1851.
19*th and* 26*th May.*
1852.
28*th June.*

ANN AND MARY MURRAY, . . . APPELLANTS.

GRANT AND OTHERS, . . . RESPONDENTS.

Under the Scottish Act of Parliament, 1617, c. 14, executors are absolutely entitled to one-third part of the "dead's part," or undisposed of residue of the testator's estate, even although legacies are given to them in their character of executors.

Semble that nothing short of a gift to another person will defeat the executors' right under the statute, and that words of mere exclusion, however express, will not bar their claim.

Costs refused, where, although the judgment complained of was affirmed, it was, nevertheless, deemed not unreasonable that the opinion of the House should be taken upon the question.

UNDER an Act of the Scottish Parliament, passed in the year 1617, chapter 14 (*a*), the Respondents, as executors of the will of Agnes Bell (*b*), claimed a *third* of the residue undisposed of.

(*a*) The statute is as follows:—"ANENT EXECUTORS. Our Sovereign Lord, understanding that a great number of ignorant people, the time of their sickness and disease or otherwise, at the making of their testaments and latter wills, do nominate certain strangers to be their executors, meaning only to commit the care of their goods, and diligent in getting thereof, to the said strangers, and that to the behoof of their children, or other persons who are nearest of kin: Whereas, by the contrary, the said office of executor, by the interpretation now observed, doth carry with it the whole property and commodity of the defunct's part of the goods contained in testament, which his Majesty finds to be altogether against law, conscience, and equity: Therefore his Majesty, with advice and consent of the estates of Parliament, finds and declares that all executors, already nominate in any testament not as yet confirmed, or to be nominate in any testament to be made hereafter, are and shall be obliged to make count, reckoning, and payment of the whole goods and gear appertaining to the defunct, and intromitted with by them, to the wife, children, and nearest of kin, according to the division observed by the laws of this realm, reserving only to the said executors the third of the defunct's part, all debts being first paid and deducted, without prejudice always to the said executors of whatsoever legacies left to them by the said defunct, which shall no ways be prejudged by this present Act; but the said executors shall have full right to their said legacies, albeit the same exceed the said third of the defunct's part; and in case the said legacies exceed the whole third part, the said executors shall have right to the whole legacy and no part of the third: With this express declaration, that where legacies are left to the executors, they shall not fall both the said legacies and a third by this present Act, but the said legacies shall be imputed and allowed to them in part of payment of their third."

(*b*) See preceding case, *suprà*, p. 163.

The Appellants, as next of kin, resisted the claim.

The *Lord Ordinary* (Lord *Murray*) found, 9th June, 1849, that the Respondents "were entitled to *one-third* of the free executry, deducting therefrom their legacies respectively." And to this decision the First Division, consisting of the *Lord President* (*Boyle*), and Lords *Mackenzie*, *Fullerton*, and *Jeffrey* (29th November, 1849), unanimously adhered. The present appeal was to have these orders reversed.

29th November.

Sir *Fitzroy Kelly* and Mr. *Rolt*, for the Appellants: By the ancient law, both in England and Scotland, executors were entitled to the whole free residue of the testator's personal estate; and Courts of equity so far followed the law as to hold the right good, unless a contrary intention appeared; in which case the executor was fixed with the character of a trustee. This was the rule in England till the year 1830, when an Act (*a*) was passed inverting the order of presumption, and declaring that executors should invariably be declared trustees, unless it should appear by the will or codicil that they were meant to take beneficially. The intention of the deceased, however, is still in all cases to govern.

Executors in Scotland are entitled to their thirds, unless a contrary intention appear. Suppose the testator had expressly declared that they should not take under this old Act of Parliament, but be content with the legacies bequeathed to them. Can there be any question that the Court must give effect to such words of exclusion (*b*)? And yet the Scotch Judges

(*a*) 11 Geo. IV. & 1 Will. IV. c. 40.

(*b*) See *Bailey* v. *Pugh*, 3 Mer. 348, where there was a devise to the right heirs of the testator, "his son excepted." Testator died leaving a son and daughters. *Held* by K. B., that the daughters took, for that the heir was manifestly excluded. But reversed by

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say they "have nothing to do with intention," but must look solely to the statute. They have quite misapprehended the principle on which the English cases proceed. It is not on a supposed *equity* controlling the legal right, but on the ground of *intention*, that the Court of Chancery has made executors trustees. This claim was never allowed before. *Nasmyth* v. *Hare* (*a*), relied upon by the Respondents, is of no authority. And yet the Court below have gone entirely on that case, which proceeds upon a principle never to be sanctioned by this House, namely, that, in construing a will, the testator's intention is not to be regarded. Here an express power is reserved to appoint "residuary legatees;" showing plainly that the executors were not to take. They, moreover, have legacies given to them expressly as executors (*b*). The reasoning of Lord *Cottenham*, in *Mapp* v. *Elcock* (*c*), where he holds that questions of this sort turn always on intention, accords with common sense. The meaning of words is the same in Scotland as in England. Now, in England it has been held that the mere giving a legacy to an executor is enough to show that the undevised surplus shall go to the next of kin.

Where a testatrix "appointed A. B. to be her executor, to see that her will was put in force," Sir *John Leach* held that these words showed an intention to confer an office, and not to bestow a beneficial interest (*d*). Now, what are the terms used in the present case? A difference will arise if the seven

the House of Lords; words of mere exclusion not being sufficient to defeat the heir's claim.

(*a*) 12 Second or New Series, 204, and see 1 Shaw's Appeal Cases, 65, from which it appears that the House of Lords (Session, 1821) reversed the decision of the Court of Session on a collateral point.

(*b*) See *suprà*, p. 165. (*c*) 2 Phill. 793.

(*d*) *Braddon* v. *Farrand*, 4 Rus. 87.

instruments be deemed testamentary; the Court below having held that only three are entitled to that character. By the second instrument, the testatrix gives a legacy of the same amount (200*l.*) to each of her trustees. By the sixth instrument, she reserves power to "appoint executors for carrying my will into execution;" words almost identical with those which occur in the case before Sir *John Leach*. The decision, therefore, must be governed by intention; and the intention is plain to confine the executors' benefits under the will to their legacies.

Mr. *Bethell* and Mr. *Anderson*, for the Respondents: Under the statute of 1617, c. 14, executors are entitled, as of right, and even if they were fixed with a judiciary character, they would still under the Act be trustees for themselves. The law, which must be held to have been in the testatrix's contemplation, presumes that executors shall take, unless a contrary intention be declared. It is immaterial whether the seven or only the three instruments be deemed testamentary; for none of them show any purpose of excluding this claim. If indeed the testatrix had said, in so many words, that the executors were not to take under the statute, no question could arise. The mere reservation of a power to appoint residuary legatees can never exclude a right established by Act of Parliament. The presumption in favour of executors named by the deceased is strong; whereas the next of kin are but the creatures of law. The argument founded on the circumstance that legacies are given to the executors proves nothing; for the statute enacts that such legacies shall be imputed in extinction *pro tanto*. The case of *Nasmyth* v. *Hare* has never been displaced. There is danger in using English authorities on a point of Scotch law; and it is a mistake to suppose that the equitable doctrines which obtained in this country before the

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11 Geo. IV. & 1 Will. IV. c. 40, were the same which now exist in Scotland. The English rules as to resulting trusts did not arise till long after the statute of 1617, c. 14, and the English cases cited on the other side, to show that certain words would take away the executors' legal right, can have no application in Scotland, where a statutory title has been established for the sole purpose of preventing all conjectural interpretation.

Sir *Fitzroy Kelly*, in reply: If the common law was originally the same in both countries, and if the effect of the Scotch statute was merely to restrict the executors' claim, it cannot give them a third in a case where the common law would not have given them anything. [LORD CHANCELLOR (*a*): Why is not the want of expression as sufficient to exclude the next of kin as the executors?] We say there is no want of expression. The executors are excluded in plain terms, and not merely by implication. The next of kin therefore take by necessity.

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Lord Truro's opinion.

Lord TRURO:

My Lords, the same will comes before you in the present case as that which occupied your attention in the last.

Under that will there is a large sum of residue undisposed of; very properly described in Scotland as the "dead's part" of the estate, because the deceased had the free disposal of it.

The question is, whether under the Act of Parliament of 1617, c. 14, the executors are entitled to a third of "the dead's part;" even although it may be collected from the will that the testatrix did not intend that they should take more than the special legacies which she has left them.

(*a*) Lord Truro.

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The executors insist that the statute positively and distinctly gives them one-third of "the dead's part;" perfectly irrespective of the intention of the testatrix, their argument being that any expression of intention which leaves the residue undisposed of, leaves it under the operation of the statute, and that by the operation of the statute they are entitled to a third part of it.

My Lords, the learned Judges in Scotland are unanimously of opinion that the statute is imperative, and that it is irrelevant to inquire what was the intention of the testatrix, provided it clearly appear that she has not bequeathed or disposed of the residue.

Now, my Lords, you can seldom find an Act of Parliament less difficult of construction than the present one. It has the merit, in the first place, of being short; and in the second place, it is expressed in very plain terms. The executors are to account to the next of kin, reserving only a third of "the dead's part," all debts being first paid and deduced.

It appears to me that the dispute in this case has arisen chiefly from the circumstance that too much attention has been directed to the state of the English law upon the points in question in contradistinction to the Scotch. Your Lordships are aware that, by the old rule of law, executors by virtue of their appointment became the universal legatees of the testator, and were trustees only to the extent to which they were made trustees by the bequest of legacies. All that was not specially disposed of they retained to themselves. That rule was very early found to be so inconsistent with the supposed intention of testators who had relatives, and who had left property undisposed of, that the Courts of this country, entrusted with the jurisdiction in that behalf, held, that, if you could discover from the will that it was not the testator's intention that the executors should take where the property was undisposed of, it

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should go in such case not to the universal legatee, the executor, but to the next of kin. Doubtless, originally the executor took from an idea that by his appointment he was intended to take; and I suppose, therefore, it was considered not inconsistent with that principle that, if you could find by the will that the general intention which was to be inferred from the nomination of executors was qualified by the particular contents of the will, in such case, by complying with the intention, you were in fact giving effect to the rule of law.

It must be admitted, however, that this mode of construing wills led to very considerable inconveniences. Decisions depending upon construction and upon discretion were often made, to which it would be very difficult to yield assent. Circumstances and particular parts of wills were laid hold of as indicating on the part of the testator a negative intention; that is to say, an intention to exclude the executors. For this purpose certain tests were fixed and relied upon, but these have not at all times commanded approbation. The rule, however, at last became pretty well understood. So much litigation had arisen in the course of time, that the cases admitted of something like a classification. It was held, for example, that a legacy to executors was, under certain circumstances, to be regarded as evidence of an intention that they should not take more. But then it was said that it must have been given to them *in their character of executors*; so as to import that it was all they should take by virtue of that character. When a legacy was given to them as executors, a different conclusion would follow from that which would be drawn from the case of a general legacy. And so, where legacies of different amounts were given to different executors, the Courts did not hold those legacies to be evidence of intention that they should not take more. But if legacies of the same amount

were given to several executors, the conclusion would be restrictive.

This system went on for a considerable period, till, as your Lordships are aware, the Legislature, finding at last that, by casting upon the next of kin the burden of proof, justice was not always satisfactorily administered, and that much uncertainty attended it, the recent statute (*a*) was passed, whereby the onus of proof is made to change sides; and now the law requires the executors to show affirmatively from the contents of the will that they are to take beneficially under it.

It appears, my Lords, that, in Scotland, the inconveniences, to which I referred as experienced in our English courts of justice, were obviated and prevented by the statute of 1617, c. 14. I find that, in every text-book which I have been enabled to see or to hear of, this statute is cited as a distinct authority for giving one-third of "the dead's part," without any qualification, to the executors.

Undoubtedly the statute begins by stating, that executors had taken contrary to the intention of the testator, and by declaring that such construction of the office of executor was contrary to law, conscience, and equity: and yet it gives them one-third of "the defunct's part," irrespective of the intention of the testator; not indeed using those words, "irrespective of the intention of the testator," but giving it absolutely without any qualification whatever. But this is not all. The statute declares that the executors shall take "whatsoever legacies shall be left to them by the said defunct, albeit they exceed the said third of the defunct's part;" and if their legacies fall short, they shall take them as part of the third; thus by statutory authority rejecting the conclusion which had been deduced in this country from the fact of legacies

(*a*) 11 Geo. IV. & 1 Will. IV. c. 40.

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having been given to executors, that they imported an intention that they should take no more.

In February, 1819, the case of *Nasmyth* v. *Hare* came before the Court of Session in Scotland, presenting the question for adjudication upon this statute in the most distinct form which I think can be imagined. The testator had by his will given certain legacies, and then he bequeathed the residue to a given individual. He left no dead's part, but disposed of his whole estate. The residuary legatee, however, died during the life of the testator. The gift of the residue therefore lapsed. The executors claimed one-third of that residue; and it was decided unanimously that their claim was well founded. For the Court of Session held that the right of the executors could be defeated only by an absolute disposal to somebody else. This case underwent considerable discussion, and nothing has occurred to weaken its authority; unless perhaps the circumstance that, when it came before this House upon appeal as to a collateral point, your Lordships held that the will was altogether invalid; so that the question upon the statute now under consideration was altogether precluded.

Now, my Lords, what is the rule by which your Lordships should be governed in construing this very old statute? It is, I think, most plainly laid down, by Lord Chief Justice *Tindal,* in the case of *Warburton* v. *Loveland* (*a*), "that, where the language of an Act of Parliament is clear and explicit, effect must be given to it, whatever may be the consequences, for in that case the words of the statute speak the intention of the Legislature. If in any case a doubt arises from the words themselves, we must endeavour to solve that doubt, by discussing the object which the Legislature intended to accomplish by passing the Act." But then he goes on to say that we must not do that, by referring

(*a*) 2 Dow. & Cl.

to some ambiguous clause in the Act of Parliament, in order to construe that which is manifest, or which is more clear than that which is referred to. Now here no part of the enactments of the Act are at all inconsistent; the question arises whether you can argue from the preamble that such an ambiguity exists as to create a doubt of the enactment? I do not apprehend you can do any such thing. Where, as Lord Chief Justice *Tindal* says, the language is ambiguous, you may resort to the other parts of the Act (as to other parts of any instruments which it is your judicial duty to construe) to find what the meaning of the authority is that has used that language. But in no part of this Act does it appear to me that there is any ambiguity. And, as I have before remarked, you find that this Act of Parliament is mentioned in almost every text-book and authority from the period when it was passed down to the present time; and it is universally stated as a general proposition, that, after the passing of this statute, the executor, instead of taking the whole of the "dead's part," is to take one-third; it is generally added, "for his trouble in executing the will," or "in respect of his office of executor." But I have not been able to find the slightest passage in any one book, nor has one been referred to at the bar, in which any doubt was raised on this question.

My Lords, this case, of course, must be decided by the law of Scotland. Here is a statute in plain and explicit terms—here, too, is a distinct authority upon the construction of that statute, in a much stronger case than the present. There is no authority on the other side. The question, therefore, is,—what is our judicial duty with reference to an Act of Parliament, plain and express in its terms, without any thing being brought to bear upon it, except some general reasoning and some general speculation with reference to what

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may be supposed to have been the ancient state of the law in Scotland prior to that statute, as to which I have not been able to find any account whatever, further than what I am obliged to take from the Act of Parliament; that is to say, that there had been a construction adopted with reference to the office of executor, which had given the executor the whole—which was considered contrary to law, contrary to good conscience, and contrary to equity. If it was contrary to law, good conscience, and equity, that executors should take the whole, I have been unable to discover what by law, before that statute, they were entitled to take. Whether that had been a subject of discussion or doubt there are no means of discovering that I am aware of. But it appears that it was the subject of statutory legislation, in order to put an end to all questions of the same nature. And I think your Lordships would be laying down a precedent which might be productive of considerable inconvenience, if, where the language of a statute is perfectly plain and definite, you were to raise doubts and difficulties, not from the language of the statute, but from some general reasoning which is borrowed from a state of the law which you suppose to be more or less analogous. I therefore propose to your Lordships, that the interlocutors appealed from be affirmed.

Lord BROUGHAM:

Lord Brougham's opinion.

My Lords, I had not the advantage of hearing the learned counsel who addressed your Lordships on this appeal. Nevertheless, I have made it my business, as it was my duty, to look into the printed cases upon the table of the House, and into the arguments urged in the Court below on both sides.

My Lords, it appears to me from this examination, and from perusing the opinions of the learned Judges,

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that their view of this case is quite unanswerable; and I am clear that your Lordships could not reverse this unanimous judgment of the Court below, without in the first place over-ruling the case of *Nasmyth* v. *Hare*, which has stood its ground for upwards of thirty years; and in the second place, doing the next thing to repealing the Act of 1617, c. 14.

I therefore entirely agree with my noble and learned friend, that this appeal should be dismissed, and that the judgment of the Court below should be affirmed.

Interlocutors affirmed (*a*).

(*a*) The Respondents' counsel applied for costs. But their Lordships held that costs ought not to be awarded, the question being upon the construction of an important Act of Parliament, as to which it was not unreasonable that the opinion of the House of Lords should be desired.

SPOTTISWOODE & ROBERTSON.—CONNELL & HOPE.