tract was thus complete. Nothing passed as to the colouring matter which should be used, but underneath this contract of course lies the implied general engagement that the article sold should be fit for use, that is for human consumption, being the purpose for which it was sold.

The whisky was taken to the Coast of Africa, and part of it having being supplied to the natives, it was found to produce very unpleasant and alarming, if not injurious effects, on the bodies of those who drank it, and the whisky thereby became unmarketable. It was ascertained that these effects on the body of the consumer, being such as ordinary whisky or whisky coloured with burnt sugar does not produce, were due to the colouring matter that had been used by the defenders. It would seem that whisky had been commonly coloured by burnt sugar, but that the defenders had used logwood or a decoction or extract of logwood for the purpose of producing the colour required, and which material, according to the evidence, does not appear to have been previously used for such purpose.

Under these circumstances the question that arose in fact was, whether there had been a breach of the implied contract, or in other words, whether the whisky which the defenders had coloured with logwood was fit for use and human consumption. It was a fit question for a jury as the law now stands, although I venture humbly to think that if the question had been argued and the witnesses examined before Lord Kinloch sitting alone, a satisfactory conclusion would have been arrived at without any chance of miscarriage in procedure, and with an infinitely less expenditure of time and money. The parties could not agree as to the form of wording the issues, which were accordingly settled by the Inner-House; and the issues as settled, though unnecessarily long and cumbrous, in effect amounted to this, was the whisky supplied by the defenders coloured by means of an innocent material?

The trial lasted five days, and the evidence showed that logwood colouring produced effects on the body of the consumer which, to say the least, were very disagreeable and alarming; it had an astringent affect, it effected the saliva and secretions from the kidneys, converting them into the colour of blood, and changed the colour of the skin down to the fingers and nails. I cannot conceive a more alarming picture to be presented to an Edinburgh or Glasgow jury where toddy is supposed to be in great esteem. The jury found unanimously a verdict for the pursuers, thereby in effect finding that the colouring material was not innocent, and that the whisky was not fit for use.

The contention by the appellants at the trial was that the learned judge ought to have given to the jury an explanation of the meaning of the word "innocent," and to have in effect told them that although it appeared that the whisky was unmarketable, yet that it did not follow that the whisky was not innocent. I think the learned judge was right in declining to do any such thing. The word "innocent" was used in the issues in its ordinary popular sense, and it was for the jury to find upon the evidence whether the colouring matter, or the whisky as coloured by it, was innocent. that is to say, harmless in use; and the jury had nothing to do directly with the question whether the whisky was or was not marketable otherwise than as that might be the result of finding that the colouring matter was not harmless—that is, not an innocent thing.

I therefore entirely approve of the manner in which the case was left to the jury by the learned judge, which is thus stated in the Bill of Exceptions at page 157. "Lord Kinloch directed the jury that the word "innocent," as contained in the issue, was not a legal term nor one on which it was necessary that he should put a legal construction, and that it was for the jury to say upon the evidence whether the thing was innocent or not in the fair and reasonable sense of the word as employed in ordinary language." I think, having regard to the issues and the evidence, that this was a proper mode of leaving the case to the jury, and it was certainly a mode more favourable to the appellants than to the respondents.

I therefore entirely agree with my noble and learned friend upon the woolsack that the appeal should be dismissed with costs so far as it is an appeal from the interlocutor settling the terms of the issues, and that the exceptions should in like manner be over-ruled.

Lord Colonsay—My Lords, the view which I entertain upon this case, both as regards the true meaning and construction of these issues, and as regards the exceptions which have been taken to the charge of the learned judge, have been so fully stated by my noble and learned friends who have preceded me that I do not think it necessary to make any addition to their statements. I think that, as regards the exceptions, the moment it is held that the sixth exception must be disallowed it follows almost of necessity from that itself that the fifth exception cannot be maintained, because in that case the appellants would be required to show what directions should have been given that would be consistent with their contentions in this case. Any directions that could have been given consistent with the views which have been expressed by my noble and learned friends, and in which I entirely concur, must have been directions to the jury not tending in favour of the appellants, but additional directions leading towards the verdict which the jury did find. I therefore concur entirely in the affirmance of the interlocutors complained of.

Interlocutors affirmed, and appeal dismissed with costs.

Agents for Appellants—White-Millar & Robson, S.S.C., and Simson & Wakeford, Westminster.

Agents for Respondents—Henry & Shiress, S.S.C., and W. & H. P. Sharp, Gresham House.

Thursday, March 26.

YOUNG OR RICHARDSON AND OTHERS *v.* ROBERTSON AND OTHERS.

MACDOUGALL'S TRUSTEES *v.* ROBERTSON AND OTHERS.

MACDOUGALL *v.* ROBERTSON AND OTHERS.

YOUNG AND CURATOR *v.* ROBERTSON AND OTHERS.

(4 Macph. 372.)

Trust—Survivor—Liferent — Fee. Held, on a construction of trust-deed and codicils, (1) that C, on the death of his wife, took a life-interest in her share of the residue of the testator's estate; (2) that the son of a predeceasing grandnephew was not entitled to a share of the

part of the estate liferented by C; (3) that on the death of C, two-thirds of the fund liferented by him fell to be liferented by R and T, the fee being retained for their issue, if any, and the remaining one-third went in liferent to M, and in fee thereafter (he having died) to his children.

The question in these appeals related to the construction and effect of certain clauses in the settlement of the late James Donaldson, merchant in Glasgow. Mr Donaldson, who died in 1844, had by his trust-deed directed his trustees, after the death of his wife, to divide the residue of his estate among John Macdougall and William Macdougall, sons of his late niece Catherine Donaldson or Macdougall, and Mrs Thomson, Mrs Richardson, and Mrs Cuthbertson, children of Mrs Elizabeth Donaldson or Young. By his first codicil, the testator appointed his grandnephew Thomas Young to be one of his residuary legatees, who were thus, in all, six in number; it being declared that if any of the residuary legatees should die without issue before their shares vested, the same should accrue to the survivors equally. By his third codicil, the testator somewhat altered this arrangement. This codicil ran thus:—"I, James Donaldson, do (with and under the conditions and provisions after-mentioned) hereby revoke, alter, and qualify" the deed of settlement and two codicils, "in so far only as these writings, or any of them, authorise 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 grand-nieces 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 authorise, will, and appoint my said trustees and executors, and survivor or survivor of them, to pay the share or shares bequeathed to my said grand-nieces 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 grand-nieces equally; whom failing, to the survivors of them 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."

At the date of the death of the testator's widow, in 1857, three of the residuary legatees had died, William Macdougall, Thomas Young, and Mrs Cuthbertson. William Macdougall died without issue, leaving a settlement in favour of Colonel John Macdougall. Thomas Young left one child, John Lawford Young; and Mrs Cuthbertson died without issue, but survived by her husband.

The first question which arose related to the two sixth shares destined to William Macdougall and Thomas Young, and these questions were decided by a judgment of the House of Lords on 14th February 1862, which found (1) that the date of vesting of the legacies was the death of the testator's widow who liferented the estate; (2) that the one-sixth share destined to Thomas Young belonged to his son John Lawford Young, as conditional institute; and (3) that the one-sixth destined to William Macdougall belonged exclusively to the grandnephews and grand-nieces who survived the liferentrix. The present question related to the one-sixth originally destined by the testator to his grand-niece Mrs Cuthbertson. On 15th January 1864, the Court of Session pronounced an interlocutor finding that Mr Cuthbertson, having survived his wife, was entitled to liferent the fund, and that the fee of the fund belonged to the issue of the testator's grand-nephews and grand-nieces existing at the date of the widow's death, whether their parents survived at that time or no. Four days after this judgment was pronounced, Mr Cuthbertson died. Thereafter, on 6th February 1866, the Court found that, by reason of the decease of Mr Cuthbertson, the fee of the share liferented by him became disburdened of the liferent provided by the third codicil, and was subject to no other burden of liferent, and that the fee fell to be divided among all those children of the testator's grand-nephews and grand-nieces who were alive at the death of the testator's widow, equally *per capita.*

Appeals were now presented against these and other interlocutors.

The appellants, Mrs Richardson and Mrs Thomson, claimed a liferent of two-thirds of the sixth share originally destined to Mrs Cuthbertson, and now forming the fund *in medio;* the appellants, Dr Richardson and Dr Thomson, claimed each a liferent of one-third of the fund *in medio* in the event of their surviving their respective spouses; the appellants also claimed that the fee of two-thirds should belong to their respective issue, if they should leave any, contending that the third codicil, while restricting the appellants' right to a liferent, did not lessen the share of the estate subject to that liferent; that the subsidiary liferents thus claimed were expressly provided by the codicil; that there was no rule against successive liferents; and that the fee of two-thirds must necessarily be held by the trustees until the death of Mrs Richardson and Mrs Thomson, when alone it could be determined whether they died with or without issue.

The trustees of Colonel John Macdougall claimed the fee of one-third of the fund *in medio*, as having vested in Colonel Macdougall on the death of Mrs Donaldson, or alternatively, a liferent of one-third. Colonel Macdougall's children claimed payment of the whole fund unburdened with any rights of liferent, and to the exclusion of John Lawford Young, or at least payment of seven-eighth parts of the fund; or, otherwise, they claimed such fee subject to any liferent that might be held to exist.

John Lawford Young claimed that the fund *in medio* should be divided between him, as the sole issue of Thomas Young, and the children of Colonel Macdougall alive at the death of the testator's widow *per stirpes;* and that the fund was unburdened with any liferent.

Cross appeals were likewise presented by certain of the parties.

Dean of Faculty (Moncreiff) and Southgate, Q.C., for Mrs Richardson and others.

Mellish, Q.C., and Young for Colonel Macdougall's trustees.

Sir Roundell Palmer and Bruce, Q.C., for Colonel Macdougall's children.

Lord Advocate (Gordon) and Kay for Cuthbertson's representatives.

Anderson, Q.C., and Cotton, Q.C., for Young.

Lord Chancellor—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, my Lords, in the first place, to direct your attention to the question relating to the life interest of Allan Cuthbertson under the third codicil, a question which is raised in the cross appeals.

That question is this, Whether, under the third 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 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 but four days, and that interlocutor of the Second Division is challenged in the first two cross appeals, that is, in the appeal of Macdougall's trustees, and in the appeal of the Macdougall children. The representatives of Cuthbertson are made parties for the purpose of meeting this challenge, and they have no other interests in the questions before your Lordships.

The codicil in question is printed at page 105 of the principal appeal, and the question to which I refer is to be answered upon the construction of the earlier part of the codicil. The codicil runs in these words, "I, James Donaldson," &c., "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, authorise 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 authorise, 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."

My Lords, 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 the survivors. Now Mrs Cuthbertson died before the widow, and died without 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 would take a share by surviving the widow, and as giving a liferent to the husband of no other niece.

My Lords, this construction appears to me to confound what the testator gives us as his motive or reason for altering the disposition made by his 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 provisions or bequests 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 Division 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 Macdougall's trustees and Macdougall'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.

My Lords, the next question to which I may conveniently direct your Lordship's 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.

Macdougall's trustees and the Macdougall 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 decision 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 testator's 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. My Lords, this argu-

ment I have already 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 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 Mr John Lawford Young was that advanced by Mr Anderson at your Lordship's 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.

My Lords, 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 construction 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 Inner 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 nieces, but to the whole and entire class of grandnephews and grandnieces, whether survivors or not. My Lords, 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 liferent, and the liferent was to be taken by the survivors of the grandnieces and of the grandnephews.

My Lords, 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 Inner Division, that I cannot do better than read to your Lordships the expressions which he has used. At page 128 of the print 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 grand nephews, 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 former 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." My Lords, I certainly concur in that conclusion, and it is that which I humbly recommend your Lordships to adopt.

My Lords, 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.

My Lords, 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 of 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 Macdougall, (deceased), Mrs Richardson, and Mrs Thomson. The Second Division, by their interlocutor of the 6th of February 1866, recalled the Lord Ordinary's interlocutor, 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.

My Lords, 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 in-

volve 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 authorise, 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 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."

My Lords, upon the reading of those 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 grandnephews named in the codicil equally, and the fee to their issue in the manner pointed out by the codicil.

My Lords, 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 connection 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 this question, and no decision took place in that case upon the words of the codicil which I have just read to your Lordships.

My Lords, in the present case the learned judges of the Inner Division have held, in the first place, that successive liferents are not from the words of this 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 and 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. My Lords, 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 pass away and her issue 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 which 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 Mr 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. My Lords upon this point I concur entirely in the judgment of the Lord Ordinary which is printed at pages 72 and 73, 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 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 Macdougall 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 for more than ten years. The date of the first summons of multiplepoinding is in February 1858. The only difficulty in this case, 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.

My Lords, 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 Macdougall. 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 grand-nieces; and the question then arose (as I have already observed) on the share of the grand-nephew. My Lords, the true effect of this codicil I take to be this—that the dispositions made by the will relating to the shares of the grand-nieces 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 new 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 words, 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.

My Lords, I was particularly pleased with observing that 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.

My Lords, 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 grand-nephews" will be represented by the class of Mrs Thomson, Mrs Richardson, and Colonel Macdougall. They take, accordingly, in equal portions of the sixth share, and they take in liferent. Then comes the 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 shows 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 Macdougall 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 these 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 farther 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 to be divided into six portions, and 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 grand-nieces. 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 grand-nieces, and then to go in fee to her issue. But the liferent was granted not only to the grand-nieces, but to the grand-nieces 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 grand-niece, his wife having predeceased the liferentrix of the whole estate. My Lords, 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? secondly, had any other person during that period a right to liferent in that estate, or after that period had any other person a right of liferent in that estate? And, in the third place, what becomes of the fee?

Now, the terms of the gift with reference to Mr Cuthbertson seems 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 grand-nephews. 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 for 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 it 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 to 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 here, 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 a liferent and 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 grandnephews 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 surviving 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 Macdougall, the son of Colonel Macdougall, 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 Macdougall, 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 payment of all 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. At page 128 of the printed case, 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 Macdougall, 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 Macdougall family were 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 Lords, the only child, and born before the death of the father.

Lord Chancellor—My Lords, 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 thirds ought to be retained in trust for their respective issue, if any. Also, to declare that Colonel Macdougall 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.

All 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 this declaration; and dismiss with costs the appeal of John Lawford Young.

In the two cross appeals of Macdougall's trustees, and Macdougall'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 Macdougall's trustees and Macdougall's children, in so far as they complain of this finding of this interlocutor in favour of Allan Cuthbertson, with costs.

The questions being severally put, the same were agreed to.

Agents for Mrs Richardson and others and Cuthbertson's Representatives—Gibson-Craig, Dalziel, & Brodies, W.S.; and Grahames & Wardlaw, Westminster.

Agents for Colonel Macdougall's trustees and children—Adam Kirk & Robertson, W.S.; and Loch & Maclaurin, Westminster.

Agents for John L. Young—Thomson, Dickson, & Shaw, W.S.; and William Robertson, Westminster.

Thursday, March 26.

UNIVERSITY OF ABERDEEN *v.* IRVINE.

(4 Macph. p. 392.)

Trust — College — Charitable Bequest — Obligation. Held, on a construction of documents, that the whole rents and proceeds of certain lands were devoted to charitable purposes expressed in the will of a testator.

This was an action at the instance of the University of Aberdeen, the Magistrates and Council, the Masters of the Grammer School, and certain Bursars and Scholars, against Mr Irvine of Drum—the leading conclusion being, to have it found and declared that—under (1) the last will and testament of Alexander Irvine of Drum, dated 20th December 1629; (2) a decree of the Court of Session, dated 27th February 1633; and (3) a bond by the son of the said Alexander Irvine, dated 12th April 1656,—certain of the pursuers, being bursars and scholars presented by the defender to the bursaries and scholarships mortified by the said Alexander Irvine, as set forth in the will, and their successors, "have the sole and exclusive beneficial interest in the town and lands of Kinmuck," and that the pursuers were entitled to reduction of a deed of entail granted by the defender's father in 1821.

The Lord Ordinary (Kinloch) held, on a construction of these deeds, that the whole beneficial interest in the lands of Kinmuck were thereby transferred for behoof of the bursars and others mentioned in the bond and mortification of 1656, that the pursuers were entitled to have this right declared against the defender, and that the right had not been cut off by prescription. The First Division of the Court recalled this interlocutor and assoilzied the defender. The ground of judgment, as explained by Lord Curriehill, was, (1) that what was to be provided to the bursars by the testament of 1629 was to be, not a right to the fee of lands, but a heritable right of annualrent constituted out of lands; (2) that the effect of the decree of 1633 was to impose upon Sir Alexander Irvine, then of Drum, an obligation to constitute that right of annualrent over lands; and for that purpose, first, to purchase and obtain, vested in his own person, lands yielding a free yearly rent of £1000 Scots, and then to constitute the right of annualrent over the same; (3) that the effect of the document of 1656 was to set apart the lands therein specified as those over which the right of annualrent was to be constituted *habili modo* by Sir Alexander; and that the defender, as representing him, was now bound so to constitute the right of annualrent over these lands, so far as the same had descended to him; (4) but that, as that right of the bursars, although it remained effectual and entire, had not been innovated nor converted into a right to claim the fee of these lands, the defender was entitled to absolvitor.

The pursuers appealed.

Mellish, Q.C., and Young, for appellants.

Lord Advocate (Gordon), Sir Roundell Palmer, Q.C., and Anderson, Q.C., for respondents.

Lord Chancellor—My Lords, the appeal in this case is in an action brought by the University of Aberdeen and certain individuals interested, against Alexander Irvine of Drum, in which it is sought to have it declared that the lands of Kinmuck are mortified as to the whole profits thereof for the support of certain bursaries and scholarships in the University and Grammar School of Aberdeen, and that Alexander Irvine has in those lands no beneficial right, and no right other than that of a trustee, with the patronage of right of presentation of bursars and scholars. Alexander Irvine admits that he is bound to make good an annualrent or payment of £1000 Scots out of these lands for these bursaries and scholarships, but he contends that as to all the profits of the lands over and above £1000 Scots a-year he is absolute proprietor. The Lord Ordinary, by his interlocutor of the 2d of December 1863, adopted the view of the appellants, the University of Aberdeen, and made a decree substantially in accordance with the conclusions of the summons. From this a reclaiming note to the First Division of the Court of Session was brought. In the First Division, a proof was allowed and led for both parties; and, finally, by an interlocutor, dated the 8th February 1866, their Lordships recalled the interlocutor of the Lord Ordinary, and assoilzied the defender with expenses. From this interlocutor the present appeal is brought.

My Lords, the question mainly turns upon the construction of three documents, all of them more than 200 years old—The will of Alexander Irvine of Drum, dated 1629; a decree of the Court of Session of 1633; and a bond and deed of mortification made by Sir Alexander Irvine, his son, in 1656.

I must ask your Lordships' attention in the first place to the terms of the will of Alexander Irvine, of 1629. By that will, so far as it is necessary to read it, the testator devised in these words—"For the maintenance of letters by these presents, I leave, mortifie, and destinate ten thousand pounds Scots money which is now in possession and keeping of Marion Douglas my spouse, all in gold and weight appointed for the use under-written, of her own knowledge and most willing consent, to be presently delivered to the Provost, Bailies, and Council of Aberdeen to be bestowed and employed by them upon land and annualrent in all time hereafter to the effect after following, to witt—Three hundred and twenty pounds of the annual rent thereof to be yearly employed hereafter on four