as to the ground upon which we affirm them. It is one upon which there was no difference of opinion among the learned Judges in the Court below, either in the Court itself, among the four Judges of the First Division, or on the part of the Lord Ordinary. In affirming the interlocutors upon this ground, I think there can be no doubt whatever. With respect to what both my noble and learned friends have said upon the same point that now arises, as to whether the registration was a sufficient intimation, I do not see how it is possible, after reading the words of the act, to have the least doubt, that, to all intents and purposes whatsoever, this registration was a sufficient intimation.

It must not be supposed, from the reference that has been made by my noble and learned friend who first addressed you, to the analogy of our delivery of sasine, as a public intimation of the transfer of lands—it must not be supposed in Scotland that we are at all giving our judgment upon English law upon the subject. On the contrary, this is merely used as an illustration and analogy, for it is upon Scotch law principles and Scotch law cases, and Scotch law text writers, and upon the statute, that we agree with the judges below, and are disposed to affirm these interlocutors. I therefore join with my noble and learned friends in advising your Lordships to dismiss this appeal, and to affirm the interlocutors.

Interlocutors affirmed.

Appellant's Agents, Morton, Whitehead, and Greig, W.S.—*Respondents' Agents*, Mackenzie, and Baillie, W.S.

MARCH 25, 1858.

CHARLES JAMES TENNANT, Trust Assignee of Mrs. Jane Pollok or Tennant, *Appellant*, *v.* Dr. WILLIAM POLLOK MORRIS and Others, Trustees of the late James Pollok, *Respondents.*

Trust Settlement—Construction—Fee and Liferent—Survivor—Faculty—*A trust deed provided that the truster's two daughters should each have the liferent of half of the free residue, and that in the event of neither of them leaving children, or in the event of such children dying before majority, the daughters were to have the power of conveying the fee of the share liferented by them respectively to such persons, and in such manner, as they should think fit, under burden of the survivor's liferent; and failing the daughters exercising such power, the fee of the shares was to go to the brother and sister of the truster.*

HELD (affirming judgment), *That there was conferred upon each of the daughters, in the event of neither of them having children, a right to dispose of the fee of her own share, but that no right was conferred upon the survivor to dispose of the share of her deceased sister.*

Appeal—Costs—Trust Estate—Obscure deed.

QUESTION—*How far costs are allowed out of the estate, when litigation is caused by an obscure trust disposition?*[1]

The pursuer appealed, pleading, in his *printed case*, that the judgment of the Court of Session ought to be reversed for the following reasons:—"I. Because, according to the sound construction of the trust deed, Mrs. Tennant, the surviving daughter of the testator, was entitled to exercise a power and faculty to settle, destine, and convey the fee of the whole residue to the appellant. II. Because the testator died intestate with regard to the fee of one half of the residue; and Mrs. Tennant being his heir at law and next of kin, succeeded thereto according to the law of succession to intestate estate, and duly conveyed it to the appellant."

The *respondents*, in their *printed case*, supported the judgment on the following grounds:—"I. Because, on a sound construction of the sixth clause of the trust deed, the power or faculty of appointment conferred on each of the truster's daughters was expressly limited in its application to that moiety of the residue of his estate which was separately devised in liferent to each daughter. II. Because that power and faculty of appointment was not a new faculty created by the sixth clause, but was simply an extension or enlargement of the faculty previously conferred on his daughters respectively by the fourth and fifth clauses, intended to be available to each of them under the different contingencies contemplated by the sixth clause, and to affect (although to a greater amount) the same portion of his estate, viz., that half share devised in liferent to each. III. Because, throughout the whole clauses of the trust deed which affect the destination of the residue of his estate, Mr. Pollok is dealing with that residue as consisting of two separate

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[1] See previous report 18 D. 382; 27 Sc. Jur. 546; 28 Sc. Jur. 173. S. C. 30 Sc. Jur. 493.

and distinct half shares, one of which is set apart for the benefit of each daughter and her family, and that plan or method pervades the sixth as well as the previous clauses, and excludes any other interpretation than what is consistent with such bipartite division. IV. Because there is nothing in the import or tendency, either of the previous or subsequent clauses, or in the presumptions of moral probability which affect the case, to modify or vary what is above set forth as the only natural and intelligible interpretation of the sixth clause. On the contrary, the other clauses, and the whole indications of the testator's intention to be gathered from them, or indicated from such presumptions of moral probability, are all consistent with, and strongly corroborative of, that interpretation."

Sir R. Bethell Q.C., *R. Palmer* Q.C., and *Anderson* Q.C., for the appellant.—The construction put upon this deed by the Court below is wrong; for the natural meaning of the whole deed was to give power to the surviving daughter, in the circumstances which had happened, over the whole fee, or both moieties. This is, *à priori*, what would be expected in the circumstances, viz., that the father should confer such a power on the daughter surviving, rather than that the residue should go to collaterals. Where the words are not quite clear, they must be construed in consistency with the probable intention of the testator. Down to the end of the fifth clause, the sole power given to the daughter over her children's provision, was a power of appointment or distribution; but the seventh clause gives a higher power, viz., that of defeating the right of the brothers and sisters of the testator, by bequeathing the fee of the whole residue to strangers. The power given by the sixth clause must also extend to the fee of the whole residue, in order to make it consistent. The sixth clause must not be read apart from the clauses preceding and following. The Court below laid much stress on the words, "share of the residue," holding that it means a moiety. That is not so. It is the proper phrase when speaking of both daughters in one clause.

[LORD WENSLEYDALE.—The word "share" more naturally means a half than a whole.]

No doubt, but it is, at most, a loose and uncertain word to found upon. There were cases where it had been held to include accruing shares, as well as the original share—*Leeming* v. *Sherratt*, 2 Hare, 14; *Doe and Clift* v. *Birkhead*, 4 Exch. 110. The word "respectively" was not to be taken as conclusively shewing, that one moiety only was intended; and there are many cases collected in 2 Jarman on Wills, 463, shewing that the Courts had latterly refused to lay any stress on expressions of that kind. There was another ground not decided in the Court below, on which the appellant claims the share originally destined to Elizabeth, but which lapsed by her predeceasing the testator. There was, in fact, an intestacy as to that share, and Janet Pollok succeeded to it. If this point was not open on the present summons, then the appellant suggests a remit to the Court of Session to amend the summons, and hear argument upon it.

The *Solicitor-General* (Cairns), and *Rolt* Q.C., for the respondents, were not called upon.

LORD CHANCELLOR CHELMSFORD.—My Lords, this is an action of declarator which was originally brought by Mrs. Janet Pollok or Tennant. Before the interlocutor was pronounced, the pursuer, Mrs. Tennant, died, and the appellant, Charles James Tennant, was sisted as trust disponee in place of the pursuer.

The summons of declarator, which was founded upon a trust deed or disposition made by Mr. Pollok, the father of the original pursuer, on the 13th of February 1839, prayed that it might be "declared, by decree of the Lords of our Council and Session, that the pursuer, Mrs. Janet Pollok or Tennant, has, according to the just and fair legal construction of the said deed of settlement, as full, free, and effectual power, right, and faculty to settle, destine, convey, and dispose of the fee of that share and moiety of her said deceased father's estate, to the liferent of which she succeeded by the death of her eldest sister, as aforesaid, as she has, or may have, to settle, destine, convey, and dispose of the fee of that share or moiety of the said estate, especially destined and secured to her by the aforesaid trust disposition and deed of settlement, and in the same way as if the said deed had been equally explicit and expressed with regard to the one as to the other."

The defender submitted certain pleas in law. In the first place, that "the pursuer is not entitled to settle and convey in any form the fee of that share of the residue of the truster's estate, the liferent of which was directly settled on her deceased sister, and the fee of this share must be governed by the ulterior destination in the sixth purpose of the trust deed;" and, secondly, that "the pursuer is not entitled to dispose of the fee of the share, the liferent of which was directly settled on herself, unless in a *mortis causâ* form."

Upon the case coming on before the Lord Ordinary, he found, "that the sound construction of the sixth purpose of the trust is to confer upon each of the two daughters of the truster a power and faculty, in the event of neither of them leaving children, of settling, destining, and conveying the fee of her own half share of the residue, under burden of the survivor's liferent, but not to confer on the survivor of the sisters any right to settle, destine, and convey the fee of the other half share provided to the predeceasing sister." He "sustains, therefore, the first plea in law for the defenders, and as regards the fee of that share of the residue of the truster's estate, to the liferent of which the original pursuer, Mrs. Janet Pollok or Tennant, succeeded by the

death of her eldest sister, Mrs. Elizabeth Harriet Pollok or Sym, assoilzies the defenders from the conclusion of the action, and decerns: Finds Charles James Tennant, the husband and trust disponee of the late Mrs. Janet Pollok or Tennant, who has been sisted in her place as pursuer of the action, liable in the expenses of the defenders."

The case was then brought before the First Division of the Court of Session, and the Lords having advised the reclaiming note for Charles James Tennant, and heard counsel for the parties, they delete from the interlocutor of the Lord Ordinary submitted to review the word "sustain," and the words, "the first plea in law for the defenders," and with this variation, adhere to that interlocutor.

The whole question in this case depends upon the proper construction of certain clauses in the deed of trust, of the 13th of February 1839, which was made by Mr. Pollok, the father of the original pursuer. At the time of this trust disposition, he had two daughters, one, Mrs. Sym, who died in his lifetime, and the other, Mrs. Janet Pollok, who was the original pursuer in this suit. Now, in that trust deed, there are certain clauses only which it is at all necessary to advert to, in deciding this question between the parties, and those are the fourth, fifth, sixth, and seventh clauses of this trust disposition.

In the *fourth* clause, he says, "I direct my said trustees, to hold the free residue of my estate, heritable and moveable, in manner following, viz., They shall hold one half of said residue for the behoof of the aforesaid Elizabeth Harriet Pollok in liferent, for her liferent alimentary use allenarly, but with power and faculty to her, as after mentioned, and for behoof of the child or children of the body of the said Elizabeth Harriet Pollok, in such proportions, and subject to such conditions as she may fix and determine by a writing under her hand, which she shall have power to execute in manner after mentioned; which failing, equally among them, and the heirs of their bodies respectively, in fee." And then he declares, that during the lifetime of Elizabeth Harriet Pollok, it shall be lawful to the trustees, with her consent, to advance certain sums to her sons. And he provided, "That in case of the death of the said Elizabeth Harriet Pollok without leaving a child or children, or issue of the body of such child or children, or in case of the failure of all her children, and of the issue of their bodies, before attaining majority, then, and in these events, it shall be lawful to, and full power and faculty are hereby given to her, by any *mortis causâ* deed, to dispone, destine, and convey a portion of the share of the residue of my estate liferented by her, not exceeding £3000, to such persons or person, and in such way as she may think fit. And in regard to the remainder of the fee of said share, or the whole thereof, should the above power and faculty not be exercised, I direct my said trustees, in the events foresaid, to hold the same in trust, for behoof of the aforesaid Janet Pollok in liferent, in case she shall survive the said Elizabeth Harriet Pollok, for her liferent use allenarly, and for behoof of the child or children of the body of the said Janet Pollok, in such proportions, and subject to such conditions as she may have fixed and determined by a writing under her hand, which she shall have power to execute in manner after mentioned; which failing, equally among them, and the heirs of their bodies respectively in fee."

Then, in the *fifth* place, he disposes of the other moiety of his property to the pursuer, Janet Pollok, exactly upon the same terms and conditions, and subject to the same limitations as those which are contained in the fourth clause which relates to the moiety that is given to Elizabeth Harriet Pollok.

Upon these two clauses no difficulty whatever arises. If either of the daughters died without children, then she had the power, under these fourth and fifth clauses, to dispose of a sum of £3000 to such person or persons, and in such way as she might think fit; and then her share was to go to the other sister, and after her death, to her children, in such parts, shares, and proportions as the mother of those children might determine; and failing any such determination, then equally among them, and the heirs of their bodies respectively in fee.

Now the difficulty which appears to me to arise in the construction of this deed of disposition, is from the words of the *seventh* clause or purpose, (as it is called,) as connected with those dispositions in the fourth and fifth clauses, because there appears to be no doubt that under the seventh clause there is a power of disposition given to the surviving sister having children, in the event of those children dying before attaining twenty-one, without leaving any issue, to dispose of the entirety as the surviving sister may think fit. And that renders it, perhaps, a little difficult to construe the exact meaning of the truster, (as he is called,) the party who enters into the deed of disposition, with respect to the sixth clause. And yet the sixth clause appears to me to be so clear in its language, the intention of the truster appears to be so specific and so distinctly defined, that I think it is quite impossible to put any other construction upon his words than that which naturally and necessarily arises from the language which he has used. There may be difficulties suggested in the way of that construction—there may be probabilities urged against it; but it is infinitely better to adhere to the exact meaning of words which are used, than to go about to discover some other meaning which he may have had, or some other motive which may have actuated the party in the disposition which he has made; and looking to that sixth purpose, as it is called, in this deed of disposition, the words appear to me to be too clear

to be capable of any other interpretation than that which the House is disposed to put upon them.

Now the *sixth* clause is this: "In case it shall happen that neither of my said daughters shall leave a child or children, or issue of the bodies of such child or children, or in case of such child or children, or issue of their bodies existing, but all dying before attaining the age of twenty one years of age, then, and in these events, full power and faculty is hereby committed to my said daughters respectively, to settle, destine, and convey the fee of the share of the residue of my estate, liferented by them respectively, to such person or persons, and in such way or manner as they may think fit; but under burden always of the survivor's liferent; and failing my said daughters, or either of them, exercising such power and faculty, then the fee of the said share or shares shall go and belong, in equal proportions, to my brothers, William and Morris Pollok, and my sister, Susan Pollok, and their respective heirs."

The event contemplated by this sixth purpose has arisen. Neither of the daughters has left a child or children, or issue of the bodies of such child or children. Well, then, what was the intention of the party who made the deed, supposing this event to occur? Did he mean, that one of the sisters surviving, who by surviving had acquired a liferent in her deceased sister's share, should have an absolute power of disposition over the entirety of the property? Or did he mean to give a power merely over the share of each daughter, giving his daughters, in the event of their leaving no children, or of the children dying before attaining twenty-one, the power to dispose of that share to whom they should think fit? Now the words which are used certainly are clearly capable of the latter interpretation, and, as it appears to me, it is very difficult indeed to put any other construction upon them.

In the first place, the power which is given is given in these words: "Full power and faculty is hereby committed to my said daughters respectively, to settle, destine, and convey the fee of the share of the residue of my estate, liferented by them respectively." Now I quite admit that there is no peculiar force in the word "share," which would confine it necessarily to the original share which was taken by each daughter, and which would not extend to the derivative share. But the words here are peculiar and precise; we have not merely the word "share," but "the share of the residue of my estate liferented by them respectively." Now, what other fair and reasonable meaning can be put upon those words than this, that they refer to the share of each daughter, in which share each of them possessed a liferent; each daughter, therefore, respectively having that particular interest which is designated by the words which are used. Although, therefore, it is perfectly clear, that the word "share" has no such precise meaning as would necessarily confine it, in this case, to the original share of each of the daughters, yet the word must be interpreted by the context, and it is difficult, looking at the whole of this clause, to put any other meaning upon it than the restricted one which I have suggested, namely, that it applies merely to the original and not to the derivative share.

But then the clause goes on, "but under burden always of the survivor's liferent." Now, what is the meaning of that? Under the previous parts of the deed, in case of the death of either of the daughters without leaving children, subject to that power which each of them had to dispose of a sum of £3000, and to make that a charge, the other sister was to have a liferent in the share, and if she had children, then it was to go to her children in such proportions as she should appoint; and in default of appointment, in equal proportions to them and their heirs. Therefore, in using the terms, "but under burden always of the survivor's liferent," it appears to me, that, as distinctly as words can express the meaning of a party, the truster meant to say this: It shall be in the power of each daughter, if she think fit, to dispose of her share,—either she may make a charge of the sum of £3000, or she may go further under this sixth clause, or sixth purpose, and may absolutely dispose of her share to any person whom she thinks fit, but subject always to the liferent which her sister has in her share. That is, although she may have an absolute power of disposition of her own share, yet that is to be subject to the interest which her sister is to have, and she is not to interfere with that interest or liferent.

Then, it being quite clear to my mind, that the intention of the party making this deed, was, by the sixth clause, (which is the only one that we are called upon to interpret,) to confine the right which was to be exercised to each share of the daughters respectively; the clause proceeds in this way, "And failing my said daughters, or either of them, exercising such power and faculty, then the fee of said share or shares shall go and belong, in equal proportions, to my brothers, William Pollok and Morris Pollok, and my sister, Susan Pollok, and their respective heirs." Now we are not called upon, on the present occasion, to consider what would be the effect of that disposition over, failing any exercise of the powers which are conferred upon the daughters. It appears to me, that it is quite sufficient for us, upon this action of declarator, and upon the form of the summons, to express an opinion upon the point, whether Janet Pollok had or had not the power and faculty to make any disposition of the share which she derived from her sister, there being, of course, no question whatever with regard to her original share, of which she has disposed. There may be difficulties suggested as to probabilities of intention; it may be said, that it is extraordinary that the person who made this deed should, in the event of either

of his surviving daughters having children, and those children dying before twenty-one, have given, or intended to give, an absolute power of disposition over the whole of the property, and yet that, in case of both the daughters dying without either of them leaving any children, he should have intended to confine that power and faculty only to the share which each originally possessed. There may be all those difficulties to contend with in the construction of the deed which is contended for on behalf of the defenders; but, on the other hand, if the words of the deed are clear and plain, it appears to me it is always the safest rule to adhere to the language which is employed, and to put upon that language its plain and ordinary meaning, and not to be ingenious in endeavouring to discover some other intention from other parts of the deed, or from the circumstances. The question appears to me to be abundantly clear, and I should, therefore, submit to your Lordships, that the proper course would be to decide in favour of the interlocutor of the Court of the Session, and to dismiss the appeal.

LORD CRANWORTH.—I entirely concur in the view which has been taken of this case by my noble and learned friend, and shall add but very few observations. It is plain that the power contended for by the appellant is not given by the 5th clause of the deed; that is beyond all doubt.

If it arises at all, it is given by the 6th clause, or by the 6th taken in conjunction with the 7th clause. The 6th clause, it will be observed, only comes into operation if neither of his daughters shall leave a child or children, or if those children shall not attain 21 years of age—in that case power is given to his "daughters respectively to settle, destine, and convey the fee of the share of the residue of my estate liferented by them respectively." And the question is, Whether those words, "fee of the share," apply to the fee of the share originally liferented by them or to both shares? That is the whole—if, from the failure of issue of one of the daughters, the whole should accrue to the other. That I take to be the question.

I think that those words clearly refer to the original share only. In the first place, the use of the word "respectively" points strongly to that conclusion; and I think that if the power had been intended to be applied to the whole, the words used would not have been "share of the residue of my estate," but "the share," or, as the case may be, "the whole," or, "the share or shares of the residue of my estate," or something to that effect.

Then again the clause proceeds thus:—"And failing my said daughters, or either of them, exercising such power and faculty, then the fee of said share or shares shall go and belong in equal proportions to my brothers William Pollok and Morris Pollok, and my sister Susan Pollok, and their respective heirs." I construe that to mean, *reddendo singula singulis*, if one daughter fails to exercise the power, then her share, and if both, then their shares, shall go over to these parties. I do not forget what was pressed by Mr. Palmer, that the words, to make it quite correct, ought to have been "shares or share," but that, I think, is a mere oversight in the wording of the deed, upon which it would be impossible to place any reliance.

The Lords of Session seem to have had some difficulty arising from the 7th clause of the deed. I confess that to my mind there is no difficulty arising from that clause. It only shews, that there was an event which might have happened, but which has not happened, in which, according to the true construction of the instrument, the surviving daughter would probably have had the power of disposing of the whole upon the failure of her issue, if she had any, but who had not lived to attain the age of 21, and therefore had not acquired a vested interest in the property. It may be that that was not contemplated, or it may be that that was contemplated by the truster, and that he had that intention; but that is not the state of facts which has arisen, and it does not appear to me that the circumstance, that such a state of things might have arisen, throws any light upon the construction to be put upon this instrument, which appears to me, I confess, to be very clear.

With regard to the question of intestacy which has been adverted to, I think that we ought not to give any opinion upon that subject at all affirmatively, because the Lords of Session determined, and I think quite correctly determined, that that question is not raised upon this summons; and, therefore, I think it would be improper for us at this moment, just as the Lords of Session considered it was improper for them, to give any opinion upon it. I confess that I do not think that the appellant loses much by that; but upon that point I wish to be silent, because he may still think fit to raise that question; and if he should think fit to raise that question, it is only right that he should be able to do so without being prejudiced by any decision of this House in the present case.

I apprehend that the motion which my noble and learned friend means to make is, that the interlocutor of the Inner House, and the interlocutor of the Lord Ordinary as corrected by the Inner House, should be affirmed.

LORD WENSLEYDALE.—I mean to follow the example of my noble and learned friend who has just addressed you, in saying nothing upon the question of what the effect would be of the predecease of the sister, Elizabeth Harriet, before the testator. I think it would be wrong for us at the present moment to give any opinion upon that question; but I think I may, with perfect propriety, suggest to the appellant to take care thoroughly to investigate the case, and to take very good advice before he attempts to raise any such question.

The question for us to decide is, What is the meaning of the 6th clause of this deed of disposition? And following that, which I think is the proper rule in all these cases, viz., to ascertain what is the meaning of the words used according to their ordinary and grammatical construction. I confess I have not felt, from the first moment I addressed my attention to the case, any reasonable doubt upon it. I think that the 6th clause is as clear as possible, and that no difficulty whatever arises upon it. The words used are—"In case it shall happen that neither of my said daughters shall have a child or children, or issue of the bodies of such child or children, or in case of such child or children or issue of their bodies existing, but all dying before attaining 21 years of age." Then comes the question, What, in that case, is the power given to the daughters? It is a "full power and faculty to the daughters respectively;" that is, to each of the daughters with respect to each of the daughter's shares, "to settle, destine, and convey the fee of the share of the residue of my estate liferented by them respectively." It is, that each daughter respectively is to convey her own share of the estate liferented by them respectively. I think the word "liferented" clearly means "originally liferented," because the truster declares that this power of disposition is to be subject to the liferent of the other sister; therefore the word "liferented" is to be construed as meaning "originally liferented." "And failing my said daughters, or either of them, exercising such power and faculty, then the fee of said share or shares shall go and belong in equal proportions to my brothers William and Morris Pollok, and my sister Susan Pollok, and their respective heirs." The meaning of that is, that if one share is undisposed of, that share is to go to these parties, and if both are undisposed of, both are to go to these parties. I do not feel the least difficulty in putting this construction upon the clause—it is the natural and proper construction; and, indeed, there is no error whatever in the terms used, except that which has been pointed out by my noble and learned friend, that the words "share or shares" are transposed—it ought to have been "shares or share." But the meaning, to my mind, is very clear.

A doubt arose in the minds of the learned Judges of the Court of Session arising from the 7th clause. I own that I do not feel the least doubt about the effect of the 7th clause. It only comes into operation in the case of children having lived, and in that case the mother is to have the power of disposition. But the 7th clause is to be read with the 4th and 5th clauses, which clauses give the daughters the power of disposing, in the event of there being children, in such proportions, and subject to such conditions, as each daughter may fix and determine by a writing under her hand, "which failing, equally among them and the heirs of her body respectively in fee." The proper mode of dealing with this deed is to add the 7th clause to those former clauses, and incorporate it with them; and then there would be a power not merely to apportion the shares, but to say what estate the children shall have—whether a life estate or an estate in remainder—and in that event occurring, each mother may dispose of the residue of her share to any stranger whom she pleases. Looking therefore to the 7th clause, which I consider is to be taken as a qualification of the 4th and 5th clauses, I think there is no difficulty whatever in the case, and I am clearly of opinion that the interlocutor of the Court below was perfectly right and ought to be affirmed.

Sir Richard Bethell.—Upon the question of costs, will your Lordships forgive me for a single moment? Your Lordships observe, that this is a question upon the construction of a will. It was but the other day, in the case of *Baker* v. *Baker*, 31 Law Times Rep. 52; 6 H. L. C. 616, where the question arose in the same way upon the construction of a will, the House went so far as even to give the respondent, the failing party, the costs of the appeal out of the estate. Surely after that which was your last decision, and upon the same point, namely, upon the construction of a will, your Lordships will hardly say that this appeal should be dismissed with costs.

LORD CRANWORTH.—I am always very much inclined, where there is a real doubt in the case, where there is a sound reason for raising a question upon the construction of a will, to say that the costs have been occasioned by the testator, and that they should be paid out of the estate, but that is always a matter of discretion, and is in truth a question of degree in each case; this case, however, having been decided by the Court of Session, and affirmed by this House, the only ground that I see for not giving costs is, that the Court of Session itself seems to have expressed a doubt upon the case.

LORD WENSLEYDALE.—One Judge doubted.

Sir Richard Bethell.—One learned Judge says, "I think it is attended with very great difficulty," and all the other Judges completely concur with him in that. It would be giving costs against the child of the testator.

Mr. Solicitor-General.—Your Lordships will, if necessary, hear us upon the point.

LORD CRANWORTH.—Will the appellant agree to waive all questions upon intestacy, if costs are not given?

LORD WENSLEYDALE.—That is, abandon the point?

LORD CRANWORTH.—Of course we must hear the Solicitor-General upon it.

LORD WENSLEYDALE.—This is a case in which four Judges held the same opinion.

LORD CRANWORTH.—You have costs at present, but it might be that the House would let this question about the costs stand over for a week, or till after Easter, in order to see whether confirmation should be given to the order as to costs.

Sir Richard Bethell.—In any event, the costs come out of the estate, and we pay half.

Mr. Solicitor-General.—The appellant has got half of the estate.

Sir Richard Bethell.—And you have got the other half. This is a question which the Judges thought was attended with some difficulty.

LORD WENSLEYDALE.—I suppose we must give the costs to the respondent. You have the opinion of LORD HANDYSIDE in your favour, on the first hearing ; but then there is the opinion of three Judges out of four all the same way. I think if a person chooses to question a decision thus come to, he must pay the costs.

Sir Richard Bethell.—The Lord Ordinary was with us.

LORD WENSLEYDALE.—But that was upon a point not very material.

Sir Richard Bethell.—The other question is treated as a question of great difficulty.

LORD WENSLEYDALE.—I was going to suggest that we might give the costs of the appeal, if you abandon the question of intestacy.

Mr. Solicitor-General.—Before your Lordships settle the question of costs, we should beg to submit our observations to your Lordships. Having done so, we shall feel perfectly satisfied with your decision. There is a question with regard to intestacy, which your Lordships have heard nothing about, which makes it quite plain, that this question was never intended to be raised.

Sir Richard Bethell.—I should have been glad to have argued the question of intestacy, and we could not give better proof of our sincerity than the way in which we come here.

LORD CRANWORTH.—What would the Solicitor-General say, if it were declared that the costs of this appeal should come out of the whole estate, and not out of the appellant's share, the appellant giving up all questions about intestacy?

Mr. Solicitor-General.—If your Lordships put that question to us, our reply is, that we are quite willing to take the risk of any further proceeding. There is another circumstance which makes it impossible that that question should be raised.

Sir Richard Bethell.—I should submit to your Lordships, that it is extremely desirable to act upon a uniform practice.

LORD CHANCELLOR.—There cannot be a uniform practice with regard to costs.

Sir Richard Bethell.—No, My Lord ; but there is a uniform principle. In the application of that principle, there are differences in different cases, but the principle is undoubtedly this, that where a difficulty arises in the construction of a will, and where that difficulty is attributable to the testator, the estate pays the costs. By dismissing this appeal without costs, those who are entitled to one half of the estate will bear their own costs, and those who are entitled to the other half will bear their proportions of the costs of the appeal ; and I hope and trust that your Lordships will not think this a question that might not reasonably be discussed. In the Court below it was felt by one of the Judges to be a case of difficulty.

LORD CHANCELLOR.—This is a very peculiar case ; you have against you the decision of four Judges in Scotland ;—and this House was so clear as to the proper construction of this will, that they did not call upon the opposite side to argue the question.

Sir Richard Bethell.—We had in *Baker* v. *Baker* three Judges against us, and we were not heard in reply, yet the House gave the costs to the respondents.

LORD CRANWORTH.—I do not think the same practice prevails in Scotland as prevails in England.

Mr. Anderson.—No, my Lord, but your Lordships have applied that rule.

Mr. Solicitor-General.—If we were to argue every case in which an appeal has been dismissed without costs, in order to submit what your Lordships should do in this case, it would be a serious undertaking.

LORD CHANCELLOR.—When I put the question to the House, I thought it was agreed, that the appeal should be dismissed with costs.

LORD CRANWORTH.—I think it must be so.

LORD WENSLEYDALE.—In *Baker* v. *Baker*, it was in mercy to the widow, that the House determined not to inflict costs upon her.

Interlocutor of the First Division of the Court of Session, varying the Interlocutor of the Lord Ordinary, affirmed with costs.

Appellant's Agents, Wotherspoon and Mack ; *Respondents' Agent*, Patrick Paul.