JULY 18, 1862.

ALEXANDER M'DOUGALL RALSTON and Others (Fergüson's Trustees), *Appellants*, *v.* JAMES HAMILTON and Others, *Respondents*.

Fee and Liferent—Trust Settlement—Legacy—Clause—Construction—Vesting—*A testator, by his settlement, directed his trustees to pay a sum of money to B "in liferent, and to his children equally among them in fee." Four children of B were alive at the testator's death; and one, who was then* in utero, *was born a few days after his death, and another was born subsequently.*

HELD (affirming judgment), *That B was entitled to the fee of the bequest.*

Process—Closing Record—Reopening Record.—*The* 6 *Geo.* IV. *c.* 120, §§ 17, 18, *applies only to interlocutors pronounced between adverse litigant parties, and not to proceedings in an action to ascertain the construction of a family settlement.*

John Ferguson's trust settlement contained the following bequest: "to John Hamilton, baker in Irvine, in liferent, and his children equally among them in fee, £20,000." In an action of multiplepoinding and exoneration raised by the trustees, an interlocutor of Lord Handyside had found that John Hamilton was only a liferenter of this legacy. The Second Division recalled that interlocutor, and directed the record to be opened, and the claim amended, so that the true construction might be ascertained.

The Court afterwards held, that the fee of the above legacy was in John Hamilton.

The various parties appealed against the interlocutors.

The children of John Hamilton appealed by cross appeal, and in their *printed case* stated the following reasons for reversal:

1. Because it was *ultra vires* of the Court, being contrary to the enactments of the Statute 6 Geo. IV. c. 120, and the Act of Sederunt, 11th July 1828, to authorize the Lord Ordinary to open up the record, and allow amended claims; and the whole proceedings in the Court of Session, in so far as they admitted and sustained a claim on behalf of John Hamilton to the fee of the legacy in question, were incompetent. 2. Because the interlocutor of Lord Handyside, of 17th July 1857, was acquiesced in by John Hamilton, and became a final judgment as between him and the respondents (cross appellants). 3. Because the meaning and intention of the testator, according to the sound legal construction of his trust deed and codicil, was, that the fee of the legacy of £20,000 should belong to the persons answering to the description of "children" of John Hamilton at the testator's death. 4. Because the assignation founded on by the claimants William M'Jannet and others, as trust assignees of John Hamilton, in so far as it bore to convey the fee of the legacy, was *ultra vires* of the granter, and afforded the said William M'Jannet and others no title to resist the claim of the present respondents (cross appellants).

The trustees of Ferguson, the appellants, also contended for the construction, that the fee of the legacy was in John Hamilton's children.

Bacon Q.C., *Mure*, and *Pearson*, for the appellants.—The main question is, whether this legacy to John Hamilton and his children amounted to giving the fee to John the father. This is entirely a question of intention derived from the words of the will, as the rule is expressed by Lord Moncreiff in *Hutton's Trustees* v. *Hutton*, 9 D. 639. In order to see what was the meaning intended by these words, it is legitimate to inquire into the circumstances of the donee's family at the date of the bequest, so as to put the Court in the situation in which the testator was at the time he used the words in question. Now, *primâ facie*, it was much more likely that the testator meant to benefit the children and give them the fee of the legacies. Such also is the natural and plain meaning of the bequest. But it is said, there is a settled rule in the law of Scotland, that in such legacies the fee vests in the father, as was laid down in *Frog's Creditors*, M. 4262. But there the subject was heritable, and the feudal technicality, as to the fee never being *in pendente*, prevailed. Besides, the testator stood *in loco parentis*, and there were no trustees. Here all these characteristics are present. The rule in *Frog's case* was soon followed as a settled rule—*Lillie* v. *Riddle*, M. 4267; *Douglas* v. *Ainslie*, M. 4269. That rule, however, has often been questioned, and Erskine (ii. 1, 4) says it has no foundation in nature or law.

[1] See previous reports 22 D. 1442: 23 D. 1290: 32 Sc. Jur. 654: 33 Sc. Jur. 135, 646 S. C. 4 Macq. Ap. 397: 34 Sc. Jur. 659.

And soon afterwards the word "allenarly" was seized upon as making an exception to the rule—*Newlands* v. *Newlands*, M. 4289, and such word has also received a fixed meaning, as implying an exception to the first rule—*Watherstone* v. *Rentons*, M. 4297; *Harvey* v. *Donald*, 26th May 1815, F. C. Another exception to the rule in *Frog's case*, was introduced when trustees were interposed, in whom the fee could vest at once, so as to avoid the maxim, that the fee cannot be *in pendente*. The rule and exceptions are stated in Bell's Prin. §§ 1713-1715. The plain result is, that if there are some words, such as "allenarly" or equivalent words, which indicate an intention to give the fee to the children, or if there are trustees interposed, such a construction will be adopted in favour of the children. Here the language of the deed shews such an intention, and there are trustees. In *Mein* v. *Taylor*, 5 S. 779; 4 W. S. 22, the fee was held to be in the children, there being trustees interposed. In *Hutton's Trustees*, 9 D. 639, the fee was held to be in the father, because there were expressions in the context of the will which shewed such to be the intention. Where there is a trust, the Court has held the fee to be in the children—*Ewan* v. *Watt*, 6 S. 1125; *Williamson* v. *Cochran*, 6 S. 1035. Therefore all the cases shew, that it is entirely a question of intention whether the rule of *Frog's case* will be applied, and that that rule will bend to a contrary intention as manifested by the context. The rule, indeed, was held to be confined entirely to heritable subjects, and not to extend to pecuniary legacies—*Turnbull* v. *Turnbull*, M. 4248. This last case is almost identical with the present. Therefore the interlocutor of the Court below ought to be reversed.

Lord Advocate (Moncreiff), *Solicitor General* (Palmer), *Rolt* Q.C., *Sir H. Cairns* Q.C., *Boyle*, *Millar*, *Lee*, *Lamond*, and *Lefevre*, for the various respondents.—In course of the argument, two preliminary objections were raised. The Court of Session, it was maintained, had no power in this case to open up the record after it had been duly closed. The Judicature Act, 6 Geo. IV. c. 120, §§ 10 and 11, and the Act of Sederunt, 11th July 1828, § 48, lay down directions as to the closing of the record, and shew, that it is allowed to be opened up only in case of *res noviter veniens ad notitiam*, or matter emerging after the action was commenced. Here, it was contended by some of the respondents, that neither of these things occurred. The amended claim of John Hamilton was not a new plea or ground in law, but an entirely new claim, inconsistent with his former claim. There was no power in the Court to open up the record in these circumstances. *Melville* v. *Douglas*, 7 S. 186; *Lothian* v. *Tod*, 7 S. 525; *Gordon* v. *Trotter*, 10 S. 47; *Crawford* v. *Bennet*, 10 S. 537; *Stewart* v. *Maconochie*, 14 S. 412; *Maben* v. *Perkins*, 15 S. 1087; *Inglis* v. *Douglas*, 22 D. 505. Moreover, even if the record was properly opened up, the interlocutor of the Lord Ordinary (Handyside) was final and conclusive as regarded John Hamilton—6 Geo. IV. c. 120, § 17. Indeed John Hamilton had acquiesced in the Lord Ordinary's interlocutor.

As to the merits, besides the cases previously stated, the following were referred to:—*Porterfield*, M. 4277; 2 Paton, Ap. 537; *Mure* v. *Mure*, M. 4288; *Dewar* v. *Mackinnon*, 1 W.S. 161; *Macintosh* v. *Macintosh*, 28th Jan. 1812, F.C.; 3 Ross L. C. 643; *Macintosh* v. *Gordon*, 4 Bell's Ap. 118; *Kennedy* v. *Allen*, 3 S. 554; Menzies' Conv. 650.

Cur. adv. vult.

LORD CHANCELLOR WESTBURY.—My Lords, the merits of this case lie in a small compass. They are involved in the question, What is the true construction in law of a bequest contained in the trust disposition and settlement of the testator, John Ferguson? and which bequest is expressed in these words:—"To John Hamilton, baker in Irvine, in liferent, and his children equally among them in fee, £20,000." The testator died upon 8th January 1856. At the time of his death John Hamilton had four children who were infants. Two other children have since been born to him—one, named Marion, shortly after the truster's death, another, named Peter, in the month of April 1858.

The legacy became payable on 9th September 1856, and there are abundant means wherewith to pay it, but no one of the parties interested has as yet derived any benefit from the bequest in consequence of this litigation.

The difficulty in the present appeals is almost entirely of a technical nature. The question may be thus generally stated: An action of multiplepoinding and exoneration having been raised by the trustees acting under the trust disposition, which I will henceforth call the will of the truster, against the beneficiaries under that will, certain proceedings were taken on behalf of John Hamilton, in which, as it appeared to the Lords of the Second Division, before whom the matter was brought by the reclaiming note of the trustees, an erroneous interpretation had been put on the bequest to John Hamilton and his children, and, accordingly, the Court by its interlocutor of the 18th March 1859, directed the record to be opened, and allowed the claims to be amended, in order that the true construction of the bequest might be again considered.

In doing so the Court recalled an interlocutor of the Lord Ordinary of the 17th July 1857, in which John Hamilton, the father, was found to be a liferenter only of the legacy in question, and from which decision John Hamilton had not reclaimed. It is insisted, that the Court had no power to do this, and, that the course taken is in contravention of the Act 6 Geo. IV. c. 120.

It must be remembered, that the object of the action is the exoneration of the trustees by ascertaining the true construction and effect of the bequest contained in the will. The trustees, therefore, have an interest in the true interpretation of the will, and especially of a bequest under which future children of John Hamilton might be entitled to claim.

Although, therefore, neither John Hamilton nor the curator of his infant children had reclaimed against the interlocutor of 1857, or disputed the construction thereby put on the bequest, the trustees had a right to do so, and to bring the whole interlocutor, so far as it affected the construction of the bequest, before the Inner House by a reclaiming note. And in my judgment, regard being had to the generality of the concluding portion of the prayer, this was in effect done by the reclaiming note of the trustees. That reclaiming note empowered the Inner House to consider the whole question of the construction of the bequest, and to take such course as might appear to them to be necessary for the exoneration of the trustees by ascertaining and declaring the true rights of the beneficiaries.

Whilst this reclaiming note was in dependence the matter was still further set at large by the birth of Peter, the youngest child of John Hamilton, and by his being sisted as a party to the process then pending, by virtue of the reclaiming note before the Lords of Session.

The claim of Peter is made in the following words:—"On the supposition, that the legacy of £20,000 should not be found to be vested in John Hamilton as fiar, the pupil claimant, Peter Hamilton, should be preferred to one sixth share thereof, under burden of his father's liferent." This claim immediately suggests the right of the father as fiar to the whole of the legacy.

Now, Peter was in no respect bound by the interlocutor of the Lord Ordinary in 1857, nor, having regard to his claim, could he bind his father by that interlocutor.

Under these circumstances it would appear to me, that the course taken by the Court of Session in their interlocutor of March 1859, of opening the record, was proper and competent. But then it is insisted that under the 17th and 18th sections of the 6 Geo. IV. c. 120, the interlocutor of the Lord Ordinary finding the father entitled to a liferent only was final; that it was not competent to the Court to relieve the father from the effect of that interlocutor, and that the interlocutor of March 1859 is therefore erroneous.

In my opinion this is not the effect of the Statute in the present case. I have already observed, that the whole of the interlocutor of the Lord Ordinary may be considered as brought up on appeal by the reclaiming note of the trustees, and, that the sisting and claim of Peter involved the necessity of reconsidering the construction of the bequest.

Further, the 17th and 18th sections of the Statute appear to me to apply only to interlocutors pronounced between adverse litigant parties. Now, as between the father and the children existing at the death, no controversy or issue had been raised. Under the process of multiplepoinding the father and the four elder children had brought in one joint claim, in which the father and curator of the children submitted, that the father was entitled to a liferent, and the children to the fee of the legacy. Afterwards Marion was added to the class of children entitled, on the ground, that though *in utero* she was a child *in esse* at the death of the testator.

The interlocutor of the Lord Ordinary, therefore, as regards the father, was the necessary result of the submission contained in this form of claim. It seems unreasonable, that the father should be bound by his submission when the four children for whom it was made can no longer have the benefit of it. But further, I am of opinion, that where the whole object of an action in a court of justice is to ascertain the true construction of a trust settlement or will, and to declare the rights of the several parties as consequent on that construction, no party can be considered as finally bound by a claim or statement founded on a construction of the instrument which is erroneous in law.

On considering the claim of Peter, the Judges of the Inner House perceived, that the true point of law had not been raised as between the father and the children, and they opened the record and gave the power of making new statements for the purpose of raising it, and in so doing, they acted in conformity with the 11th section of the Statute.

For these reasons I submit to your Lordships, that the interlocutor of March 1859 was right, and ought to be affirmed.

We now come to the merits, namely, the true construction of the bequest. It must be remembered, that the rules which govern the transmission of property, are the creatures of positive law, and, that when once established and recognized, their justice or injustice in the abstract is of less importance to the community than the fact, that the rules themselves shall be constant and invariable.

Now, if the subject of this gift had been heritable property, I should have considered it a clear proposition in the law of Scotland, that the father was absolute fiar.

I consider it to be also established by decisions, that the same rule of construction must be applied to the words when the subject of the gift is movable or personal property. I am fully sensible of the absurdity of the legal reasoning on which this last proposition is founded. It begins by confining the father to a liferent, in order to arrive at an enlarged construction of the word "children;" and having thus affixed to the word a construction founded on the existence

of a liferent, it uses that construction for the purpose of destroying the very basis on which it is founded. The only answer is, that the law is so settled, for I cannot oppose the obscure case of *Turnbull* to the current of subsequent decisions and opinion.

I therefore humbly advise your Lordships, that the interlocutors appealed from ought to be affirmed, and the appeals dismissed.

LORD CRANWORTH.—My Lords, on the question decided by the Judges of the Second Division of the Court of Session, namely, that, by the law of Scotland, John Hamilton was absolutely entitled to the fee of the legacy of £20,000, none of your Lordships had, I believe, any doubt. There might formerly have been fair ground for contending, that the doctrine applicable to real estate, under which a gift to one in liferent and to his children *nascituri* was held to vest the absolute fee in the parent, ought not to regulate the construction of pecuniary legacies. But this is one of a numerous class of questions in which it is of far greater importance, that a rule once laid down should be strictly adhered to, than that the rule itself should be abstractedly the best which could be proposed; and it seems to me clear, that the rule, as acted on by the Court of Session in this case, has long been understood to be an established principle in the law of Scotland, and to have been recognized by this House as applicable to pecuniary legacies in the case of *Macintosh* v. *Gordon*, 4 Bell's Ap. 105.

It was, indeed, contended, that here the gift to the children of John did not include children *nascituri*, but only those in existence or *in utero* at the testator's death. But there is evidently no foundation for such an argument. As to James Hamilton, the gift to whom and whose children immediately precedes, and is in the very same words as that to John and his children, children to be born must have been intended, for he was at the date of the will a bachelor. And it is impossible to hold, that the word "children" was used in one sense when applied to James, and in another when applied to John. Of the propriety of the decision of the Court, if they had authority to adjudicate on the subject, I have no doubt.

But it was argued, that the Court was acting *ultra vires;* that by the Judicature Act, 6 Geo. IV. c. 120, an interlocutor of the Lord Ordinary is binding on those who have not reclaimed against it. And here, it was said, Lord Handyside's interlocutor of the 17th July 1857 decided, that John was a liferenter only, and, that by that he must be taken to be concluded, as he did not reclaim against it. But is this so?

The contention of John and his four children born in the testator's lifetime was, that they, and they alone, were entitled to the legacy of £20,000. The contention of Marion, the child born shortly after the testator's decease, was, that she was entitled to the same rights as the four other children, her brothers and sisters. The contention of the trustees was, that John was a mere liferenter, and, that all children of John, whensoever born, were entitled to the fee, and so that they were bound to retain the fund. Lord Handyside decided, that Marion was to be treated as a child born in the testator's lifetime, and that John and the children then born (including Marion as one) were entitled to the exclusion of after born children, and so repelled the claim of the trustees to retain the fund.

The trustees reclaimed; and on the argument of the case before the Inner House, the Court saw, that from the form of the record, though the question between the children born and those to be thereafter born, might be decided, yet, that another question, apparently overlooked by John, namely, the question between him and his children, whether he was not the fiar, could not be decided.

The Court, therefore, remitted the case to the Lord Ordinary, with power to open up the record, and allow the claims to be amended, or new claims to be given in.

This was accordingly done, and John and his children made separate claims, John claiming that he was not a mere liferenter, the fee being in him.

The result of the proceedings on the record thus amended has been, to decide, that John is the fiar, and so entitled to the whole £20,000 absolutely.

This judgment is, in the opinion of your Lordships, correct. Any other decision would have had the effect of handing over the money to a person or persons not entitled to it, and consequently of depriving John of his just right.

The only question is, whether the Inner House had the power so to remit the cause, and enable John to insist on his true right. I think it had. If such a power is excluded by the Judicature Act, this must have been a result contrary to the real intention of the Legislature. It cannot have been intended to compel the Court to order trustees who have a fund in hand, and who are seeking the directions of the Court as to the persons to whom it ought to be paid, to hand it over to persons not entitled, though it appears on the record who the person is who has really the right.

But I do not think, that the Judicature Act does prohibit the Court from taking the course which it followed.

Whenever the Legislature imposes restrictions or regulations on the action of the superior Courts, it is not unreasonable to say, that its language must be looked to with a strong inclination to construe it in the mode best calculated to promote obvious justice. And I think, that,

if necessary, we may fairly understand such a proceeding as is now in discussion to have been sanctioned by the 11th section. That section contains a proviso, that where any new plea or ground of law (*i. e.* some ground of law not brought forward by the pleas appearing in the closed record) shall be suggested by the Judges of the Inner House as fit to be discussed in relation to the facts already set forth, it shall be competent to add such plea to the pleas already on the record.

The obvious object of this proviso is, to enable the Court, when justice requires it, to allow the record to be amended, so that all questions of law arising on the facts before it may be fairly and fully raised.

I am aware, that what has been done in this case is not merely to add new pleas, but also to withdraw others, and, in fact, to add pleas not only in addition to, but also at variance with, some already on the record. This is true; but considering the nature and object of the proviso, I think the greatest latitude of construction ought to be allowed. Here the Court saw, that two parties having conflicting interests had (evidently mistaking their rights) joined in making a common claim with the view of negativing the claim of a third party. To a certain extent the claim was rightly asserted, *i. e.* the parties were right in their contention against the third party. But the Court said, that, as among themselves, there was a question which the record in its actual form did not allow to be raised, and as to which the parties were in error. Surely, on a fair construction of the 11th section, the Court was at liberty to allow any amendment to be made which would bring for decision the real rights of all parties concerned.

The children to whom Lord Handyside's interlocutor gives the fee have clearly no right except what arises from the estoppel affecting their father, (I use an English expression, but the meaning is obvious,) from the circumstance of his having joined with them in an erroneous statement of the true construction of the will.

But on that ground it is clear, that Marion had no title whatever. No child could claim against its father on the ground of his being bound by the way in which he had framed his claim, except those expressly named by him.

It follows, that the interlocutor which lets in Marion cannot be right.

I must add, that, though I think the 11th section authorized the course taken, I am by no means satisfied, that there would not be a power inherent in the Court to take the course it did, even independently of that section.

The enactments of that Statute are framed with a view to regulate the proceedings of parties engaged in hostile litigation, and I should be slow to admit, that by any of its provisions it could have been intended to compel the Court to hand over a fund *in medio* to a party appearing on the record not to be entitled.

This is an action of multiplepoinding, and by an Act of Sederunt, made in July 1828, proceedings in such an action are to be assimilated, as far as may be, to those in ordinary actions. But there is no specific Act of Sederunt applying to such a case as that now before us, and I do not think we are bound by the general language of the Act of Sederunt of 1828 to follow all the enactments of the Judicature Act. The analogy, if it is necessary to find an analogy between this proceeding in multiplepoinding and the proceedings in an ordinary action, goes no further, in my view of the case, than to decide, that Lord Handyside's interlocutor established conclusively against parties not reclaiming, that as between, on the one hand, John and his children born at the death of the testator, treating the child *in utero* as then alive, and, on the other hand, children of John to be afterwards born, the latter had no interest in the legacy.

This appears to me a fair and reasonable view of the case, and one which warranted the Court in the course they took. I am therefore of opinion with the LORD CHANCELLOR, that the interlocutors appealed against ought to be affirmed.

LORD CHELMSFORD.—My Lords, before the claims of John Hamilton and his children can be determined upon this appeal, it is necessary to ascertain, whether the competition is open to him, or whether he is not precluded from questioning the interlocutor of Lord Handyside, which found, that he was entitled to the legacy of £20,000 in liferent only, and that his children, born at the death of the testator, including a child *in utero* at that period, were entitled to the legacy amongst them in fee.

It was strongly contended on the part of John Hamilton's children, that as neither he nor they had appealed against this interlocutor, it became final as between them, although it might be open to Peter Hamilton, the son who was born pending the proceedings in the Inner House, and was sisted as a party to contend against that part of it which confined the fee of the legacy to the children in existence at the death of the testator; and that the interlocutor of the Second Division, recalling the interlocutor of Lord Handyside, and remitting to Lord Kinloch, Ordinary, with power to open up the record and allow the claims to be amended, or new claims to be given in, was *ultra vires*, and ought to be reversed. The objection to this exercise of jurisdiction was grounded principally on the provisions of the Act 6 Geo. IV. c. 120, commonly called the Scotch Judicature Act, the 17th section of which enacts, "that every interlocutor of the Lord Ordinary shall be final in the Outer House, subject, however, to the review of the Inner House, in manner

hereinafter directed;" the 18th section, that "when any interlocutor shall have been pronounced by the Lord Ordinary, either of the parties dissatisfied therewith shall be entitled to apply for a review of it to the Inner House, praying the Court to alter the same in whole or in part;" and the 21st section, that the judgment pronounced by the Inner House shall in all causes be final in the Court of Session.

The application for a review of the Lord Ordinary's interlocutor was by the reclaiming note of the trustees, which was directed to that part of the interlocutor giving the fee of the legacy amongst the children of John Hamilton living at the death of the testator, and merely prayed, that it might be found they were bound to retain the fee of the legacy of £20,000, *inter alia*, until it was seen whether any other children might be procreated of John Hamilton, and by the claim of Peter Hamilton, the child born pending the proceedings, claiming to be preferred to a sixth share, under burden of his father's liferent. It was insisted, that, there being no attempt to disturb the interlocutor so far as it gave John Hamilton the legacy in liferent and his children in fee, the Inner House was bound to confine itself to the only part of the interlocutor upon which the application was made for a review, and to decide the cause upon that ground.

On the part of John Hamilton, it was argued, that the provisions of the 6 Geo. IV. c. 120, relied upon by the other side, did not apply to cases of multiplepoinding, but were confined to ordinary actions of the description mentioned in the 1st section, to which all the subsequent sections impliedly referred. To which it was answered, that an Act of Sederunt of 11th July 1828, § 48, after prescribing to claimants in multiplepoinding, the forms of proceeding as to condescendences, objections to claims, and note of pleas, enacts, that "thereafter in every instance the procedure shall correspond, as nearly as may be, to what is provided in the case of an ordinary action."

Now, if this had been the case of an ordinary action, I should have felt great difficulty in saying, that the Court would have had power to open the record, not upon any application of the parties themselves, but *proprio marte* and with the view of allowing a claim to be made totally different from that which was originally preferred.

Various authorities were cited to establish the right of the Court to deal with the record in the manner they have done, but none of them appear to me to meet this case. The case of *Crauford and Others* v. *Bennett*, 10 S. 537, which was much relied upon, differed from the present in one essential particular, that the Court there acted on the application of one of the parties who had to pay the expenses as the price of the indulgence granted. I have not been able to find any authority for the Court itself directing the record to be opened, except where there has been some irregularity in preparing or closing it, or where it has not been made up in a shape so correct and full as to enable the Court to give judgment upon it, as in the cases cited in argument of *Melville* v. *Douglas's Trustees; Lothian* v. *Tod;* to which may be added the recent case of *Inglis* v. *Douglas*, 22 D. 505.

If this, therefore, had been an ordinary action, I should have been disposed to think, that there had been an excess of authority by the Inner House, in giving power by their interlocutor to open the record, and to allow new claims to be given in. But after some hesitation I have come to the conclusion, that the course was competent from the peculiar nature of the proceedings in multiplepoinding, and from the mode in which the case was presented for review. I have not lost sight of the Act of Sederunt, which assimilates the procedure in multiplepoinding to that in an ordinary action. But I do not think, that the discretion exercised by the Court of remitting the cause and opening the record, can be said to come within the proper meaning of the term procedure. An action of multiplepoinding is not like an ordinary action brought by one person against another to recover a debt or damages, or to establish some right in which the pursuer must necessarily be bound to prove the claim or title which he has chosen to allege. In a proceeding of multiplepoinding, the fund upon which the different claims are made is brought into, or at least is within, the authority of the Court, and while it remains *in medio* all parties claiming any interest in it may appear, although not cited, and assert their claims. The duty of the Court is to adjust these claims, and to distribute the fund, in the words of the summons, to such of the several defenders and others, as may be found to have best right thereto. If, upon the proceedings being brought before them, it appears, that some of the claimants have proceeded upon a mistaken view of their rights, and therefore, that the record as it stands precludes a determination of the true title, it seems scarcely consistent with the duty which the Court are called upon to discharge, or with reason and justice, that they should be forced to decree payment to parties who, according to their own more correct judgment, have no just claim upon the fund. It was admitted by the Lord Advocate, that unless the Court had power to recall the record, it would not be open to them to determine, that the parents and children had other rights than those which the interlocutor had decided. Both the reclaiming note of the trustees, and the claim of Peter, the after born son of John Hamilton, challenged the interlocutor only so far as it confined the fee in the legacy to the children born at the death of the testator. These claims proceeded entirely upon the supposition, that the legacy was not vested in John Hamilton as fiar, and in this respect the interlocutor was not brought in view before the Inner House.

Attention was called, in the course of the argument for John Hamilton, to the closing prayer

of the reclaiming note, "or to do otherwise in the premises as to your Lordships shall seem proper." And the case of *Somerville* v. *Darlington*, 21 D. 467 was referred to. I did not entirely comprehend the drift of the argument upon these words in the reclaiming note. If it were meant to be said, that the prayer for general relief enabled the Court of Session to go into questions not specifically raised before them, it would appear to be adverse to John Hamilton's contentions in favour of their interlocutor, for they should then have dealt finally with the case themselves, and not have remitted and given power to open the record. But there is no authority for saying, that this general prayer authorized the Court to decide the case upon totally different grounds from those expressly mentioned in the reclaiming note. The case of *Somerville* v. *Darlington* was a case of sequestration, in which there was a note of appeal to the Court from an interlocutor of the Sheriff, deciding upon the validity of the votes of creditors in favour of a resolution for the re-examination of the bankrupt. The note of appeal concluded with the prayer for general relief, and the Court held, that it was competent to them to consider the merits of the resolution itself. The Lord Justice Clerk said—"I think the appeal would have been good without any prayer at all, and if a prayer is necessary I am inclined to construe this prayer on much the same liberal principles as we should the prayer of a reclaiming note. Under such a prayer appended to a reclaiming note, the Court has got over as formidable a difficulty." I am unable to gather from this passage whether the Lord Justice Clerk intended to refer to the particular part of the note now under consideration, or to the note generally. It is difficult to suppose, that he meant that the concluding prayer opened questions to the Court into which they could not otherwise have entered, because the very same words in the present case were not deemed sufficient to enable them to determine, according to their own view, in favour of a title which was not specifically raised upon the record. It was because the interlocutor prevented a decision which they thought the just rights of all the claimants called for, that they found it necessary to remove it out of the way, and to afford an opportunity to the parties who had mistaken their title to amend their claims, so as to raise the real question for determination. To some small extent, the interlocutor of the Lord Ordinary interfered with the rights of a party who was not in any degree bound by acquiescence in his judgment. The decision of the Lord Ordinary, even supposing he was right in excluding after born children of John Hamilton from participation in the fee of the legacy, by confining the interest of the parent to a liferent, shut out entirely the *spes successionis* of these children. This, it is true, is an interest of a very trifling character, amounting to a mere expectancy; but such as it is, the decision of the Lord Ordinary entirely excludes it, while the judgment of the Inner House determining the fee to be in the parent, if held to be correct, will open it to them. But I prefer resting my opinion upon the peculiar nature of the action of multiplepoinding in which the Court is called upon to adjust the claims of different parties upon a fund *in medio*, and in which the object and end of the proceeding seem to render it their duty to ascertain and determine not upon the footing of what the parties may respectively claim, but upon their own judgment of the true right of all, whether original defenders or others, who may have claims upon the fund. It appears to me, that the Court of Session were not prevented by any of the Scotch Judicature Acts, or by any of their own previous decisions, from pursuing the course which they adopted on this occasion. And in expressing my opinion upon this part of the case, I would borrow the words of the Lord Justice Clerk in the case last referred to, and say, that "I should think it very unfortunate if, under the appeal to the Court, owing to the terms or the prayer, it was not in a position to do justice to the parties."

The interlocutor of Lord Handyside being thus removed out of the way, the case is open as to the construction of the bequest upon the competition between the parents and the children. I agree, that this is a question of intention, to be collected from the words of the trust disposition; but if certain words are employed, which have obtained a known and settled meaning by law, we are not at liberty to look behind them in order to discover some other intention in the mind of the testator different from their legal import. The trustees contend, that in this case the difference of language used by the testator as to the different bequests, plainly shews a difference of intention in each instance; that where he has intended the fee of the legacy to go to the legatee, he has said so in express terms; and that, therefore, where he has given a legacy to a parent in liferent, and to his children amongst them in fee, he must be supposed to have intended what his words naturally express.

But in answer to this argument it must be observed, that the words, in which the legacies in question are given, have received a settled construction, which cannot bend to a presumed different intention. No authority has been cited except *Turnbull's case*, in which a gift simply to the parent in liferent, and to the children in fee, has been held to carry the fee to the children, and not to give it to the parent. The appellants admit, that the rule of construction against which they are contending has been long settled as to heritable subjects, but they say, that the principle, that the fee cannot be *in pendente*, upon which it was founded, is not applicable to movables, and, that there is no authoritative decision which extends it to them. But it has been generally assumed, that there is no distinction in the construction of gifts of these different

subjects, and it may be sufficient to answer the objection by referring to the language of LORD CAMPBELL and LORD BROUGHAM in *Mackintosh* v. *Gordon*, 4 Bell's Ap. 119, 120.

The appellants, however, contend, that the rule is not so rigid as not to bend to the intention, and, that various exceptions to it have been from time to time introduced. Thus it has been held, that any expressions which clearly and unequivocally shew, that it was the intention of the testator, that the parent should be confined to an interest for life in the legacy, have been allowed to prevail. The word "allenarly," for instance, or any word of equivalent meaning, in a gift of legacy in liferent to the parent, and to the children in fee, has been held sufficient to prevent the fee vesting in the parent. LORD CAMPBELL, in *Mackintosh* v. *Gordon*, observes, "that he cannot say that the word 'allenarly' more clearly expresses the intention of the settler, who, when he gives a life interest to the parent, and fee to the children, can hardly intend, that the parent should take the fee; but," he adds, "I consider, that we are bound by the long and uniform current of authorities." It appears to me, that these words suggest a remark which is hostile to the appellants' argument. The deed in question was evidently drawn by a person of legal knowledge. He must have known, that if it were really the intention of the truster, that in the gift of the legacies in question the parents' interest should be limited to their lives, one single word would have effected the object, and by adopting a form of gift without this restrictive expression, he must be taken to have intended to leave it to its legal effect.

But the appellants rely upon the exception which has been introduced into the rule in cases where the fee of the subject is given in trust to apply to the objects of the gift, it being held, that the trust fee satisfies the maxim, that the fee cannot be *in pendente*, and that the liferent may therefore be construed according to the true meaning of the words. Cases of this description were cited, amongst which it is necessary only to mention *Seton's case*, M. 4219, and *Mein* v. *Taylor*, 4 W.S. 22. But in order that this construction should obtain, the trust must be of such a nature as to render it necessary, that the trustees in the execution of their duty, should hold the trust estate, and not merely have to do some act with respect to it, by which they at once divest themselves of it, either by paying it over to the parties entitled, or by conveying it in such manner and form as is expressly designated in the trust disposition. This was the nature of the trust in the case of *Hutton's Trustees*, 9 D. 639, and in *Robertson* v. *Duke of Atholl*, 20 Nov. 1806, F.C.

The appellants, however, contend that a trust was created in this case which would exclude the operation of the rule; and, if I understand their argument, it was carried to this extent, that whenever executors are named they are trustees. This is certainly true in a sense, but the question here is, whether their trust is of such a character as to render it necessary, that the fee should be in them, so as to obviate the influence of the rule of not allowing it to be *in pendente*, upon the construction of a gift to the parent in liferent, and to the children in fee. Now, all that the executors are required to do is, to pay to the parties who are entitled, at the Whitsunday or Martinmas, that shall occur after the date of twelve months of the testator's decease, so far as they shall have realized funds sufficient for the purpose; and to pay into the bank, where the legatees shall not be ready to receive and discharge the same. This latter direction appears to be applicable only to such of the legatees as were in existence and immediately entitled, but who, from circumstances, might be unable to take their legacies at the appointed time, and give a receipt for them. To argue that there was a trust for the children of John Hamilton and of James Hamilton which required the trustees to hold the fee of the legacies, is to assume the very point to be proved, viz., that the parents had nothing more than a liferent, and that the fee belonged to the children.

There is nothing, therefore, to prevent the ordinary operation of the words in which the gifts in question are made to the legatees, and no decision which favours the view of the appellants but that of *Turnbull*, which was so much commented upon in the Court of Session, and during the argument at your Lordships' bar. The majority of the learned Judges of the Court of Session did not consider that case as any authority—an opinion which the meagre report we have of it may perhaps justify. But Lord Benholme said, "Had this been an heritable subject and not a mere money provision, I should have had no doubt upon the question. My doubt is applicable only to money provisions or legacies. And with reference to this legacy, I confess I have felt extreme difficulty in this part of the case arising exclusively from this case of *Turnbull*." Probably, the explanation of this decision is that which is given by Lord Cowan, who, in observing upon *Turnbull's case*, says, "Besides the peculiarity of the circumstances attending the competition, there is this further circumstance, that the subject of the destination was a money provision, which is the view taken of it in the subsequent case of *Porterfield*, and in the case of *Williamson* v. *Cochran*, in 1827. It was not then so firmly fixed, that the rule of construction applied to movables as well as to land, as it came afterwards to be." If *Turnbull's case* was founded upon this distinction, the ground of it has been long ago removed; and if it proceeded upon the construction of the words of the gift, it is opposed to numerous decisions both before and after it was pronounced. I may be disposed to acquiesce in the remarks made by the Lord Justice Clerk in the case of *Ramsay* v. *Beveridge*, 16 D. 769, "that the decisions

proceeded originally upon a feudal subtlety as to the fee of heritage not being *in pendente;* that the notions then adopted, and unfortunately applied at last to money provisions, were directly adverse originally to the presumed intention and object of the settlements, the plan of which was thereby defeated, and, that rules of construction were introduced which have been the subject of much regret among lawyers." But I feel bound, by the long and almost unbroken current of authorities, to agree with the interlocutors of the Second Division of the Court, which I therefore think ought to be affirmed.

LORD CRANWORTH.—I ought to say, that I am desired by my noble and learned friend, LORD KINGSDOWN, to state that he is unable to attend here this morning, but that he entirely concurs in the result at which we have arrived.

The *Lord Advocate* asked what was to be done as to the costs.

LORD CHANCELLOR.—The House has considered the question of costs, and is of opinion, that the appeals should be simply dismissed and nothing further said about costs.

Interlocutors affirmed.

Messrs. Deans and Stein, Messrs. Loch and M'Laurin. and Messrs. Maitland and Graham, Solicitors, London.—Messrs. Patrick, M'Ewen, and Carment, W.S., A. and A. Campbell, W.S., and Robert Landale, S.S.C., Agents, Edinburgh.

JULY 25, 1862.

JOHN CULLEN, W.S. *Appellant, v.* THOMAS THOMSON, W.S., and Others (Trustees of the late John Thomson), and CHARLES JAMES KERR, *Respondents.*

Company — Bank — Relevancy — Fraudulent Reports — Fraud by Manager and Secretary — *An action was raised against the manager and secretary of a bank, for damages alleged to have been occasioned to a party by his purchase of shares of the bank, through sales brought about, as averred, by false statements contained in reports of the directors, which they knew to be false.* HELD (reversing judgment), *That the allegations were relevant, for, the defenders and directors being alike servants of the Company, their conspiring to deceive the joint master was actionable, if loss and damage ensued.*

The appellant Cullen raised an action against Sir W. Johnston, a director of the Edinburgh and Glasgow bank, and Mr. Kerr and Thomson, the secretary and manager, conjunctly and severally, to recover back the price of shares which he had bought, relying on their false and fraudulent reports and representations.

The condescendence contained the following allegations:

"COND. 33. Many of the parties who had been thus permitted to overdraw their accounts were, at the date of said report, in bankrupt circumstances, and others in bad or doubtful credit, and most of whom ultimately became bankrupt. That they were in bankrupt circumstances at the time, or in bad and doubtful credit, was a fact well known to the defenders, Sir William Johnston and Mr. Kerr and the late Mr. Thomson; but notwithstanding of this knowledge upon their part, they, along with the other directors, issued a report to the shareholders in February 1850, read at a general meeting where Sir William Johnston acted as chairman, in which these facts were wilfully and fraudulently concealed from the partners of the company,—in which the real state of the affairs of the company was misrepresented, with the intention and purpose of deceiving the pursuer and others,—and by which the pursuer and others were, as the defenders fraudulently intended that they should be, induced to believe, that the affairs of the bank were in a flourishing condition, when they were the reverse.

"COND. 34. The general meeting for the year 1850, took place in the month of February. To that meeting a report required, in terms of the contract, to be submitted of the true position of the bank. The defenders, Sir William Johnston, and Mr. Kerr, and the late Mr. Thomson, knew, and had special grounds for knowing, the position of the bank at that time, in consequence of the investigations of the foresaid committee. These parties, along with the other directors then in office, did prepare and present to two general meetings in February 1850, (one held at Glasgow, and the other at Edinburgh,) a report, in which they stated, *inter alia*, two things, *first*, that during 'the year the bank has done a large and steadily increasing business, and the

[1] See previous reports 23 D. 574: 33 Sc. Jur. 162. S. C. 4 Macq. Ap. 424: 35 Sc. Jur. 728.