 53, § 28).* Held that the proceedings following upon a petition and complaint under sections 40 and 41 of the Medical Act, 1858, are of a criminal nature, as defined by section 28 of the Summary Procedure Act, 1864; and an appeal to the Court of Session from a judgment of the Sheriff thereon (in which he found the complaint not proven) dismissed as incompetent.

On the 27th October 1871 Forbes presented a petition and complaint against Adair to the Sheriff of Aberdeen, in which it was stated that the respondent falsely pretended to be a doctor of medicine, whereas he was not registered as such under the Medical Act, nor was recognised by law as such.

Section 40 of the Medical Act enacts, "that any person who shall wilfully and falsely pretend to be, or take or use the name or title of a physician, doctor of medicine, licentiate in medicine and surgery, bachelor of medicine, surgeon, general practitioner, or apothecary, or any name, title, addition, or description implying that he is registered under this Act, or that he is recognised by law as a physician, or surgeon, or licentiate in medicine and surgery, or a practitioner in medicine, or an apothecary, shall, upon a summary conviction for any such offence, pay a sum not exceeding £20."

Section 41 provides that "Any such penalty may, in Scotland, be recovered by the procurator-fiscal of the county, or by any other person, before the Sheriff or two Justices, who may proceed in a summary way, and grant warrant for bringing the party complained against before him or them, or issue an order requiring such party to appear on a day and at a time and place to be named in such order; and every such order shall be served on the party by delivering to him in person, or by leaving at his usual place of abode, a copy of such order and of the complaint whereupon the same has proceeded; and upon the appearance, or default to appear, of the party, it shall be lawful for the Sheriff or Justices to proceed to the hearing of the complaint, and, upon proof on oath, or confession of the offence, the Sheriff or Justices shall, without any written pleadings or record of evidence, convict the offender, and decree him to pay the penalty named, as well as such expenses as the Sheriff or Justices shall think fit; and failing payment, shall grant warrant for recovery thereof by poinding and imprisonment, such imprisonment to be for such period as the discretion of the Sheriff or Justices may direct, not exceeding three calendar months, and to cease on payment of the penalty and expenses."

The prayer of the petition was precisely in terms of this section.

The Sheriff (GUTHRIE SMITH) found the complaint not proven, and dismissed the same.

The petitioner appealed to the Court of Session. SCOTT for him.

SOLICITOR-GENERAL and R. V. CAMPBELL, for Adair, objected to the competency of the appeal—in respect (1) that the Court of Session had no jurisdiction to entertain the appeal, the proceedings being of a criminal nature; (2) that the clause in the Medical Act dispensing with a record of the evidence virtually excluded review on the merits.

The first objection turned upon the application of the 28th section of the Summary Procedure Act, 1864 (27 and 28 Vict. c. 53):—"And whereas much inconvenience has resulted from the uncertainty which exists as to the nature of the jurisdiction conferred by various Acts of Parliament, authorising convictions for offences, and the recovery of penalties, and the enforcement of orders by imprisonment upon summary complaint before Sheriffs, Justices, and Magistrates in Scotland, and it is expedient to define the cases in which such jurisdiction shall be held of a criminal nature: In all proceedings by way of complaint instituted in Scotland, in virtue of any such statutes are hereinbefore mentioned, the jurisdiction shall be deemed and taken to be of a criminal nature where, in pursuance of a conviction or judgment, or as part of such conviction or judgment, the Court shall be required or shall be authorised to pronounce sentence of imprisonment against the respondent, or shall be authorised or required, in case of default of payment or recovery of a penalty or expenses, or in case of disobedience to their order, to grant warrant for the imprisonment of the respondent for a period limited to a certain time, at the expiration of which he shall be entitled to liberation; and in all other proceedings instituted by way of complaint, under the authority of Act of Parliament, the jurisdiction shall be held to be civil."

Argued, for Forbes, that the adjection of poinding to the warrant of imprisonment showed that the penalty was contemplated as a civil debt, to be recovered by civil diligence. As the distinction drawn by section 28 of the Summary Procedure Act was purely artificial and for convenience, it would produce the opposite effect to that aimed at by the section if the line was not drawn in the exact mode in which it was drawn by the statute.

At advising—

LORD PRESIDENT—This is an appeal against a judgment of a Sheriff dismissing a petition and complaint under sections 40 and 41 of the Medical Act of 1858. That statute provides, in section 40—(reads). Section 41 provides the mode for recovery of the penalty—(reads). Now, we have not an opportunity of seeing in this case how the Sheriff would have followed out the provisions of this section. But, if he had convicted, I think he would have been bound to decree the respondent "to pay a penalty of , with of expenses;" and failing payment, he was bound to grant warrant for recovery thereof by poinding and imprisonment, under declaration that the imprisonment should in no case exceed three calendar months, and should cease on payment of such penalty and expenses. Such is the nature of the sentence which he is required to pronounce. The question is, Whether this is a criminal or a civil proceeding within the meaning of section 28 of the Summary Procedure Act? If it is criminal, we have no jurisdiction; if it is civil, we are bound to entertain the