and his Honour accordingly dismissed the bill. The decision was then brought by way of appeal to this House, and it was heard at your Lordships' bar in the present session. Your Lordships concurred in the view of the Master of the Rolls, and so dismissed the appeal.

These cases evidently afford no authority to guide your Lordships in that now under consideration, which must be decided on other grounds. I have already stated that I think the decision of the Court of Session must be reversed. Its effect is to compel the appellants to do an act which they have no authority to do, in performance of a contract entered into, not by themselves, but by others who had no authority to bind them.

I shall therefore move your Lordships to reverse the interlocutors below, and to assoilizie the defenders.

Solicitor-General.—My Lords, the expenses in this case, that have been paid by the defenders in the Court below, will be returned?

LORD CHANCELLOR.—Yes.

Mr. Anderson.—My Lords, I submit to your Lordships that, considering the state of the authorities upon which the Court below acted, there should be no costs.

LORD CHANCELLOR.—Mr. Anderson, I have thought of this very much. I think if I had decided upon a case exactly similar to those before Lord Cottenham, I should have come to that conclusion; but, though I have intimated my opinion upon those authorities, I think they do not govern this case, and it appears to me that the Court of Session also very much doubted it.

Mr. Anderson.—My Lord, a great portion of the expense was incurred in arguing this branch of the case. There were two branches of the case. The Court of Session was bound by the authorities, although this House is not bound by them.

LORD CHANCELLOR.—If this case had come within the case of *Edwards* v. *The Grand Junction Railway Co.*, I should have adopted that view, but I am of opinion that the expenses in the Court of Session must be returned.

I ought to state, that I have been in communication with LORD BROUGHAM upon the subject, and from the first we both took the same view, and having reduced into writing what I have now read, I sent it to him, and he has desired me to express his full and entire concurrence in the whole. The reason why we could not give judgment before was—that we had been led to suppose (and, from my own recollection of the case, I thought it was so,) that the case of *Preston* v. *The Liverpool, &c. Railway Co.* would involve the same question, but it certainly went off upon a totally different ground.

Interlocutors reversed—Defenders below assoilzied, and expenses ordered to be returned, and cause remitted.

Appellants' Agent, Thomas Sprot.—*Respondents' Agent,* Tawse and Bonar.

JULY 15, 1856.

The Honourable Mrs. JANE LESLIE CUMING, *Appellant, v.* Mrs. JANE DOUGLAS BOSWELL, *Respondent.*

Et è contra.

Trust Settlement—Substitute—Conditional Institute—Construction—*A, whose only child, a son, had predeceased him, leaving a son and several daughters, executed a* mortis causâ *settlement, by which he conveyed his whole property to trustees, directing them, after payment of debts, to invest the residue for the benefit of G, his grandson, and the heirs of G's body, till he or they should attain majority, when they were to denude in his or their favour, and failing G or his issue, the residue was to pertain to any posthumous son of the truster's son, (who never existed,) on his or the heirs of his body attaining majority; and failing him without lawful issue, to the truster's granddaughters, equally among them. By a codicil, the truster declared, that failing heirs male of his son's body, and the succession opening to the heirs female of his body, the residue, instead of pertaining to his granddaughters equally, should pertain to the eldest heir female—the eldest heir female always succeeding without division. G, the grandson, survived the truster, afterwards attained majority, and died intestate without issue, the trustees never having denuded in his favour.*

HELD (affirming judgment), *That the trust estate had not vested absolutely in G, and that his eldest sister succeeded to it, and not the heirs at law of G.*

Trust Settlement—Fee and Liferent—Accumulation—Bonus—*A party, by* mortis causâ *settlement, conveyed his whole property to trustees, directing them, after payment of debts and*

legacies, to invest the residue for behoof of his grandson, in such way and manner as might seem most expedient to them, till he attained majority, when they were to denude in his favour. Part of the trust estate consisted of bank stock. The truster died while his grandson was in minority. The trustees maintained, that during his minority the surplus of the annual proceeds of the estate, after a proper allowance for the education and maintenance of the heir, ought to be accumulated as part of the capital of the estate.

HELD (affirming judgment), *There being no direction to accumulate, that the whole annual proceeds of the residue, after paying debts and legacies, previous to as well as after majority, ought to be paid to the grandson, including bonuses on the stock declared and paid during his minority.*[1]

The late William Cuming, banker in Edinburgh, had one child, Thomas, who died in March 1788, leaving a widow, Mrs. Janet Chalmers or Cuming, one son George, and several daughters, of whom five survived.

On the 19th of the same month, William Cuming executed a trust deed and settlement, whereby he conveyed to trustees, of whom the respondent was the survivor, the whole estate and effects which should belong to him at his death.

The purposes of the trust were, that the trustees should, *first*, pay debts—"*Secondly*, That they shall pay to each of the children of the said Thomas Cuming, my son, other than the heir male of his body, the sum of £1000 sterling, at the first term of Whitsunday or Martinmas after my decease, with the legal interest thereafter till payment."

The *last* purpose had reference to posthumous issue; and is set out, *post*, p. 655.

On 22d March 1788, Mr. Cuming executed a codicil to this deed, as follows:—"I, the before designed William Cuming, do hereby declare, that failing heirs male of my son's body, and the succession opening to heirs female of his body, that then, in place of the said residue of my estate and effects pertaining to the daughters of the said Thomas Cuming my son, equally among them, as provided by the foresaid disposition, the same shall solely pertain to the eldest heirs female of the said Thomas Cuming, and their issue, the eldest heir female, through the whole course of succession, succeeding always without division, and secluding heirs portioners, and they, as well as the heir male, bearing and using the name and arms of Cuming; and with these and the other conditions expressed in the preceding disposition, the before mentioned trustees are accordingly to denude upon such heir attaining to the age of majority, in such form of settlement, and under such clauses and conditions, for carrying my intentions into execution effectually, according to the law of Scotland, as to them may seem most proper, and as I could have done myself,—hereby putting them, in that respect, in my own place, and with the same powers that belong to me."

Mrs. Thomas Cuming had no posthumous child.

On 23d February 1790, Mr. Cuming executed a second codicil, as follows:—"I hereby declare it to be my intention, and, failing my grandson George Cuming, and the heirs of his body, I hereby give to each of my granddaughters (except the eldest at the time) who shall survive me, and the heirs of their bodies, £4000 sterling, over and above the sum of £1000 sterling which I have appointed for them by my preceding deed, and which sum of £4000 sterling shall bear interest to each of them from the failure of my said grandson and his said heirs; and I recommend it to my said trustees to see to the execution thereof accordingly; and consent, as above, to the registration," &c.

William Cuming died in March 1790, leaving a large fortune, which consisted chiefly of personal estate.

George Cuming attained majority on 21st May 1799, and died, unmarried and intestate, on 30th April 1811. He never called on the trustees to denude in his favour, and they held the estate during his lifetime. During his minority, they furnished him with the means of maintenance and education out of the annual proceeds of the estate, carrying the surplus each year to capital; and after his attaining majority, they accounted to him regularly for the annual proceeds on the capital, as accumulated at the date of his majority.

Part of the estate of the truster consisted of stock of the Bank of England and of the Bank of Scotland, and bonuses accumulated thereon.

The bonuses paid under these resolutions, in respect of the trust stock, were carried by the trustees to the capital of the estate. In 1801 and 1802, additional bonuses were paid. These the trustees paid to George Cuming as part of the annual proceeds.

On George Cuming's death, the trustees, holding that the estate fell to Mrs. Leslie Cuming, his eldest sister, continued to pay the annual proceeds to her.

In 1829, the trustees invested the greater part of the property in the purchase of land, and thereafter raised the present action of exoneration and multiplepoinding, in which they produced a deed of conveyance to Mrs. Leslie Cuming, in the form of a strict entail.

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[1] See previous report 14 D. 363; 24 Sc. Jur. 180. S. C.: 28 Sc. Jur. 646.

Mrs. Cuming, as a claimant in the multiplepoinding, maintained that the trustees were bound to denude in her favour, free from any restrictions except those contained in the deeds of 1788.

The Court sustained Mrs. Cuming's plea, and a conveyance was executed in her favour in terms of the judgment—(Cuming's Trustees, 10th July 1832).

Thereafter the claimant, as representing Lady Boswell, another of George Cuming's sisters, made appearance. She *pleaded*—1. That on a sound construction of the settlements, the succession to the residue of the trust estate was conferred on the eldest daughter of Thomas Cuming, and the other heirs female in their order, only in the event of George Cuming predeceasing majority. That residue, on his attaining majority, vested absolutely in him, and, on his death intestate, it descended to his legal representatives. 2. That, at any rate, the whole annual proceeds of the estate, during George Cuming's lifetime, belonged to him. Accordingly, the annual produce during his minority, so far as not applied for his behoof,—and, on the same principle, the bonuses declared in 1799,—fell to be accounted for as part of his executry.

Mrs. Boswell claimed—"to be preferred, *first*, to the extent of one fifth share of the whole residue of the trust estate, in the hands of the raisers at the death of George Cuming in 1811, at least of such portion of the residue as was not heritable, and of one fifth of the proceeds of what may have been heritable, with the accruing interest and accumulation thereof; or, *second*, and at all events, assuming the residue to have been destined to the eldest daughter of Thomas Cuming, to one fifth of the annual profits and proceeds of the trust estate which accrued during the whole period of George Cuming's life, including the period of his minority, as also of the bonuses on the bank stock declared by the banks in 1799, in so far as the same were not accounted for to George Cuming by the raisers."

The defender (the trustee) denied his liability under either head of the claim.

The Court of Session held that the trust estate had not vested absolutely in George Cuming, and that his eldest sister succeeded to the same and not the heirs at law of George: and that as there was no direction to accumulate, the whole annual proceeds of the residue previous to as well as after majority belonged to George, including bonuses.

The Honourable Mrs. Leslie Cuming appealed, maintaining, that the judgments of the Court of Session (of Lord Ordinary, 4th July 1848, and of the First Division, 27th January 1852) should be reversed—1. Because, according to the sound construction of the trust deed, the proceeds of the estate accruing during the minority of George Cuming, ought to have been accumulated with the capital of the residue, and disposed of along with the capital in the purchase of lands to be entailed. 2. Because, in any view, the bonuses declared upon the stock of the Banks of England and Scotland ought to have been added to capital, and appropriated along with the residue.

The appellant also pleaded, that the interlocutors ought to be affirmed, in so far as they repelled the first branch of the claim of Mrs. Jane Douglas Boswell to a fifth share of the residue —1. Because George Cuming did not take under the trust deed and settlement of the testator, and the codicils thereto, an absolute interest in the capital of the residuary estate of the testator. 2. Because the intention of the testator was, that the whole residue of his estate should be laid out and invested in the purchase of lands, and that the destination in favour of the appellant Mrs. Leslie Cuming, as the eldest daughter, was to take effect whether her brother George Cuming died before or after majority.

The respondent Mrs. Boswell supported the judgments upon the following grounds:—1. The annual proceeds of the estate accruing during the lifetime of George Cuming, belonged to him in consequence of the truster's deeds of settlement; and in so far as not accounted for by payments, they belonged, as part of his executry, on his death, to his executors and next of kin, and, among others, to Lady Boswell, to the extent of one fifth. 2. The bonuses on the bank stocks declared in 1799, belonged absolutely to George Cuming, and, in so far as not accounted for to him, the same, as *in bonis* of him at his death, fell to his next of kin and executors, and, among others, to Lady Boswell, to the extent of one fifth. 3. According to the sound construction of the settlement, the residue vested absolutely in George Cuming, upon his attaining majority, with no other special substitution to the heirs of his body, except that, upon his death, intestate, and without issue, it should descend to his sisters as his legal representatives, and, among others, to Lady Boswell; and it was not destined to the eldest surviving sister, excepting in the event, which did not happen, of George Cuming failing before attaining to majority.

Solicitor-General (Bethell), and *Rolt*, for the appellant.—The first question, and one of construction, simply is—whether George Cuming was appointed as an institute, or took the property absolutely. According to the destination in the trust deed, the succession of the daughters was not dependent on any condition whatever except the non-existence of the posthumous son. It says, "failing of him without lawful issue, then such residue is to pertain to the daughters." This is made clearer by the first codicil, which is the testator's own interpretation of his trust deed,—"failing heirs male of my son's body, and the succession opening to the heirs female." The succession of the heir female was not stated here to be dependent on the casualty of George Cuming attaining 21. So the second codicil again says, "failing my grandson George and the heirs of his body, I give to each of my granddaughters." The language of the deed and codicils,

as well as the other provisions, are only consistent with the assumption, that George was to take as institute and the eldest granddaughter as substitute. The decision of the Court below ought therefore to be affirmed on this point. The second question is—whether the accumulation of rents and interest during George's minority is to be treated as part of the capital; or whether he took these absolutely. We contend that they are part of the capital. The testator did not confer any immediate interest, but postponed the vesting till George's majority, and made a destination over, fortified by prohibitory clauses. According to a series of cases in Scotland and England, these are the characteristics of a legacy not vested.—*Viscount of Oxenford*, 2 Br. Sup. 528; *Omey* v. *M'Clarty*, M. 6340; *Sempill* v. *Lord Sempill*, M. 8108; *Grindlay* v. *Merchant Co.*, 1st July 1814, F. C.; *Buchanan* v. *Downie*, 8 S. 516; *Onslow* v. *South*, 1 Eq. Cas. 295; *Cruse* v. *Barlay*, 3 P. Wms. 20; *Smell* v. *Dee*, 2 Salk. 415; *Stapleton* v. *Cheales*, Prec. Ch. 317; *Atkinson* v. *Turner*, 2 Atk. 41; *Elton* v. *Elton*, 3 Atk. 504. But whether the residue vested in George or not at the testator's death, the intermediate rents were given to no one, and the testator must be held to have died intestate *quoad* these.—*Turnbull* v. *Cowan*, 6 Bell's Ap. 222. It was not a case like *M'Pherson* v. *M'Pherson*, 1 Macq. Ap. 243; *ante*, p. 102; where the intention of the testator was held inconsistent with the notion of any accumulation, and also with intestacy. —See also *Howatt's Trustees* v. *Howatt*, 16 S. 622. Nor was it like *Stair's Trustees*, 2 W. S. 624, and *Mitchell* v. *Scott*, 16 D. 1, where there was no limit of time fixed; for the majority of George was the time, up to which the trustees were to manage the property. When there is a clause in a trust deed directing the residue to be invested and the heritage entailed, this necessarily implies, that the rents of the property fall to be accumulated with the capital.—*Bullock* v. *Stones*, 2 Ves. 521; *Green* v. *Ekins*, 2 Atk. 472; *Turnbull* v. *Cowan*, 6 Bell's Ap. 234; *per* Lord Alloway in *Graham* v. *Templar*, 3 W. S. 48; *Trevanion* v. *Vivian*, 2 Ves. 429; *Butler* v. *Freeman*, 3 Atk. 58; *Gordon* v. *Rutherford*, Turn. & R. 373; *Ramsay* v. *Ramsay*, 1 D. 83. The third question is—whether the bonuses on the bank stock were to be accumulated with the capital. Whether these are to be viewed as capital or interest, they must be so accumulated.—*Cuming's Trustees* v. *Cuming*, 26th Feb. 1824, F. C.; *Rollo* v. *Irvine*, M. 8282; *Brander* v. *Brander*, 4 Ves. 800; *Paris* v. *Paris*, 10 Ves. 184; *Witts* v. *Steere*, 13 Ves. 363.

Lord Advocate (Moncreiff), and *R. Palmer* Q.C., for the respondent.—1. We contend, as to the first question, that the residue of the estate pertained to the legal heirs of George Cuming on his death, according to the right construction of the deed. 2. As to the second question, we contend that George Cuming was entitled absolutely to the profits or interest of the residue up to his majority. The trustees were not directed to accumulate, but to do what was inconsistent with such a notion, viz. to lay out and employ the residue for George's behoof. 3. He was also absolutely entitled to the bonuses on the bank stock, which cannot be distinguished from the other rents and profits. It is settled, that the dividend upon bank stock belongs to the proprietor of the stock at the date when it becomes payable.—*Thomson* v. *Lyell*, 15 S. 32; *Paterson* v. *M'Naughton*, 1 D. 241.

Sir R. Bethell replied.

Cur. adv. vult.

LORD CHANCELLOR CRANWORTH.—This was an appeal from certain interlocutors of the Court of Session that were made in a proceeding that had been instituted in the year 1830, a suit of multiplepoinding and exoneration, by the trustees of the will and codicil of a gentleman of the name of Cuming; and in that suit questions arose which have given rise to the present appeal. I will first call the attention of your Lordships to the trust disposition or will under which the question arose. It was made by Mr. Cuming, a banker in Edinburgh, in March 1788, and thereby he gave all his property to certain trustees in trust, for the uses and purposes after mentioned, viz. that the trustees should, in the first place, pay all his just and lawful engagements; secondly, that they should pay to each of the children of his deceased son Thomas Cuming, (who had then recently died, a few days or weeks before the making of the instrument,) other than the heir male of the body of Thomas Cuming, the sum of £1000 sterling, "and this (he says) I mean to be over and above the provisions they were entitled to by their father's settlements, as a mark of my affection for them. And, lastly, after payment of these sums, the said trustees shall lay out and employ the residue of my said estates and effects for the use and behoof of George Cuming, my grandson, only son of the deceased Thomas Cuming, and the heirs of the body of the said George Cuming, in such way and manner as may seem most expedient to them, till he or they may arrive at majority, when they are to denude thereof in his or their favours, with such conditions that they shall not dispose of the same, nor alter the succession thereof, either gratuitously or onerously, as to the said trustees may seem proper; and failing of the said George Cuming or his lawful issue, before either of their attaining to majority, then such residue is to pertain, under the conditions foresaid, to any other heir male of my said son's body, if any such shall hereafter exist, by the said Janet Chalmers being delivered of a posthumous child, and that also at his, or the heirs of his body, attaining to majority; and failing of him without lawful issue, then such residue is to pertain to the daughters of the said

Thomas Cuming, my son, equally among them; and in case of the decease of any of them before such succession opening to them, and leaving lawful issue, such issue shall be entitled to succeed to the share that such deceased daughter would have been entitled to, had she been alive." Then he appoints executors and guardians to his grandson.

That will bore date the 19th March 1798, but three days afterwards he executed a codicil, which is in these words :—"I, the before designed William Cuming, do hereby declare, that failing heirs male of my son's body, and the succession opening to heirs female of his body, that then, in place of the said residue of my estate and effects pertaining to the daughters of the said Thomas Cuming, my son, equally among them, as provided by the foresaid disposition, the same shall solely pertain to the eldest heirs female of the said Thomas Cuming, and their issue, the eldest heir female, through the whole course of succession, succeeding always without division, and secluding heirs portioners, and they as well as the heir male bearing and using the name and arms of Cuming;" and so on, &c.

Then, a year and a half after that, in February 1790, he made another codicil, wherein he says—"I, the before named William Cuming, hereby declare it to be my intention, and failing my grandson George Cuming and the heirs of his body, I hereby give to each of my granddaughters (except the eldest at the time) who shall survive me, and the heirs of their bodies, £4000 sterling, over and above the sum of £1000 sterling given by the will."

That was the instrument which gave rise to the question in the present case. Mr. Cuming, the maker of the settlement, died in the year 1790, leaving his grandson George, who was the only son of his then recently deceased son Thomas, to succeed to the property, and leaving several daughters of that deceased son Thomas, of whom the eldest is Mrs. Cuming, the present appellant in one of these appeals. Another was Lady Boswell, who is now represented by Mrs. Boswell. I need not go into the details of the mode in which that representation is alleged to have taken place. Mrs. Boswell is a respondent in one of these appeals, and an appellant in another. The grandson George attained his majority in the year 1799, and then he was put into possession of the whole of the property, which he enjoyed until his death, which happened in the year 1811. He never married, and then, upon his death, Mrs. Cuming, as the eldest daughter, was let into possession of the property, as being the person who, under these circumstances, was entitled under the will to succeed. When George, the grandson, died in 1811, there having been no posthumous child born of Thomas Cuming, he left as his heirs at law, his co-heirs, and five sisters, Mrs. Cuming being the eldest, and Mrs. Boswell, one of the younger sisters, the next but one to Mrs. Cuming.

In the year 1830 the trustees of this settlement raised an action of multiplepoinding, in order to obtain a discharge of their duty as trustees, and to have the disposition of the property sanctioned by the authority of the Court. It was not till the year 1844 that the claims were put in, which gave rise to the present questions, the questions being three in number. In the first place, what is the true construction of this (as I call it) will and codicil? Under this will and codicil, did George, the grandson, become absolutely entitled, to all intents and purposes, to the property, so that upon his death it goes to be divided amongst those who represent him? Or did he take it only as heir in tail—as a fiar in tail, so that upon his death without issue, it passed over to his sisters, or any of them? That is the first question. The Court of Session held that he took only as institute in tail, and that upon his death Mrs. Cuming, as the elder sister, succeeded as heir substitute to him. That was the decision of the Court of Session upon that point. Against that, Mrs. Boswell, who represented one of the other sisters, contended, that George took absolutely, and that upon his death without issue, the whole property became divisible amongst those who were his next of kin. Whichever way that question is decided, Mrs. Cuming contends, that the residue of the property, from the death of the settlor in 1790, up to the time when George attained his majority, was to be accumulated, and then invested, so that the accumulations of rents or interest during the minority of George were, upon his attaining 21, to be all invested and treated as part of the capital, which was to pass to those who were to take in succession. Upon that point the Court of Session differed from Mrs. Cuming. They concurred with her in the former contention, but differed from her in that, and held that the residue belonged absolutely to George, and consequently, upon his death became divisible amongst those who were entitled to his property as upon intestacy.

There was another question, which arose in respect to certain bonuses that were declared upon a portion of the personal property of this testator, which consisted in part of English bank stock, and in part of Scotch bank stock, or stock in Scotland, that was of the same nature, and in respect of which stock, both that in England and that in Scotland, certain bonuses had been declared a few weeks before George attained his majority, to be made payable at a future day, which day did not happen till after he had attained his majority. The question is—whether these bonuses did or did not pass as part of what was to be considered as residue during the minority, and so to be invested. Upon that point I do not find that the Lord Ordinary gave any very distinct opinion. He treated it all as being a portion of the residue. But that point

does not appear to me, as far as I can recollect, to have been very distinctly raised before him, nor is it very material, as will appear in the view which I take of this case.

I will very shortly consider these three questions in succession. The first is a question of construction—whether, upon the event of the death of George Cuming, the grandson, in 1811, unmarried, the whole of the residue of the moveable estate, the whole property, in fact, (for the property was nearly all moveable estate, but afterwards invested in heritable estate,) did or did not pass over to Mrs. Cuming. The Court of Session held that it did. Mrs. Boswell has appealed against that.

Now, this question must be determined along with the other question of construction, by looking at the exact terms which have been used. Collecting the intention of the testator from the language which he has used to embody that intention, he gives his property to trustees, and directs, first, that they shall pay his debts; and, secondly, that they shall pay certain legacies; "and lastly, after payment of these sums, the trustees shall lay out and employ the residue of my said effects for the use and behoof of George Cuming, and the heirs of the body of the said George Cuming, in such way and manner as may seem most expedient to them, till he or they may arrive at majority, when they are to denude thereof in his or their favours, with such conditions that they shall not dispose of the same, nor alter the succession thereof, either gratuitously or onerously, as to the said trustees may seem proper; and failing of the said George Cuming or his lawful issue before either of their attaining to majority, then such residue is to pertain, under the conditions foresaid, to any other heir male of my said son's body, if any such shall hereafter exist, by the said Janet Chalmers being delivered of a posthumous child"

The first question is—what would have been the construction, if there had been no codicil afterwards, George having attained his majority, and whether or not there would have been any gift over to the daughters. Now, if there had been no codicil, I confess that I should have been very much inclined to be of opinion, that the daughters were there intended to take as conditional institutes, and not as heirs by substitution, because otherwise I must overlook the words, "and failing of the said George Cuming or his lawful issue before either of them attaining to majority." But when I come to read that, coupled with what follows in the two codicils, I come to the same conclusion as that at which the Court of Session arrived, namely, looking at all these instruments together, which I think are legitimately to be construed together, (the first codicil, particularly, having been executed only three days after the will,) it is quite clear, although there were those expressions "before either of their attaining to majority," that they were really used *per incuriam*, or without the testator exactly understanding the effect of them; because I cannot come to any other conclusion, looking at the codicils, than this, that the testator intended that, whenever the entail which he directed to be created in favour of George should fail, the daughters should succeed. By the will they were to succeed. Whenever the son's issue should fail, then the daughters were to take equally. Then in his codicil he says—"I, the before designed William Cuming, do hereby declare, that, failing heirs male of my son's body, and the succession opening to heirs female of his body, that then, in place of the said residue of my estate and effects pertaining to the daughters of the said Thomas Cuming, my son, equally among them, as provided by the foresaid disposition, the same shall solely pertain to the eldest heirs female of the said Thomas Cuming, and their issue, the eldest heir female, through the whole course of succession, succeeding always without division, and excluding heirs portioners." Now, the way in which I read these words, "failing heirs male of my son's body, and the succession opening to heirs female of his body," is this:—I understand the testator to put his construction upon the former instrument, that, whenever the succession of heirs male of his son's body failed, the succession was to open to heirs female. Then, he alters the mode in which heirs female should take—instead of taking as heirs portioners, they are to take *successivè*. I think that would have been the legitimate construction, and the only construction which I could have acted upon, even if it had stood upon the first codicil only. But I see that confirmed two years afterwards by the second codicil, in which he says—"failing my grandson George Cuming, and the heirs of his body, I hereby give to each of my granddaughters (except the eldest at the time) who shall survive me, and the heirs of their bodies, £4000 sterling, over and above the sum of £1000 sterling." I think that clearly shews, that what he meant was, that whenever George Cuming, the grandson, and the heirs of his body, failed, his granddaughters, except the eldest, who was to succeed, should take £4000 sterling. It is said that that could not have been intended, because, in all human probability, they would have been dead a century before that limitation might take effect. The observation upon that is this—that the £4000 must be taken to be merely a charge upon the *corpus*, therefore, whenever a daughter succeeded, in default of heirs of the son, to the *corpus* of the estate, she should take it *cum onere*, and she would be liable to pay the £4000.

Upon these grounds, I come to the same conclusion as that to which the Lord Ordinary and the Court of Session arrived, viz., that the construction was right, which has been put upon these instruments, that, at the death of George, the grandson, without issue, in 1811, Mrs. Cuming

succeeded as heir female to this property, according to the true construction of the will and codicils stated here.

Then the next question is—to what did Mrs. Cuming succeed? She succeeded, of course, to all the property the testator left. Did she succeed also to the accumulations of interest and profits made by that property from the death of the testator up to the time when George attained his majority in the year 1799? The Lord Ordinary held that she did not, but that that was clearly property given by the will, according to the true construction, to the first taker, George, for his own benefit, and that, consequently, it passed to those who now represent him.

I need hardly say, that this is a mere question of construction. The word "residue," no doubt, may comprise interest accruing after the death of the testator. That was the case in *Green* v. *Ekins*, 2 Atk. 473, to which we were referred by the Solicitor-General in the argument. That is an English case, but the same principle would apply to Scotland; and there are Scotch cases which bear out exactly the same principle. In that case, Mr. Green had issue by his first wife, the defendant Elizabeth, who, in his lifetime, had privately, and without his consent, married Mr. Burnaby, and by his second wife had issue, another daughter named Frances, who at the time of making this will, and at his death, was an infant. And having a very considerable real estate and a very large personal estate, he devised several particular legacies to his wife and to Mrs. Burnaby and his daughter Frances, and gave directions to have his trade carried on after his death for the benefit of those who should be entitled to the residue of his estate. And all the residue of his personal estate he devised to any son he should have by his wife at his age of 21; if no son, then to his daughter Frances, to be paid to her at her age of 21, or marriage. But if it should happen that his daughter Frances should depart this life before 21, or marriage, and he should have no other daughter born of his second wife who should attain 21, or marriage, then, and in such case, if his daughter Elizabeth Burnaby should have issue of her body, one or more son or sons, he gave and bequeathed the residue of his personal estate to such son of his said daughter as should first attain the age of 21; but if his daughter should have no such son or sons, or having such son or sons, none should attain the age of 21, then, and in such case, he gave and bequeathed the residue of his personal estate to William Ekins Pier, or defendant in this case, subject to the payment of £4000 to the daughter of his daughter Burnaby, in manner therein mentioned. There Lord Hardwicke said—"As to the rest of the profits which have accrued, and will accrue, till the devise to the son of Mr. Burnaby vests, I am of opinion that the interest and profits must be considered as a part of the residue, and must accumulate." That, he says, is the construction to be put upon those particular words. That I do not at all doubt; but the question is—whether or not that construction can fairly and properly be adopted in the present case. Now, I confess I cannot think that such a case is at all applicable to the present, because here what the testator directs his trustees to do is this:—"After payment of these sums the said trustees shall lay out and employ the residue of my said estates and effects for the use and behoof of George Cuming, my grandson, only son of the said deceased Thomas Cuming, and the heirs of the body of the said George Cuming, in such way and manner as may seem most expedient to them, till he or they may arrive at majority, when they are to denude themselves in his or their favours." What are they to do with the residue during the minority? They were to employ it "for the use and behoof of George Cuming my grandson." I think it follows of necessity from that, that the testator meant to say, that he was to be the person entitled, though he was not to claim possession of it from the trustees till he attained his majority. That was a postponement for convenience arising from his want of capacity as an infant to manage the property; but he did not mean to interfere at all with his right and interest which should then accrue. Indeed any other construction would lead to this result, that the testator contemplated that the grandson was to have no fund out of which he was to be educated. The trustees have applied a portion of the income to his education, and have very properly done so, if it did not belong to him. I do not mean that that is quite conclusive, because a grandfather may choose to say—I give the residue of my property to my grandson, if he attains 21, but without any interest in the property in the intermediate time. But here it appears that the maintenance was to be derived from this source. I do not, however, rely upon that; but I go upon the words which I find in this instrument, from which I collect clearly that the trustees were not to denude of their trusts till the grandson had attained 21, but they were nevertheless, in the mean time, to manage the property for his benefit till he did attain 21. The language seems to me to exclude any other construction, and all doubt. On any other construction the grandson would have been left unprovided for during his minority. I think, therefore, upon that point, that the decision of the Lord Ordinary, and afterwards of the Court of Session, was perfectly correct.

Now, as to the question of bonuses, a great deal of argument was addressed at your Lordships' bar, as to whether those bonuses were to be considered sums of money accruing due during the minority, or after the minority had ceased, and when the majority had commenced. In the view of the case which I take, I think that is quite unimportant. I think the bonuses must go with the other interests and profits. I do not mean to dispute the English rule, that such benefits do not go to the tenant for life, but must be added to the capital. This has been considered as

settled since the case of *Brander* v. *Brander*, 4 Ves. 800, where Lord Loughborough laid down the rule, though evidently feeling that it rested on not very solid grounds. This decision was followed by Lord Eldon in *Paris* v. *Paris*, 10 Ves. 189, and by Lord Erskine in *Witts* v. *Steere*, 13 Ves. 368. And the rule in Scotland is the same, as was settled by this House upon an appeal in *Irving* v. *Houston*, 4 Paton Ap. 521. Indeed, in *Paris* v. *Paris*, Lord Eldon refers to the Scotch case as having been settled after great inquiry as to analogous cases in England. But that Scotch case was the case of a liferenter, and does not, in my opinion, govern the case now before the House, where the person entitled is not a liferenter but an absolute fiar. It is true, that during his minority, which is the period now in question, the income is given not to him, but to trustees for his behoof. But this makes no difference in principle. The gift was evidently made to the trustees instead of to George himself, only on account of his personal incapacity by reason of his minority. There was no intention to alter the character or quality of his interest in the fund. He was no more a liferenter during his minority than he was after he had attained his age of 21 years. After attaining that age he became entitled in his own right. Before that age others were entitled, as trustees for him. If there had been no minority he would at once have been fiar, and so entitled to the bonuses as well as to the ordinary profits. The minority makes no difference, except that the persons entitled are the trustees? but they are entitled with all the same incidents as would have attached to George himself if he had been of age. Therefore I think both appeals must be dismissed, and dismissed with costs.

Sir R. Bethell.—There are cross appeals, my Lord.

LORD CHANCELLOR.—I propose to dismiss them with costs. If the parties like that they should be dismissed without costs, as they are cross appeals, that will save the necessity of taxation.

Sir R. Bethell.—I think, probably, the simplest way would be to dismiss them both without costs.

Lord Advocate.—I think it would.

LORD CHANCELLOR.—Very well. I do not think I should be justified in making the fund liable.

Sir R. Bethell.—No, my Lord, we do not ask it. The parties ought to bear their own costs.

Interlocutors in both appeals affirmed, and both appeals dismissed.

Appellant's Agents.—G. and G. Dunlop, W.S.—*Respondent's Agents*, J. W. and J. Mackenzie.

JULY 18, 1856.

ROBERT HUTCHISON and Others, *Appellants*, *v.* JAMES SKELTON and Others, *Respondents.*

Legacy—Provisions to Children—Vesting—Fee and Liferent—Trust—Personal Bar—Discharge—*A father, subsequent to the death of his daughter M., executed a trust settlement, directing his trustees to set apart for each of his daughters, (including M.,) and their children respectively, in fee, the sum of £1500, and declaring that such sums as had been or might be paid by him to any of them, and were vouched by receipt, or entered to their debit in his books, should be held in* pro tanto *of provision. Previous to the date of his settlement, the truster had disponed to M. heritable subjects valued at £1000, and that sum he entered to her debit in his books, as "to account of patrimony." On the truster's death:*

HELD (reversing judgment), *That this £1000 was to be deducted from the provision to M.'s children, as the will obviously intended, that equal legacies should be given to all the daughters.*[1]

The late John Hutchison, on 16th December 1840, executed a trust disposition and settlement, by which he conveyed to his wife and his sons, as trustees, his whole property, heritable and moveable. The trust purposes were—*1st.* For payment of debts. *2d.* That the trustees should "secure to Mrs. Elizabeth Morrison, my spouse, in liferent, for her liferent use only, the dwelling house of Cairngall, with the garden;" and also deliver over to her, as her own absolute property, the whole household furniture, &c., with a free liferent annuity of £150, by equal portions, at Whitsunday and Martinmas, beginning the first half year's payment at the first of these terms which shall happen six months after my death, for the half year succeeding, and so to continue during her life. "*Tertio*, That they shall set apart and secure to each of my daughters, Mary, Elizabeth, Katharine, Ann and Jean Hutchison in liferent, and their children respectively in fee,

[1] See previous report 15 D. 570; 25 Sc. Jur. 340. S. C. 2 Macq. Ap. 492; 28 Sc. Jur. 670.