and are irreconcileable with his account of the hopeless condition of the ship at and prior to the date in question. I am of opinion that the defender has stated a good objection to the pursuer's title, that the Lord Ordinary's interlocutor should be recalled, and the action dismissed.

LORD ADAM—I am of the same opinion. The pursuer here alleges that he has a good title to sue upon two grounds—1st, That he is the purchaser of the ship; 2nd, that he is the assignee of all claims for damages connected with the ship.

The facts with regard to the second of these two propositions are as follows:—The summons in this action was served upon the 28th of June, which according to the authorities cited to us is the date of the raising of the action. The assignation is dated June 29th, the day after the raising of the action. The question before us is, whether at the date of raising the action the pursuer had a title to sue. I think he had not, and that suspecting this, he procured the assignation next day in order that he might have a good title. It has been suggested that this case is like that of executors who have been held able to sue competently before getting confirmation, and that in consequence it is competent for the pursuer here to sue. But the difference between the cases is that the executors had a good title at bottom which they only required to have formally made absolute, while the pursuer here had absolutely no title till the assignation had been entered into. "But," says the pursuer, "I have a title *qua* purchaser." This title he obtained in May 1893, but all the damage to the vessel was done before that date, and the mere fact of becoming the proprietor of a ship will not give the purchaser the right to claims for damages sustained before his purchase. The pursuer tried to remedy this defect by procuring the assignation, but he did so too late for the purposes of this action.

I am therefore of opinion that the pursuer has no title to sue.

LORD M'LAREN and LORD KINNEAR concurred.

The Court recalled the Lord Ordinary's interlocutor and dismissed the action.

Counsel for the Pursuer—N. J. D. Kennedy—Forbes. Agent—W. R. Mackersy, W.S.

Counsel for the Defender — Guthrie — Chree. Agents—John C. Brodie & Sons, W.S.

Wednesday, January 31.

SECOND DIVISION.

[Lord Low, Ordinary.

WATSON'S TRUSTEES *v.* HAMILTON.

Succession—Vesting—Substitution—General Disposition—Special Destination.

A died leaving a holograph settlement entitled "Notes of intended settlement," by which he gave the liferent of his whole estate, heritable and moveable, to his widow. By the said deed he also left to his nephew B his estate of Bankhead, but wished it to be expressly understood that in the event of B dying without leaving any lawful male heir of his body, then and in that event the lands of Bankhead were to revert to his nephew C.

B survived A, and died leaving a widow, but without issue. By his trust-disposition he conveyed to trustees for the purposes therein mentioned "all and sundry the whole means and estate, heritable and moveable, real and personal of every kind and description, and wherever situate, at present belonging or that may belong to me at the time of my decease.

Held (*diss.* Lord Young) that the fee of the estate of Bankhead had vested in B at A's death, and had passed to the trustees under his trust-disposition, and that the clause of return in favour of C in A's settlement was not any higher than a simple substitution, and had been evacuated by B's trust-disposition.

Walter Whyte died on 16th September 1880 leaving a holograph settlement entitled "Notes of intended settlement by Walter Whyte of Bankhead, dated 19th June 1873, and recorded 22nd September 1880, in the following terms:—"First, I liferent my wife Mrs Margaret Pollok or Whyte in my whole estate, both heritable and moveable burdened with an annuity of £300 Stg Three hundred pounds Sterling a-year to my Sister Mrs Jane Macnish Whyte or Hamilton Widow of the late James Hamilton Writer in Glasgow should my wife survive me—at the death of my Wife said Annuity to cease, In place thereof I leave to my said Sister Mrs Jane Macnish Whyte or Hamilton in liferent only and to my nephew John Hamilton Writer in Glasgow in fee my pro indiviso half of the lands of Kenmuir situated in the parish of Old Monkland & County of Lanark, likewise my pro indiviso half of the lands of Shettleston situated in the Barony parish of Glasgow & said County of Lanark—To my nephew James Hamilton I leave my lands of Cuthill & Newmill of Briech &c situated in the Parish of Whitburn & County of Linlithgow subject to the liferent of his mother the said Mrs Jane Macnish Whyte or Hamilton I also leave to my nephew James Frances Watson presently residing at Ardmore House in the Parish of Cadross, Dumbartonshire, my Estate of Bank-

head situated in the parish of Rutherglen and County of Lanark, but I wish it expressly understood that in the event of my said Nephew James Frances Watson dieing without leaving any lawful mail heir of his body, then and in that event my said lands of Bankhead are to revert back to my said nephew John Hamilton."

James Francis Watson survived the testator, and died on 3rd April 1883 leaving a widow, but without issue. By trust-disposition and settlement dated 14th September 1870, and recorded 13th April 1883, Mr Watson conveyed to trustees, for the ends, uses, and purposes therein mentioned—"All and sundry the whole means and estate, heritable and moveable, real and personal, of every kind and description, and wheresoever situate, at present belonging or that may belong to me at the time of my decease, including also all means and estate over which I have the power of testing and disposal, together with the writs and vouchers of the same, and all action, diligence, and execution competent to follow thereupon."

Mrs Whyte died on 20th September 1892.

Thereafter the trustees under the trust-disposition of James Francis Watson raised an action against John Andrew Hamilton (1) To have it declared that under the destination in favour of Mr Watson in Mr Whyte's settlement, the lands of Bankhead had vested in Mr Watson under burden of Mrs Whyte's liferent, and had been effectually conveyed to and vested in the pursuers as Mr Watson's trustees, and that the destination in favour of the defender of the said lands in Mr Whyte's settlement had been evacuated by the conveyance in favour of the pursuers contained in Mr Watson's trust-disposition; and (2) to have two notarial instruments and a general service expede by Mr Hamilton reduced.

The pursuers averred—"Under the settlement of the said Walter Whyte an absolute fee in the estate of Bankhead was vested in the said James Francis Watson, subject only to a liferent in favour of the testator's widow, and was transferred to his trustees under his said trust-disposition and settlement. On 6th November 1882, John Hamilton, proceeding on the destination in his favour in Mr Whyte's settlement, expede and recorded two notarial instruments with reference to the lands and estate of Bankhead. . . . The warrants of registration thereon were as follows:—'Register on behoof of Mrs Margaret Pollok or Whyte, residing at Bankhead, in the parish of Rutherglen, widow of the late Walter Whyte of Bankhead aforesaid, in liferent, and John Andrew Hamilton, commonly called John Hamilton, writer in Glasgow, nephew of the said deceased Walter Whyte, in effectual fee, as within mentioned,' the one 'in the register of the burgh of Rutherglen' and the other 'in the register of the county of Lanark.' He also, on 6th September 1883, expede before the Sheriff of Chancery a general service as nearest and lawful heir of provision in general of the said James Francis Watson in virtue of the destination in Mr Whyte's settlement. Said notarial instruments, in so far as applicable to the fee of said estate of Bankhead, and said service, being invalid as titles to and ineffectual to vest in, transfer, or convey any right in the estate of Bankhead to the defender ought to be reduced."

The defender lodged preliminary defences, and pleaded—"(2) The defender is entitled to absolvitor, in respect (*a*) That under the late Walter Whyte's settlement no right of fee in the subjects in question ever vested in the late James Francis Watson. (*b*) That in view of the terms of the destination of the said subjects contained in the said settlement, the said James Francis Watson was barred from granting any gratuitous deed dealing with the said subjects to the prejudice of the defender. (*c*) That it was a valid condition and qualification of any right conferred on the late James Francis Watson by the said Walter Whyte's settlement that the subjects in question should revert to the defender in the event of the said James Francis Watson dying without leaving a male heir of his body. (*d*) That the trust-disposition and settlement of the said James Francis Watson was inept and ineffectual to affect the said subjects or to alter the destination thereof contained in the settlement of the late Walter Whyte. (*e*) That on a sound construction of the late Walter Whyte's settlement, and in view of the events which have occurred, the fee of the said subjects is now vested in the defender."

On 1st July 1893 the Lord Ordinary (Low) pronounced the following interlocutor:—"Finds, decerns, and declares in terms of the declaratory conclusions of the summons, &c.

"*Note.*—I confess that this case does not seem to me to be one of difficulty.

"In the first place, I think that it is clear that the fee of the estate of Bankhead vested in James Francis Watson. The testator gave his widow a liferent of the whole estate, and in regard to the estate of Bankhead the words of the settlement are—'I also leave to my nephew James Francis Watson, presently residing at Ardmore House, in the parish of Cardross, Dumbartonshire, my estate of Bankhead.'

"Now, that is an absolute conveyance, subject only to the liferent of the testator's widow, and I do not see how it can be contended that the conveyance is not to take effect, at all events to the effect of giving the fee to the disponee *a morte testatoris*.

"But then it is said that there was a clause of return here, to take effect in the event which happened, of James Francis Watson dying without leaving any lawful heir-male of his body, and that that clause of return cannot be evacuated by him, at all events by a voluntary conveyance or by deed of settlement. I think that it has long been settled that although a clause of return to the granter or his heirs is good against a disponee, a clause of return in favour of a stranger is not in any higher or better position than a simple substitution. I am of opinion that the clause of return here is, for the purpose of questions of this

sort, a return in favour of a stranger. There is no averment upon record that John Andrew Hamilton was heir-at-law of the testator, and whether he was in fact so or not, he is not called in that capacity, but simply as 'my nephew John Andrew Hamilton,' and it is not unimportant to notice that James Francis Watson, to whom the direct conveyance of Bankhead was made, is also a nephew of the testator. So here we have an absolute disposition of the estate to one nephew, and a clause of return in favour of another nephew.

"It seems to me that upon the authorities which were cited at the bar, that is just a substitution, and a substitution which it was in the power of James Francis Watson, surviving, as he did, the time when the gift came into operation, viz., the death of the testator, to evacuate if he chose to do so.

"The next question is, whether or not he has evacuated that substitution by the general deed of settlement which he left. Now, I think that it has been settled by the case of *Thoms* that a general disposition carries all the estate over which the granter had power of disposal, and the extraneous circumstances which in the case of *Glendonwyn*—and I think one other case—were held to overcome that general view, simply show, I think, that that is the general rule, because it was assumed in that case that a general disposition would carry everything over which the granter had power of disposal unless there were circumstances to show that he did not intend to do so.

"Now, here there are no such circumstances whatever. You have an estate conveyed to him which he might dispose of, and you have him disposing in the most absolute terms, 'All and sundry the whole means and estate, heritable and moveable, real and personal, of every kind and description, and wheresoever situate, at present belonging, or that may belong to me at the time of my decease.' I think that it is clear that that carried this estate, which, as I have said, vested in him, and which, although it was subject to substitution, he could dispose of, with the effect of evacuating that substitution. I therefore apprehend that decree must be pronounced in favour of the pursuers." . . .

The defender reclaimed, and argued—1. The fee of the estate had never vested in Mr Watson. If a testator gave a liferent, and at the expiration of the liferent directed the estate to be paid to one person, or in the event of his dying to another, the fee does not vest till the date of the expiration of the liferent—opinion of Lord Chancellor Westbury in *Young* v. *Robertson*, February 14, 1862, 4 Macq. 319. The will in point was in the form of notes, and must be construed in a broad and liberal sense. The testator dealt with the liferent first, and "at the death of my wife" must be read in before the bequests of his estate to nephews. That was the true import of the will, and must be given effect to—*Studd* v. *Cook*, May 8, 1883, 10 R. (H. of L.) 53; *Bogle's Trusteee* v. *Cochrane*, November 29, 1892, 20 R. 108; *Cumming's Trustees* v. *White*, March 2, 1893, 20 R. 454. 2. If the fee of the estate had vested in Mr Watson, it was subject to defeasance in the event of his dying without issue—*Earl of Dalhousie's Trustees* v. *Young*, May 24, 1889, 16 R. 681. 3. The general words in Mr Watson's will did not include the estate left to him by Mr Whyte under the special destination in the latter's settlement—*Glendonwyn* v. *Gordon*, May 19, 1873, 11 Macph. (H. of L.) 33; opinion of Lord Young in *Campbell* v. *Campbell*, December 11, 1878, 6 R. 313.

Argued for pursuer—It was a clear case of a fee vesting on the death of the testator. The substitution had been evacuated by the general deed of settlement left by Mr Watson—*Leitch* v. *Leitch's Trustees*, February 17, 1829, 3 W. & S. 366; *Thoms* v. *Thoms*, March 30, 1868, 6 Macph. 705; *Gray* v. *Gray's Trustees*, May 24, 1878, 4 R. 820.

At advising—

LORD YOUNG—Walter White, who died in 1880, was at his death owner of the lands of Bankhead, and the question in the case is how he has settled the succession to these lands by his will dated 19th June 1873, it having been decided by this Court and the House of Lords that the will is valid and effectual to settle the succession according to its true construction and legal import. The question thus comes to be, what is the true construction and import of the will in this matter? That the succession to these lands in liferent, is by the will settled on the testator's widow, is clear and undisputed, and she accordingly enjoyed the liferent from his death in 1880 till her own death in 1892. The question therefore is, how is the succession to the fee settled? That it is primarily settled on the testator's nephew James Francis Watson is undoubted. Whether this primary settlement is absolute, or only contingent on James Francis Watson's survivance of the testator, or whether it is contingent on his survivance of the liferentrix, is the question in dispute. The words, the effect of which is in dispute between the parties, are these—"But I wish it expressly understood that in the event of my said nephew James Francis Watson dying without leaving any lawful heir-male of his body, then and in that event my said lands of Bankhead are to revert back to my said nephew John Hamilton." The words "revert back" are obviously inaccurate and inappropriate, but I think they must nevertheless have effect as importing that in the event specified the lands shall go to John Hamilton, or that the succession thereto (the succession to the testator therein) shall devolve on John Hamilton. The event specified is—"my said nephew James Francis Watson dying without leaving any lawful heir-male of his body," and no time or limit of time for its occurrence is expressed. But the parties were agreed, and I think rightly, that some intention, to be collected from the will, must be imputed to the testator on this subject. He necessarily contem-

plated Watson's survivance or predecease at some period or other capable of being specified, although not in terms specified by himself, and meant that if he survived that period the succession should devolve on him, and that if he predeceased it leaving an heir-male of his body, the succession should devolve on that heir; and, on the other hand, that if he predeceased that period without leaving such heir, the succession should devolve on John Hamilton. What is that period? The pursuers say the death of the testator. The defenders say the death of the liferentrix.

Now, in answering this question we must, I think, have regard to the fact that the instrument we have to construe is not a deed of conveyance, but a will expressive of a testator's intention. The distinction is material. In construing and determining rights under a deed of conveyance we are governed by established technical rules which we cannot generally—certainly not always—sacrifice to a well-founded conviction that they lead to results contrary to the maker's intention. In the case of a will intention always prevails. We may possibly mistake the intention, but we must give effect to what we are judicially convinced was the intention, and authorise and order to be done whatever is formally necessary to carry it out. Now, a more striking case of a will, a writing only expressive of intention, as distinguished from a deed of conveyance, than that which occurs here cannot easily be conceived. The maker's intentions as to the settlement of his heritable as well as his personal property is expressed, and must have effect as to both according to intention, and, I should think clearly, without allowing any conveyancing technicalities to prevail over the intention as they might in a deed of conveyance of land. And in my endeavour to reach the intention I cannot distinguish between land and money, but must, I think, take the same language as meaning the same thing with respect to either.

The Lord Ordinary assumes that there is in this instrument an absolute conveyance of Bankhead to J. F. Watson, subject only to the liferent of the testator's widow, and if the assumption were sound I should not question the conclusion that the fee is thereby given *a morte testatoris* notwithstanding the subsequent provision for the event of the death of the disponee without an heir of his body.

But have we any such case to deal with? I think not. The testator expresses his will to the effect that his widow shall liferent everything, whether land or money, and that at her death there shall be distribution of everything, both land and money. There could be no distribution before. In the distribution some of the objects of his bounty are to have land, and others money. His nephew J. F. Watson is to have land—the estate of Bankhead—and it is in the expression of the testator's will to this effect, that he expresses his wish that it shall be understood that in the event of J. F. Watson dying without an heir-male of his body the estate of Bankhead shall go to John Hamilton. Now, it seems to me clear, as matter of intention, that what the testator meant was, that if neither Watson nor an heir-male of his body existed at the period of distribution Bankhead should go to Hamilton. This is certainly the meaning which, on the very same words, we should have imputed to the testator using them, had the subject been money; and in construing a will so as to reach the testator's intention, no reason occurs to me why we should construe the same language differently according as the subject of it is land or money. Prior to the Act of 1868 the language of mere will without *de presenti* conveyance was inoperative, but this is no longer so, and the language of will is as operative with respect to land as with respect to money. Our system of public records necessitated provision for making up a recordable title. Such provision is accordingly made by declaring that when in a will words are used with reference to land, which, if used with reference to money or other moveable property, would give a right to the beneficiary to claim and receive the same, they shall be deemed equivalent to a general disposition of such land within the meaning of sec. 19, so that a recordable title may be completed as provided in that clause. But the formal completion of the title being the sole purpose of this provision, and indeed the sole purpose of sec. 19 of the Act, it would, I think, be outside and foreign to that purpose to take any account of the provision in construing words of survivorship, or, which is the same thing, words providing for the event of predecease. The disposition to be implied from words of testamentary bequest or expression of will, must be a disposition in accord with the meaning and intent of the will. If the meaning and intent to be collected from the will now in question be that Watson should have absolute right to Bankhead *a morte testatoris*, and that it should thereafter be subject to his debts and deeds (of course saving the liferent), then the implied disposition will be a disposition to him, and a title may be completed accordingly. If, on the other hand, we shall be of opinion that the testator meant that Hamilton should have the lands in the event of Watson predeceasing the liferentrix without leaving an heir-male of his body, then the disposition to be implied for the purpose of completing title must be a disposition to him.

It was suggested as a difficulty that a fee in land cannot be *in pendente*. I do not appreciate the difficulty, which I think imaginary. It would certainly have equally existed had the testator signified in the most explicit terms his will and intention to be that in the event of Watson surviving the liferentrix he should have Bankhead, or predeceasing her leaving an heir-male of his body, that such heir should have it, but that in case of his predeceasing the liferentrix without leaving such heir, that then Hamilton should have it. I could not countenance the notion that such a will would be inoperative or incapable of execu-

tion according to the only meaning which the words expressing it could bear, because of a difficulty in finding a place of rest and repose for the fee during the subsistence of the liferent.

I have already observed that I think the construction of the survivorship clause (or clause providing for the event of predecease) would have been clear had the subject of the gift been moveable property or mixed property, both heritable and moveable, and need not refer to the authorities, of which the case of *Young* v. *Robertson*, 4 Macq. 314, is now perhaps the chief. That was a case relating to both heritable and moveable estate, and there being a trust, there was, of course, a disposition which did not, however, and could not affect the construction of the survivorship clause. Suppose the testator here had left to his nephew Watson the lands of Bankhead, and also the sum of £10,000, with exactly the same expression of his will in the event of Watson dying without leaving an heir-male of his body, is it doubtful that the event would, on the authority of *Young* v. *Robertson*, have been referred to the death of the liferentrix? or would it have been referred to the death of the testator as to the land, and to that of the liferentrix as to the money?

LORD RUTHERFURD CLARK—I agree with the Lord Ordinary.

By force of the Act of 1868 the will is equivalent to a general conveyance in favour of James Francis Watson. If it were not, it would not affect the heritage of the testator. It is only operative because it is a conveyance or equal to a conveyance. Further, I think that it came into operation from the testator's death. There is no other time assigned. The creation of a liferent and annuities did not postpone the disposition of the fee. These are burdens merely, either on the land or on the fiar. Accordingly, under the will, James Francis Watson on the death of the testator could have made up a feudal title to the lands by expeding a notarial instrument under the Titles to Lands Act. That he did not do so is of no importance, for the will as a general conveyance vested in him a personal fee.

It is said that the clause which declares that on failure of heirs of the body of James Francis Watson "the said lands of Bankhead are to revert back" to John Hamilton, has the effect of suspending the conveyance till the death of the liferenter. I cannot see that it has. The words of the clause seem to imply an immediate fee. For unless such a fee were taken, the lands could not "revert" to Hamilton, and Watson seems to be the only person from whom they could so revert. But I am not disposed to put my judgment on any such narrow ground. I think that the clause is a substitution of Hamilton on the failure of Watson and the heirs of his body. It can be nothing else if we hold that the conveyance took effect on the death of the testator.

If there had been a trust, and if the trustees had been directed to convey on the death of the liferenter, the case would have been different. For in that case it would probably be held that the trustees were bound to convey to a beneficiary who survived the period at which they were directed to convey, and that no interest could vest in anyone who died before that date. But we are here dealing with a direct conveyance, which, unless there be some limitation to the contrary, must come into operation at the testator's death, and as on this view it necessarily created a fee in Watson, the clause in favour of Hamilton can only be a substitution.

I am further of opinion that the substitution was evacuated by the general settlement of James Francis Watson. I need not say more on this head.

LORD TRAYNER — I agree with Lord Rutherfurd Clark.

The LORD JUSTICE-CLERK was absent.

The Court adhered.

Counsel for Pursuer — Dickson — James Reid. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Defender—Dundas—Kincaid Mackenzie. Agents—Campbell & Smith, S.S.C.

Wednesday, January 31.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

MACVICAR *v.* SCHOOL BOARD OF KILTEARN.

School—"Old Schoolmaster"—Government Grant—Education (Scotland) Act 1872 (35 *and* 36 *Vict. cap.* 62), *sec.* 55.

An "old schoolmaster" was allowed by the school board to draw the full annual Government grant earned by the school until 1892. In 1888 and 1890 the school board arranged with him that as he was drawing said grant in full he should pay the salaries of certain pupil teachers. In 1892 they intimated to him that in future they proposed to give him only a portion of the Government grant but that they would relieve him of these salaries. His total emoluments continued to exceed those he enjoyed at the passing of the Education Act. In 1893 he brought an action against the school board for payment of the full Government grant received for 1892-93, in which he averred that he was entitled to the same in terms of his appointment and according to the usage of the parish, and further, by virtue of the agreements of 1888 and 1890.

Held that the action fell to be dismissed as irrelevant.

Observed that the only right conferred upon old schoolmasters by the Education Act was to have as their