PURSELL, ... APPELLANT.
NEWBIGGING ET AL., ... RESPONDENTS.

1855.
May 8th and 10th.

Construction.— Vesting.—Circumstances in which it was held (affirming the decison of the Court of Session) that the beneficial enjoyment of a trust fund was not postponed or suspended until certain debts and annuities charged upon it were paid.

Johnston v. *Johnston* commented upon.

Mr. *Rolt* and Mr. *Anderson* for the Appellant.

The *Solicitor General* (*a*) and Mr. *R. Palmer* for the Respondents.

At the close of the argument on behalf of the Appellant the Lords, without hearing the Respondents' counsel, delivered the following opinions :—

The LORD CHANCELLOR (*b*) :

Lord Chancellor's opinion.

My Lords, this case may appear to your Lordships at first somewhat complicated (*c*). It certainly is not at the first blush quite clear and intelligible ; but I must confess that from the moment that I fully comprehended it, I have not entertained any doubt as to the decision to be pronounced.

The question is, at what time the interest in this estate vested in Dr. John Pursell, or in what event during his life the terms of the deed intended it should vest in him.

The gift is upon trust, in the first place, to pay the debts of the testator, a trust which has been kept out

(*a*) Sir R. Bethell. (*b*) Lord Cranworth.
(*c*) It is reported very fully in the Second Series, vol. xv. p. 489.

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of view in the argument; secondly, to pay certain annuities to certain individuals or the survivor of them, and, subject to the payment of those debts and annuities, for the benefit of the settlor or testator in his lifetime, and at his death the annuities are to be increased in a certain manner, and after that the estate is given to Dr. John Pursell.

Dr. Pursell being the survivor, came into possession in 1814, and enjoyed the property till his death. The question is, whether during that time the estate had vested in him or not?

The argument is, that because there were certain trusts to pay certain annuities, by some supposed rule of the Scotch law bearing analogy to the rules of the English law, this estate was not to vest in him unless he lived after the time when all these annuities had ceased to be payable. Of course it is competent to a testator or settlor to make a settlement so framed; but there is no reason for saying, that because the testator intended to charge his property with reference to the amount of annuities of 40*l.* a year, and certain other annuities, that therefore the estate was not to go to any one until those annuities had ceased. If that had been his intention, it ought to have been clearly expressed, and might have been carried into effect.

Now there must be some rule of law in Scotland as there is in our Courts,—a rule very familiar to your Lordships,—with reference to cases in which there is a fund or estate left to a party, or a succession of parties during their lifetime, and afterwards to other survivors or children. The question has frequently arisen whether the children are such as shall answer the description given at the death of the person who speaks. Originally, I think, the ruling of the Courts was that they were to be children living at the time of the death of the testator. Certainly that has been a good deal

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modified. The meaning is now generally assumed to be that which common sense suggests, viz., the meaning of the person who speaks. I do not think, however, that that rule applies to this case; for I put it to the learned Counsel who argued the matter on behalf of the Appellant, what construction he put on the Quinto clause, which is in these words: "After executing the purposes of the trust, the free residue of the trust funds shall pertain and belong to the said Dr. John Warrock Pursell and the heirs whatsoever of his body?" And Mr. Anderson said fairly enough, I interpret that to mean that they are to pay the funds to Dr. John Pursell when the purposes of this trust have been performed. My Lords, as it turned out, forty years elapsed before those purposes were performed. To whom, then, are the funds to go? To the heir-at-law clearly, so much as was undisposed of.

The argument of Mr. Anderson is, that there was no gift at all; that you are to regard this as a trust subject to what is called in England a life estate, or in Scotland a burden of the life estate, and that Dr. Pursell did not take it and never could take it until the death of the annuitants. And that is not all; according to their theory, he is not to take it till all the debts are paid.

The case appears to me to lie in so very narrow a compass when looked at closely, that I think I should not be justified in making further observations upon it except to advert to one or two of the authorities, to show that they are inapplicable to this case. This is the case of an annuity; but suppose it were a liferent, 40*l.* a year is given to the liferenter, and 800*l.* is set apart to go to the children after the death of the liferenter. The liferent is given to one party. The capital of 800*l.*, after the death of Catherine Pursell, is to go to a certain class of persons who are

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named. Then the question is, does it mean persons answering to that description on the death of the settlor or on the death of the liferenter? I should say, upon principles analogous to those which are acted upon in our Courts in England, it would mean those who were alive at the death of the liferenter.

In *Johnston* v. *Johnston* (*a*), 25*l.*, which was called an annuity, was given to the niece of the settlor, and 500*l.* was set apart, which, upon the death of the niece, was to be given to a certain class of persons. The question was, did that mean a class who were alive at the death of the settlor or at the death of the liferenter? It was held to mean persons alive at the death of the liferenter, and that a sum was to be set apart to meet and provide for the event there contemplated.

But it appears to me that although this doctrine of suspending may be made applicable to the case of an annuity as well as to that of a liferent, it requires much stronger language to satisfy your Lordships that there was an intention to suspend in the case of an annuity than in that of a liferent. It would be preposterous to contend that because Dr. Pursell was to pay in 40*l.* a year to his sister during her life, therefore he was to have no enjoyment whatever of his property, and there was no gift to him at all, except subject to the interest of the liferenter. It appears to me that the Appellant has contended for something which is untenable. To suppose that this property was to be kept suspended until all the debts and all the annuities were paid, seems preposterous. Not only no principle leads to such a conclusion, but there are no authorities which, in my opinion, ought to influence your Lordships to disturb the interlocutor of

(*a*) 9 June 1840, 2nd Series, vol. ii. p. 1038.

the Court below carrying out the express intention of the words of this instrument. I shall therefore move, your Lordships, that the interlocutor of the Court below be affirmed.

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The Lord ST. LEONARDS:

Lord St. Leonards' opinion.

My Lords, I certainly have laboured under very great difficulty, notwithstanding the elaborate argument at your Lordships' bar, to discover what the point is that is attempted to be insisted on in this case. I take it that it is only sufficient to glance at this will to see that there ought never to have been an appeal brought to this House on the points which have been so elaborately argued.

As to the intention of the testator, no man who is competent to consider this will can entertain the slightest doubt. It is the clearest, the most explicit will that it is possible for a man to make without using technical expressions. He gives the property to a person for life, subject to a certain annuity, and leaving another person to succeed, he gives that person during the life of the tenant for life an annuity; and when the tenant for life dies, he directs the increase to be paid by the person whom he meant to succeed to the estate. The idea is so fixed in his mind, that before he has given him the property to enable him to pay the annuities, which are to be increased on the death of the tenant for life, this successor, Dr. Pursell, is directed to pay these annuities, and then the donor directs that the surplus shall pertain and belong to Dr. Pursell. Supposing the will had stopped there, what possible doubt could have arisen that Dr. Pursell would have taken the entire fee, subject to the conditional limitation over, and subject to the annuities? Now, does anything that follows weaken that? On the contrary, it strengthens it, for Dr. Pur-

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sell is directed, if an annuity should amount to more than 40*l.* to one of the surviving annuitants, himself to become bound for the payment of that annuity, and to secure it on the property of the donor, the property in settlement, or any other property. How could you fix a personal obligation on a man to secure an annuity of 40*l.* a year, and 800*l.* to the children, unless you had first given to that man some property which would enable him to perform the obligations which you impose upon him? Independently of the question as to the time at which the 40*l.* a year became payable the 800*l.* was to be paid at all events; there is no question about that. Suppose that the amount had never reached more than 38*l.* a year, no one can doubt that the 800*l.* must have been secured to the children. The donor meant that Dr. Pursell should, when he came into possession of this property, secure the 40*l.* a year to the annuitant and the 800*l.* to the children, and he knew so perfectly what he was dealing with, that knowing that the 800*l.* might not become ultimately a charge on this property, he gives the 800*l.* over to Dr. Pursell in case there should be a failure of the children of the annuitant. Then he declares in the clearest terms that when these trusts are performed Dr. Pursell shall take the annuity. The words are, "that after executing the purposes of the trust the residue shall pertain and belong to Dr. Pursell and the heirs of his body," and then with limitations over.

Now let us consider for a moment what might have happened on the death of the tenant for life. The moment the tenant for life dies, under the direction here in so many words in this instrument, Dr. Pursell would have taken,—at all events that must be conceded,—so much of the property as was not exhausted by the annuities. No one will dispute that it is given

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to him in so many words. There is no contingency. Are you to divest him of that because the fund increases? Are you to take away that which has already become not a charge but beneficial enjoyment? Suppose the annuity had been 90*l.* a year and the rental 100*l.*, then Dr. Pursell would have had instantly 10*l.* a year. There is no failure as to that, except failing the heirs of his body; the Appellant at your Lordships' bar cannot take it; it is vested beyond a doubt in Dr. Pursell: it is not given over. What are the Appellants to contend for? Is it that because there is an annuity which might or might not in the lifetime of Dr. Pursell have attained the sum of 40*l.* a year, therefore there is to be no vesting. No vesting of what? Of so much as would represent the annuity. How much is that? Which part of the estate will you have? Will you have a charge or will you have the fee itself? It is perfectly absurd. There is nothing to rest the argument upon. As regards the intention of the donor, there is not the slighest doubt about it.

The creation of this trust in no respect alters the construction of the instrument; I think it might rather strengthen the view which I would advise your Lordships to take of this case, because the same person it made a trustee, who is to take the beneficial interest in the property. He is made a mere trustee, with clear, definite rights, and your Lordships never can by the law, either of the one country or of the other, alter that beneficial interest.

Cases may arise in which when you are dealing with the conveyance of trust property you may so decide the event in which the trustee is to denude himself of the property, as to show that you meant that person to be left out at the time the particular act is done. But there is nothing of the sort in this

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disposition; on the contrary, personal obligations are imposed on Dr. Pursell, which prove that he was at once to take the fee of this property in order to enable him to answer those obligations or to repay himself the money that he might expend.

In this country an argument might formerly have been raised on the point that has been addressed to your Lordships, but happily all these questions have been set at rest for more than a century. What my noble and learned friend said is true enough, that during the argument the learned Counsel never touched the question of the debts. If their argument is good for anything, it goes to the question of the debts. If the argument of the Appellant could be maintained, this trust could not have arisen in favour of Dr. Pursell until the debts had been paid.

There seems to me no doubt as to what has been the law of England for a number of years upon this subject. I think this is a case which does not admit of the shadow of a doubt; it is a case which I was surprised to hear so elaborately argued, because it does not admit of argument; and I believe it is impossible for the House to look at it without immediately coming to the conclusion that the decree of the Court below should be affirmed, and affirmed with costs.

Interlocutor affirmed with costs.

MAITLAND AND GRAHAM.—DEANS AND ROGERS.