the same power and jurisdiction over trusts of this nature as are possessed by the Court of Chancery in England, should develope and exercise it in a correspondent manner.

I shall therefore humbly advise your Lordships to reverse the interlocutors appealed from, and by your order to declare, that, according to the legal effect and true meaning of the deed of mortification of the 12th April 1656, the whole of the lands thereby mortified and appointed, and the entirety of the rents and profits thereof, are destinate and given to the use and behoof of scholars in the College and School of Aberdeen, and ought to be applied accordingly; and with this declaration remit the cause to the Lords of the First Division to settle a scheme for the proper management and collection of the rents of the lands now subject to the said deed of mortification, and the application of the net proceeds thereof, after deducting the expenses in augmenting the stipends directed to be paid to the ten scholars by the will of Alexander Irving, in such manner as, having regard to the will and the altered state of circumstances, shall be fit, and declare that the defender is entitled to the patronage of the bursaries and scholarships that shall be so augmented, and also declare, that the defender ought not to be decreed to account for or pay any of the surplus rents and profits of the lands over and above the sum of £1000 Scotch received by him prior to the date of the signeting of the summons, but let him account for and pay, in such manner as the Lords of Session shall direct, all the rents and profits of the said lands (including grassums, if any,) that have come to his hands since the signeting of the summons, and let the costs of the appellants be paid out of the funds that shall be recovered by virtue of this order.

LORD COLONSAY.—My Lords, I agree in the opinion that has been expressed by all my noble and learned friends, that there is here no ground for the plea of prescription. I also am of opinion, that the deed granted in 1656 is obligatory upon the defender, and that he can take no benefit from the circumstance, that the further deeds which were then contemplated have never been executed. But still the question remains, What was the nature of the obligation so undertaken, and of the deeds so contemplated? Was it a disposal of the lands out and out? or was it a grant of lands to the effect of securing, in all time coming, implement of the deed of the first Alexander Irving, so as to make payment for the bursars of the sum specified in the deed? My noble and learned friends who have addressed the House entertain the former view, and in that view I think, that the terms of the judgment which has been proposed are the proper terms. I may be permitted, however, with great deference to the opinions that have been expressed, to say that I doubt the soundness of that conclusion. My inclination is the other way. At the same time, I express that with the greatest deference, and I think it quite unnecessary to go into a statement of the circumstances which raise these doubts in my mind.

Interlocutors reversed, and cause remitted to the Court of Session with a declaration as stated in LORD WESTBURY'S *opinion.*

Appellants' Solicitors, M'Ewen and Carment, W.S.; Dodds and Hendry, Westminster.—*Respondent's Solicitors*, A. F. Gordon, W.S.; Connell and Hope, Westminster.

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26 MARCH, 1868.

MRS. ISABELLA YOUNG or RICHARDSON and Others, *Appellants*, *v.* LAURENCE ROBERTSON and Others, *Respondents.*

MACDOUGAL'S TRUSTEES, *Appellants*, *v.* LAURENCE ROBERTSON and Others, *Respondents.*

MACDOUDAL'S CHILDREN, *Appellants*, *v.* LAURENCE ROBERTSON and Others, *Respondents.*

JOHN LAWFORD YOUNG, *Appellant*, *v.* LAWRENCE ROBERTSON and Others, *Respondents.*

Trust—Legacy—Gift to Class—Grandnieces and Husbands in Liferent—Successive Liferents—*D. in his will gave the residue of his estate to his grandnieces and their respective husbands, only in liferent, for their, her, or his liferent use allenarly, and the fee of such shares to the lawful issue of his said grandnieces equally, whom failing, to the survivors of them and his grandnephews equally in liferent, and their issue also equally in fee, after the death of the*

longest liver of D. and D.'s wife. D.'s wife survived him. C., the husband of a grandniece, survived her and also D.'s wife, and died without issue, leaving other two grandnieces and a grandnephew of testator surviving.

HELD (affirming *judgment*), *That C. was entitled to the liferent of his wife's share.*

HELD FURTHER (reversing *judgment*), *That after C.'s death the liferent of such share belonged to the two surviving grandnieces and grandnephew equally, and the fee to their issue respectively.*

HELD FURTHER (reversing *judgment*), *That L., a child of a grandnephew, who survived the testator, but predeceased the testator's widow, had no share in the fund.*[1]

This was a multiplepoinding to declare the construction of the will of the late James Donaldson, who died in 1844, as regards one sixth share of his estate, the liferent of which was directed to be paid to his grandniece, Mrs. Eliza Young or Cuthbertson, wife of Allan Cuthbertson, after the death of the testator's widow, who died 2d December 1857.

The third codicil, on which the present question turned, was as follows, dated 19th February 1844:

"I, James Donaldson of Thornwood, merchant and cotton broker in Glasgow, do (with and under the conditions and provisions after mentioned,) hereby revoke, alter, and qualify the deed of settlement before written, executed by me, of date the 30th day of March 1841, and two codicils thereto subjoined, dated the one on the 22nd day of March, and the other on the 8th day of November 1843, in so far only as these writings, or any of them, authorize and appoint the distribution or payment of certain shares of the fee, or principal sums of the free residue of my means and estate, or proceeds thereof, to be accounted for and paid to all or any of my three grandnieces therein named, it being my will and intention to restrict the provisions or bequests, in favour of such of them as shall decease without issue, to a liferent, and therefore hereby authorize, will, and appoint my said trustees and executors, and survivors or survivor of them, to pay the share or shares bequeathed to my said grandnieces, in or by the foresaid deed of settlement, to them and their respective husbands, only in liferent, for their, her, or his liferent use allenarly, and the fee of such shares to the lawful issue of my said grandnieces equally; whom failing, to the survivors of them and my grandnephews, also named in the foregoing settlement or codicils, equally in liferent, and their issue also equally in fee, after the death of the longest liver of me and my wife," etc.

There were appeals and cross appeals. (See former appeal, *ante*, p. 1108.)

Lord Advocate (Gordon), *Dean of Faculty* (Moncreiff), *Sir R. Palmer* Q.C., *Anderson* Q.C., *Mellish* Q.C., *Southgate* Q.C., *Cotton* Q.C., *Druce* Q.C., *G. Young, and J. Kaye*, appeared for the various parties.

Cur. adv. vult.

LORD CHANCELLOR CAIRNS.—My Lords, the only real difficulty in these appeals appears to me to arise out of the number of actions which have been brought, the number of interlocutors which have been made, and the number of appeals which have been thought necessary in order to raise before your Lordships the various questions which interest the different parties. I propose, in the first place, to direct your attention to the question relating to the life interest of Allan Cuthbertson, under the 3d codicil, a question which is raised in the cross appeal.

That question is this, whether, under the 3d codicil to the testamentary deed of James Donaldson, which codicil is dated 19th February 1844, Allan Cuthbertson took a life interest in the share of his deceased wife in the residue of the estate of the testator. Upon that point there is an interlocutor of the Second Division of the Court of Session, of the 15th of January 1864, recalling the interlocutor of the Lord Ordinary, finding Allan Cuthbertson entitled to a liferent use of the fund in question. Mr. Cuthbertson survived only four days, and that interlocutor of the Second Division is challenged in the first two cross appeals, that is, in the appeal of Macdougal's Trustees, and in the appeal of Macdougal's Children. The representatives of Cuthbertson are made parties for the purpose of meeting this challenge, and they have no other interest in the questions before your Lordships.

The question to which I refer is to be answered upon the construction of the earlier part of the codicil in question.

The codicil runs in these words, "I, James Donaldson," etc., "revoke, alter, and qualify the deed of settlement before written, executed by me, of date the 30th day of March 1841, and two codicils thereto subjoined, dated the one on the 22d day of March, and the other on the 8th day of November 1843, in so far only as these writings, or any of them, authorize and appoint the distribution or payment of certain shares of the fee or principal sums of the free residue of my means and estate, or proceeds thereof, to be accounted for and paid to all or any of my three

[1] See previous report 22 D. 1527; 2 Macph. 428; 4 Macph. 372: 32 Sc. Jur. 684: 34 Sc. Jur. 270: 36 Sc. Jur. 211: 38 Sc. Jur. 187. S. C. 6 Macph. H. L. 18: 40 Sc. Jur. 466.

grandnieces therein named, it being my will and intention to restrict the provisions or bequests in favour of such of them as shall decease without issue to a liferent, and therefore hereby authorize, will, and appoint my said trustees and executors, and survivors or survivor of them, to pay the share or shares bequeathed to my said grandnieces, in or by the aforesaid deed of settlement to them and their respective husbands only in liferent, for their, or her, or his liferent use allenarly."

By the will of Mr. Donaldson he had given, after the death of himself and his wife, his residue to his grandnephew and his grandnieces by name, equally, with a proviso, that if any residuary legatee should die without lawful issue before his or her share vested, which words your Lordships in the former appeal held to mean before the death of the widow, his or her share should go to his survivors. Now Mrs. Cuthbertson died before the widow, and died without lawful children, and, upon the codicil which I have read to your Lordships, it was argued at the bar, that it should be read as a restriction of the bequest made by the will in favour of grandnieces, and as giving a liferent to a husband of a niece, who, under the will, should take a share by surviving the widow, and as giving a liferent to the husband of no other niece.

This construction appears to me to confound what the testator gives as his motive or reason for altering the disposition made by this will with the manner and form in which he has actually altered the disposition. It is quite true, that the testator tells us that his desire is merely to restrict the provision or bequest made by his will in favour of a childless niece; but that being his motive, the question is, In what manner has he given effect to this wish and desire? As I construe this codicil, it amounts to a result the same as if the testator had said, "I wish to restrict the share in the residue of a childless grandniece, and the way I intend to do that is this: I give the one-sixth intended for each grandniece to her for life, then to her husband for life, then as to the fee to her lawful issue equally," &c. In that case, and under that construction, the various interests or limitations would stand independently of each other. A grandniece, if she survived, would take a liferent use. If she did not survive, but left a husband, he in his turn would take a liferent use.

I therefore submit to your Lordships, that the conclusion at which the Inner House arrived on this part of the case was entirely right, and that the appeal, so far as it complains of that conclusion, ought to be dismissed. And the order which I would propose to your Lordships upon this part of the case would be this: That the interlocutor of the 15th of January 1864, in so far as it finds Allan Cuthbertson entitled to the liferent use and enjoyment of the fund *in medio*, ought to be affirmed, and that the two cross appeals of Macdougal's trustees and Macdougal's children, in so far as they complain of this finding of the interlocutor in favour of Allan Cuthbertson, ought to be dismissed, with costs.

The next question to which I may conveniently direct your Lordships' attention is, as to the case and interest of John Lawford Young. The principal interlocutors which have dealt with that case are these: The Lord Ordinary by his interlocutor of the 12th of March 1863 found John Lawford Young not entitled to the fund *in medio*, or any part of it. The Second Division, by their interlocutor of the 15th of January 1864, recalled the Lord Ordinary's interlocutor, and found that John Lawford Young, as the sole issue of Thomas Young, one of the testator's grandnephews, was entitled to a share of the fee of the fund. The Second Division, by another interlocutor of the 6th of February 1866, found that, on the decease of Allan Cuthbertson, the fee of the share fell to be distributed among all the children of the testator's grandnephews and grandnieces living at the death of the testator's widow, equally *per capita*. Lord Benholme dissented from that interlocutor.

Macdougal's trustees and the Macdougal children, the appellants in the first and second cross appeals, complain of these interlocutors, so far as they give any interest to John Lawford Young; and, on the other hand, John Lawford Young, the appellant in the third cross appeal, complains of the division made by the last of these interlocutors *per capita*, and insists that it ought to be *per stirpes*. The first question, however, is, whether John Lawford Young is entitled to any share whatever? His father, Thomas Young, a grandnephew of the testator, died before the widow.

The claim of John Lawford Young has been put in the argument upon three different grounds. In the first place, it has been contended on his behalf, that the succession to Mrs. Cuthbertson's share falls to be determined, not by the third codicil, but by the deed and the first codicil, for that the third codicil is inapplicable by reason of the death of Mrs. Cuthbertson before the widow, and it is contended, that John Lawford Young claiming his succession under the deed and first codicil would, by the decision of this House upon the former appeal, be entitled to a share. This argument I already have expressed my opinion upon in the observations I made as to the liferent of Mr. Cuthbertson. It is the same argument, only in another form. It contends, in fact and in substance, that the third codicil is inapplicable, inasmuch as Mrs. Cuthbertson, the first of the series of takers, did not survive the testator's widow.

The next argument in favour of John Lawford Young was that advanced by Mr. Anderson at your Lordships' bar, who contends, that the words which I am about to read, "whom failing, to

the survivors of them and my grandnephews also named in the foregoing settlement or codicils equally in liferent, and their issue also equally in fee, after the death of the longest liver of me and my wife," should be read with the interjection before the words "my grandnephews," of the word "to," so that the gift over would run thus, "whom failing to the survivors of them," that is, of my grandnieces, "and to my grandnephews," making the grandnephews take irrespectively of survivorship, while the grandnieces would only take upon the condition of surviving.

Upon that construction, I have only to observe, that, in the first place, it would do manifest violence to the words used by the testator. In the next place, it would be at variance with the scheme of the original deed of the testator, in which, with reference to survivorship, he clearly constituted a class of survivors both of grandnephews and grandnieces. In the third place, it is almost impossible to conceive any reason why the contingency of survivorship should be adjected to the case of the grandnieces, and not equally adjected to the case of the grandnephews. That, therefore, is a conclusion which I certainly cannot advise your Lordships to adopt.

The third ground, upon which the claim of John Lawford Young was put, was that adopted by the majority of the Judges of the Second Division of the Court of Session. The learned Judges read the codicil thus: "whom failing, to the survivors of them and my grandnephews." That the learned Judges considered to mean the survivors of the entire class of grandnieces and grandnephews equally in liferent, and their issue also equally in fee. The learned Judges considered, that, although the first class named is a class consisting of survivors, the words "their issue" refer, not to the survivors of the class of grandnephews and grandnieces, but to the whole and entire class of grandnephews and grandnieces, whether survivors or not.

I must submit to your Lordships, that that appears to me to be a very violent construction of the words which are used. It appears to me, that, according to all legitimate principles of construction, you must read the words "their issue" as referring to the issue of those who, by the preceding words, were to take liferents; and the liferent was to be taken by the survivors of the grandnieces and of the grandnephews.

My opinion upon the construction of these words is so clearly and succinctly expressed by Lord Benholme, who dissented from the other Judges of the Second Division, that I cannot do better than read to your Lordships the expression which he has used. Lord Benholme says, "The second question relates to the claim of Lawford Young to share in the fee of the fund *in medio*. The clause upon which that claim depends is that of devolution, which follows the former, and which is thus expressed: 'Whom failing' (*i.e.* grandnieces without leaving children,) 'to the survivors of them and my grandnephews also named in the foregoing settlement or codicils, equally in liferent, and their issue also equally in fee.'"

In this clause a question of grammatical construction occurs which it is necessary to solve, in the first instance, viz. who, on the failure of a grandniece, are the persons who are to take the liferent? Are we to read "to the survivors of them and (to) my grandnephews," or to read, "to the survivors of them and (of) my grandnephews." I confess I think the latter is not only the ordinary grammatical construction, but the only reasonable one. Because what is here bestowed is a liferent, which could not vest until the death of the testator's widow, and could ~~not~~ vest beneficially or at all in survivors only. For to bestow a liferent or a share of a liferent upon a party or parties who do not survive the time when that liferent is to commence, is simply absurd. I hold it therefore to be clear, that, so far as the words bestowing the liferent are concerned, survivors alone both of grandnieces and of grandnephews are designated. Who then are to take the fee? It is their issue also equally in fee. Now what is the antecedent to "their?" I find myself unable to refer to any other than the survivors, who are to take the liferent equally, just as their issue are to take the fee equally. Such being my opinion, I concur in that part of the Lord Ordinary's judgment which repels the claim of Lawford Young, who is the son of a predeceasing grandnephew. I certainly concur in that conclusion, and it is that which I shall humbly recommend your Lordships to adopt.

If you agree with that conclusion, you will declare, that, in the events which have happened, John Lawford Young did not become entitled to any part of the fund *in medio*, being the one-sixth of the residuary trust estate of John Donaldson, liferented by Allan Cuthbertson, deceased, and you will reverse so much of the interlocutor appealed against in the first and second cross appeals, as is inconsistent with this declaration. I should also advise your Lordships to dismiss with costs the appeal of John Lawford Young, complaining of the manner of division.

This brings me to the last question, the question, namely, raised in the first or principal appeal. Mrs. Richardson and Mrs. Thomson, the appellants in that appeal, insist that they are liferenters of the fund *in medio* to the extent of two-thirds under the third codicil, and that the fund to that extent must be retained in trust in case they should have children to take a share of the fee. The Lord Ordinary, by his interlocutor of the 8th July 1865, found, that the one-sixth in question on the death of Allan Cuthbertson, the liferenter, fell to be liferented in equal shares by Colonel Macdougal, deceased, Mrs. Richardson, and Mrs. Thomson. The Second Division, by their interlocutor of the 6th of February 1866, recalled the Lord Ordinary's interlocutor, and found, that by reason of the death of Allan Cuthbertson on the 19th of January 1864, the fee of the share

of residue, which is the fund *in medio*, became disburdened of the liferent provided by the third codicil, and was subject to no other burden of liferent. Against this Mrs. Richardson and Mrs. Thomson appealed.

The question depends on the construction of the same third codicil, part of which I have already read. The question appears to me, as was said by the Lord Ordinary, to be one of the construction and meaning of words, and not to involve any technical rule or doctrine of feudal conveyancing; and viewing it in that light, I think the construction of the codicil admits of no reasonable doubt. I will take the liberty of reading it, and asking your Lordships to substitute, as I read it, the name of the niece in question, whose share is concerned in the present controversy, in place of the names of, or a reference to, all the grandnieces generally. The testator says, "it being my will and intention to restrict the provisions or bequests in favour of such of my grandnieces as shall decease without issue to a liferent, I therefore hereby authorize, will, and appoint my said trustees and executors, and survivors or survivor of them, to pay the share or shares bequeathed to Mrs. Cuthbertson in or by the foresaid deed of settlement to her and her husband only, in liferent, for her or his liferent use allenarly, and the fee of such shares to the lawful issue of my grandniece Mrs. Cuthbertson, whom failing, to the survivors of my grandnieces and my grand-nephews also named in the foregoing settlement or codicils, equally in liferent, and their issue also equally in fee, after the death of the longest liver of me and my wife."

Upon the reading of these words, I should humbly apprehend and submit to your Lordships, that words could not more clearly and more simply express an intention to give a liferent to Mrs. Cuthbertson, and a liferent to the husband, and the fee to her children if she had any, and if she had no children to take the fee, then a liferent to the class described in the codicil, namely, the survivors of the grandnieces and grand nephew named in the codicil, equally, and the fee to their in the manner pointed out by the codicil.

That being, as I humbly conceive, the natural and obvious meaning of the words, I turn to ascertain the *ratio decidendi* of the Second Division which led their Lordships to adopt a different meaning of the codicil. Upon this point, I ought to state to your Lordships, that, upon the former appeal which came to this House, the judgment was pronounced by your Lordships upon the construction, not of this third codicil, but of the original deed of the testator, taken in connexion with the first codicil to the deed. The words upon which your Lordships then put a construction were these: "if any of my residuary legatees shall die without leaving lawful issue before his or her share vest." Those words were held by this House to refer to the death of the widow, that is to say, the period of distribution. No other point was decided in that case as regards that question, and no decision took place in that case upon the words of the codicil which I have just read to your Lordships.

In the present case, the learned Judges of the Second Division have held, in the first place, that successive liferents are not, from the words of the codicil, to be presumed. Now, I should remark with great respect to the learned Judges, that although I should entirely concur in their observation, that successive liferents are not to be presumed, the question here is not a question of presuming successive liferents; but the question is, what you are to do with the expressions used by the testator, which appear distinctly and clearly to point to successive liferents. Upon a codicil so framed, I do not understand from the expressions of the learned Judges, that there is any rule of law which prevents the giving effect to successive liferents when they are clearly expressed. The learned Judges in the next place say, that the effect of the decision of this House, in the former appeal to which I have referred, is, that at the death of the widow, all the interests, whether of liferent or of fee, are fixed or determined, and that no change or substitution in those interests can afterwards arise. And they hold, that the commencement or taking effect of one liferent after another, is a change or substitution of interest afterwards occurring. If that was the effect of the decision of your Lordships upon the former occasion, this singular result would flow from it, that at the death of the widow there might be a grandniece of the testator married and likely to have children, for which children he clearly has evinced an intention to provide, and yet the fee would be excluded if the doctrine of the learned Judges is right, that the fee must stand vested and determined, once for all, at the death of the widow. But your Lordships did not decide that question, but decided one question, and one only, namely, that the words I have already extracted from the will, and the words of the codicil pointing to the time of the vesting of the share, referred to the death of the widow, as I have already stated. But what was the state of things at the death of the widow, with reference to the fund with which we have now to deal? Mrs. Cuthbertson was dead, she had no children, she had a husband. There were at that time survivors of the class pointed out in the third codicil, namely, the class of grandnephews and grandnieces surviving both Mrs. Cuthbertson and the widow. That being the state of the family at the period of the surviving of either Mrs. Cuthbertson or the widow, I am at a loss to know what there is in any doctrine of law, or any principle of construction, that would prevent Mrs. Cuthbertson taking (as I hold that the words naturally mean,) a liferent of the whole, or the income of the whole afterwards, to go equally among that class of the surviving grandnephews and grandnieces to which I have referred, the fee of the whole being kept through the medium

of the trust created by the deed, in trust for that class, the issue of which afterwards might become entitled to it. Upon this point, I concur entirely in the judgment of the Lord Ordinary, and I do not further repeat the observations which are to be found in that judgment.

If your Lordships take the view which I strongly entertain in this case, the result will be, that in the first appeal you will declare, that, on the death of Allan Cuthbertson, the fund *in medio* fell to be liferented as to two-thirds by Mrs. Richardson and Mrs. Thomson in equal shares, and that the *corpus* of such two-thirds of the fund ought to be retained in trust for their respective issue, if any, and you will declare that Colonel Macdougal was entitled to the remaining one-third in liferent, and that on his death such one-third fell to be divided among all his children equally. And you will reverse so much of the interlocutors appealed against in this first appeal, as is inconsistent with that declaration, and remit the case with this declaration to the Court of Session.

LORD WESTBURY.—My Lords, I entirely concur in the conclusions at which my noble and learned friend has arrived, and also in the reasons which he has given for those conclusions. I further most entirely subscribe to the preliminary observations of my noble and learned friend.

This is a very plain and simple case. It arises on the construction of a will and of one codicil particularly. In a proper mode of jurisdiction, all the parties interested might have been convened, and the true intent and meaning of the will and its legal effect might have been judicially declared in a very short period of time, and at the expense, perhaps, of a few hundreds of pounds at the outside. But this case, I see, has dragged its slow length along in the Court of Session. The date of the first summons of multiplepoinding is in February 1858. The only difficulty, as my noble and learned friend has observed, arises from the multiplicity and variety of the legal proceedings. I cannot pretend to conjecture what the expense has been, but I suppose it has cost as many thousands of pounds as, in a proper course of procedure, it would have required the expenditure of hundreds.

It is necessary always to bear in mind, that, in the former appeal before your Lordships, there was but one question which arose upon the share of William Macdougal. The question was, to what period the clause of survivorship should be referred. Your Lordships held, that it was to be referred to the period of distribution, that being the death of the widow, the liferentrix. The effect of the codicil was not at that time called in question, the codicil relating almost exclusively to the share bequeathed to the grandnieces; and the question then arose (as I have already observed,) on the share of the grandnephew. The true effect of this codicil I take to be this, that the dispositions made by the will, relating to the shares of the grandnieces, are revoked; and there is a substitution of a new set of dispositions in lieu of those contained in the will. There is also a survivorship clause; but it is quite clear, that the construction of that clause must be the same as the construction of the original clause, namely, that it must be referred to the period of distribution.

Now, what is the effect of this? My noble and learned friend has pointed out, that if, instead of the general, you put a specification of the only fund *in medio*, namely, the sixth share given to Mrs. Cuthbertson, the language becomes perfectly clear, and its construction would hardly admit of any reasonable doubt. It is given in the first place to the nieces and their respective husbands. What is there to qualify the right of the husband of Mrs. Cuthbertson to take under and by virtue of these words? There is nothing, and, accordingly, I entirely concur in the conclusion that Mr. Cuthbertson is entitled to the benefit of a liferent in that share.

I was particularly pleased with observing what my noble and learned friend has deemed it right on this part of the case to propose to your Lordships, that the counter appeal against the claim of Mr. Cuthbertson should be dismissed with costs. I am very glad to see that rule acted upon, for in a great estate like this, when it is brought into Court for distribution, encouragement is given to this protracted litigation by the facility with which on many occasions costs are permitted to be taken out of the estate.

I entirely concur with my noble and learned friend, that when you come to consider the operation of the survivorship clause, which comes into play on the death of Mr. Cuthbertson, you find, that the persons who are to take, namely, "the survivors of them and my grandnephews," will be represented by the class of Mrs. Thompson, Mrs. Richardson, and Colonel Macdougal. They take accordingly equal portions of the 6th share, and they take in liferent. Then comes the only question, namely, to what portions of the property do these words "and their issue equally in fee" relate? The whole scheme of the will, taking it from the beginning to the end, plainly shews, that the meaning of these words is, that the issue take the share of the parent. The issue intended, therefore, is the issue of each one of the persons taking in liferent. Then what is the conclusion which that construction leads to, with regard to the claim of Mr. Lawford Young? He has no real claim whatever; and therefore I entirely concur with my noble and learned friend, that his appeal should be dismissed with costs. The title of Colonel Macdougal is to take in liferent, and the title of Mrs. Richardson and of Mrs. Thomson is to take in liferent. But as it is impossible to tell whether the persons will or will not have issue, it is not right or proper now to go further in the way of declaration. One would almost hope, that the exposition

now given by your Lordships of almost every part of this will will be attended with the consequence of preventing any further appeal to your Lordships' House.

LORD COLONSAY.—My Lords, this question relates to a sixth part of the residue of the estate of Mr. Donaldson, and to certain claims which have been made of liferent and fee in regard to that sixth part. Mr. Donaldson made a settlement whereby he ordered that residue was to be liferented by his widow. To the parties who were to take these six portions there was a gift in fee; but Mr. Donaldson afterwards made a codicil, and by that codicil he made a material alteration. In the first place, he revoked the gift in fee which had been given to his three grandnieces. Then, in place of that gift, he made a different gift. That different gift was a gift in liferent to those nieces and in fee to their children. The question we have to deal with has reference to the sixth share that was appointed to be so liferented by one of the grandnieces, and then to go in fee to her issue.

But the liferent was granted not only to the grandnieces, but to the grandnieces and their respective husbands. Now we have to look to the terms of that gift to see, in the first place, what was the interest given to Mr. Cuthbertson, the husband of the grandniece, his wife having predeceased the liferentrix, of the whole estate.

I think we have in this case three questions raised. One is, whether the surviving husband, Mr. Cuthbertson, took a liferent from the period of the death of the widow until 1864, when he died? *2d.* Had any other person during that period a right to liferent in that estate? and, in the *3d* place, what becomes of the fee?

Now the terms of the gift with reference to Mr. Cuthbertson seem to me to be perfectly clear. It is a new disposition, and the author of the deed says, that he revokes and alters the settlement previously made, in so far only as relates to the fee which he had given to his grandnieces, and not with reference to the fee which he had given to his grandnephews. He says it is his will and intention to restrict the provisions and bequests in favour of such of them as shall decease without issue to a liferent. And he appoints trustees and executors "to pay the share or shares bequeathed to my grandnieces in or by the foresaid deed of settlement to them and their respective husbands in liferent, their, her, or his liferent use allenarly." Now, I cannot doubt, that that was the gift of a liferent to Mrs. Cuthbertson and her husband, or the survivor. I think that is perfectly clear, and whichever of them survived at the widow's death was entitled to that liferent.

That appears to me to be remarkably clear, and therefore I concur in that part of the judgment which has been proposed to sustain the claim of Mr. Cuthbertson to a liferent. That being so, I think it is clear, that during his life at least no other person had a life interest in that fund.

The next question is, After his death, what was to become of the life interest, or was there to be any life interest?

The codicil, down to the words "whom failing," is simply a revocation of the gift which had been given in fee for his grandnieces, and a substitution of a liferent to them and to their husbands, and the fee to their issue. That I think is plain, but then, after "whom failing," come the words which have raised the great difficulty in this case, "whom failing, to the survivors of them and my grandnephews also named in the foregoing settlement or codicils, equally in liferent, and their issue also equally in fee." By the first part of the codicil he had given both liferent and fee. By the second part, after the words "whom failing," he also deals both with liferent and fee. What does he mean by "whom failing?" He means the failure of the grandnieces without issue. But when? That seems to be the first question. It is contended on the part of one of these parties, who are cross appellants, that it alludes only to the case of a failure of a grandniece before the death of the liferentrix. Another party contends, that it cannot apply to that, and that it can apply only to the case of the failure of one of the grandnieces after the death of the liferentrix. It appears to me, that it covers the case where there is a liferent after the death of the widow, whether that liferent be in the grandniece herself, or in her husband who survives, and that the words following the words "whom failing" are intended to deal with the liferent and the fee, as the previous clause had already dealt with the liferent and the fee, and they provide who are to take the fee after that failure has taken place. If that be so, it follows, that the surviving grandnieces and grandnephews are to have a liferent, and their issue are to have the fee. With respect to the words "to the survivors of them and my grandnephews," it appears to me, that the words mean "to the survivors of them, my grandnieces, and my grandnephews"—not that it is to be given to all the grándnephews who are mentioned in the deed, but only to those grandnephews who are the survivors in the sense of the deed. That would exclude Mr. Lawford Young, and that seems to me to exhaust the case, because as a liferent is to go to his grandnieces, so Mrs. Thomson and Mrs. Richardson must be liferenters of two thirds. It should be stated, that nothing has been decided here as to the fee. That is a matter that stood over. Perhaps it ought now to be made clear by a declaration, that that has not been disposed of, because the Court of Session, as I read the interlocutor, has excluded the issue of Mrs. Richardson and Mrs. Thomson from any participation in the fee if any such issue should exist. Words might be introduced into the present judgment for the purpose of making that clear.

Sir Roundell Palmer.—Before the judgment of the House is given, perhaps your Lordships will permit me to ask your attention to a point which has not been noticed by your Lordships, but which was dealt with by the judgment of the Court of Session. It is this: Your Lordships have decided that a child named Dougall Braddock Macdougal, the son of Colonel Macdougal, who was born after the death of the tenant for life, but before the cessation of the life interest of the father, is excluded from participation. And your Lordships may also recollect, that with regard to one third of the fund, it has, by reason of the death of Colonel Macdougal, now become distributable. I presume your Lordships will declare, in accordance with the opinions which have been pronounced, that that child will participate, and, if your Lordships think fit, it would no doubt tend to save expense of litigation if your Lordships would declare, that that one third is now distributable. With regard to costs, your Lordships would wish to be informed, that the parties have signed an agreement, all of them consenting, if your Lordships will so order it, that the expenses incurred by them respectively in the process in the Court of Session and in the House of Lords shall come out of the fund.

LORD WESTBURY.—Then let them enforce that agreement, of which we know nothing.

Sir Roundell Palmer.—Your Lordships acted upon it before in the former appeal. Your Lordships will find that you acted upon a similar consent.

LORD WESTBURY.—I am sorry we did. It seems to have been the parent of a great deal more contention.

Sir Roundell Palmer.—The parties who would get the costs have *sui juris* consented to this arrangement.

LORD WESTBURY.—If they have made that agreement, let them get the benefit of it out of doors. We know nothing of that agreement, nor can it enter into our judicial consideration.

LORD CHANCELLOR.—With regard to the share of the child of Colonel Macdougal, it had not escaped my attention, that that question was referred to in some of the proceedings; but I think your Lordships understood at the bar, that, supposing John Lawford Young's claim is not entertained, the Macdougal family are content to arrange among themselves the question of the inclusion or exclusion of that child. Certainly the point was not argued at the bar.

Sir Roundell Palmer.—They hardly could arrange it among themselves, because in truth some of them are infants, and are not separately represented. I appear for all of them, and am quite content to receive your Lordships' judgment without argument upon the point.

LORD WESTBURY.—Has it been ascertained with certainty, that that is the only child?

Sir Roundell Palmer.—Yes, my Lord, the only child, and born before the death of the father.

LORD CHANCELLOR.—In the first appeal the question is, to declare, that on the death of Allan Cuthbertson, two thirds of the fund *in medio* fell to be liferented by Mrs. Richardson and Mrs. Thomson in equal shares, and that the *corpus* of such two shares, and that the *corpus* of such two thirds, ought to be retained in trust for their respective issue if any. Also to declare, that Colonel Macdougal was entitled to the remaining one third in liferent, and that on his death such one third fell to be divided among all his children equally; and to reverse so much of the interlocutors appealed against in this appeal as is inconsistent with this declaration, and remit to the Court of Session.

In the three cross appeals, declare, that in the events which have happened, John Lawford Young did not become entitled to any part of the fund *in medio*, being one sixth of the residuary trust estate of John Donaldson, liferented by Allan Cuthbertson; reverse so much of the interlocutors appealed against in the first and second cross appeals, as is inconsistent with the declaration, and dismiss, with costs, the appeal of John Lawford Young.

In the two cross appeals of Macdougal's trustees, and Macdougal's children, affirm the interlocutor of 10th January 1864, in so far as it finds Allan Cuthbertson entitled to a liferent use and enjoyment of the fund *in medio*; and dismiss the two cross appeals of Macdougal's trustees and Macdougal's children, in so far as they complain of this finding of this interlocutor in favour of Allan Cuthbertson, with costs.

Interlocutors partly reversed.

Appellant's and Respondent's (*Mrs. Richardson's*) *Solicitors*, Gibson-Craig, Dalziel, and Brodies, W.S., Grahame and Wardlaw, Westminster.—*Appellants'* (*Macdougal's Trustees'*) *Solicitors*, Adam, Kirk, and Robertson, W.S., Loch and Maclaurin, Westminster.—(*J. L. Young's*) *Solicitors*, Thomson, Dickson, and Shaw, W.S., William Robertson, Westminster.