

[16th August 1833.]

JOHN HAMILTON, Appellant.—*Lord Advocate (Jeffrey)*—*Solicitor General (Campbell)*. No. 37.

GEORGE BENNET, Respondent.—*Dr. Lushington*—*Murray*.

Testament—Legacy—Trust.—Held (affirming the judgment of the Court of Session), that where a party had by a trust deed settled certain lands on one person, and left legacies to others, and provided for the sale of other lands for payment of the debts, legacies, &c., and to entail any residue that might be left, the legacies were not excluded by insufficiency of the fund provided for their payment, but were payable out of the trust estate generally.

JOHN OGILVIE was proprietor of the estate of Gairdoch, of Carron House and lands adjacent, and of Pockneave and Orchardhead. He executed a deed of settlement on the 11th August 1798, in favour of trustees, by which he conveyed to them those estates, and generally his whole heritable and moveable properties, among other purposes, for payment of certain specific annuities, legacies, and other provisions:—“ Item, for payment of all other annuities, legacies, or donations which I may hereafter grant to any person or persons by a regular deed, or by any writing, instruction, or letter to my said trustees under my hand, at any time

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“ during my life, or even on deathbed.” “ Quinto. In
 “ order that my said trustees may sell, as I do hereby
 “ authorise and appoint them to sell, either by public
 “ roup or private bargain, in their option, and in such
 “ lots as they shall judge proper, and at such time or
 “ times as they shall think most advantageous for the
 “ interest of the subjects, after proper advertisements in
 “ the newspapers, the whole lands,” &c., enumerating
 the lands specified in the deed, and appointed
 them to sell out stock, &c. “ and to apply the price
 “ of the said lands and others which are so ap-
 “ pointed to be sold in payment of my debts and of
 “ the legacies and donations herein-before mentioned,
 “ and of all other legacies and donations which I may
 “ hereafter grant,” &c. “ Septimo. In order that my
 “ said trustees, after payment of the expenses to be
 “ incurred in the execution of this trust, the debts due
 “ by me, the provisions which in case of my marriage
 “ I may leave to my widow and children, the legacies
 “ and donations hereby granted, and all other legacies
 “ and donations to be hereafter granted by me as
 “ aforesaid, either by a regular deed, or by any writing,
 “ instruction, or letter under my hand, may lay out and
 “ employ the surplus, if any shall be, of my personal
 “ estate and the produce of my land estate in the pur-
 “ chase of lands, and thereafter make, grant, and
 “ execute a valid and formal disposition and entail of
 “ the lands so to be purchased, and of the whole residue
 “ and remainder of my lands and estate and others
 “ herein particularly and generally before mentioned,
 “ which I hereby direct and appoint to be called in all
 “ time hereafter the lands and estate of Gairdoch, to
 “ and in favours of the heirs of my body, and their heirs

“ and assigns whatever ; whom failing, to and in favour
 “ of the said John Walker, cabinet maker in London,
 “ my cousin, and the heirs male of his body ; whom
 “ failing,” &c. to various substitutes of entail nominated
 or to be nominated, under burden of a jointure to his
 widow, and the annuities. Farther, “ I do hereby reserve
 “ to myself, not only my life-rent of the whole subjects
 “ hereby conveyed, but also full power and liberty to
 “ sell, use, and dispose thereof and burden the same at
 “ my pleasure, as well gratuitously as for onerous
 “ causes ; and also to cancel, revoke, alter, or innovate
 “ these presents at my pleasure at any time during
 “ my life, and even on deathbed.”

By a subsequent deed he appointed John Walker junior to be his successor in place of John Walker senior, who had died ; and he left the following among other written instructions : — “ On considering that Carron House with
 “ the grounds around on the north of the river are ap-
 “ pointed by my trust deed to be sold, as well as all the
 “ property on the south of Carron, for payment of all
 “ my debts and legacies or donations granted or to be
 “ granted, and that it may be proper and necessary to
 “ keep the house as at present with the gardens and
 “ pleasure grounds in proper order for a sale, and the
 “ furniture to remain in the house for such convenient
 “ time as the trustees may appoint ; and that I wish
 “ that John Walker, my cousin, in the Renfrew Bank,
 “ Greenock, his father being now dead in London, may
 “ get possession of the estates of Pockneave and
 “ Orchardhead at the first term of Martinmas after my
 “ decease ; and now intending that said John Walker
 “ should get the furniture of Carron House and farm-
 “ ing stock, &c., formerly meant to be sold for benefit

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“ of the trust estate; therefore I request my said trus-
 “ tees under my trust deed of 11th August 1798 to
 “ grant to the said John Walker, my cousin (as soon
 “ after my decease as they can find convenient to dis-
 “ pose of Carron House, &c. as above stated), all the
 “ furniture of every kind in Carron House,” with cer-
 “ tain exceptions, by way of legacy and otherwise;
 —“ declaring hereby, that if my said trustees or the
 “ majority of their number shall find any painful diffi-
 “ culty in settling the donations above granted, I hereby
 “ authorize and empower the said trustees to sell off by
 “ public roup the whole subjects above named for the
 “ benefit of the trust estate under their charge.”

He afterwards gave other instructions, and in particu-
 lar he stated this:—“ It is not my intention that any of
 “ the legacies be paid until the sale of Carron House
 “ and lands, &c. to procure the money, unless the sums
 “ ordered for the poor of the four parishes and mourn-
 “ ings to the ministers there at my decease.”

Again, he stated,—“ In case it should happen
 “ that any of the creditors for lent money, as there
 “ will be but few unsettled accounts, should become
 “ impatient for payment before sales of the property
 “ be accomplished in a regular way to clear off my
 “ debts,” “ if money cannot be easily borrowed by the
 “ trustees on security of the lands to be redeemed at
 “ the sale, and which I hereby authorize the trustees to
 “ endeavour to do;—but if not obtained, I request they
 “ may sell immediately all of the lands on the south of
 “ Carron, including the feus and large granary of Gra-
 “ hamstoun, or as much as may be necessary to satisfy
 “ the demands, divided into lots for more conveniency
 “ of sale, according to a particular state of the pro-

“ perty and supposed values, as here particularly
“ referred to.”

After his death his personal property was found to amount to above 8,000*l.*, but his debts were of nearly three times that amount. The trustees did not succeed in selling the lands directed to be sold, and the Bank of Scotland, a creditor, brought a ranking and sale, under which lands to the extent of about 60,000*l.* were sold. Claims were lodged by legatees, and particularly by Bennet; and thereafter the common agent prepared a state and order of ranking, whereby he found “ that these legatees may rank upon the
“ price of the lands which have been sold, posterior
“ to the onerous creditors of Mr. Ogilvie, but cannot
“ be allowed to rank upon the rents or price of those
“ lands which were ordered by Mr. Ogilvie to be
“ entailed.”

Bennet and the other legatees objected to this ranking; and the Lord Ordinary, on 9th December 1831, pronounced this judgment:—“ Finds that the late Mr. Ogilvie of Gairdoch conveyed his whole heritable and
“ moveable property to trustees, by a deed in 1798, for
“ payment of his debts and certain annuities, legacies,
“ and donations therein specified: ‘ Item, For payment
“ ‘ of all other annuities, legacies, or donations which
“ ‘ I may hereafter grant to any person or persons by a
“ ‘ regular deed, or by any writing,’ &c.: That the trustees were authorized to sell certain parts of his heritable property specially enumerated, ‘ and to apply
“ ‘ the price in payment of my debts, and of the legacies
“ ‘ and donations herein-after mentioned, and of all other
“ ‘ legacies and donations which I may hereafter grant:’
“ That the deed farther provides, ‘ that my trustees,

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“ ‘ after payment of the expenses to be incurred in the
 “ ‘ execution of this trust and the debts due by me, the
 “ ‘ legacies and donations hereby granted, and all other
 “ ‘ legacies and donations to be hereafter granted by me
 “ ‘ as aforesaid, may lay out and employ the surplus, if
 “ ‘ any shall be, of my personal estate and the produce
 “ ‘ of my land estate in the purchase of lands, and there-
 “ ‘ after execute a valid entail of the lands so to be pur-
 “ ‘ chased and of the whole residue and remainder of
 “ ‘ my lands and others herein particularly and generally
 “ ‘ before mentioned to and in favour of,’ &c. Besides
 “ his life-rent, the truster reserved power to sell and
 “ burden the subjects at his pleasure, as well gra-
 “ tuitously as for onerous causes, and also to cancel,
 “ revoke, or innovate the trust deed. Finds, that sub-
 “ sequent to its date Mr. Ogilvie, by various codicils,
 “ left instructions to pay legacies to various persons
 “ who are now claimants: Finds the instructions to
 “ entail the whole residue and remainder of his lands,
 “ beyond those specially enumerated which were to be
 “ sold, cannot be construed to imply a special pro-
 “ vision or conveyance to the heirs of entail of specific
 “ lands, entitling them to plead that it must be prefer-
 “ able to general legacies; and although instructions
 “ have not been given to sell lands sufficient for pay-
 “ ment of these legacies, it must be presumed that this
 “ has arisen from his not supposing that his personal
 “ funds and lands sold would fall short of the sum
 “ necessary for fulfilling all the purposes of the trust,
 “ and not that it was with the view of preferring the
 “ heirs of entail at all events, to the disappointment of
 “ legatees subsequently favoured by him: Therefore
 “ finds, that the legatees are entitled to payment out of

“ the trust estate, and the residue to be entailed is only
 “ after all the other purposes of the trust have been
 “ executed; and ordains the common agent to alter the
 “ order of ranking in terms of this interlocutor, and
 “ decerns.”

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The common agent reclaimed, and the Court (14th February 1832) having adhered he appealed.*

Appellant.—It is an undoubted rule of law that while general legacies of sums of money suffer abatement proportionally in consequence of the inadequacy of the fund out of which they are directed to be paid, a legacy of a specific subject must have full effect, provided that specific subject remains extant.†

The same rule is necessarily as applicable to bequests made through the intervention of a trust as to legacies made directly in favour of legatees. If a testator possessed of moveable property only, conveys the whole of that property to a trustee, directing that trustee to deliver over his plate to one person, his books to another, and his household furniture to a third, and at the same time to pay to other individuals certain sums of money, the trustee, in the event of a deficiency of funds for the payment of the pecuniary legacies, would not be entitled to sell the plate, or the books, or the furniture, in order to make up that deficiency. If the testator left no money, or no effects which his trustee was entitled to convert into money, the pecuniary legacies must remain unpaid. The same

* 10 S. & D. 330.

† Stair, book iii. tit. 8. sec. 40; book iv. tit. 35. sec. 4; Erskine, book iii. tit. 9. sec. 12.

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rule applies to a testator making a trust of heritable property. If after conveying his whole property to a trustee he directs that trustee to entail the estate of A. upon a certain individual, to sell the estate of B., and out of the price of the estate of B. to pay certain legacies in money,—although the testator may have over-estimated the value of the estate of B., and have left legacies to an amount greatly exceeding the price which could be realised by the sale of it, yet the specific provision of the estate of A. in favour of his heir of entail cannot on that account be disappointed.

The same principle is equally applicable to the present case.

By the trust deed Mr. Ogilvie conveys to the trustees his whole moveable property of every description, and also all his heritable property, not in general terms, but each part specially described.

Now, Mr. Ogilvie specially authorized those trustees to sell only a part of the heritable property thus conveyed to the trustees, for the purpose of paying his debts and the pecuniary legacies which he had bequeathed or might bequeath. He did not authorise a sale of the whole of the heritable property for these purposes, although for the payment of his debts a sale of the whole might have been compelled by judicial process. But he specially enumerates those portions of the property which the trustees were authorised to sell.

The heir of entail was, in one sense, and to a certain extent, a residuary legatee, inasmuch as he was entitled only to the residue of the price of the property appointed to be sold, after paying the debts and the pecuniary legacies. But in relation to the heritable property which was not authorized to be sold the heir of entail was the special

disponee of Mr. Ogilvie, unburdened with any debts, excepting in so far as the other funds might be insufficient to pay those debts, and certainly unburdened with any pecuniary legacies.

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Respondents.—According to the fair and legal construction of the trust disposition, it was the intention of Mr. Ogilvie to subject his whole estates, heritable and moveable, to payment of all his debts and legacies, and only to entail the residue after these objects had been fulfilled. The provision in favour of the heirs of entail was not therefore of the nature of a special legacy necessarily depending on the existence of any particular subject, but was truly of a residuary nature, and consequently that provision, as in the case of all residuary legacies, must be postponed in a competition with the other legacies.*

LORD CHANCELLOR. — My Lords, this case does not rest entirely upon the general principles, which are not in dispute, but upon the application to the individual case of those general principles. The question here is simply, Whether in this particular disposition and arrangement of the property conveyed by the trust deed, or deed of settlement as it is called, which was made, there was a specific disposition made of the real estate; or whether it is in the nature of a disposition only of what may be called the residue? My Lords, as there was a difference of opinion among the learned Judges of the Court below, I shall certainly move your Lordships

* *Authorities.*—*Erskine's Trustees v. Wemyss and others*, May 23, 1829, Fac. Col. ; and 7 S. & D. p. 594.

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to grant time to consider this matter a little further before pronouncing any opinion upon it.

His Lordship afterwards moved, and

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondent the sum of one hundred and seventy-seven pounds for his costs in respect of the said appeal.

RICHARDSON and CONNELL — A. DOBIE, Solicitors.