

[17th March, 1848.]

MRS. A. TURNBULL and Others, Trustees of WILLIAM TURNBULL, Esq., deceased, *Appellants*.

JOHN COWAN, Esq., Advocate, Curator Bonis of THOMAS TURNBULL, Esq., *Respondent*.

Intestacy.—Accessorium sequitur principale.—Where real and personal estate are given to Trustees, with a direction to invest the personal estate in the purchase of lands, and upon the happening of a contingency to entail both the lands given and those to be purchased, upon a specified series of heirs, without any direction as to the application of the rents of either set of lands, until the occurrence of the contingency, these rents will not fall under the direction to invest and entail; but will go to the heir as undisposed of.

Heir at Law.—Minor.—Lunatic.—Curator bonis.—Election.—Whether a minor or lunatic should, before majority or convalescence, elect by his Curator between his rights at law and his interests under a will, is completely within the power of the Court, and will be exercised for him by the Court, only where it is absolutely necessary, with a view to the interests of other persons.

Truster's debts.—Where, between the time for investment of personalty in the purchase of land, and for entailing the land, on the occurrence of an uncertain contingency, there are rents undisposed of, these rents will not form the primary fund for payment of the Testator's debts; They will be payable out of the *corpus* of the personalty before investment.

Legitim.—Intestacy.—Heir ab intestato.—A lunatic heir entitled, on the occurrence of a contingency, to certain benefits under the will of his ancestor, is entitled in the meanwhile, to the undisposed estate of his ancestor, without prejudice to his right to elect, when the contingency should arise, between his *legitim* and the benefits given by the will.

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WILLIAM TURNBULL by trust, disposition, and settlement of the 2nd February, 1826, conveyed to trustees “ All and
“ sundry lands, teinds, fishings, superiorities, adjudications,
“ annual rents, and other heritages whatsoever, presently be-
“ longing, or which shall happen to belong to me at my decease,
“ with the whole writs and evidents, rights, title-deeds, and
“ securities thereof: As also all and sundry debts and sums of
“ money, real and personal stock in 3 per cent. Government
“ annuities, or in any other Government security, stock in the
“ Bank of England, or in any other bank, corporation, or com-
“ pany: Also all money due on bill, note, account, decret, or
“ any other manner of way: Also all household furniture and
“ effects, farm-stocking and produce, utensils of every kind,
“ lying money, arrears of rent, interest, dividends, and, in gene-
“ ral, all personal property of every description, which shall or
“ may belong to me at death, with the whole vouchers and
“ instructions thereof.” (Then followed an enumeration of the
particular lands.) “ With full power to my said trustees, imme-
“ diately after my decease, to enter to possession of the premises,
“ to output and input tenants, and to manage the same in the
“ like ample manner as I could have done myself, and particu-
“ larly to liquidate and realise my whole personal property, and,
“ as soon as conveniently they can thereafter, to invest the
“ proceeds in land, as near to my other properties as can be got,
“ and thereafter to hold and entail the same in manner under-
“ written: First, my said trustees are to pay all my just and
“ lawful debts, deathbed and funeral expenses, and the expense
“ of executing this trust: Secondly, they are to pay to my said
“ wife, Mrs. Alison Turnbull, in the event of her surviving me,
“ during all the days of her lifetime, and remaining my widow,
“ a free yearly annuity of 500*l.* per annum.” (Then followed
gifts of certain annuities and legacies.) “ And, third and lastly,
“ I hereby direct and appoint my said trustees to apply such

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“ part and portion of the income of my residuary estate as they
 “ shall see useful and proper for the support and comfort of my
 “ only child, Thomas Turnbull, during all the days of his life-
 “ time; and, in the event of his recovery or death, then my said
 “ trustees are hereby directed to execute a strict entail, accord-
 “ ing to the law of Scotland, of my whole lands and heritages,
 “ as well as of such lands as may be purchased and acquired with
 “ my personal property, so directed to be invested as aforesaid,
 “ and that to and in favour of the said Thomas Turnbull, my
 “ son, if it shall please God to restore him to health, and to the
 “ heirs whatsoever of his body—whom failing, to the said Wil-
 “ liam Turnbull, son of my said brother deceased, and the heirs
 “ whatsoever of his body—whom failing, to my own nearest
 “ heirs whatsoever, the eldest heir-female always succeeding
 “ without division, and excluding heiresses-portioners through-
 “ out the whole course of succession: And further, I hereby
 “ nominate and appoint my said trustees to be my executors
 “ and universal intromitters with my personal means and estate,
 “ in trust as aforesaid, with power to give up inventories thereof,
 “ and confirm as effeirs.”

The maker of this deed died in the month of December, 1840, leaving his only son mentioned in it, surviving him. At the date of the deed, and likewise of the truster's death, this son was in an imbecile state of mind, and in March, 1842, the Respondent was appointed *Curator bonis* to him.

The fortune left by the truster, to be regulated by the trust disposition, consisted of lands, worth about 1500*l.* a-year, and personal estate, chiefly Government stock, amounting to upwards of 80,000*l.* in value.

The trustees having accepted the trust, and entered into possession of the trust estate, the Respondent, on behalf of his ward, brought an action against them and the persons in whose favour an entail was by the trust disposition directed to be made, concluding to have it found, that it was not incumbent on the

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Respondent to elect between the *legitim* of his ward out of the personal estate of the truster, and the benefits given to him by the trust deed; and that his ward, in the event of his recovery, and his representatives in the event of his death before recovery, would be entitled to make such election notwithstanding he should have received from the trustees out of the income of the estate sufficient for his ward's maintenance. That the trustees were not entitled to make an entail of the lands, left by the truster, and to be purchased by them, until his ward should have recovered; and that the income of the general estate between the death of the truster and such period was undisposed of and belonged to his ward absolutely "without prejudice to
 " the right of the said Thomas Turnbull, or of his legal repre-
 " sentatives, afterwards to exercise the said right of election, or
 " to claim *legitim*, as before mentioned; and that the same shall
 " so belong to the said Thomas Turnbull, and form part of his
 " funds, whether effect shall ultimately so be given either to the
 " said legal right of *legitim*, or to the foresaid testamentary
 " provision in his favour under his father's said deeds of
 " settlement."

The Lord Ordinary made avizandum to the Inner House, and directed cases for the parties to be prepared and boxed for that purpose.

Upon the 13th June, 1845, the Court pronounced the following interlocutor, which was the one appealed from: "find,
 " decern, and declare in terms of the first declaratory conclusion
 " of the summons; and, further find and declare that the
 " Defenders, the trustees of the late William Turnbull, are not
 " directed or entitled under the terms of his trust settlement to
 " execute an entail of the lands conveyed to them by that deed,
 " or of the lands to be purchased by them under the directions
 " thereof, until the period of the recovery or death of Thomas
 " Turnbull his son; and that the free income and annual produce
 " drawn and to be drawn from the estate heritable and move-

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“ able estate of the said William Turnbull by the said Defenders;
 “ his trustees between the period of his death and that of the
 “ execution of such entail, whether the same was acquired by
 “ him in his lifetime, or has been, or shall be acquired by the
 “ said trustees, under the direction of the said trust deed, after
 “ deduction of all payments which the trustees shall, in con-
 “ formity with the direction and authority in the said trust deed,
 “ make out of the said income and annual produce, including
 “ such allowance as they shall make for the support and comfort
 “ of the said Thomas Turnbull, during all the days of his life-
 “ time, or until his recovery, is undisposed of by the said deed,
 “ and now belongs, or as the same shall from time to time exist
 “ and become due, will belong, to the said Thomas Turnbull
 “ absolutely and unconditionally as his own funds; and that
 “ the pursuer as his *curator bonis* is entitled to demand and
 “ recover the same without prejudice to the right of the said
 “ Thomas Turnbull, or of his legal representatives afterwards to
 “ exercise his right of election, or to claim *legitim* as concluded
 “ for in the first declaratory conclusion of the summons; and
 “ that the same shall so belong to the said Thomas Turnbull,
 “ and form part of his funds, whether effect shall ultimately be
 “ given either to the said legal right of *legitim* or to the testa-
 “ mentary provision in his favour under his father’s said deeds
 “ of settlement.”

Mr. Stuart and *Mr. Anderson* for the Appellant.—I. Although it be very true that the curator of a lunatic or minor cannot change the character of the estate to which his ward has succeeded, as by converting personal into real estate by lending money upon heritable bond, and, in this way, affect the succession to the ward’s estate, as between his heir and personal representatives, there is nothing to prevent the curator of a ward, to whom one of two rights belongs, to elect between the two. Until the election is made the ward has not succeeded;

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the nature of the estate to which his heir or representatives will be entitled, in the event of his death, has not, till then, been ascertained; so that the election cannot, in any way, alter its nature. The voluntary act of a curator in changing the character of his ward's estate is altogether different from his election between two estates, rendered necessary by the existence of interests in others. And, if the officer has not this right inherent in the office, there can be no doubt the Courts have power to give it to him, where the circumstances make this necessary. In England there are many examples of this course being taken, *Chetwynd v. Fleetwood*, 1 *Bro. Par. Ca.* 300; *Ebrington v. Ebrington*, 5 *Macl.* 117; *Hume v. Randall*, 2 *Sim. & St.* 187; *Bigland v. Huddleston*, 3 *Bro. Ch. Ca.* 285; *Wilson v. Townsend*, 2 *Ves. Sen.* 696. And in Scotland, whenever the Court has been satisfied that the particular power asked by a curator for the management of his ward's estate was necessary, either to prevent loss, or to procure evident advantage, or to save the interests of third parties, it has been in use to grant it. *Re Miller*, 15 *Sh. & D.* 147; *Tutors of Lord Cardross*, 16 *Sh. & D.* 238; *Somerville's Factor*, 14 *S. & D.* 451. If the power exists the reasons are obvious, why, in the present instance, it should be exercised. Unless election is made the trustees cannot know how to proceed in the administration of the trust, for if the ward is to have *legitim* they should invest in land only two-thirds of the personal estate; whereas they should invest the whole if he is to take the benefit of the trust deed. Until this is ascertained, which may not be for many years, if the curator is not presently to elect, the execution of the trust is practically suspended, and the rights of those to take under the entail possibly materially affected, by risk to the fund while uninvested, the loss of opportunity for profitable investment; and the postponement of enjoyment, which, in the case of election to take *legitim*, would become immediate. And if the ward is to be entitled to the rents as unappropriated, the injury to the other parties by

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the delay of election, is rendered more obvious, for this delay is what will create these surplus rents, which, if *legitim* were presently elected, could not have existence.

II. With regard to the surplus rents between the period of the testator's death and the period for making the entail, which will remain after providing for the ward's maintenance, the gift to the trustees is of the whole estate, real as well as personal. There is no intestacy as to any part. The trust, therefore, must be commensurate with the gift; and these rents, coming within the gift, must be invested as the rest of the estate is directed to be invested. A direction to invest the *corpus* of an estate embraces a direction to invest the fruits of the *corpus*. In *Gillespie v. Marshall*, *Mor. No. 2, App. accessorium, &c.*, a gift of capital to be paid at twenty-five, without any direction as to the interest in the meanwhile, was held to carry the interest, accumulated with the principal, as an accessory to it. In *Graham v. Templar*, 3 *Wil. & Sh.* 48, although there was a gift of the accruing rents, the opinion of the Judges was, that without this they would have been carried; for in the words of one of them, "when an estate is conveyed to trustees, for behoof of another, the conveyance carries the whole rents, casualties, &c., in the same manner as the estate itself." The rents are but accessories to the estate itself, and follow it according to the maxim *accessorium sequitur principale*. The authorities in England are much to the same effect: in *Gibson v. Montford*, 1 *Ves. Sen.* 485, Lord Hardwicke reiterated, as an acknowledged doctrine, that an executory devise of the residue of real and personal estate, took in the intermediate profits of the estate devised; and in *Ackers v. Phipps*, 9 *Bli. N. S.* 440, a case which very much resembled the present, where there was a devise of real estate, and a bequest of personal estate, to trustees, to be conveyed by them to the object of the trust, at twenty-four years of age, it was held, that the rents, accruing till the period of making over the estate, did not go to the heir-at-law of the truster as a

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resulting trust, although there was an express direction for accumulation of the income of the *personal* estate, while the will was silent as to the income of the *real* estate, which suggested, as a fair inference, that accumulation as to them was not intended.

In the present case the whole estate of the truster is given “for the uses, ends, and purposes after specified;” everything, therefore, which the deed passed is directed to be applied to the purposes of the trust. But the investment in land is not fixed at any time; it is to be made “as soon as conveniently may be,” whence it necessarily follows that some period, in contemplation of the truster, was to elapse between his death and the investment. If the expressions of the deed are large enough to carry the rents of the lands left by the truster, and the interest of the money to be invested as a part of a whole, this part must, as a necessary inference, be devoted to the same trusts as the land itself, and the capital of the money.

III. Assuming that the income, until the period of entail, is undisposed of, and that the Respondent is entitled to elect between *legitim* and the provisions of the trust, as the general intent of the truster was that the beneficiaries under the trust should enjoy the whole estate, including that part of it which would consist of the *legitim*, in order to give effect to this general intent, which, according to the doctrine laid down in *Stair v. Stair*, 2 *Wil. & Sh.* 414, must first be given effect to; the Court would, in case the Respondent elected to take his *legitim*, be constrained to apply the undisposed-of income to answering the *legitim*, for to take it out of the capital of the estate would be to defeat, so far, the general intent of the trust.

But further, if the Respondent take the income as undisposed of, he must do so under a passive title of representation to make good the obligations of the truster, and, among the rest, to fulfil his disposition of the fund of *legitim*. If, therefore, the Respondent were to take the undisposed-of income the

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trustees would be entitled, when he came to demand his *legitim*, to set off against it what he had so taken, and the difference between the two would be all he would be entitled to receive.

IV. Moreover, construing the deed, so as best to effectuate the purposes of the truster, his debts, legacies, and annuities, and the expenses of the trust, must be deducted out of the undisposed of income, which, whether it is to be invested in land or not, is, at all events, given to the trustees for the purposes of the trust.

Mr. Bethel, Mr. Wortley, and Mr. Gowan for the Respondents.

LORD CHANCELLOR.—My Lords, In this case several questions arise, and the most important is that which relates to the income arising from the property real and personal, intermediately between the time of the testator's death and the period at which the entail, according to the directions of the instrument, was to be carried into effect.

The question depends upon what appears to be the intention of the testator. In fact, all questions upon instruments of this sort, but peculiarly questions as to what must become of the intermediate income of the property in such a case, depend upon the will of the party who is the author of the instrument. If he has directed the manner in which those intermediate rents or interest are to be applied of course that direction must prevail. If he has not so directed, and there is no disposition, then it is equally clear that with respect to that part of the property belonging to him at the time of his death of which he has so made no disposition the rule of law must prevail, which applies, in the absence of any direction by the party entitled to prescribe the mode in which it is to be taken.

The terms of the gift, so far as they are necessary for the consideration of this question, are thus expressed. He gives

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all his lands “presently belonging, or which shall happen to belong to me at my decease;” he then gives his household furniture, enumerating several descriptions of property, “and in general all personal property of every description which shall or may belong to me at my death.” Then he vests the property in trustees, and he directs them to convert the personalty into money, and to invest the proceeds in land;—then he directs the payment of his debts, and gives annuities to his wife and to several other persons. And then his only child, being unfortunately deficient in intellect and incapable of enjoying the property, he directs the appointment of trustees “to apply such part and portion of the income of my residuary estate as they shall see useful and proper for the support and comfort of my only child, Thomas Turnbull, during all the days of his lifetime, and, in the event of his recovery or death, then my said trustees are hereby directed to execute a strict entail according to the law of Scotland of my whole lands and heritages, as well as of such lands as may be purchased and acquired with my personal property so directed to be invested as aforesaid, and that to and in favour of the said Thomas Turnbull, my son, if it should please God to restore him to health and to the heirs whatsoever of his body, whom failing,” then to certain other parties in succession.

He gives therefore all the lands of which he might be possessed at the time of his death; and he gives his property as it existed at the time of his death, not as an executory gift—not a gift to take place at a future time,—but an immediate gift to trustees, who are immediately ordered upon the property so vesting in them, after the payments directed to be made, to invest it in the purchase of lands; and the lands when so purchased are to go with the lands which he had himself the possession and the disposition of at the time of his death, and those lands which so belonged to him and the other lands so to be purchased with the residue of his personalty, are to be

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entailed. But they are to be entailed only upon certain contingencies or certain events. They are to be entailed if the son recovers his health; and if he does not recover his health, then they are not to be entailed at all until the period of his son's death.

Two events therefore are pointed out, upon the happening of either of which the entail is to take place; and then, and not till then, are the trustees to denude themselves of their trust and to hand over the property to those who would be entitled under the entail so directed to be made. But till one of those two events arrives the trustees have nothing to do but to hold the land according to the directions of the will. And we in vain look in any part of the will to find any direction as to what they are to do with the income arising from the land so directed to be purchased, in the interval between the death of the author of the trust and the period at which the trustees, under this direction, are to create an entail. I am speaking of course of the surplus, not of that portion which is directed to be applied either to the payment of the annuity to the wife or to the maintenance of the child. The question is only as to the surplus which remains after those particular purposes are provided for.

My Lords, several cases have been cited, and doctrines have been referred to of unquestionable authority, and authority not only in point of principle but in point of decision, which cannot be controverted, but which appear to me to have no application whatever to the present case;—for instance, the case of *Fitzgerald v. Fitzgerald*, and the case of *Sitwell v. Barnard*. Those cases are both governed by a principle totally inapplicable to the present case. The decision in *Sitwell v. Barnard*, (and there are other cases which follow upon the same principle,) is simply this:—that where a testator does not leave property undisposed of, but does dispose of the intermediate rents and profits, and directs an accumulation until the money be invested in land, a year is a fit time to allow that to be done. There is

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this difficulty, that you cannot always invest money in land; it may take some time to ascertain what the surplus is, and when you have got the money you cannot always find an estate fit to appropriate a sum of money to. Then the testator having directed that, until the investment shall be made, there shall be an accumulation, the question comes, if you cannot immediately invest, what is to become of the tenant for life's provision until the trustees sell the property, execute their trust, and find land in which the money can be properly invested. There is an established rule in the cases referred to, that a year is a reasonable time to allow to trustees to perform their trust (a rule applicable in other cases), and that after a year has elapsed, which is a fair time to enable them to perform their duty, then the tenant for life shall be entitled to the income of the property, if not invested, as he would be entitled to the income if the investment had taken place. There is no absence in that case of any disposition on the part of the testator or the author of the trust; on the contrary, it is a dealing by the Court of Equity with the direction of the will, or the legal construction to be put upon it; not an application of an income unappropriated by the testator, but a controlling of the direction which is to be found on the face of the will.

Another class of cases is *Fitzgerald v. Fitzgerald*, and other cases which have followed upon the same principle. Those cases are equally inapplicable to the present; they turn entirely upon this rule of equity in this country, that where a residue is given upon a future contingency, the intermediate income goes with the principal, but that where land is given upon a future event the intermediate rents do not go, and for this most obvious of all reasons, which seems to have been lost sight of at the bar very much: a gift of land is a gift of a specific thing, and if that is only to commence at a future period there is nothing in a gift of land the interest in which is to commence *de futuro*, to show an intention to give the intermediate interest, and

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therefore it descends to the heir. But where you give the residue of personality then, from the comprehensive nature of the term “residue,” the Court says, it is quite immaterial that the intermediate interests are not given; they are not given in terms as intermediate interests, but they are given under the term “residue,” and therefore a gift of the residue of personality *de futuro* carries with it all the intermediate income. But the gift of a specific sum of money does not, unless there is something showing an intention to give an intermediate interest in the meantime.

Then the Court has this to consider. Here is a joint mixed gift of personality and realty. One rule applies to personality and another rule applies to realty. The term “residue” is used as to both. It is not, strictly speaking, applicable in the same sense to realty in which it is applied to personality, because, although you talk of the residue of land, and a gift of land as a specific gift, still a rule having been adopted with regard to personality, it has been considered that where the gift is mixed, that is an indication of intention that the same rule shall prevail when applied to realty. But that rule has no application to the present case, unless it can be shown that with regard to the personality, in this case, at all events, the intermediate income fell into the *corpus* of the fund to be invested in land. In all those cases there is no intermediate gift at all. The gift is *de futuro*. Here is an immediate and direct trust to be executed by the trustees, which distinguishes it from the various other cases which have been referred to, which, to my great surprise, was used in argument as reason why the intermediate rents should pass.

Now, my Lords, if it rested entirely upon that the case of *Bullock v. Stone*, which was referred to in the argument, expressly takes that distinction, and decides that it makes no difference whatever generally speaking, whether there be an intermediate trust or not, except this, which Lord Hardwicke

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observed, that the question does not arise as to the legal interest in the land appropriated; but if it be in trust, then what descends to the heir is an equitable interest to be handed over to the party entitled by the trustees, instead of being a legal right to receive the rents in the first instance.

But it is very important in looking at the intention of the author of the trust, to see what he has directed to be done upon his own death. Now, to be sure, a gift of personalty is not materially varied in extent by the party describing it as personalty which he had upon his death; but when you are looking at the intention, and to see what it is that he meant to have done with his personalty, it is an indication of his intention as to the course to be adopted with the property upon his death. He in terms gives the personalty, and he directs the gift to be invested in land, as soon as conveniently may be, after his death. There is no doubt, therefore, that it is the duty of the trustees, after taking a reasonable time to convert the property into money, to invest the money in the purchase of land: Now, according to the rule of equity, which applies to Scotland as well as to this country, what he has directed to be done at the time of his death, must be considered as being done; and if it is postponed by any accidental circumstances, although it may make a difference to the parties, whether it is received in the shape of interest, or in the shape of rent, yet their right must be the same. It is not a postponement by the trustees of the execution of the trust, that can possibly take the property from one party entitled to it, and give it to other parties not entitled to it. We must therefore suppose that the testator supposed that what he directed to be done would be done.

Now, in this trust, therefore, if the money when realized had been invested as soon as conveniently could be after the death of the author of the trust in the purchase of land, what is to become of the rents of that land in the intermediate period between his death and the time fixed for the settlement? I

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asked that question of the learned Counsel at the Bar, and of necessity they said that the rents as they accrued, must be invested *de anno in annum* in the purchase of other lands. In what part of the will do you find any such direction? Where do you find any intimation of it?—Quite the reverse.—What is to be invested in land is not what may so accrue as the income of the property *de unno in annum*; but in terms the author of the trust has said that the personalty shall be invested as it existed at the time of his death; therefore, whether it includes the rents of the property in land which he had himself at the time of his death, or whether you look to the land which he directed to be purchased with his personalty as soon as conveniently could be after his decease, there is an absence of all provision in the will as to what is to become of the intermediate rents, after discharging those payments which he has directed to be made by the deed. Therefore it appears to me that this is precisely a case in which there is an absence of all disposition of the intermediate property, which, therefore, must devolve upon the son. And without at all entering into the question whether the intermediate income arises from the personalty when invested in land, or whether the intermediate income arises from the interest of the personalty whilst existing in that form, it would necessarily fall to him as heir, in one character or the other; as he is representing both, it would necessarily fall to him, there being no gift from him and he taking it by law.

My Lords, having expressed the opinion which I have formed upon the principal part of the case; there are two other points which I must shortly notice. It was contended that the debts which the testator has directed to be paid, are to be paid out of the income which shall arise after his death. I in vain endeavoured to ascertain upon what principle it was that that was contended for, inasmuch as though the property is property which he had power to dispose of beyond all doubt by his will, yet not having disposed of it, it is property which descended to

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the heir. I presume that the argument was intended to be founded upon the rule that property which has descended is first applicable to the payment of debts. But that will not answer the purpose of the argument, because this is not property which has descended,—it is the income arising from property disposed of.

Therefore they must go still further and show, not only that property which has descended is first applicable to the payment of debts in such cases, but that the debts are to be paid, not out of the *corpus* of the estate, but out of the income undisposed of, or out of a portion of the estate, with respect to which no intention has been declared. There can be no authority for such a proposition. And, if there were any doubt about it, the author of the trust has here directed the payment of the debts by the trustees out of the property which he has disposed of by his will. I apprehend, therefore, there is no doubt whatever that the debts are to be paid out of the *corpus* of the estate. Nobody can say that the creditors are not to be paid till a sufficient sum is realised, by the accumulation of the annual income of the estate. They are to be paid out of the *corpus*. And the heir is not bound, out of that which has fallen to him as a future income, to provide a fund for the payment of those debts.

Then, my Lords, comes the question of election. Now all that has been done with regard to election has been to postpone the period at which the election shall take place. If I am right, and your Lordships adopt the proposition which I mean to submit to you, to affirm the decree, so far as it declares that the intermediate rents and profits are undisposed of, and therefore fall to the estate of the lunatic, your Lordships observe that there is nobody who can be interested in having the question of election decided now, because, then, the whole income arising from the estate belongs to the lunatic. Whether he takes it as the interest of his *legitim*, or whether he takes it as falling to him as heir, the intermediate interest is that which nobody else

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can touch until the period comes when the entail is to be created.

But there is another reason which makes it extremely inconvenient, and it is an inconvenience which the Court would not expose the party to, except in a case of absolute necessity, namely, that there is no means at this moment of forming an opinion about the election. There is no means of ascertaining what the interest of the lunatic would be, because it must depend entirely upon the probability of his recovery. Now if the interest of other parties was very much affected by the postponement, I will not take upon myself to say what course might be proper to be adopted for the purpose of relieving other parties from the inconvenience arising from the postponement of the election. But we know perfectly well, in this country at least, (and there is no reason to suppose that it is not the same in Scotland,) that the question of election is very much in the control of the Court, and that it either postpones it or directs the election to take place immediately, according to the circumstances of the case. It is so frequently with regard to infants. If the interests of other persons are very much affected, and require an immediate election, the Court takes upon itself to perform that duty by considering what is the most expedient course to be adopted for the interest of the infant. On the other hand, if it appears that there is no inconvenience from the delay, the Court then postpones it till the party is in a situation to choose for himself.

Now here no inconvenience can arise to anybody else from postponing the period of election, as the election will be between the legitim and the interest which the lunatic would take under the entail, and which, in the event of his not recovering, would leave nothing to choose between; because then of course the legitim would be the better interest for him, inasmuch as in that case he would take nothing under the entail. It would be putting his interest in a most inconvenient position, and assum-

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ing a duty which it would be impossible to execute with anything like certainty, if the Court should take upon itself to choose for the lunatic, even if it has the power of so doing, as to whether it would be more expedient for him to take the actual legitim which, he is clearly entitled to, or to take the chance of the benefit from the entail, which is very uncertain, and which, from the nature of his malady, it is very unlikely that he should ever derive any benefit from.

My Lords, there was considerable confusion, as it struck me, in the argument upon this question of election. It seemed to be supposed that the interest which the party took as heir, or as next of kin, was in some way or other to be a question of election. Nothing can be more unfounded. The question of election turns upon this,—where a party gives to an individual something which is his own, and attempts to give to somebody else away from that party something which does actually belong to the person to whom the first gift is made, then the party cannot both take under the instrument and against the instrument—he cannot both claim that which is his own and take that which is intended to be given to him. But the heir-at-law is not in that position. He claims nothing against the will. He claims that which is his own by the law of descent. The legitim the party has an antecedent right to. Supposing, for instance, the personal property is given to the heir-at-law, and the real estate is attempted to be given by a will not properly executed, the heir-at-law takes the land as the heir, but he is not deprived of any benefit given under the will; unless indeed the testator has imposed the condition of election (which no doubt he may do), the question of election will not arise at all. The election therefore clearly would be ultimately between the benefit taken under the entail and the title to legitim as a claim against the gift, because the gift has professed to give all which the author of the gift had at the time of his own death.

My Lords, I therefore see no inconvenience at all in the

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course which the Court of Session has adopted, of deferring the period of election at present. And I think they are also right in principle in declaring that the intermediate income arising from the property is undisposed of by the will. It is to be observed, with regard to the postponement of the election, that at the commencement of this process it appears that the parties all concurred in the propriety of that arrangement, but that they changed their minds, and thought that it would be expedient to get the election at the present moment. But all the parties at the commencement (and it is so assumed by the first interlocutor of the Lord Ordinary), concurred in the opinion, that it would be convenient and proper, under present circumstances, to postpone the question of election.

My Lords, I think therefore, upon all these points, that the Court of Session have come to the right conclusion; and I move your Lordships to affirm their interlocutor.

LORD CAMPBELL.—My Lords, I have very little to add to what has been addressed to your Lordships by my noble and learned friend. The first point which was discussed by the Judges below, and which has been debated at the Bar, is with respect to the election, namely, whether it was necessary for the *Curator bonis*, who is the Pursuer in this case, to elect between the will and the right to legitim, before making this claim. Now, my Lords, I by no means say that in no case the *Curator bonis* may not, under the direction of the Court, exercise the right of election. The *Curator bonis* appears to have considerably more authority by the law of Scotland than the committee of the estate of a lunatic has in England. He may sue in respect of the property of the person whom he represents, whether *compos* or *non compos*. And if his interest and the interest of third persons should require that an election be exercised, as at present advised, I should think that that might be done. But I see no convenience, but on the contrary, great

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inconvenience, which would arise from compelling the *Curator bonis* here to make an election, before claiming the surplus of the rents and profits of the real and personal estate that may arise between the death of the testator and the contingency contemplated, which is, the recovery of the lunatic or his death, when the lands are to be entailed.

Now, my Lords, the first consideration is, that the claim made in this action is not under the will at all. The claim made in this action is made on behalf of the lunatic (as I will call him, although he is not *cognosced*), for something which he takes not under the will, but which is undisposed of by the will, and which he would either take as heir-at-law or next of kin, either as the real property descending, or what in Scotland is called the executry or the personal estate. Then in this case he is not approbating and reprobating. He is not setting up the will. He is saying that there is something which, as heir-at-law and next of kin, he is entitled to. And that, therefore, is not at all a case in which he is claiming something under the will, and at the same time rejecting the bequests or devises which the will may make.

Then there is certainly no inconvenience to the interests of the lunatic arising from the postponement, but quite the contrary. There is no inconvenience arising to the interests of third persons from the postponement, for no legatee and no creditor can be injured by the postponement, until either the recovery or the death of the lunatic.

Under these circumstances, it seems to me that the Court of Session were quite right in deciding that this question respecting the right to the surplus between the death of the testator and the recovery or death of the lunatic, may be determined without the election being declared upon.

Then, my Lords, with respect to the other question, I entirely concur in the view taken by my noble and learned friend who has advised your Lordships that the judgment should

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be affirmed. You can hardly expect that any case should assist you much in coming to a conclusion, because it does not depend upon any general rule of law but upon the intention of the testator as expressed in the will, or in the deed of settlement which has been executed. And I entirely agree with what my noble and learned friend has said, that none of the cases which have been cited have the smallest application to it. We must look to see the intention of the testator from the language which he has employed. Now unless this will contains a direction, either expressly or impliedly, to vest the accruing profits of the landed and personal estate which the testator left at the time of his death, and to entail the lands so purchased from time to time, it is perfectly clear that the surplus is undisposed of. And there is no other mode in which there is the smallest conjecture or hint that it is disposed of. Then if it is not to be so applied it is undisposed of. It goes to the son either as heir-at-law or next of kin. Well, then, if there is no such express directions in the will, is there anything from which you can conjecture that such was his intention? There is nothing of the sort. There is no language employed which, in my opinion, will admit of that construction.

An argument was strongly urged by Mr. Stuart, who seemed to think that he had done enough by showing that what we call the legal estate in those rents and profits came to the trustees. To be sure they did, because with regard to the lands of which the testator died seised, they were devised to the trustees. With regard to the lands which were to be purchased afterwards the conveyance would be to the trustees. No doubt the trustees would receive the rents and profits, but not for their own benefit. They are purely trustees; and unless, in so far as the testator has pointed out what the trustees shall do, and what they shall receive, there is not the least vestige of any beneficial interest in the rents and profits.

Now it is quite clear to me when I look at the language of

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this instrument that it contains an express direction that this property, of which he died possessed, should be converted in the manner he directs; and that, with the proceeds, land should be immediately purchased; and that the lands of which he died seised and the lands purchased were the lands to be entailed. But there is no direction whatsoever that the rents and profits of those lands should be applied in the purchase of estates during the intermediate time between his death and the time when his son should either die or recover. I think, therefore, that it is quite plain that those rents and profits are undisposed of, and that being undisposed of they go to the son as heir-at-law.

A strong objection was made to the form of the decree, that it would allow the representative of the son, upon his death, to claim the legitim without accounting for the benefit which he has received under the will. But, my Lords, I think it was quite unnecessary for the decree to make any express provision upon that subject. The decree is in these words, “ That the
“ pursuer as his *curator bonis* is entitled to demand and recover
“ the same without prejudice to the right of the said Thomas
“ Turnbull, or of his legal representatives afterwards, to exercise
“ his right of election, or to claim legitim as concluded for in
“ the first declaratory conclusion of the summons; and that the
“ same shall so belong to the said Thomas Turnbull, and form
“ part of his funds, whether effect shall ultimately be given
“ either to the said legal right of legitim, or to the testamentary
“ provision in his favour under his father’s said deeds of settle-
“ ment.”

Well, then, what is the point which is finally decided, and the only point which is finally decided? Why it is that the surplus of the intermediate rents and profits shall, in all events, belong to the son. Upon his death the election may then be exercised; and, if the legitim is preferred, that can only be done by giving credit or accounting accordingly.

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For these reasons I entirely agree in the motion of my noble and learned friend.

Ordered and Adjudged, That the petition and appeal be dismissed this House, and that the interlocutors complained of be affirmed. And it is further Ordered, That the Appellants do pay or cause to be paid to the Respondent the costs incurred in respect of the said appeal, the amount thereof to be certified by the Clerk Assistant, &c.

SPOTTISWOODE and ROBERTSON—RICHARDSON, CONNELL,
and LOCH, Agents.