(No. 11.) [*27th May* 1841.]

WILLIAM DILL (MRS. MACHARG'S Executor), Appellant.[1]

[*Biggs Andrews — James Anderson.*]

THOMAS Earl of HADDINGTON and others (Mr. HOUSTON'S Trustees), Respondents.

[*Lord Advocate (Rutherfurd) — Sir W. Follett.*]

Provision to Wife — Clause — Vesting. — Terms of a postnuptial contract, upon the construction of which, Held (reversing the interlocutor of the Court of Session), that a provision of a sum of money by the husband imported a gift to the wife, and became vested in her as her absolute property upon her surviving her husband, and there being no issue of the marriage.

Rules for construing ambiguous clauses in instruments, p. 311.

2d DIVISION.

Lord Ordinary Jeffrey.

Statement.

ALEXANDER Houston of Clerkington, now deceased, was married to Miss Helen Mackie. No settlement was made previous to the marriage. By a postnuptial contract by these parties, dated the 6th and 30th April 1785, Mr. Houston bound himself, his heirs and executors, to pay to his wife a free yearly income of 400*l.*, and to grant her a life-rent infeftment over certain heritable property in security thereof.

He further bound himself, and his heirs and executors,

[1] Fac. Coll.; 2 D., B., & M., 7th Dec. 1839.

" to make payment to the said Mrs. Helen Houston,
" his wife, or to any person or persons she shall
" appoint by a writing under her hand, at any time in
" her life, with or without the consent of her said hus-
" band, and that whether she survive or predecease him,
" and whether she have issue or not, of the sum of
" 3,000*l.* sterling money, or such other lesser sum as she
" shall direct, and that at the first term of Whitsunday
" or Martinmas next after the death of her said hus-
" band, in case he shall survive her, or shall predecease
" her without leaving issue of the marriage, or at the
" first of these two terms next after the failure of the
" issue of the marriage, in case he shall predecease her
" leaving issue, who shall fail before her, or at the first
" of these two terms next after her decease, in case
" she shall survive him, having issue of the marriage
" then existing, or at any term of Whitsunday or
" Martinmas after any of these events respectively, so
" that it shall not be in the power of the said Mrs. Helen
" Houston, or the persons to whom she shall appoint
" the foresaid sum of 3,000*l.* or any part thereof to
" be paid, to uplift the same during the life of the said
" Alexander Houston, or even after his death, during
" the joint existence of the said Mrs. Helen Houston
" and the issue of this marriage, and with 4*s.* of penalty
" for each pound of principal in case of failure, and
" the legal interest of the said principal sum, from the
" term at which the same shall be appointed to be paid,
" during the not-payment of the same; but with this
" provision alwise, as it is hereby specially provided
" and declared, that in case the said Mrs. Helen Hous-
" ton shall happen to survive her said husband and the
" issue of the marriage, and shall ask and recover pay-

DILL v. EARL OF HADDINGTON and others.

27th May 1841.

Statement.

" ment of all or any part of the foresaid sum of 3,000*l.* " sterling, then and from thencefurth her said liferent " annuity of 400*l.* sterling shall suffer such a restriction " as shall be equal to the legal interest, for the time, of " the principal sum which she shall so recover."

The deed also contained a special proviso and declaration, "that in case the said Mrs. Helen Houston shall, " at any time during her life, uplift the sum of 3,000*l.* " sterling, herein provided to be paid to her in manner " after mentioned, or any part thereof, then and from " thencefurth the said annuity of 400*l.* sterling, pro- " vided to the said Mrs. Helen Houston, as said is, " shall suffer such a restriction and abatement as shall " be equal to the legal interest for the time of the sum " so to be uplifted by her, and that in manner more " particularly after mentioned, and payable alwise, the " annuity remaining after such restriction and abate- " ment, by the proportions, at the terms, and with the " penalty before mentioned."

In 1816 Mr. Houston settled an additional annuity of 600*l.* on his wife, and also the liferent use of the mansion-house, offices, lawn, garden, &c. at Clerkington, along with the life-rent use and possession of the household furniture there, and a gift of certain effects belonging to him.

Mr. Houston died in 1822, without issue of the marriage, having appointed the respondents his trustees and executors. His widow occupied the house at Clerkington till her death in 1837. She never received or uplifted any part of the 3,000*l.*, nor granted any deed specially in relation to the same, or any part of it. She executed a will in 1804, which made no reference to the 3,000*l.*

DILL v. EARL OF HADDINGTON and others.

27th May 1841.

Statement.

In November 1837 Mrs. Helen Macharg, as executrix dative qua nearest of kin of Mrs. Houston, brought an action against the respondents, concluding for payment of the 3,000*l.*, with the penalty and interest, "the same "having vested absolutely in Mrs. Houston, as a debt "due to her from the estate of her late husband."

Among other defences, the respondents pleaded, 1. Nothing was conveyed to the late Mrs. Houston but a faculty or power to uplift or dispose of, by a writing under her hand, the whole or any lesser part of the sum of 3,000*l.* That faculty was personal to herself; and as she never exercised it during her life, it fell by her death; and as the sum of 3,000*l.* never vested in her during her life, it cannot be taken up or claimed by her executors ab intestato. 2. As Mrs. Houston left a will, which contains no reference to this sum of 3,000*l.*, it must be presumed that she purposely abstained from exercising the faculty, and from disposing of the whole or any part of the aforesaid sum.

The pursuer lodged in process the following minute: "Denying the statements in the defences, in so far as "they are not in precise accordance with those in "the summons, the pursuer is willing to close the record "upon these two papers."

The record having been closed on the summons and defences and the above minute, the Lord Ordinary, after hearing parties, pronounced the following interlocutor, adding the subjoined note.[1]

"27th February 1839. The Lord Ordinary, having

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[1] "*Note.*—This case is not without difficulty, from the singularity of "the terms in which the provision of 3,000*l.* in the postnuptial contract

DILL
v.
EARL OF HADDINGTON and others.

27th May 1841.

Statement.

" heard the counsel for the parties on the closed record,
" writs produced, and whole process, repels the defences,
" is conceived. But, on the whole, the Lord Ordinary has come to be
" satisfied, that, according to the just construction and true meaning of
" that deed, the said provision was fully vested in the widow, and
" became, to all intents and purposes, her property, if not from the first
" constitution of the trust, at all events at the first term after the death
" of her husband without surviving issue of the marriage. Even after
" that time, it is indisputable that she had all the rights and powers over
" this sum which could be enumerated in the most comprehensive
" definition of absolute and entire property. She could call it up as
" freely and directly as if she had herself lodged it in a bank on a
" deposit receipt. She could spend or lend it out anew to the original
" trustees, or to any other party, without calling it up herself. She
" could assign and make over the instant right to it, onerously or gra-
" tuitously, mortis causa or inter vivos, to any one she chose. If she
" married a second time, the entire right to it would pass to her new
" husband jure mariti, whether she wished it or not; and finally, her
" own creditors, or the creditors of such second husband, could attach,
" pursue for, and recover it, in spite both of her and the defenders. It
" is difficult for the Lord Ordinary to conceive how a fund, over which
" she had thus all the imaginable rights of a proprietor, should yet not
" be vested in her, so as to entitle her next of kin to succeed to it ab
" intestato.

" The opposite proposition, however, is rested on two points; first,
" and principally, on the admission of the ordinary destination in such
" provisions to the 'heirs, executors, and assignees of the wife,' and the
" introduction in its stead of a precise specification of a person to be
" nominated in a writing under her hand, as the only party who was to
" take after her or in her right; from which it is alleged that an abso-
" lute exclusion of her successors ab intestato is necessarily to be
" inferred. The second or corroborative argument on the part of the
" defenders is derived from the apparent uselessness of this anxious
" power of nomination and appointment, if the wife was herself vested
" with the full right of property, which must necessarily have carried
" such a power, and a great deal more. When duly considered, how-
" ever, neither of these views appears to be maintainable.

" The mere omission of the ordinary remainder to heirs, executors,
" and assignees is plainly of no consequence, where the words are suffi-
" cient to carry a direct (and not contingent) right of property to the
" person actually named, especially in the case of a mutual and onerous
" provision, like that in a contract of marriage; while the specific power
" to nominate an assignee or successor, even during the life of the hus-
" band, might well have been thought not to follow from the mere
" constitution or vesting of the right itself in the person of a married
" woman. Even if it were to be held, therefore, that the wife was the

" and decerns in terms of the conclusions of the libel; " finds expenses due, allows an account thereof to be

DILL v. EARL OF HADDINGTON and others.

27th May 1841.

Statement.

" proper beneficiary as to this sum, from the first constitution of the " trust, the insertion of this specific power of appointment would not " be either superfluous or unaccountable; since, without it, no such " power could be competently exercised during the subsistence of the " marriage.

" But the Lord Ordinary conceives that the best explanation of this " perplexing part of the deed is to be found in the supposition, that it " was understood by the parties to it (whether that view was legally " correct or not) that the right to this 3,000*l.* would not vest fully in " the wife during the life of the husband or of children by whom he " was survived, nor until the full right to demand payment of it had " opened to her, free of all conditions or qualifications, by her being the " only survivor. How the law would have construed the deed if the " first had been the case that occurred, it is not now absolutely necessary " to determine, though it is easy to see that the claim of her repre- " sentatives would then have been encumbered with difficulties to which " it is not now liable.

" If she died before her husband, and without making any appoint- " ment, it might obviously have been maintained that the property was " still in the trustees, and that all the right she had ever over it was " truly a mere power or faculty to affect its ultimate vesting when the " proper time arrived, by the death of the husband; and that, if she " predeceased him without executing that power or exercising that " faculty, it would remain with the trustees for the general trust pur- " poses, and would never be claimed by the legal representatives, as " having never been truly in her person.

" The Lord Ordinary thinks the tenor of the deed is sufficiently " explained by assuming that this was the view of the case entertained " by the framer of it. But he is also of opinion that it is the sound " and the true view. By the constitution of trust the vesting of all " future and contingent interests may be competently suspended, espe- " cially in mere money provisions; and so long as all actual rights are " contingent as well as future, it will generally hold that they are so " suspended, and that in the interim there is no vested property but " in the trustees. Now, the wife was here to have no right to draw this " money during the life of her husband, or even after his death, while " issue of the marriage survived. Her own actual or beneficial right to " it, therefore, was truly contingent, and might never have opened in " her life; and if so, the property consequently remained vested in the " trustees, while it was still in contemplation to give her a power to " dispose of it by special deed; and not only was such a provision as " actually occurs in this contract necessary, but it was obviously the " fittest and most natural way of effecting that purpose; and what was " given was truly nothing more than a power or faculty to affect a

DILL v. EARL OF HADDINGTON and others.

27th May 1841.

Judgment of Court, 7th Dec. 1839.

"given in, and remits the same, when lodged, to the "auditor, for his taxation and report."

The respondents reclaimed, when the Lords of the Second Division pronounced the following interlocutor:—"7th December 1839. The Lords, having heard "counsel for the parties, and advised the case, alter the "interlocutor of the Lord Ordinary submitted to

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"subject which did not belong to her, which must be exercised in "terminis, in order to be available, and left nothing to be taken up by "her representatives ab intestato, if she died without so exercising it.

"But after the husband's predecease without issue of the marriage, "the whole aspect and state of the case were changed. There was no "longer any contingency, or even futurity, in the description of her "right; all pretence for a suspensive or fiduciary vesting in the trus-"tees, as for uncertain beneficiaries, was at an end, and they were direct "and full debtors to her, and to her alone, for the money. It seems "really impossible, therefore, to doubt that the full property was then "vested in her; and if it was so vested, it seems plain that without a "proper clause of return, or a most express exclusion of her represen-"tatives ab intestato, it must go to those representatives.

"To infer or construe such a clause of return or such an exclusion "out of the granting of a specific power of assignation, would be "difficult under any circumstances, and however hard it may be to "account, on any other assumption, for the granting of such a power. "But if there was no proper vested right in the wife herself till after "the death of the husband and children, and if her ever having any "such right was consequently a matter of contingency, the necessity "and the object of granting that power with a view to one result of "the contingency are at once apparent, and the whole difficulty of the "case is solved, in the Lord Ordinary's apprehension, by holding that "the power was granted to enable her to affect the fund in question in "the event of its never vesting in her, but flew off and became null "and inoperative as soon as the object or necessity of it ceased, by "the full right to it vesting, by her sole survivance, in herself. The "expression is not so lucid, perhaps, as might be desired, but the object "and purpose are thought to be plain enough; and, at all events, the "Lord Ordinary can never hold that the constitution of a special "power, which might be necessary in certain events, can either bar "the vesting of a right, in which all the imaginable tests and attri-"butes of a vested right are combined, or imply a clause of return, "or a capricious and most improbable exclusion of legal heirs or "representatives."

" review, sustain the defences, assoilzie the defenders, " and decern."

DILL v. EARL OF HADDINGTON and others.

27th May 1841.

The appellant, as the executor of Mrs. Macharg, who died since the date of the above judgment, appealed.

Appellant's Argument.

Appellant.—The subsequent deeds to which the Court below referred do not affect the question, because in all of them there is a reservation of the provisions in the marriage contract. But it was incompetent to go to subsequent transactions, in order to ascertain the meaning of the contract. Its effect must be regulated by the intention of the parties, as expressed in the deed itself. The clause which is the subject of controversy is to be primarily regarded, although reference may be made to the context to explain any doubtful expressions in the clause; per Lord Eldon in Ker v. Duke of Roxburgh, 2 Dow. 149, and Appendix to Sandford on Heritable Succession. Then, in construing the clause in question, any thing ambiguous or doubtful in it must be interpreted against the obligor, for sibi imputet that he did not express his mind more clearly when it was in his power; Ersk. 3. 3. 87. Now, the effect of the destination is to make Mrs. Houston the absolute donee of the 3,000*l.* The auxiliary members of the clause are introduced for the purpose of regulating the term of payment in the various events for which provision was made. It was not necessary that the destination should have the words "heirs" or "executors and assignees." A bequest or obligation to a party may be made effectual by his executor.

If the leading operative destination gave Mrs. Houston a right of property, it would be for the respondents

DILL
v.
EARL OF HADDINGTON and others.

27th May 1841.

Appellant's Argument.

to show that there were other clauses in the deed which defeated or restrained the exercise of that right. The addition of a power of appointment could have no such effect, for, even though it were superfluous, if an absolute right of property was given by the leading clause, still the maxim would apply, utile per inutile non vitiatur. But the power was not useless, in the circumstances in which Mrs. Houston was at the time placed, and in reference to the different events provided for; because it may well have been supposed that the right did not vest in Mrs. Houston from the date of the deed, but only on the death of her husband without issue. It was, however, a leading object of the deed to give Mrs. Houston the power of disposal during her husband's lifetime. Again, even though Mrs. Houston's right was absolute, she could not have disposed of it by a deed inter vivos during her husband's lifetime without his consent. In this view also the power was necessary. Therefore on the clause of destination itself the interlocutor is wrong. But this conclusion is materially fortified by a consideration of the context, which uniformly refers to the 3,000*l.* as a provision to Mrs. Houston absolutely, and the consideration given by Mrs. Houston is made on that footing.

Respondents Argument.

Respondents.—As the provision in the postnuptial contract of marriage, according to its sound construction, gave to Mrs. Houston merely a faculty or power to uplift and dispose of, by a writing under her hand, the whole or any lesser part of the sum of 3,000*l.*; and as that faculty or power, which was personal to herself, was not exercised during her life, it lapsed on her

death, and the sum cannot be claimed by her next of kin.

Had it been the intention of the contracting parties to give an absolute and unqualified right of property in this sum to Mrs. Houston and her representatives, subject to no other condition except as regards the term of payment, Mr. Houston would have been taken bound to make payment of this sum to his wife, her heirs, executors, and assignees. Where such an object is in view, this is the usual and customary form in which the obligation is conceived.

The case has been dealt with by the Lord Ordinary as if the only point at issue were, Whether the right to this money vested or not? But this is truly a proper question of construction, in which the point of vesting forms a very subordinate ingredient. It was in Mrs. Houston's power to have uplifted the money at any time; and, after having been so reduced into possession, it would have been dealt with as any other portion of her personal estate. But this right would not (as the Lord Ordinary assumes) have passed to a second husband jure mariti, or been attachable by his creditors; for, unless he had been made special appointee, neither he nor his creditors could have touched it. His Lordship first considers the effect of the obligation to make payment to Mrs. Houston; and having arrived at the conclusion that, separately considered, it would have vested an absolute right in her, he treats the remaining portion of it as merely a means of enabling her more fully to exercise this absolute power over it. But the clause must be taken as a whole; and, in construing it, the House will look, not to what effect might be given

DILL
v.
EARL OF HADDINGTON and others.

27th May 1841.

Respondents Argument.

to each part of it, had it stood alone, but to the whole in combination; for, in this question of construction, the addition of the latter part of the clause implies a restriction and limitation upon the first. His Lordship assumes that, under a general clause of obligation to make payment to Mrs. Houston, and her heirs, executors, and assignees, at a period future and contingent, the right would not have vested till the contingency arrived. But this is an error in point of fact as well as of law. His reasoning proceeds upon the assumption of the fact that the right was held by trustees for her behoof. Now, as regards Mrs. Houston, the power of uplifting the money, or disposing of it, was conferred on her individually, free from control of trustees; and, again, as regards her husband, although Mrs. Houston's property was to be conveyed to trustees for certain purposes, it was expressly declared that the obligation to pay the sum of 3,000*l.* "shall only be per-" sonal on the said Alexander Houston;" and it was further declared, that it was to be "nowise real upon " the said trust estate itself." Further, his Lordship must have overlooked the distinction, in point of law, between an obligation which was conditional and one which, like the present, was only contingent; for, where there is an obligation to pay a certain sum of money to an individual, and his heirs and assignees, under a declaration that the term of payment is postponed to a future period, but contingent on an event which must happen, the provision vests in favour of the grantee from the moment of its execution.

Judgment deferred.

LORD CHANCELLOR.— My Lords, the controversy in this cause arises between the representatives of the wife and the representatives of the husband; and the question is, whether a sum of 3,000*l.*, which is the subject of a postnuptial settlement, in the event which has happened, of the husband dying first, and there being no issue of the marriage, vests in the representatives of the wife or vests in the representatives of the husband? The Lord Ordinary was of opinion that the estate of the wife was entitled. When it came before the Inner House, the learned Judges there were of opinion, that it belonged to the estate of the husband, and that the title of the wife had never become, under the terms of the settlement, absolute, so as to give her representatives a right to the sum of 3,000*l.*

This of course can only be ascertained from an accurate examination of the terms of the settlement. The obscurity has arisen from an attempt, on the part of the individual who framed the settlement, to express a great deal more within one sentence than one sentence was capable of bearing, so as to be sufficiently explicit, to ascertain the rights of the parties without difficulty.

Now, it is quite clear that there were four events contemplated: the death of the wife, leaving her husband surviving, or the death of the husband, leaving the wife surviving; these were two of the events. The two others would be either of those events happening, there being or there not being children; so that there were four contingencies that the parties had evidently in contemplation.

Having those four events in contemplation, the provision was expressed in these terms: in the first place

DILL
v.
EARL OF HADDINGTON and others.

27th May 1841.

Ld. Chancellor's Speech.

an annuity of 400*l.* a year was provided for the wife for her life, and there was this proviso added, that in case the wife "should at any time during her life uplift the "sum of 3,000*l.* sterling therein provided to be paid to "her in manner herein-after mentioned, or any part "thereof, then and from thenceforth the said annuity "of 400*l.* sterling, provided to the said Mrs. Helen "Houston, as said is, should suffer such a restriction "and abatement as should be equal to the legal in-"terest for the time of the sum so to be uplifted by "her."

Then comes the covenant by the husband as to the 3,000*l.* [His Lordship read the clause as above quoted.] Certainly, on reading that clause there is great confusion, apparently, in the construction of it, and a great variety of events are contemplated, which are endeavoured to be provided for in the same sentence.

Now, my Lords, the parties not only had those four events to provide against, but they evidently had in contemplation, that, although the enjoyment of the 3,000*l.* was postponed, the wife, during the life of the husband, should have the power of bestowing the whole or any part of that sum upon any person she might please; and it was necessary, therefore, to provide that she should have that power, for, although it may be that she might by will have had that power without any special provision, she could not have had it, except with the consent of her husband, by any deed executed inter vivos. It was necessary therefore, in order to give to the wife that power over the property which the parties evidently intended her to have, that there should be an express

provision in the settlement that she should have the power, during the life of the husband, of giving a future interest in the property in question to any person she might please. There were, therefore, these four events to be provided for, and there was also a power to be reserved to the wife of disposing of the principal, or any part of it that she might please, during the time of coverture.

These several provisions, if they had been provided for in different clauses of the settlement, would, no doubt, have been expressed in very different terms from those which we find upon the face of this deed; but the framer of the deed has endeavoured to express all under one provision, and from thence, as it appears to me, has arisen the obscurity.

But the mode of dealing with a case of this sort is, first of all, to look at the event which has happened, and then to see whether that part of the deed which is in question in the present discussion does or does not embrace within itself the means of ascertaining the intentions of the parties in that particular event; if that be sufficiently clear, it is not material whether the other events, which have not occurred, are or are not provided for with a degree of obscurity which, if those events had happened, might have created considerable difficulty as to the construction of the settlement.

Now, the event that has happened is the death of the husband, living the wife, and there being no issue of the marriage, I have only to call your Lordships attention to the different provisions to be found in this instrument relative to that state of circumstances; and the question for your Lordships will be, whether there

DILL
v.
EARL OF HADDINGTON and others.

27th May 1841.

Ld. Chancellor's Speech.

are not to be found upon the face of this instrument sufficient words of gift to the wife, in the event which has taken place?

My Lords, in calling your attention to the first part of this settlement, I shall read it, divested, as far as possible, of the other provisions for contemplated events which have not taken place. It begins by the husband binding himself to make payment to the wife of the sum of 3,000*l.* sterling money, at the first term of Whitsunday or Martinmas next after the death of the husband, if he shall predecease her without leaving issue of the marriage. All those words are to be found in the sentence; they are mixed up, it is true, with other words, which other words contemplate other events, but those words are to be found upon the face of the settlement, and those words contemplate the event which has taken place.

Now, those words, if they stood by themselves, would leave no doubt or ambiguity whatever, because they are so expressed as to be amply sufficient to bestow upon the wife, in the event which has happened, namely, her surviving the husband without issue, the sum in question.

Then, is any ambiguity thrown upon this intention by the different parts of this instrument? There can be no ambiguity thrown upon this gift by the provisions made for other events that have not taken place; or, if there were any ambiguity from those provisions in contemplation of other events, it must be of a very cogent nature, in order to destroy the effect of the terms which are found in this part of the deed. But I do not find that there are any words

which throw any doubt upon the intention of the parties in contemplating the event which has happened; but, on the contrary, I find very distinct provisions in this deed, which very much confirm this construction of the deed, and to my mind leave no doubt of that being the intention of the parties; for I find in a subsequent provision these words: "that it shall "not be in the power of the wife, or the persons to "whom she shall appoint the sum of 3,000*l.*, or any "part thereof, to be paid, to uplift the same during "the life of Alexander Houston, or even after his "death, during the joint existence of Mrs. Helen "Houston and the issue of this marriage." That contemplates, therefore, the wife being entitled; but in case of there being children of the marriage, it provides that during the lives of those children the wife shall not have the power of uplifting the 3,000*l.*, but after the expiration of the lives of those children it is a necessary inference that that power was to exist in her of uplifting.

But that is not so strongly expressed in this part of the sentence as it is in the following, where it is said, that in case the wife "shall happen to survive her hus-"band and the issue of the marriage, and shall ask and "recover payment of all or any part of the sum of "3,000*l.*, then and from thenceforth" her annuity shall suffer diminution to that extent.

Now that contemplates the precise event which has happened. It contemplates the wife surviving, and there being no issue of the marriage; and in that state of circumstances, which is the precise state of circumstances which has happened, it assumes that she would have the power of asking for and recovering that 3,000*l.*

DILL
v.
EARL OF HADDINGTON and others.

27th May 1841.

Ld. Chancellor's Speech.

or any part of it; and all that it provides is this, that in that event, that is, if she shall think proper to ask for and demand that 3,000*l.*, or any part of it, then the 400*l.* a year, which she was entitled to for life, shall suffer a diminution equal to the amount of the interest of the sum she shall so recover.

Now, although the party contemplated that if the wife survived, and there should be no children, she should have a right to the 3,000*l.* or any part of it, that she should not exercise that right and demand payment was very natural, because she had 400*l.* a year during her own life; and unless she had some occasion for the employment of the capital, her income would not be benefited by applying for the 3,000*l.*, or any part of it, because she could not apply for the 3,000*l.*, or any part of it, without sustaining a corresponding diminution in her income of 400*l.* a year. It was very natural, therefore, that, unless some particular occasion had occurred which made her wish to have control over the capital, she should leave the fund in the state in which her husband had left it, namely, as a charge upon his property, she receiving an income which would not be increased by the receipt of any part of the 3,000*l.*

But then the words "any part of it" were very much relied upon in the argument. It was said, that it is clear that this party contemplated her exercising some powers by which she was to receive part of the 3,000*l.* It is obviously necessary that those words should be introduced, because the object was not only to give her power over the whole, which would include a power over any part, but it was contemplated that she might, during her husband's lifetime, have exercised the power which the instrument gave her of transferring her right

to part of the sum to somebody else, and the individual, therefore, to whom she might transfer her right to part, would be entitled to demand, not the 3,000*l.*, but to demand so much of the 3,000*l.* as he obtained through the power that was so reserved to the wife. It appears to me, therefore, that the introduction of those words refers to those who might claim through the wife, or to the wife herself, in the case of her demanding only part of the 3,000*l.* If she thought proper to demand only part, then, of course, her annuity of 400*l.* a year would be diminished, not by the interest of the whole 3,000*l.*, but by so much as she might ask for and demand of it. She might ask for 1,000*l.* out of it; the 1,000*l.* might be paid, and of course the annuity would then be diminished by the amount of the interest of 1,000*l.*, and not by the amount of the interest of 3,000*l.* Those words, found in the instrument, therefore, do not at all appear to me to shake the construction of what is to be found in the instrument, as applicable to the event which has taken place.

There are, certainly, to be found in this deed terms of gift directly applying to the case which has occurred; and when there is found upon the face of an instrument a clear and distinct expression of the intention of the party, those terms of gift are not to be superseded by ambiguities, not having reference to the particular state of circumstances which has occurred, but to other events which have not occurred, and which therefore call for no decision.

For these reasons I am of opinion, that the construction put upon this instrument by the Lord Ordinary was correct, and that the construction put upon it by the Inner House was not correct. I shall, therefore,

DILL
v.
EARL OF
HADDINGTON
and others.

27th May 1841.

Judgment.

move your Lordships to reverse the interlocutor appealed from, and in its place to substitute the interlocutor pronounced by the Lord Ordinary.

The House of Lords ordered and adjudged, That the said interlocutor, complained of in the said appeal, be and the same is hereby reversed.

G. & T. W. WEBSTER — RICHARDSON and CONNELL, Solicitors.