provision, and that she had instituted proceedings for the purpose of reducing the original deed; and it is supposed that the old man, being apprehensive that, if the original deed was set aside in this action by the widow, he would be deprived of all means of subsistence, and therefore that he was willing to make this species of compromise. But, my Lords, that was a gross delusion. If the widow had a right to set aside the deed, she had a right to set it aside only to the extent to which she was herself interested, and the rest of the deed must remain; and, as one of the learned Judges stated in the Court below, that forms an additional reason for vacating this transaction, as having been founded in delusion on the part of this old man. I think your Lordships will be of opinion that the Court below were fully justified in the opinion they formed of this transaction, that there is sufficient in the case, as it now appears, to justify the Court in setting aside this deed, under the circumstances under which it was obtained. March 28. 1828.

My Lords,—It may be satisfactory to your Lordships to know, that when this case was opened by the appellant's counsel, a noble and learned Lord, who held the office to which I have the honour to succeed, was present, and paid great attention to every part of it. I have had some conversation with him upon the subject, and he has authorized me to state, that he perfectly concurs in the view I have stated to your Lordships. Under these circumstances, I conceive your Lordships will be of opinion that this judgment ought to be affirmed.

Appellant's Authorities.—Smith, Dec. 23. 1697, (4955.); Gordon, Feb. 7. 1729, (4956.); Maitland, Feb. 13. 1729, (4956. and Craigie and Stewart's Appeal Cases, April 20. 1732, p. 73.); Swintoun, Dec. 10. 1679, (4962.); Mackie, Nov. 24. 1752, (4963.); Scott, Nov. 17. 1789, (4964.); Ersk. Inst. 4. 1. 27.

Respondents' Authorities.—Ersk. 4. 1. 27.; Gordon, April 28. 1730, (Craigie and Stewart, p. 47.); Murray, Jan. 21. 1826, (4. Shaw and Dunlop, 374.); M'Neil, May 26. 1826, (4. Shaw and Dunlop, 620. and 2. Shaw's Appeal Cases, No. 29.)

J. HYNDMAN—MONCREIFF, WEBSTER and THOMSON,—Solicitors.

ANNA MARIA GRAHAM or TEMPLER, and Lady MONTGOMERIE, Appellants.—*Adam—Wilson.* No. 4.

The Reverend GEORGE HENRY TEMPLER, and Others, Respondents.—*Sugden—Keay.*

Trust—Clause—Succession.—A party having conveyed his estate to trustees, for behoof of a contingent heir, whom failing, other substitutes, with a general assignation of rents for behoof of the contingent heir;—Held, (affirming the judgment of the Court of Session), That the heirs-at-law had no claim to the rents arising between the death of the party and the succession of the heir.

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2D DIVISION.
Lord M'Kenzie.

THOMAS GRAHAM went to India in 1769, where, in 1783, he married Miss Paul, and settled L.10,000 upon himself and her, and the longest liver, in liferent, and the fee among the children of the marriage. In 1802 he acquired the estate of Kinross, in Scotland, under a transaction with the natural son of his brother George, the former proprietor.* He had previously bought the estate of Burleigh in the same county. Of his marriage he had two daughters, Anna Maria, who married the Rev. Henry George Templer, vicar of Shapwick, in Somersetshire, (on which occasion she received from her father L.5000), and Helen, who at a future period married Sir James Montgomerie of Stanhope. In 1808, Mr Graham, immediately before his departure from India, executed a trust-deed in these words:—'Know all men by these presents, that I, Thomas 'Graham, a native of Kinross, in that part of the United King-'dom of Great Britain called Scotland, Esq. now acting Presi-'dent of the Board of Revenue at Calcutta, in Bengal, being 'about to embark on shipboard for Scotland, and now without 'the aid of persons learned in the laws of Scotland to assist me 'in making a disposition of my lands and other property in the 'manner I am now most desirous, and different from what I 'have heretofore done, according to the strict rules of the laws of 'Scotland, do hereby, for certain causes, and for the better dis-'posing of all the property, landed, or real and heritable, where-'of I am seized, possessed of, and entitled to in Scotland, Eng-'land, India, or elsewhere, and also of all and every my perso-'nal, moveable, and chattel interests, estate, and effects whatso-'ever, in the manner herein after mentioned, and in consideration 'of the confidence which I repose in the persons herein after 'named, whom I appoint as trustees for the ends, uses, and pur-'poses herein after-mentioned, give, grant, dispone, assign and 'make over, to and in favour of myself during my lifetime, 'and at my death to and in favour of my wife, Anne Graham, 'the Rev. George Henry Templer, vicar of Shapwick,' (and certain other trustees), 'heritably, according to the respective 'qualities of my said estates, real, or landed and personal, upon, 'and to and for the uses, trusts, intents and purposes following: '—All messuages, lands,' &c. and his whole 'personal estate 'and effects, and chattels, of what nature or kind soever,' belonging to him at the time of his death; 'and without prejudice

* See 1. Shaw's Appeal Cases, p. 365.

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'to the said generality of these presents, all and sundry my lands 'and estates herein after-mentioned; that is to say, All and Whole 'the lands and barony of Burleigh, &c. all lying in the barony 'of Burleigh and sheriffdom of Kinross; and sicklike, All and 'Whole the lands and barony of Kinross and Lochleven, &c. 'together with all right, title,' &c.; 'declaring always, and it is 'hereby expressly provided and declared, that my aforesaid es-'tates, real or landed, and heritable and personal, are conveyed 'by these presents to my aforesaid trustees in manner aforesaid, 'upon the trusts, and to and for the uses, intents, and purposes 'following:'—First, The payment of such an annuity to his wife, as, with the produce of the L.10,000 settled on her by their marriage-contract, should yield a free annuity of L.2000. Second, A sum of L.5000 to his daughter Helen, chargeable on his real estate alone, unless deficient. And, third, That subject to these burdens the trustees should 'denude themselves of, and convey 'all and every my aforesaid real or landed and heritable estates 'hereby conveyed, but charged and chargeable with the annuity 'to my said wife Anne as aforesaid, and the said sum of L.5000 'to my daughter Helen, in favour of, and unto and to the use of 'the first son of my body lawfully to be begotten, and of the 'heirs-male of the body of such first son lawfully issuing;' (whom failing, then his other sons in their order, and their heirs-male respectively); 'and for default of such issue, then unto the first 'son of either of my said daughters, lawfully begotten, who shall 'first attain the age of twenty-one years, his heirs and assigns, 'for ever. But in case my said daughters shall both of them 'die, and have no such son of either of them my said daugh-'ters lawfully begotten, who shall attain his age of twenty-one 'years, then in trust to denude themselves of, and convey all and 'singular the aforesaid real estate and lands, barony and appur-'tenances, of Kinross and Lochleven, formerly the estate and 'property of my deceased brother George Graham, to my 'nephew, George Graham, Esq. and his heirs and assigns for 'ever, and to denude themselves of, and convey all and singular 'the aforesaid real estate and lands of Burleigh, purchased by 'me, unto my nephew Robert Graham, a senior merchant in the 'service of the United Company of Merchants of England 'trading to the East Indies, his heirs and assigns, for ever; and 'also in trust, to sell all the rest, residue, and remainder of all 'my aforesaid real or landed estate whatsoever, or wheresoever 'lying and being, and to pay, assign and transfer the proceeds 'and produce of the said sales of the said rest and residue of my

April 1. 1828. 'said real or landed estates, together with all the rest and residue 'of my personal estate and effects, equally, share and share alike, 'as tenants in common and not as joint tenants, between my 'said wife, Anne Graham, and my said daughters, Anna 'Maria Templer and Helen Graham, for their own sole and 'separate use and benefit, notwithstanding their or either of their 'present or future coverture, without being subject to the debts, 'controul, forfeiture, disposal or engagements of their or either 'of their husbands, present or future, and subject to the appoint-'ment of them, the said Anne Grahame, Anna Maria Templer 'and Helen Graham, from time to time, notwithstanding their 'or either of their covertures, of their said respective shares, by 'any writing or writings by them respectively signed, in the pre-'sence of one or more credible and attesting witnesses.' Then followed various other provisions immaterial to the present question; procuratory of resignation; revocation of previous dispositions; reservation of power to revoke; clause of registration and precept of sasine; and particularly the following clause:—'And 'I do hereby assign and dispone to myself, and to my said trus-'tees, for the use and behoof of my heirs and substitutes before-'mentioned, in the order aforesaid, all and sundry charters, pro-'curatories of resignation, precepts and instruments of sasine, 'and other writs and securities of the lands and others before 'conveyed; and also the whole rents, feu-duties, maills, profits 'and casualties thereto belonging, and tacks, if any be subsisting 'at the time, for now and in all time coming.'

Mr Graham came to Great Britain, and resided partly in London, (where he had bought a house), and partly on his estates in Scotland, which he had increased by the purchase of Bowhouse and Balgeddie. Thereafter his daughter Helen married Sir James Montgomerie, on which occasion he secured to her the L.5000 provided by the above deed. He died in London on 28th July 1819, leaving no other issue alive than his two daughters, Mrs Templer and Lady Montgomerie. The trustees accepted, and took possession of the estates. In 1820 the widow died. A question then arose as to the right to the rents which had become due since the death of Mr Graham, and to become due till the period when the trustees might be obliged to denude. Mrs Templer had only a daughter, and at this time Lady Montgomerie had no son. To try the question, they raised an action against the trustees, stating, 'That by the failure of issue-'male of the body of the said Thomas Graham, and as there are 'yet no male issue of the bodies of the pursuers, the said Anna

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'Maria Templer and Dame Helen Montgomerie, who, under 'the destination in the said trust-deed, are entitled, or have a 'right to take up the succession to the said lands and estates, or 'to intromit with the rents, feu-duties, and casualties thereof, 'and that nothing is given by the trust-deed to the heirs called 'to the succession but the lands, when their right shall open to 'the same, the pursuers, the said Anna Maria Templer and 'Dame Helen Montgomerie, who are not only the heirs-por-'tioners at law of the said Thomas Graham their father, but 'entitled by said trust-deed and settlement to his whole rents, 'feu-duties, and casualties of the lands and estates libelled, and 'the issues and profits of all other real estates of which he may 'have died possessed, and that from and after the period of the 'said Thomas Graham's death, until an heir shall appear en-'titled to take up the succession thereto, under the destination 'contained in the trust-disposition before-libelled. That al-'though it was evidently the intention of the said Thomas 'Graham that the pursuers, his heirs-at law, should enjoy the 'rents of all his real estates in Scotland and elsewhere, until an 'heir should appear under his trust-settlement entitled to take 'up the succession, he having made no special appropriation 'thereof during such interval, and carried that intention into 'execution by the trust-deed before-libelled, drawn up at his 'sight, and under his special direction, by an English con-'veyancer, and executed in India, where the law of England 'prevails, and by which law the pursuers have an undoubted 'right to the whole rents of their father's estates during the 'interval aforesaid, as unappropriated funds. And although 'the pursuers, in consequence of said right, have divers and 'sundry times desired and requested the said trustees to 'give up and surrender the said rents to the pursuers, and to 'account to them for their intromissions therewith since the 'death of the said Thomas Graham, they nevertheless refuse, at 'least postpone and delay, so to do, unless compelled.' They therefore concluded, that the pursuers should be declared to have right to the rents, &c. of the baronies of Burleigh, Kinross, and all the other heritages, from the death of their father, until an heir should appear entitled to take up the succession to the estates, to be applied to their own proper use and benefit, and all the arrears thereof, subject to the payment of such burdens as might affect the said lands during the pursuers' possession of the rents; and they also concluded for the bygone and future rents, &c.

The trustees stated in defence, that, by the law of Scotland,

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the rents of lands, and increase from other property, are considered as accessories to the respective properties which yield them; and therefore the rents and profits concluded for must all be considered as falling under the trust for behoof of the heirs called by the trust-deed, in the same way as the estates themselves, more especially as there was an express clause assigning to them the rents for behoof of the heir.

The Lord Ordinary decerned in terms of the conclusions of the libel, and communicated this opinion in a note:—'The Lord 'Ordinary does not conceive the case to depend on English law: 'but he does not see sufficient ground in Scotch law for hold-'ing that the rents must be conveyed to the son of the testator's 'daughters first attaining majority, &c. along with the land. 'The Lord Ordinary is not able to consider past rents as acces-'sories of lands. They are the price of the use of the land in 'past years, and no authority is referred to, establishing, that 'direction to convey land, at a time subsequent, implies that 'prior rents as accessories are to be conveyed with it. Now, 'in this case, the direction is such as necessarily to imply, that 'the conveyance of the land shall not be made till after an event 'shall have happened, *i. e.* after a time shall have passed. And 'there is no provision that the daughter's son, &c. shall have 'the intermediate rents, or that in the intermediate time it shall 'be managed for his profit, but merely that the land shall be 'held by the trustees for the purposes of the trust; and as one 'purpose, that, after a certain event, the land (not the rents) shall 'be conveyed to the daughter's son first attaining majority, &c. 'The Lord Ordinary has great doubts, whether, if the truster 'had been reminded that such rents might accumulate, and asked 'whether he desired that the daughter's son, &c. should have 'conveyed over to him, along with the land, such accumulated 'fund, he would not have said, "No. If money is to be 'gathered, I shall dispose of that otherwise." At any rate, he 'has not directed this, nor does it appear to be necessarily im-'plied in what he has directed.'

In the meanwhile Lady Montgomerie had two sons, and one of the substitutes having become bankrupt, and the trustees having reclaimed, the Court, on advising petition and answers, appointed intimation of the process to be made to such of the defenders of full age who had not yet appeared, and to the guardians of such of them as were under age, and also to the assignees under the commission of bankruptcy against George Edward Graham, Esq.; and thereafter, the order having been complied with, and a curator ad litem appointed for Lady

Montgomerie's two sons, the Court, on the 14th February 1826, on considering memorials, altered the interlocutors complained of, and assoilzied the defenders; but found, that the expenses of both parties in trying the question must be paid out of the trust-funds.* April 1. 1828.

† *Lord Glenlee.*—This case is certainly not in the same situation as when it was before us on the petition and answers. There is a great deal of new matter stated for the defenders. One thing which was not formerly stated to us, at least not so strongly, and which is of great importance, is not only the terms of the precept of sasine, but the terms of the assignation of the rents future and to come. When the question was before the Lord Ordinary, and formerly before us, it was understood to stand entirely in the manner stated in the cases from the English law; that in the trust-deed there were no directions as to the intervening rents; that the trustees claimed these as accessories of the estates themselves, for the use of those entitled to those estates, and that they would thus go to a person whose right only emerged at a distance of time; that there was no disposition of rents between the death of the testator and the coming of age of the son of the daughters, nor any due direction as to whom the trustees held the estate for during that time; and that the only purpose expressed by the testator was, that on that event the estate should go to the son when he comes of age; that the rents, no doubt, are accessories to the estate, but that it is absurd to say, that a person, whose right only emerges to-day, carries all the bygone rents; and that you are not to superinduce an intention to the will of the testator, which he might have had if he had thought of the matter. But it is quite a different question when you find the testator using words indicating this intention, that these rents should be held for a particular person. There is an express declaration that the rights to the estates are to be held 'for the 'use and behoof of my heirs and substitutes before-mentioned 'in the order aforesaid; and also, the whole rents, feu-duties, 'maills, casualties, and profits thereto belonging, and tacks, if 'any be subsisting at the time, for now, and in all time coming.' I cannot hold that this is not a declaration that the rents of the estate are to be held by the trustees for behoof of the persons who, in the order mentioned in the deed, are to take the estate. As to the English law, I cannot pretend to say that I have any

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* 4. Shaw and Dunlop, No. 303.

† These are the opinions laid before the House of Lords.

April 1. 1828. knowledge of the matter; but from the quotations made in the papers, I rather think the English seem to have a notion that accessories cannot exist till there is a person entitled to uplift them; but according to our law, we may give effect to a trust for behoof of a certain set of persons under a general description, although the precise individual may not be ascertained at the time, and the trustees may hold for him till he cast up; and therefore it appears to me, that the testator having used this expression, that these rents should be held for behoof, no doubt of an indefinite person, as to whose existence there was an uncertainty, but still for behoof of a certain set of persons, such a trust is competent by the law of Scotland, and that these rents must remain with the trustees in the mean time, and be afterwards made over to the person who shall be entitled to the estate.

Lord Pitmilly.—If we had been forced to decide this case as it stood formerly before us, I will acknowledge that I would have been disposed to concur in the interlocutor pronounced by the Lord Ordinary; but I am glad that it has been more fully investigated; and upon a more full consideration of the case, and of the new matter that has been brought before us, I have come to form the same opinion with that just delivered. The pursuers rest much on the idea, that these rents were not appropriated by the testator. It is not denied, and indeed could not be denied, that they were conveyed. They were so by the very nature of the conveyance; but there is, besides, an express assignation of them. But it is said that they were not appropriated; and therefore fall to the pursuers, either as nearest of kin, or as residuary legatees. The effect of their being conveyed would go a certain length in deciding the question. But we cannot lay out of view, that the rents were conveyed in a precise manner, which was not before us formerly, at least not so fully. This assignation is, I think, sufficient to decide the question. The rents are conveyed for the 'use and behoof of my heirs and 'substitutes before-mentioned, in the order aforesaid.' Where that is the nature of the conveyance, the case is completely distinguished from the case of Souter, mentioned in the papers. There the whole subjects had been conveyed to the trustees to pay debts and funeral expenses, and the residue to an only son who had gone abroad; but in the event of the son not being heard of, there were certain legacies left. These were paid, and a surplus remained which the trustees claimed for themselves. That claim, however, was disregarded, and the next of kin was preferred to the surplus unappropriated. But this is a totally

different case, for here the rents are conveyed for the use of the substitutes. Does not this take away the claim as heirs-at-law, which is the strongest ground of the pursuers' claim, because these rents are conveyed for the use of the substitutes in their order? The claim of the pursuers must rest therefore on the doctrine of their being the residuary legatees, and that these rents fall under the clause of the rest, residue, and remainder of the testator's estate, heritable and personal, provided to them. But when we look at the terms of the conveyance of the estate, the only meaning we can put on it is just a conveyance of the estate with the future rents, after they have paid the burden of the provision to the widow, and the L.5000 to Lady Montgomerie. It is admitted, that if Mr Graham had left a son, the subject conveyed would have included these very rents. Now, whatever was the subject conveyed to the son, the same was conveyed to the substitutes. For there is no repetition of the conveyance; it is just conveyed 'in default' of the son. There is no new conveyance, and as to the son, it was just a conveyance of the estate with these rents; and, besides, we cannot hold, that there is one case in which they are to be held as appropriated, and another in which they are to be held as not appropriated. They were in all cases in the same situation. No doubt, the right to these rents was contingent; but it is plain, that the amount of the estate is not to be affected by the contingency of who is to get it. The amount is one thing, and whether it should belong to the son of the one or the other is another thing; and, therefore, upon the whole, and particularly from the express terms of the trust-deed, I cannot adhere to the Lord Ordinary's interlocutor.

Lord Alloway.—None of your Lordships can regret the course we took when the case was last before us: At that time it struck the Court that the parties were nearly the same. The trustees, Sir James Montgomerie and Mr Templer, were pursuers so far as their wives were concerned, and as trustees they had little or no interest in the case; and therefore you properly ordered parties to be called who had an adverse interest. These parties have not appeared; but now the question is fairly debated, and I very much mistake if it will not be followed by an unanimous judgment, different from what would have been pronounced when it was last before us. At that time I considered it a case of such importance, that I stated the doubts which occurred to me for the use of the Bar. I am now satisfied on all the points, and that the case is now ready for decision.

The case for the pursuers is very well argued; but it is admit-

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ted, at least as far as not dwelling very much on the point is an admission, that this question must be regulated by the law of Scotland. I think we ought not to admit the English authorities at all. It is a Scotch heritable estate, and if there be any contrast between the law of England and Scotland, it is in the rights of landed estates. To a Scotch lawyer the English law on this subject is totally unintelligible. But whether the English authorities quoted are right or wrong, how can they affect this question, where a Scotch estate has been effectually vested? And I entertain no doubt that it has been vested, not only for the son of the testator, if there had been a son, but also for the conditional heirs, who are to be the first son of the daughters who arrives at majority, and failing that, the two nephews, when the estates divide. The pursuers have fairly met this view of the question. But they argue, that they have the right to these rents because they are the heirs of line; and if the testator has omitted to appropriate any thing, they are entitled to it. The answer to this I shall state immediately. But, in the second place, they maintain, that if they can take nothing as heirs of line, they will take as residuary legatees. But this last plea is altogether out of the question. For, suppose any thing had been omitted, these lands were not to go to the heir alioqui successurus. The estate of Kinross was settled by Thomas Graham's brother George, on the heir-male of Thomas, and failing that on his nephews. Now, suppose Thomas had not conveyed all the right which was in the person of George, (which he was entitled to do), there would be no doubt that the heir alioqui successurus was the heir under the old investiture. It also appears that Thomas, when he succeeded, and had a power of altering the destination, seems to have adopted very nearly the same idea. He prefers the heir-male to the heirs-female; and therefore he settles the estates on the heirs-male of his own body, and particularly, you will observe, on their heirs-male. If he had left a son, it is impossible his daughters could have taken. They were not the heirs. And then in the second destination he calls the heirs-male of the daughters; the first heir-male who should attain the age of twenty-one,—thus following a male succession in preference to a female. The third destination is, that then the estates should go to his nephews. There is no doubt that the estate of Burleigh stands in a different situation, not having been settled before he acquired it, and therefore, if he had omitted any thing as to it, they would be entitled to take it up. But according to my view, every thing he held was positively settled

by the trust-deed, and the daughters absolutely excluded by that deed. But when the succession opened by failure of the grandsons, it was only then the ladies could have any succession at all. Upon that ground it is utterly impossible that they can have claim to any part of the residue till that event. I agree with what has been stated by Lord Glenlee and Lord Pitmilly,—but I go a great deal farther; for, according to my view of the case, though I think with them that the assignation of the rents for behoof of the heirs-substitute is sufficient to put an end to the question, I maintain, as a substantive proposition, that when an estate is conveyed to trustees for behoof of another, the conveyance carries the whole rents, casualties, wood, and quarries, in the same manner as the estate itself. My opinion would have been, that the rents were accessories. I take this simple view of it:—Suppose the institute had succeeded, is it possible to doubt that the whole rents would have belonged to him? No doubt, a person settling an estate by a trust may give away the rents, and may give such directions to apply them as he thinks proper; and if the testator had given any directions here, we must have given effect to them. But the instructions here are inconsistent with the idea of the plea maintained by the pursuers; as heirs-male are alone called, and they can have no claim until the failure of the nephews. I would therefore have held the case as clear, even if the clause had not been so express as to the assignation of the rents. The pursuers have quoted all the cases which bear on the question. But is it possible to apply the case of Souter to this question? In that case, a woman having L. 550, disposed of L. 400 in the event of her son not appearing within a year after her death. The trustees, on the lapse of that time, without the son being heard of, disposed of the L. 400, and the only question was, Whether the surplus of the L. 150 belonged to the trustees themselves, or to the heir-at-law? There was no ground to shew the testator's inclination to give it to the trustees, and none of the legatees could claim it, and therefore the next of kin took it. But here the testator has specially excluded his daughters till the failure of his grandsons. It is impossible, therefore, to apply that case. The other cases quoted by the pursuers, I think, illustrate the argument on the other side; such cases as those with regard to cotton mills, and as to what is to be held as accessories to them. No doubt, with regard to a thrashing mill, the machinery is a moveable subject, except what is inedificatum. The question as to a cotton mill is to be decided on the same principle. In one of the cases, a person had an heritable security over a cotton mill. The question,

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April 1. 1828. therefore, was, What was the nature of a cotton mill? It must be a fair working cotton mill; and when a security is given, it must necessarily cover every thing to make it effectual. These questions depend on the principle of heritable and moveable. But can these questions enter into a case like the present? They might enter in this way:—Suppose these trustees had a power of granting leases, and they had granted a lease of a cotton mill on the one estate, and a common mill on the other, the heirs-substitutes succeeding would have taken as accessories those parts of the machinery of the mills, which, in a question with a tenant, are held as belonging to the landlord. But these questions do not enter into discussion here. I therefore concur in the opinions delivered.

Lord Justice-Clerk.—As I agree entirely with the opinions that have been delivered, I do not intend to enter into the question at any length, but I must express my satisfaction that we took the course we did; for though this is an amicable suit, we adopted a course to enable us to have it argued fully. The case being now fairly before us, the question is, Whether we can authorize the trustees to pay over these rents to the pursuers. On the fullest consideration of the case, I am entirely of opinion that we cannot adhere to the interlocutor of the Lord Ordinary. It certainly is true, that this clause as to the assignation to the rents, on which your Lordships have founded so much, was not so strongly brought before us formerly. It is impossible, upon seeing that clause, to doubt that the question here raised by the pursuers does not apply to this case, that the testator must be held as having disposed of part of his estate, and not of the rest. If that had been the case, you would have looked to the cases quoted, and especially that of Souter. But is that the case here? We have an express declaration on the face of the deed, that the trustees are to hold these estates for behoof of the substitute heirs; and there is an assignation of the rents, not for behoof of the heirs of line, or the residuary legatees, but for the heirs mentioned in the deed. It is quite impossible to doubt that these trustees must do their duty. They must hold every advantage derived from the estate, as much as the estate itself, for the behoof of the first son of the daughters who shall attain the age of 21; and every thing for him as the favoured heir of the testator, the same as if it had been a son of the testator who succeeded. The same question, to be sure, could not have arisen with him, as the trustees must have denuded at once; but the same estate is conveyed to the substitute heirs as to the son. We cannot cut and carve on this deed, though these ladies stand as near to

the testator, and though it is the son of one of them who is to succeed. There is here no question of aliment. The cases quoted would deserve consideration, especially the case of Somerville. But the demand here made is, that the trustees shall be authorized to pay over to the pursuers the whole rents. We cannot adhere to the interlocutor of the Lord Ordinary; and I am convinced that he must have pronounced the interlocutor from the case being presented to him in the same view in which it was presented to us formerly. This is one of the cases, however, in which I think that we should find that the expenses of the question should be paid out of the trust-funds. April 1. 1828.

Lord Alloway.—We certainly ought to find that the expenses should be paid out of the trust-funds.

The pursuers appealed.

Appellants.—The lands were conveyed to the trustees, to be held for behoof of the son of the one or other of the appellants who should first attain majority, whom failing, the other substitutes. It is clear, therefore, that they do not hold the lands for any particular person. If the sons die before attaining majority, then the estates go to the substitutes; and, on the other hand, if one or other of them reach majority, then, but not till then, the estates will vest in his person. If they had vested in any party immediately, then, no doubt, the rents would as accessories have accrued to him. But that is not the case; and the only other way in which a right to them could be given, was by special conveyance. But there is no special conveyance to any part of the rents, and consequently they must belong to the appellants as the heirs-at-law of their father. It is true that there is a general clause conveying the rents to the trustees; but this is merely the usual one of style, and cannot be considered as indicative of the intention of the maker of the deed. Besides, it is plain, that if all the substitutes fail, the rents must accrue to the appellants as residuary legatees.

*Respondents.**—This case must be treated as a Scotch case, and be governed by the Scotch law. Mr Graham has most unequivocally expressed his will, that the rents and profits of his heritable property should be drawn and held by the trustees for the use and benefit of the heirs and substitutes, to whom ultimately these estates are destined. If Mr Graham had had a son, the

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* The Lord Chancellor did not require the respondents' Counsel to proceed, as he considered the assignation clause to settle the question against the appellants. The argument is taken from the respondents' Case.

April 1. 1828. trustees would have held the rents for him as first called; heirs-male failing, they hold for the next party called, viz. the first son of either daughter attaining majority; then for the nephews; and, lastly, as to the residue, for the daughters. But this appropriation is fatal to the appellants' present plea. Even, however, if this clause had not occurred in the deed, the rest of the deed would, by the ordinary rules of law, and in conformity to the intention of the testator, have belonged to the trustees for the benefit of the heirs and substitutes called by the deed. The maxim, accessorium sequitur principale, regulates this question. Whatever was given to the trustees by the trust-deed, was by the same deed, when the primary purpose of the settlement was accomplished, given to the son of the truster. They could no more have withheld the rents from him, than the solum which produced these rents. But whatever had been given to the son was, on his failure, directed to be given to the daughter's son. There is, therefore, nothing unappropriated that can fall to the appellants as heirs-at-law; and as the rents in question do not enter into the 'residue,' the rents cannot be taken up by the appellants as residuary legatees.

The House of Lords 'ordered and adjudged, that the appeal 'be dismissed, and the interlocutors therein complained of affirm-'ed; and further, that the expenses of both parties in this 'cause be paid out of the trust-funds in dispute.'

Appellants' Authorities.—Hyslop, Jan. 18. 1811, (F. C.); Arkwright, Dec. 3. 1819, (F. C.); Niven, March 6. 1823, (2. Shaw and Dunlop, No. 250.); Souter, Jan. 22. 1801, (No. 2. Ap. Imp. Will); Earl of Stair, May 24. 1826, and June 19. 1827, (ante, Vol. II. Nos. 31. and 54.)

Respondents' Authority.—Gillespie, Dec. 7. 1802; (No. 2. Ap. Acc. Seq. Prin.)

MOORE—SPOTTISWOODE and ROBERTSON,—Solicitors.

No. 5.

JOHN WILSON and Others, Appellants.—*Shadwell—Adam.*

Sir WILLIAM FRANCIS ELIOTT of Stobs and Wells, Respondent.—*Spankie—Brougham.*

Et e contra.

Sale—Entail—Land-tax—Fraud.—Part of an entailed estate, which was greatly more than sufficient, having been sold under the 42. Geo. III. c. 116. for redemption of the land-tax; and no evidence having been taken that it could not have been divided, so that an adequate part only might have been sold; or that the sale of the whole would have been more eligible and advantageous for the estate and heirs-substitutes than the sale of a part only;—Held, in an action at the instance of an heir-substi-