an enrolment before a Lord Ordinary in session is a condition precedent of the exercise of any power under the Act by the Lord Ordinary on the Bills. I do not think so. It is something against that view that no good reason for such a provision can be suggested, and that this reading seriously limits the usefulness of the enactment. In my opinion the true meaning of the words 'the power of the Lord Ordinary before whom the petition is enrolled' is, 'the power of the Lord Ordinary before whom the petition is or might be enrolled (though addressed to the Court) may be exercised by the Lord Ordinary on the Bills during vacation.' Under these powers I hold that the mere ordering of intimation and service is included, and I have invariably acted on this view during the last ten years. Under the larger power of disposing of the merits of applications under section 16 of the statute, I think the minor power of ordering intimation and service is included, and I do not think the language of the section compels or warrants an opposite view.

"What I have said applies also to the case of appointment of judicial factors, and giving them power to make up titles, though not to the applications of such factors for other special powers. See 30 and 31 Vict. c. 97, secs. 15 and 16; 31 and 32 Vict. c. 101, sec. 24; and 32 and 33 Vict. c. 116, sec. 3."

Counsel for Petitioners—Kermack. Agents—Mackenzie & Kermack, W.S.

HOUSE OF LORDS.

Tuesday, May 8.

(Before the Lord Chancellor, Lords Watson and Fitzgerald.)

STUDD *v.* COOK.

(*Ante*, vol. xviii. p. 177, and 8 R. 249.)

Succession—Foreign Destination—Devise of Scotch Heritage by an English Will—Titles to Lands Act 1868 (31 *and* 32 *Vict. c.* 101), *secs.* 19 *and* 20—*Conveyancing Act* 1874 (37 *and* 38 *Vict. c.* 94), *sec.* 46.

An Englishman by a will in English form devised his landed estates situated in England and in Inverness-shire "to the use of my elder son and his assigns for his life without impeachment of waste," and after the death of the elder son "to the first and every other son successively" of the elder son "according to their respective seniorities in tail male, with remainder," &c. This was admittedly a valid settlement in tail male of the English estates by English law. The elder son was also residuary devisee and legatee. He raised against his pupil children an action to have it declared that he was entitled to the estate in Inverness-shire in fee-simple either (1) as conveyed to him absolutely by the will, on the ground that the devise was habile to convey the estate, but that the destination was not such as by the law of Scotland could restrict or limit his right, or (2) as falling to him under the residuary clause, or (3)—on the assumption that it had not been validly conveyed by the will—as heir-at-law.

Held that the intention of the testator that the pursuer should have a liferent interest only in the estate, though conceived in technical terms involving restrictions and limitations not capable of being precisely expressed or carried out by Scotch law, must receive effect in so far as that law would allow, that effect being to give the pursuer a liferent allenarly, and the heir-male of his body at the time of his death a fee, the pursuer's liferent including all powers given by the will and capable of receiving effect by Scotch law.

Process—Appeal—Expenses—Parent and Child—Obligation of Parent who had Raised Action against his Pupil Children to Provide Funds to Enable their Curator ad litem *to Defend Judgment of Court of Session.*

A father having in an action raised by him against his pupil children for declarator that he was fee-simple proprietor of certain heritage appealed to the House of Lords against an interlocutor by which the defenders were assoilzied, the House, on the petition of the curator *ad litem* for the children, *ordered* that all proceedings in the appeal should be stayed until reasonable means should be provided by the appellant for enabling the curator *ad litem* to defend the interests of the pupil children in the appeal.

In Court of Session 10th December 1880, *ante*, vol. xviii. p 177, and 8 R. 249.

The pursuer appealed to the House of Lords. After the petition of appeal had been served upon the respondent, the curator *ad litem* to the appellant's pupil children, a note was on 8th March 1882 presented by him to the Second Division setting forth that his taxed account of expenses amounted to £52, 6s. 8d.; that he had moved for expenses on the case being decided in his wards' favour on 10th December 1880, but that the Court had indicated an opinion that it was unnecessary to insert a decerniture for expenses in the interlocutor, since the main question having been decided, the expenses would be paid him as matter of course; that he had frequently written to the appellant's agents asking payment, but without effect; that an appeal had now been taken to the House of Lords, and that the interlocutor had not been extracted. The curator prayed the Court either (1) to find him not obliged to enter appearance in the appeal, and discharge him from his office, reserving right to recover the amount of his account, or (2) to ordain the appellant to pay the said account, and to supply a further sum of £250 to enable him to defend the case in the House of Lords.

The appellant objected to the competency of the application, on the ground that an interlocutor had been pronounced which was final in the Court of Session—6 Geo. IV. c. 120, sec. 21—and that the process was now with the unextracted processes, and that no further interlocutor could therefore be pronounced. Moreover, he submitted that the judgment of the Court being under appeal to the House of Lords, the Court had no power to pronounce any further interlocutor in the cause except under remit from that House.

He also stated that he repudiated liability as father and administrator-in-law of his children for their curator's expenses in the cause.

The Court superseded consideration of the

question till the then ensuing summer session.

Meanwhile, it having become necessary that the case for the respondents should be lodged under the order of the House of Lords, the curator presented a petition to the House setting forth the facts above narrated, and that he had no funds belonging to his wards wherewith to retain counsel to prepare and argue their case. He prayed the House either to order the appellant (1) to pay to him for this purpose a sum of £250, to be duly accounted for by him, or (2) to grant delay in lodging the respondents' case till the appellant should provide means for carrying on the case. The petition was referred to the Appeal Committee of the House, on a report from whom the House ordered that "until reasonable means are provided by the appellant to enable the curator *ad litem* to defend the interests of the pupil children of the appellant, all further proceedings in the appeal be stayed."

Such means having been provided, the appeal was then heard.

At delivering judgment—

Lord Chancellor—My Lords, the first question on this appeal is, whether the will of the testator General Studd does or does not contain a valid disposition of his Inverness-shire estate? Upon that point your Lordships did not think it necessary to hear the learned counsel for the respondent. Any disposition which would be effectual as to moveables is by the Lands Titles (Scotland) Act of 1868 made effectual as to Scotch heritage without regard to technical rules.

The Lord Justice-Clerk (a judge from whose opinions I seldom differ, and never without hesitation) appears to have considered that the only intention which the testator had expressed in this will as to his Inverness-shire estate was to create an English entail of it, with all the incidents and consequences of an English entail, according to English law, and that as this was impossible by the law of Scotland the entire disposition must fail. In that view I cannot concur.

The English words "in tail male" are nothing more than a short mode of describing a gift to a man and the heirs-male of his body, which latter words ought in England to be used when such an estate tail is created by deed, though any words from which the intention can be ascertained are sufficient in a will. If in the present case the dispositions now in question were paraphrased in the way which would properly express the same meaning in an English deed, and if they were confined to the Inverness-shire estate, they would run thus—"I devise all my freehold lands and hereditaments situate in the county of Inverness unto and to the use of my elder son Edward Fairfax Studd and his assigns for his life without impeachment of waste, and after his death unto and to the use of his first and other sons successively, according to their respective seniorities, and the heirs-male of their respective bodies," with remainders over, in which the words "in tail male," as often as they occur, would in like manner be rendered by the equivalent terms "and the heirs-male of their respective bodies," and the words "in tail" by the terms "and the heirs of their respective bodies." I take it to be quite clear that a disposition of Scotch heritage in precisely similar terms (though the word "freehold" may be technically inapplicable to Scotland, and though the words "with remainder" might in Scottish legal phraseology be replaced by their equivalent "whom failing") need not be ineffectual either wholly or in part, but that, on the contrary, it would take effect through the whole series of limitations, unless the course of succession were subsequently altered by anyone of the *hæredes designati* competent by the law of Scotland to make a valid disposition of the property.

This being so, I hold it to be clear that neither the use of English terms of art nor the intention to create in Scotland an estate as nearly as possible corresponding to an English estate tail, ought to prevent such dispositions from operating in Scotland to the fullest extent to which by the law of Scotland they can operate. There is no reason why the intention should fail altogether because some consequences of it which the testator may have had in contemplation cannot take effect. The incidents and consequences of the estate or estates which under such a form of gift may vest in the donees according to Scotch law must of course be determined by that law, and not by the law of England. But the fact that a donee who in England would take under these words an estate tail capable of being barred under the Act for the abolition of fines and recoveries, and not otherwise, would in Scotland be a fiar without fetters—or that in England he would have only limited statutory powers of leasing beyond his life, while in Scotland his powers would be unlimited—is no reason why the destination itself to him and the heirs-male of his body, and to the rest of the *hæredes designati* in succession, should not take effect in Scotland as far as by law it may. If in England real and personal property were both given together by an exactly similar series of dispositions, the same thing would happen. By English law real property can be entailed, so that (unless and until the entail is barred) it may be transmitted through the whole intended course of succession, but personal property cannot. The disposition, however, of the personal property would not therefore fail; it would receive as much effect as the law applicable to personal property could give it, which would vest that property absolutely in the first tenant in tail of the land. The case of *Forth* v. *Chapman* (1 Peere Williams, 667) is a well known and often quoted example of the flexibility in English law with respect to different kinds of property governed by different rules and having different incidents of the same words occurring in a single clause of disposition.

Whatever, therefore, is the interest which (having regard to the law of Scotland) ought to be deemed to have vested under the words of this will in the appellant Edward Fairfax Studd, I am of opinion that the disposition of the Inverness-shire property was not wholly ineffectual.

The remaining question is, Whether the intention of the testator, when ascertained according to such principles of construction as ought to be applied to the words of this will, was to give the appellant an estate for life only, or to give him the fee for his own benefit, so that his eldest son would in the one case have an indefeasible right of succession to the fee as institute under the will, subject to the burden of his father's liferent, and would in the other case have nothing but a mere *spes successionis* transmissible from and

through his father, and defeasible by any alienation, &c., which the father in his lifetime might make by deed or will.

I have stated this to be simply a question of intention, because the Act of 1868 says (in effect) that the intention as manifested by the will is to prevail as to heritage in the same way that it would prevail as to moveables; and there is no law of Scotland applicable to moveable property which would prevent the actual intention in such a case as this from receiving full effect when once duly ascertained. The technical way in which effect might be given to it by Scotch law seems to me to be for this purpose immaterial. If it were material, I should assent to the proposition of the appellant's counsel, that the gift here is direct, and not executory, and is not meant to be effectuated through the medium of a conveyance by trustees.

There is a rule of construction applicable to Scotch dispositions of either immoveable or moveable property (between which in this respect there is no distinction) in favour of parents and their unborn children, known as the rule in *Frog's* case, and which though sometimes criticised as arbitrary must be taken in all cases to which it properly applies as settled by the law of Scotland. According to that rule a destination to a parent in liferent, and after his death to his children (unborn at the date of the disposition) in fee, vests the fee in the parent, unless an intention to the contrary is in some sufficient way manifested, which is most usually done by the addition after "liferent" of the word "allenarly" or "only," but may also be done (as the cases of *Douglas* v. *Sharpe*, 9th March 1811, Hume 173, and *Dawson* v. *Dawson*, 10th Nov. 1876, 4 R. 597, cited for the respondents, show) by any other means which unequivocally indicate an intention not to vest the fee in the parent.

In the present will, made in England in English form, we have not the word "only," or anything equivalent to it, superadded to the destination to the appellant "for his life," obviously, as it seems to me, because the rule in *Frog's* case does not belong to that system of law in the language of which this will is expressed. But the question is, what estate the testator intended to give, first, to his son, the appellant, and secondly, to the appellant's (then unborn) eldest son? The one question, what the intention was as to the father, is (as it seems to me) inseparable from the other question as to the child. If the meaning of the testator's words, in the system of law from which they are borrowed, may properly be regarded (and I myself see no reason for distinguishing in that respect between their meaning and their legal effect, because the question is, what estates the testator *intended to give*) there is no room for doubt that he meant the father to take a life interest "only," and the child to take what (in English law) is called a remainder expectant upon a life estate, equivalent in Scotch law to a fee under burden of liferent. If the instrument had been Scotch, conceived in the language of Scotch law, it might, I suppose, have been proper to take into account the rule in *Frog's* case for the purpose of ascertaining the testator's intention, on the principle stated by Lord Eldon in *Dewar* v. *Mackinnon*, 5th May 1825, 3 Ross' L. C. 613. But to import a technical Scotch rule of construction into the interpretation of a will conceived in the language of a different system of law, when the sole question is as to the testator's intention, and when by the law of Scotland itself that rule is not inflexible as to immoveable more than moveable property, does not seem to me to be consistent with sound principle, or with the doctrines laid down by the eminent judges who decided *Trotter* v. *Trotter*, 5 S. (N.S) 72 — *aff.* June 10, 1829, 3 W. and S. 407; *Mitchell & Baxter* v. *Davis*, December 3, 1875, 3 R. 208; and *Ramsay* v. *Beveridge*, March 3, 1854, 16 D. 764.

If more were necessary to repel the application of the rule in *Frog's* case, and so bring the present will within the principal of *Douglas* v. *Sharpe* and *Dawson* v. *Dawson*, there would, in my opinion, be for that purpose enough here. This testator has plainly manifested his intention that the appellant should take (if he could give it him) *the same* interest in all and every part of the immoveable property in England and Scotland which he aggregated together under the description of "Edward's freehold estate;" and in the English part he clearly takes an estate for his life *only*. That life interest is qualified by the words "without impeachment of waste," showing that the testator intended to give the appellant such an estate as would not enable him to cut timber, or to open mines, etc., without the special authority which those words confer. In Scotland as well as in England such powers may by any sufficient words be given to a man who has a liferent only, and unless so given they will not be incident to such an estate. The testator has also by this will given to the appellant other special powers, extending to the Scotch as well as to the English property, viz., to appoint a jointure to his widow, and portions to his younger children, which are not to exceed in the whole £15,000, and from which the eldest son is excluded, and also to grant leases under certain conditions and limitations not to be transgressed. All such powers would be superfluous, and all the restrictions placed upon their exercise would be nugatory, as to the Scotch property unless the appellant were restricted to a liferent only.

I am therefore of opinion that the interlocutor appealed from is in substance right, and ought to be affirmed. The costs must of course be provided for by the appellant.

Lord Watson—My Lords, The late Major-General Edward Mortlock Studd was at the time of his death in December 1877 duly infeft as fee-simple proprietor of the lands and teinds of the estate of Banchor, in the county of Inverness. The deceased left a will, executed according to the forms of English law, by which he, *inter alia*, devised all and such parts of his manors, messuages, lands and hereditaments, situated in the counties of Devon, "of Inverness, in Scotland," of Stafford, and of Warwick, as consisted of "freehold of inheritance," to the use of his elder son Edward Fairfax Studd and his assigns, "for his life, without impeachment of waste," and after the death of the said Edward Fairfax Studd, to the use of the first and every other son of the said Edward Fairfax Studd successively, according to their respective seniorities, in tail male, with remainders over.

The appellant Edward Fairfax Studd, the elder son of the testator, instituted in March 1880, before the Court of Session, the action in which this appeal is taken, concluding to have it found and declared that under the devise in his father's

will the estate of Banchor is vested in him absolutely, without any restriction or limitation; and alternatively, that the devise is wholly ineffectual, and consequently that the estate of Banchor now belongs to him, either as the residuary legatee or as the heir-at-law of the testator. The action has been defended on behalf of Edward Arthur Studd and Gladys Studd (the infant children of the appellant born since the testator's death) by their curator *ad litem*, who appears as respondent in this appeal.

The point thus raised for decision—the legal effect of a devise of Scotch heritage in an English will—is one of novelty and importance; and it gave rise to great diversity of judicial opinion in the Court below. The Lord Ordinary (the late Lord Curriehill) thought that the devise was in effect a conveyance to the appellant in liferent and to the heirs-male of his body, and thereafter to a series of heirs in fee, subject to the limitations of an English entail; and, holding that these limitations could receive no effect in Scotland, and that by the law of Scotland such a conveyance imported a fee in the appellant, he decerned in terms of the first conclusion of the action. When the case came before the Second Division of the Court on a reclaiming note, the Lord Justice Clerk (Moncreiff) was of opinion that the devise and the conditions attached to it constituted a settlement in tail male according to the law of England; and that the law of Scotland cannot recognise or give effect to a conveyance of landed estate qualified by such conditions. His Lordship accordingly came to the conclusion that "the whole settlement must fail, and the pursuer (appellant) as heir-at-law must prevail." The majority of the Court, consisting of Lords Gifford and Young, took a different view. They held that the law of Scotland must, so far as practicable, give effect to the intention of the testator as expressed in his English will; and seeing that the language of the will, read in the light of English law, gave the appellant nothing more than a liferent right, they assoilzied the defender from the whole conclusions of the action. I am of opinion, and on substantially the same grounds, that the case was rightly decided by the two learned judges who formed the majority of the Court, although I do not concur in some of the observations which fell from their Lordships.

It must be kept in view that down to the year 1868 no foreign will, unless it was executed with all the formalities required by Scotch law, and was expressed in appropriate terms of *de præsenti* conveyance, could affect heritable estate in Scotland. In all deeds relating to heritage words of *de præsenti* conveyance were necessary, and "dispone" was an expression not merely technical but indispensable. No deed professing to convey or settle heritable estate, whether *inter vivos* or *mortis causa*, could receive effect unless the dispositive clause contained that magic word. In 1868 the necessity for using "dispone" or other words of *de præsenti* conveyance was dispensed with by section 20 of "The Titles to Land Consolidation (Scotland) Act" in the case of *mortis causa* and testamentary deeds and writings relating to heritage. It was not until the passing of the Conveyancing and Land Transfer (Scotland) Act in 1874 that "dispone" ceased to be *verbum sine quo non* in the case of dispositions *inter vivos*. The 27th section of that Act provides that the absence of the word shall not affect the validity of any deed or writing as a conveyance of heritage, provided it contains "any other word or words importing conveyance or transference or present intention to convey or transfer."

But for the provisions of section 20 of the Act of 1868 (31 and 32 Vict. cap. 101), the will of the late General Studd would have been defective according to the law of Scotland both in execution and expression, and would have carried no right whatever to the estate of Banchor; and I venture to think that the real, if not the only, question which the House has to consider in this case is, To what extent and effect has the old rule of the Scotch law been relaxed in the case of a foreign will by these statutory provisions?

It is therefore necessary to attend to the language of section 20 so far as it bears directly upon that question. The clause commences with a declaration that it shall be competent to the owner of heritable estate to settle the succession to the same in the event of his death by testamentary or *mortis causa* deeds or writings, and that no such deeds or writings shall be held to be invalid by reason of the grantor not having used the word "dispone" or other words importing a conveyance *de præsenti*. It is then enacted that "Where such deed or writing shall not be expressed in the terms required by the existing law or practice for the conveyance of lands, but shall contain, with reference to such lands any word or words which would if used in a will or settlement with reference to moveables be sufficient to confer upon the executor of the grantor, or upon the grantee or legatee of such moveables, a right to claim and receive the same, such deed or writing, if duly executed in the manner required or permitted in the case of any testamentary writing by the law of Scotland, shall be deemed and taken as equivalent to a general disposition of such lands within the meaning of section 19 hereof," &c.

In my opinion the obvious purpose of the provisions which I have first quoted is to assimilate so far as possible the settlement of heritable to that of moveable estate. First, as regards execution.—The effect of these enactments is, that a writing duly executed as a Scotch testament, *e.g.*, by one notary and two witnesses, will suffice to carry heritage, and that any settlement executed in a foreign country will also be sufficient for that purpose if it be executed in such manner as would render it a valid settlement of moveable estate in Scotland. Secondly, as regards the language which must be used in such a writing in order to affect Scotch heritage, it is not necessary to resort to the technical terms of Scotch conveyancing, or even to employ language familiar to Scotch lawyers. Any words which in a settlement of moveables would be recognised by the law of Scotland as sufficient to create a right or claim in favour of an executor, grantee, or legatee, must receive effect if used with reference to lands in Scotland. Thirdly, words sufficient to create a right or claim to moveables are, when used in reference to lands, declared to be equivalent to a "general disposition" of such lands.

Now, a general disposition of land in the law of Scotland simply means a conveyance, which from the want of a full description of the lands, or from the want of proper feudal clauses, does not of itself constitute a sufficient warrant to the disponee to obtain infeftment directly by recording the deed in the register of sasines or

by expeding and recording an instrument of sasine. If the heir of the disponer declined to make up a title and then convey the lands to him, the disponee, prior to the Act of 1868, could not obtain a feudal right to the subjects except by an action of constitution and adjudication in implement directed against the heir. The 19th section of the Act of 1868 enables the disponee to obtain infeftment directly without the aid either of the heir or of the Court, by expeding and recording in the appropriate register of sasines a notarial instrument in the form prescribed by Schedule L annexed to the Act. It is almost unnecessary to say that general disposition is a very comprehensive term, and, taken by itself, gives no information as to the nature of the right which may be thereby constituted. There may be a general disposition of each and every right or interest in land, limited or unlimited, which can be made the subject of legal conveyance and is capable of being clothed with infeftment.

In enacting that the words of the deed or writing shall be equivalent to a general disposition, the Legislature obviously did not intend to define the character of the rights and interests conferred upon the persons favoured by such deed or writing, but to indicate the means by which these persons were to obtain a complete feudal title. The only possible mode of ascertaining the precise character of these rights and interests is by an examination of the language of the deed or writing; and that language must be read and construed, for the purpose of ascertaining the intention of the settler, just as if the settlement had been of moveables and not of heritage. When the intention of the settler has been so ascertained, the law of Scotland must give effect to it, in so far as is practicable, consistently with the principles which govern the tenure of heritable estate in Scotland.

Greater difficulty may possibly be experienced in giving precise effect to a foreign will relating to Scotch lands than in the case of a foreign will relating to moveables only, because no conditions or limitations attached to a settlement of land in Scotland can receive effect if they be inconsistent with the *lex loci*. But such impossible conditions and limitations, when they occur, do not void the settlement, although the granter intended them to be effectual. The rule applicable to a settlement, whether it be of moveables or of land, whether it be in the form of a probative Scotch deed or of a foreign will capable of carrying an interest in Scotch land by virtue of section 20 of the Act of 1868, must always be *valeat quantum valere potest*. I know of no Scotch case in which a bequest of moveables or a conveyance of land has been held to be ineffectual because a condition attached to such bequest or conveyance, not being a condition precedent, was repugnant to the law of Scotland, although the intention of the testator or disponer was thereby defeated *pro tanto*. There is abundant authority to the contrary. A testator directs his trustees to accumulate the rents of land for forty years, and then to pay over these rents with accruing interest to a person named. The intentions of the testator cannot be carried out because of their inconsistency with the provisions of the Thellusson Act, but the beneficiary will take the 21 years' accumulations which the Act permits. Or a truster directs his trustees to make a strict entail upon A and his heirs whomsoever, whom failing upon B and his heirs whomsoever. What the trustees are thus directed to do is a legal impossibility, because such a destination is not in the sense of Scotch law a "tailzied" destination, and cannot therefore be made the subject of an entail. Yet twelve out of the thirteen judges of the Court of Session, in the case of *M'Gregor* v. *Gordon*, 3 Sess. Ca. (3rd Series) 148, held the legal consequence of a direction in these terms to be, not that it was to be treated as void, but that A took in fee-simple, and was free from the fetters which the truster desired to impose upon him, because the law forbade their imposition. Again, where a deed of entail, executed in strict form, embraces both land and moveables, I do not think any Scotch lawyer would entertain a doubt that, whilst the fetters applied to the land they could not attach to the moveables which would belong in fee to the institute.

The will of General Studd is sufficiently executed to satisfy the requirements of section 20 of the Act of 1868; and the words of devise plainly refer to the estate of Banchor, the only lands belonging to the testator in the county of Inverness. The expression "freehold of inheritance" has no meaning in the law of Scotland; but when translated into popular language it does describe, though not with perfect accuracy of definition, the tenure by which the deceased held the estate of Banchor, and the nature of his interest in it; even if the expression were less appropriate it would not make any difference in this case, because the rule of the law of Scotland in such matters is *falsa demonstratio non nocet, si satis constet de relato*. The gift of the estate, and the restrictions and limitations attached to it, are expressed in the technical language of English conveyances; and to my mind it is no disadvantage that an Englishman settling his Scotch estates, and availing himself of the leave which the Legislature has given him to dispense with the formal terms of a Scottish deed, should express his intention in the legal phraseology of his own country, and not in popular language. That course, when adopted, as it has been in this case, enables the parties or the Court, by reference to the law of England to ascertain with legal precision the rights and interests in his Scotch estates which the testator intended to give to the persons favoured by his will, and to determine how far these rights and interests can receive or must be refused effect according to their consistency or inconsistency with the land laws of Scotland. It General Studd's will be interpreted according to the rules of English law, it is certain that the intention which he therein expressed was that the appellant should take a mere liferent, and that the fee of the estate of Banchor should go to the eldest son of the appellant, and the other heirs nominated in the order of their appointment. The law of Scotland, in so far as regards the separate destination of the liferent and fee of the estate, can give—and I can see no reason why it should not give—effect to the intention so expressed.

It has, however, been argued for the appellant (and his contention on this point was favoured by the Lord Ordinary) that he is entitled to take a right of fee, because by the law of Scotland

a conveyance of land to the use of A for his life, and to his children *nascituris* in fee, gives the parent the full beneficial fee. To that argument there are two answers, either of which appears to me to be conclusive. In the first place, the Legislature in enacting section 20 of the Titles to Land Act did not in my opinion contemplate or provide that in the case of an English will relating to land in Scotland, expressed in terms of English law, words having an intelligible legal meaning in both countries should be separated from the context and construed according to the canons of Scotch law. What I think the Legislature did intend and have provided is, that the intention of the testator shall be gathered from the whole context of the will, interpreted by the rules of English law. In the second place, even if the words on which the argument is founded fell to be construed according to the law of Scotland, the rule established in "*Frog's Creditors* v. *His Children*" (Morison's Dictionary, p. 4262), and the series of decisions by which that case has been followed, is not an inflexible rule, but must yield to reasonable presumptions that the maker of the deed intended otherwise; and the will of General Studd contains numerous provisions clearly indicative of his intention that the appellants' interest should be restricted to a liferent. If, as I venture to think, the interest which the appellant takes in the estate of Banchor under his father's will is merely that of a liferenter, that is sufficient for the disposal of this appeal. The appellant has so framed his conclusions that your Lordships in the present action can do no more than affirm either that he is or that he is not entitled to the fee of the estate.

There are one or two matters which I shall briefly notice because they have been referred to in the opinions of the learned Judges in the Court below, and have entered into the argument at your Lordships' bar.

The statute of 1868 expressly provides that the devise of the estate of Banchor in General Studd's will shall be equivalent to what is known in the law of Scotland as a general disposition of that estate in favour of the devisees. There is, so far as I can see, no possibility of the devisees obtaining any other conveyance to the estate unless the appellant were to make up a title as heir-at-law to his father, and then to execute a conveyance in favour of himself and the other devisees according to their respective interests, a course of procedure which in a case like the present would be manifestly inexpedient. There is no devise of the estate to the trustees of the will, with directions to settle it; and there is in my opinion no administrative purpose to be served thereby, which would justify the trustees in making up a title under section 46 of the "Conveyancing and Land Transfer Act 1874," and thereafter granting a conveyance to the parties entitled.

The provisions of section 19 of the Act of 1868 afford the readiest method by which the devisees can obtain a complete feudal title in a case like the present. The only other alternative is an action of constitution and adjudication in implement against the heir-at-law of General Studd, not an expedient process when the heir is both pursuer and defender. An action of declarator for ascertaining the relative rights and interests of the parties entitled to take under the will or general conveyance may afford useful aid in making up a title by notarial instrument under section 19. An English will relating to Scotch heritage may be expressed in terms of bequest so simple that no declarator is needed; and, on the other hand, a Scotch testamentary writing may be expressed in language so obscure that if recorded *per se* in a notarial instrument it would not constitute a good marketable title. In all cases where the precise nature of the rights conferred is matter of serious doubt, an action of declarator is a desirable if not a necessary step. If your Lordships had recalled the judgment of the Inner House in this case, and reverted to that of the Lord Ordinary, the appellant would have had no difficulty in making up a clear feudal title to the estate of Banchor, by framing and recording a notarial instrument in terms of section 19, and narrating therein the decree of the Court as one of the links connecting him with the devise. In like manner, if a decree were obtained determining the respective rights of the devisees, it would be available to both the liferenter and the institute for the purpose of making up a complete and intelligible feudal title to their respective estates under the provisions of section 19.

Although it may be impossible to give effect in Scotland to all the rights and powers incident to a liferent estate in England, I agree with the Lord Chancellor in thinking that the law of Scotland must give the appellant the powers which in England are implied in the words "without impeachment of waste," and likewise the powers of jointuring and making provision for younger children, which are expressly conferred upon him by the terms of the will. I also concur in what has been said by the Lord Chancellor in respect to the devise of the fee, and the extent of its efficacy in Scotland. The gift of fee must receive effect, although the fiars will take it unfettered by certain limitations implied in an English settlement in tail male.

The devise in this case is to the first and every other son of the appellant "after the death of the said Edward Fairfax Studd." I do not think that under such a destination the eldest son can be held to take a fee upon his birth, because the vesting and divestiture of a proper feudal fee, as distinguished from a heritable *jus crediti*, is, I humbly conceive, alien to the principles of the law of Scotland. Such a devise appears to me to be equivalent to a destination to A in liferent, for his liferent use allenarly, and to the heir-male of his body in fee. In both cases there will be an implied fiduciary fee in the liferenter so long as he lives, but there can be no vesting in the beneficial fee before his death, because until that event occurs it is impossible to ascertain who is entitled to the character of disponee or institute.

I am accordingly of opinion that the interlocutor appealed against ought to be affirmed with costs.

LORD FITZGERALD—My Lords, having heard the very instructive judgments which have been just delivered, it would be inexcusable in me to take up much of the public time in expressing my entire concurrence. The arguments at the bar were not only very able but so full as to give us every aid, and enabled your Lordships in the course of the hearing to dispose of many of the points that were discussed, such as that the

description was sufficient to pass the Banchor estate, and that there was no room for doubt as to the testator's intention.

My Lords, I conceive it to be fortunate that we do not feel ourselves coerced to adopt the judgment of the Lord Justice-Clerk, to the effect that the law of Scotland would not recognise or give effect to such a will as that which we have now before us so far as it relates to real property in Scotland. To adopt that view would be somewhat disastrous, as tending to widen the divergence of the real property laws of the two countries, whereas your Lordships' judgment enables us to smooth over some of their difficulties.

Your Lordships, then, being of opinion that the will of General Studd having been executed according to the solemnities of Scotch law, is effectual to pass the estate of Banchor, and is to be recognised and given effect to, and the rights of the parties ascertained as to the Scotch estate according to the law of Scotland, I desire to add a few words on the question whether the pursuer took a greater estate or interest than a liferent. My Lords, on this question the pursuer's counsel relied principally on *Frog's* case, as to which I may say that we no more intend to dispute it or to take away from its effect than we would endeavour to contravene the rule in *Shelley's* case. We deal with the rule laid down in *Frog's* case as a rigid rule of law so long established and acted upon as not to be shaken. It is not however inflexible, and is not to be extended, nor is it to be given effect to in its primitive rigidity if a testator shows by adequate expressions that to do so would be contrary to his intention. I take it, then, to be part of the *lex rei sitæ* that a gift or devise to a parent in liferent, and after his death to his unborn children in fee, confers a fee on the parent from a supposed necessity, and leaves a *spes successionis* only to the children. The rule however yields to the addition of restrictive words, and if proper words be added restricting the parent to a liferent if he takes the fee, it is only in a fiduciary character and to prevent its remaining *in pendente*, the real fee being in the children. It is not doubted that the use of the terms "allenarly," or "only," or "not otherwise," or "alimenting" after the words "for life," or "in liferent," would be a sufficient expression of the intention of the testator that the parent was to take a life estate or liferent and no more. The application of the rule is excluded not only by such restrictive words but by anything to be found in the gift itself showing adequately and satisfactorily that the intention of the testator was to confine the gift to a life estate and no more.

In this view the learned Solicitor-General for Scotland, and Mr Rigby, called our attention very forcibly to the provisions of the will as to this devise, such as "without impeachment of waste," powers to jointure, to charge portions for children, to lease for twenty-one years, and to make building leases, and to sell with consent of tenant for life, &c. &c., as plainly showing that the testator intended to confine the devise to his eldest son, the pursuer, to a life estate alone, and gave efficient and adequate expression to that intention by adding provisions which would be wholly unnecessary if he were to take in fee or in tail.

My Lords, we have now before us the will of a domiciled native of England expressed in the proper language of the country where it was made, and we interpret it according to the law of the testator's domicile, but so far as it deals with immoveable property in Scotland its application and the rights of the parties claiming under it are to be determined by the *lex rei sitæ*. Adopting, then, but not extending, the rule in *Frog's* case—admitting that according to it the pursuer would take the fee unless the word "allenarly" or some equivalent word is used, or unless there be found in the devise some equivalent expression of the testator's intention to restrict the pursuer to a life estate—I concur in the opinion expressed by your Lordships that the testator has adequately and sufficiently, according to the law of Scotland, indicated his intention to restrict the pursuer to a liferent, and that he takes a liferent only in the estate of Banchor. My Lords, it would be strange indeed if the same words in the same devise, showing one and the same intention, should be interpreted as to the English estate as giving a life estate, but as to the Scotch estate we should interpret them so as without any necessity for it to give operation to them according to *Frog's* case. We ought not to do so. Neither ought we to say that the devise fails because you cannot give effect to it in all its incidents according to the law of Scotland. We have to ask ourselves, what did the testator mean by the words he has used, and having ascertained his intention we give effect to it according to the law of Scotland.

I concur, my Lords, in thinking that the judgment of the Inner House should be affirmed.

The Solicitor-General (for Scotland) — Will your Lordships allow me to mention a matter which was referred to in the discussion, namely, that the respondent is an officer of the Court, and I have therefore to ask your Lordships to allow him costs as between solicitor and client.

Lord Chancellor—Yes.

Interlocutors appealed from affirmed, and appeal dismissed with costs as between agent and client.

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