

for the manse along with the heritors of Alloway, or whether the burden should be borne by Alloway alone. It was held that the united districts constituted a burghal landward parish, and that the assessment must be laid on the whole lands of that parish. Some observations were made from the bench to the effect that the existence of a landward district within the bounds of a royal burgh might be sufficient to take away from its purely burghal character in a question of this kind. But these observations did not enter into the grounds of judgment, and I do not feel bound to adopt them in opposition to an opinion clearly formed on other grounds.

“No other decision has been cited bearing on the question, nor has it been shown that royal burghs have ever acknowledged the obligation to provide glebes out of unbuilt-on lands locally situated within the burgh. The circumstance that no such claim has been raised for decision by the incumbents of the parish of Arbroath until more than two centuries have elapsed from the date of the statute is not altogether to be overlooked when it is considered that the Acts conferring the right to a glebe are, as the appellant’s counsel expressed it, Acts for the immediate equipment of the benefice. Against this it may be said that the burgh of Arbroath has within a comparatively recent period endowed the benefice with a manse. The burgh had been in use from time immemorial to make an annuity or allowance for house rent to the minister. Instead of this customary contribution a manse was provided of greater value than the annuity. This appears to have been a voluntary arrangement, and I do not think it can be drawn into an admission on the part of the burgh that it is subject to the liabilities of a landward parish.

“In considering the statutes it is impossible to avoid observing that there is apparently no warrant in those which are in force for designing a glebe out of lands other than kirk lands. The right given by the statutes passed in the sixteenth century was expressly confined to parishes in which there were kirk lands, and although the right was enlarged by the statutes passed in the interregnum, yet as these statutes were repealed, and as the Act of 1663, cap. 21, merely recognises the right to a glebe as a right standing upon the existing law, it is difficult to discover where the authority for designing a glebe out of temporal lands is to be found. Such a right has, however, been assumed to exist in various decisions of the Court, and also by the institutional writers, and in other departments of teind law it would appear that the statutes have received an extension which is hardly warranted by ordinary rules of construction. In this state of the authorities I prefer to give no formal opinion on the point, the grounds of judgment which I have previously explained being sufficient for the decision of the case.”

Counsel for Appellants—J. P. B. Robertson—Gardner. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Respondent—Guthrie Smith—Strachan. Agents—Duncan, Smith, & Maclaren, S.S.C.

Thursday, July 12.

SECOND DIVISION.

[Lord Kinnear, Ordinary.]

KEITH AND OTHERS v. FRASER
AND OTHERS.

Succession—Residue—Legacy—“Whatever more Money.”

A testatrix by her trust-disposition and settlement, after giving her daughter a life-rent of her property, directed, as to the residue of her estate remaining after her daughter’s death, that her trustees were to make over the same, and any accumulations thereof, in such manner and way as she should direct and appoint by any writing to be subscribed by her at any time during her life, and failing any such direction and appointment, “then to my own nearest heirs, executors, and successors whomsoever.” By codicils to the settlement a number of legacies of sums of money and of specific articles were left to various persons. One of these codicils contained the following clause:—“Whatever more money I leave after paying my lawful debts to be divided amongst my legatees.” Questions having arisen on the daughter’s death as to who was entitled to the residue of the estate—held (rev. judgment of Lord Kinnear—*diss.* Lord Rutherford Clark) that on a sound construction of the deeds the truster intended by the words used in her last codicil to divide the residue of her estate among the legatees to whom pecuniary legacies had been bequeathed.

Mrs May Grant or Innes died in 1860 survived by one daughter Mary Innes. She left a trust-disposition and settlement dated 15th April 1842, in which, after providing for payment of debts, &c., she directed the trustees therein nominated to reserve unsold during the lifetime of her daughter, the said Mary Innes, for her use and accommodation, the household furniture and effects belonging to her, or such part thereof as they should think proper, and to give to her said daughter the use thereof during her lifetime, or from time to time, as her said trustees might consider fit; further, to realise and convert into cash the whole residue and remainder of her estate and effects, heritable and moveable, and to lend the same in one or more sums on such security, heritable or personal, as they should consider sufficient, and to make payment of the interest and annual profits thereof, or such part thereof as they should think proper, to or for behoof of her daughter the said Mary Innes during her lifetime. She further, after bequeathing certain legacies, some of which lapsed by the predecease of the legatees, disposed of the residue of her estate as follows:—“And with regard to the residue and remainder of my said estate and effects, heritable and moveable, above conveyed, remaining after the death of my said daughter, and after payment of the debts, expenses, provisions, legacies, and others foresaid, I appoint my said trustees or trustee to pay, assign, and make over the same, and any accumulations thereof, in such manner and way

as I shall direct and appoint by any writing to be subscribed by me at any time hereafter during my life, and failing any such direction and appointment, then to my own nearest heirs, executors, and successors whomsoever." She also left four codicils to this trust-deed dated respectively 23d June 1842, 28th May 1844, 5th August 1848, and 4th April 1850. By the codicils she bequeathed several legacies of money to domestic servants in her employment, to the guardians appointed to her daughter, and to acquaintances. She also left various specific articles by way of legacy, viz.—feather-beds, articles of jewellery, a picture, and a pianoforte and music. Some of the legatees received both pecuniary legacies and legacies of specific articles, others only the latter. The codicil of 1850 was in the following terms:—"I, May Innes, at present intend this to be my last codicil to my will. I leave and bequeath the following sums to Robert Green, son to Robert Green, Esquire, banker in Keith, one hundred pounds sterling, and I leave and bequeath to Mrs Anderson, wife of William Anderson, Esquire, Dell of Abernethy, by Grantown, fifty pounds sterling, as a small mark of my regard. I leave and bequeath to William Russell, son to Thomas Russell, Esquire, farmer in Pluscarden, by Elgin, fifty pounds sterling, along with the fifty pounds that I have before left to him, to be laid out in whatever his father thinks best for his benefit. I leave to the poor of Forres twenty pounds, to be given to the clergyman of the Established Church to be laid out in whatever way he thinks best. The money that I have bequeathed in my codicils I wish to be paid the first term after my death. If my dear daughter Mary does not require the interest of it, which I trust she will not, I hope my friend Mr Green, if he survives me, will see everything settled. And whatever more money I leave, after paying my lawful debts, to be divided amongst my legatees.—In witness whereof I have written this with my own hands, and subscribed the same at Forres the fourth day of April Eighteen hundred and fifty years."

On the death of the truster's daughter Mary Innes, who died unmarried on 8th March 1879, the legacies which became due on that event were paid by the Rev. James Keith and others, her mother's trustees, and questions were raised as to the persons who were entitled to the residue of the trust-estate, amounting to £2932, 13s. 11d., viz., Whether these were—First, the "legatees" mentioned in the codicil of 4th April 1850, and if so, who were the "legatees" meant by that codicil? or second, the heirs, executors, and successors of the truster claiming under the residuary bequest in the trust-deed? There were also questions raised as to the period of the vesting of the residue.

This action of multiplepointing was in these circumstances raised by the trustees. The parties entitled by survivorship of the truster to pecuniary and specific legacies under the settlement and codicils were eight in number. William F. Russell, who was entitled to a legacy of £50 under the codicil of 1850, in addition to another legacy of £50 left to him by a previous codicil, claimed (1), on the assumption that the bequest to legatees contained in the codicil of 4th April did not vest till the death of the daughter of the testatrix, to be ranked and preferred along with the two other legatees under that codicil who survived that date

to the fund *in medio, pro rata*, according to the amount of their several legacies, or alternatively to one-third of the fund *in medio*; (2) assuming that the bequest vested at the death of the testatrix, he claimed to be ranked and preferred along with the other legatees to the fund *in medio* in proportion to the amount of the respective legacies, or to an equal share of the fund along with the other legatees. A similar claim was made by Mrs Anderson, as a legatee under the codicil of 1850, and by her and her son as executors of Mr Anderson, a legatee under the codicil of 1848. The Rev. James Keith and another, as executors of Elizabeth Anderson, a legatee under the codicils of 1844 and 1848, as well as under the settlement, claimed that she was entitled to a share of the residue in virtue of the clause dealing therewith in the codicil of 1850. A similar claim was made by Mr Keith and another as being legatees of the testatrix who survived her.

Mrs Sophia Grant, nearest relative in blood alive at the death of the liferentrix, maintained that the fee vested at that date. She also maintained (1) that the words "whatever more money I leave," &c., in the codicil of 1850 applied to the cash in the house, &c., and not to residue, or, in any view, that the codicil was void for uncertainty, and that the disposal of the residue fell to be regulated by the settlement. She therefore claimed the whole fund *in medio*, or if vesting should be held to be at the death of the testatrix, the share falling to her as one of the next-of-kin at that date.

Mrs Tapson and others, the next-of-kin of the testatrix, also maintained that the fee of the residue passed under the settlement, or, in any view, that the codicil was void from uncertainty, and claimed to be ranked as next-of-kin whether the period of vesting should be held to be the death of the testatrix or that of the liferentrix. They therefore claimed that the fund fell to be divided into twelve shares corresponding to the twelve great-grandchildren of the father of the testatrix or their issue *per capita*.

The Lord Ordinary (KINNEAR) pronounced this interlocutor:—"Finds that the late Mrs May Grant or Innes, the testatrix, died in 1860, survived by one daughter Mary Innes, who died unmarried in or about 8th March 1879: Finds that, on a sound construction of the testamentary writings of the said Mrs May Grant or Innes, the persons entitled to the residue of her estate are those persons who stood in the relation of heirs *in mobilibus* to the testatrix at the date of her said daughter's death; therefore repels the claims for the claimants William Fairweather Russell, Mrs Elizabeth Duncan or Anderson, and others, the Rev James Keith and another (Miss Elizabeth Anderson's executors), and also the claim for the Rev. James Keith and William Innes: . . . Finds the claimants Mrs Eliza Rannie Marquis or Tapson and others entitled to the shares of the fund *in medio* respectively claimed by them in the first alternative branch of their claim, and the claimant Mrs Sophia Rannie or Grant entitled to one-twelfth share of the fund *in medio*; and with these findings continues the cause in order that arrangements may be made for a final division of the fund among all the parties entitled thereto.

"Opinion.—I think the sentence in the codicil directing that 'whatever more money I leave

after paying my lawful debts, to be divided amongst my legatees, cannot possibly be intended to be a direction as to residue of the kind contemplated in the settlement. It is a direction for disposing of such money as may be left by the testator, and available for being disposed of immediately on her death, and after her debts are paid. It appears to me, therefore, to dispose of the cash on hand, and must fall under that description, and I think that the only possible construction ever intended to be put on the bequest fortifies very strongly the view I take, because the words 'to be divided amongst my legatees' could not possibly be construed in any limited sense, there being no reason to exclude any one legatee or class of legatees from the general description in these words; and the obligation would therefore be to impute the whole residue among all the special legatees, which I think is absurd, having regard to the legacies and to the position of the several legatees.

"The only other question is, what is meant by the words 'then to my own nearest heirs, executors, and successors whomsoever?' and, in my opinion, that means the persons who stand towards the testator in the relation of heirs of moveables at the date of the daughter's death. If it meant the heirs, executors, and successors of the testator herself as at her death, I think that would carry the whole estate to the daughter; and it is perfectly clear from the directions for the administration and management during the daughter's life that the testator did not intend the daughter to have the capital, and so to defeat the whole of those provisions in *liferent*. If it does not go to the next-of-kin at the testator's death, the only alternative is that the testator intended these persons to take the estate, and that is quite in accordance with the terms used, because the trustees are directed to pay what remains, after the death of the testator's daughter, to the testator's heirs, executors, and successors. The only question, therefore, that I think requires, not consideration, but a little attention, in adjusting the interlocutor, is the question of who these persons are who were at the date of the daughter's death in the position of heirs of moveables of the testator. There are a great number of them, and I should like to know again who represents them.

"I hold that the words of the destination do not apply to the nearest relatives in blood, but mean the testator's heirs *in mobilibus*. That is why I am anxious it should be quite certain that we fix on the right people to take under that finding."

William Fairweather Russell reclaimed, and argued—The codicil of 4th April 1850 was in the form of a residuary bequest, and disposed of the residue. The word "money" might embrace the whole of the personal property—*Dunsmure v. Dunsmure*, Nov. 22, 1879, 7 R. 261; *Easson v. Thomas' Trustees*, Nov. 22, 1879, 7 R. 251. Here it obviously had that meaning, and the word "more" meant "more than I have specifically bequeathed in my settlement and codicils. The division should be among the legatees found entitled equally, share and share alike—*Pitcairn v. Thomson*, 15 D. 741.

The next-of-kin argued—By the word "money" the testatrix meant money properly so-called that might be left over in the hands of her executors after paying expenses and debts. The word

"more" referred to the immediately succeeding clause in the sentence, "after paying my lawful debts." In the cases of *Dunsmure* and *Easson* the word "money" received its widest signification, but any other meaning would have resulted in partial intestacy. Here there could be no intestacy; only one period of time was referred to, viz., the death of the testatrix, and it was not reasonable to suppose that after setting apart the residue for her daughters' maintenance the testatrix would direct it to be divided among her legatees. Further, looking to the nature of many of the legacies, and the position of the legatees, the view was strengthened, for no distinction could be drawn between those taking legacies of money and those who received specific articles such as feather beds, pictures, &c. The only alternative was to hold the codicil, so far as it related to residue, void from uncertainty.

Mrs Sophia Rannie or Grant (who was one degree nearer in blood-relationship than any of the others called as next-of-kin) argued—If the residue went to the "nearest heirs, executors, and successors" under the settlement, and if vesting were postponed till the death of the life-rentrix, she was then entitled to the whole fund *in medio*. The word "nearest" meant nearest in blood—*Haldane's Trustees v. Sharpley*, Dec. 15, 1881, 9 R. 269.

At advising—

Lord CRAIGHILL.—The raisers of this multipointing are the testamentary trustees of the late Mrs May Grant or Innes, and they have brought this action that the Court may decide between the competitors for the residue of the trust-estate. These competitors are (1) the next-of-kin of the truster, who claim under the residuary clause of the trust-deed, by which, whatever might remain after the death of the truster's daughter, the truster directed her trustees to make over in such manner and way as she might appoint by any writing to be subscribed by her at any time thereafter, and failing any such appointment, then to her nearest heirs, executors, and successors whomsoever; and (2) the persons to whom specific legacies were left in the codicils of the trust-deed, and who as such legatees say they are residuary legatees by virtue of the last bequest in the last of the codicils by which the truster appointed "whatever more money I leave after paying my lawful debts, and the legacies previously bequeathed, to be divided amongst my legatees."

The question at issue, as all such questions are, is one of intention. This is the first consideration by which we are to be guided, and there is a second hardly less important, which is, that intention is to be gathered from the words of the will. These, unless there is another interpretation plainly and presumably put upon them by the testator, or unless as used they have a technical meaning in which they are to be taken, ought to be allowed their ordinary and natural meaning. Plainly the truster in using the words of bequest in the codicil, the meaning of which has come to be in controversy, must have intended to bequeath something, and consequently there must in her contemplation have been some fund by or out of which this bequest was to be satisfied. What was that fund? Once this shall be ascertained the controversy between the next-of-kin and the

legatees of special bequests will be as good as determined. No doubt another will then be introduced, for should the clause be read as desired by the next-of-kin, we must decide whether those alive at the testator's death or those existing at the death of her daughter are the parties called by the testator, and, on the other hand, should the clause be read as desired by the legatees of specific legacies, the question whether other legatees than those entitled to pecuniary legacies are to participate in the residue will be presented for determination. But at present the question in controversy really is, What is the fund which was bequeathed? Was it residue? If not, what was it? All which the next-of-kin have said, or indeed can say, on this subject is that, whatever else might have been in view, the bequest of residue was neither intended nor accomplished. The probability, as they suggest, is that money which was kept in the house, or the contents of a current bank account operated on for every-day expenditure was the subject, and the only subject, of the legacy by which the "whatever more money" the testator might leave was bequeathed. This is the case of the next-of-kin, and they ask the Court to take their interpretation, because, as they contend, it is inconceivable that the truster could direct the residue of her estate, which happens to be large, to pass as a supplementary legacy to legatees the previous bequests to whom were comparatively small. This appears to me to be an insufficient and unsatisfactory suggestion. Try the question in this way. If in place of grouping all together as "my legatees" the truster had directed whatever more money she left to be divided among her legatees, A, B, C, and D, the argument from improbability would plainly have been excluded. The circumstance that the legacies previously given were small never could be warrant for the conclusion that the words "whatever more money" were not to have their natural meaning as used, because the result would be the bequest of a much larger portion of the succession than what had been previously bequeathed. In the present as in other similar cases we must fix the meaning by the words used, taken together with the context, and not by the consideration that upon a particular interpretation a testamentary arrangement which many, if not most, would think strange will come to be the will of the truster. Many trusters make what are considered strange wills, though I do not think Mrs Grant's will was at all strange. But once the will has been ascertained, that, however others may regard it, must be taken to be the rule for the regulation of the testator's succession.

The next-of-kin also say that if there is a difficulty in deciding upon the fund on which the bequest in question may operate according to what may presumably be held to be the intention of the truster, the bequest must be held void for uncertainty. This, however, really is the presentation in another form of the old argument. If there is a bequest to legatees of legacies previously bequeathed, there is in this case certainly a fund for satisfaction of the bequest. There is a residue, and a large residue too, the truth being that its largeness is the source of the supposed uncertainty so much relied on by the next-of-kin. Why then shall this

residue not be taken to be the fund which was the subject of this last of the truster's bequests, in what as she tells us was intended to be the last of the codicils of her will. There is no reason why it should not so far as I can see. There is good, and I think irresistible, reason why it should be so regarded. In the first place, the natural reading of the bequest as it occurs in the codicils that it is a bequest of residue. The words of course must be taken with the context, for without the context there is not a basis for interpretation. The passage of which the bequest in question is the concluding part is this—"The money that I have bequeathed in my codicils I wish to be paid the first term after my death, if my dear daughter Mary does not require the interest of it, which I trust she will not. I hope my friend Mr Green if he survives me will see everything settled, and whatever more money I leave after paying my lawful debts to be divided amongst my legatees." Now, here there is a fund, and one fund only, for payment, first, of the previous legacies bequeathed in the codicils; secondly, of the truster's debts; and thirdly, the general bequest of whatever other money she left, which is to be divided among the legatees of specific legacies. Such a fund plainly must be the *corpus* of the estate, for out of it all debts and all legacies, whether specific or general, are to be satisfied. Creditors and legatees of specific legacies of course are preferential, but whatever remains after their claims have been provided for is the "whatever more money" which is bequeathed by the concluding provision of the last of the testator's codicils. The residue, therefore, must be the subject of this ultimate bequest. No doubt the word "residue" has not been used, but the "whatever more money" that is used is in the collocation merely an equivalent expression. Let us go back to the residuary clause in the trust-deed. There we find—"With regard to the residue and remainder of my said estate and effects, heritable and moveable, above conveyed, remaining after the death of my said daughter, and after payment of the debts, expenses, provisions, legacies, and others foresaid, I appoint my said trustees or trustee to pay, assign, and make over the same, and any accumulations thereof, in such manner and way as I shall direct and appoint by any writing to be subscribed by me at any time hereafter during my life, and failing any such direction and appointment then to my own nearest heirs, executors, and successors whomsoever." In this clause residue is described as what remains after the death of her daughter, and after payment of debts, legacies, and other provisions. The "whatever more money I leave"—direction for the payment of the legacies previously bequeathed having immediately before been given after paying the truster's lawful debts—is, as I think, a parallel or equivalent expression, and so this last codicil upon this interpretation is to be taken as the writing which was referred to in the trust-deed as one that might thereafter be subscribed. This last consideration is not immaterial, because the time for payment—that is to say, the death of the truster's daughter, which is not mentioned in the codicil—is fixed by the trust-deed, which excludes the difficulty that must have arisen if in this way the death of the truster's daughter had not been made the term of payment.

For these reasons I think that the legatees, as that word is used by the truster, and not the next-of-kin, are entitled to the residue of the trust-estate. Who are they? In my opinion only those who have received pecuniary bequests. The residuary legatees are legatees of money, and those *ejusdem generis*, and they alone are presumably the parties among whom the residue of the trust-estate according to the will of the truster is to be divided. Should your Lordships agree in this opinion the interlocutor reclaimed against will be recalled, and the legatees of prior pecuniary bequests bequeathed in the codicils be found entitled to the fund *in medio*—that is to say, the residue of her trust-estate.

LORD RUTHERFURD CLARK—I rather think that the interlocutor should be adhered to. I do not doubt that the testator intended to leave some legacies to her legatees. She practically says so, and when she uses such words, the testatrix, I cannot doubt, intended to leave more money to the legatees. But I confess I am unable to satisfy myself with any certainty what is the subject of the legacy which is referred to in the words in question, and I would prefer to hold that the legacy was void in consequence of the uncertainty of the subject of it.

LORD JUSTICE-CLERK—I cannot say that I have found this case unattended with difficulty, nor do I come to the conclusion at which I have arrived with any very great confidence. All the less can I do so from the opinion that Lord Rutherford Clark has intimated. At the same time my impression at the hearing—and it has been strengthened by my consideration of the case since—was in favour of the view of Lord Craighill; and the views that weighed with me in coming to that result were substantially those which he has fully explained, and mainly this—the original destination of this lady's property contained a clause directing her trustees to pay, assign, and make over the residue of the estate, "and any accumulations thereof, in such manner and way as I shall direct and appoint by any writing to be subscribed by me at any time hereafter during my life," and failing such direction then to her nearest heirs. Now, the first question is, Is there any such writing that bears the character described in that clause in her settlement? I think the presumption is that at the time when she used these words she did intend to make a writing which should have that character, and should regulate the residue of her estate. We find that she executed codicils at intervals, and that dated 24th April 1850 begins—"I, May Innes, at present intend this to be my last codicil to my will." And as therefore she intended to make her last settlement, we may assume that she meant to fill up the blank that she had left in her original settlement, and to make an arrangement with regard to the residue of her estate; and I should commence the reading of this codicil, which is certainly a writing under her hand, with the expectation of finding that that had been done. And I find in the course of that codicil words which certainly bear that interpretation, namely, "whatever more money I leave after paying my lawful debts shall be divided among my legatees." These words were not in any way restrained by the rule which seems to prevail in England, that

the word "money" will not carry property other than money in the strict sense. That question has been considered and decided here, but we do not acknowledge that limitation of the term at all. The only question is, whether it was meant in this particular case to be a bequest of residue? It was a bequest of the surplus of that fund out of which debts were to be paid, and beyond all question the *corpus* of the estate was to be liable for the debts. My opinion is that she meant that writing to be a writing under her own hand disposing of the residue, and that the words she uses are fitted to carry the residue. I think so all the more that the presumption is in favour of and not against sustaining the testament.

I thus prefer the opinion of Lord Craighill. And I think he is also right in limiting the legatees to pecuniary legatees. Your Lordships will therefore alter the judgment and find that on a sound construction of these writings the residue is conveyed to the pecuniary legatees.

LORD YOUNG was absent.

The Court pronounced this interlocutor:—

"The Lords having heard counsel for the parties on the reclaiming-note for the claimant William Fairweather Russell against Lord Kinnear's interlocutor of 15th February last, Recall the said interlocutor: Find that on a sound construction of the testamentary writings of the testatrix Mrs May Grant or Innes the persons entitled to the residue of her estate are the persons to whom she bequeathed pecuniary legacies, and who survived her, or the representatives of such of them as have since died: Find that the claimant the Reverend Robert Smith, as one of the guardians of Mary Innes, the daughter of the testatrix, is entitled to a legacy of £50 sterling out of the fund *in medio* before division thereof in terms of the first branch of his claim: Find that the whole claimants are entitled to payment of their expenses out of the fund *in medio*, and decern; and with these findings remit the cause to the Lord Ordinary with instructions to proceed therein as accords."

Counsel for William Fairweather Russell—Keir-Wallace. Agents—Rhind, Lindsay, & Wallace, W.S.

Counsel for Next-of-Kin—Jameson—Low. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for Mrs Grant—Armour. Agents—Lindsay, Howe, & Co., W.S.

Friday, July 13.

FIRST DIVISION.

SPECIAL CASE — KING AND OTHERS
 (YOUNG'S TRUSTEES) v. WALKINSHAW
 AND OTHERS.

Succession—Issue—Children—Meaning of Term
 "Issue."

The word "issue" has no technical or specific meaning by the law of Scotland, and is capable of applying to descendants in any