RALSTON, ET AL., ... APPELLANTS (*a*).
HAMILTON, ET AL., ... RESPONDENTS.

1862.
May 8th and 9th, July 19th.

Bequest to a Father in life-rent and Children in fee.—A bequest of money to a father "in life-rent, and his children, equally among them, in fee," gives the fee absolutely to the father.

Per the Lord Chancellor (*b*): The rules which govern the transmission of property are the creatures of positive law, and, when once established and recognized, their justice or injustice in the abstract is of less importance to the community than that the rules themselves shall be constant and invariable; p. 405.

Per the Lord Chancellor: If the subject of this gift had been heritable property, I should have considered it a clear proposition in the law of Scotland that the father was absolute fiar. I consider it to be also established by decisions that the same rule of construction must be applied to the words when the subject of the gift is moveable or personal property; p. 405.

Per Lord Chelmsford: If certain words are employed which have obtained a known and settled meaning in law, we are not at liberty to look behind them in order to discover some other intention in the mind of the testator, different from their legal import; p. 418.

Opening up a Record—Action of Multiplepoinding—Prayer of Reclaiming Note—New Claimant—6 Geo. 4. c. 120. ss. 11, 17, and 18.—Upon a reclaiming note in an action of multiplepoinding, it appearing that a child interested in the matter had been born after the date of the Interlocutor reclaimed against, and that the original claims had been made and adjudicated upon in error, the Lords of the Inner House, in compliance with a general

(*a*) This case is very fully reported in the Court of Session Cases, Second Series, vol. 22, p. 1442; vol. 23, p. 1290; and vol. 24, p. 31.

(*b*) Lord Westbury.

prayer in the reclaiming note, ordered that the record should be opened up, and new claims given in. Held by the House that this was not *ultra vires*.

Per the Lord Chancellor: The reclaiming note, regard being had to the generality of the concluding portion of the prayer, empowered the Inner House to consider the whole question of the construction of the bequest, and to take such course as might appear to them necessary; p. 402.

Per Lord Chelmsford: I have come to the conclusion that this course was competent, from the peculiar nature of the proceedings in multiplepoinding, and from the mode in which the case was presented for review; p. 414.

Per the Lord Chancellor: The 17th and 18th sections of the statute appear to me to apply only to Interlocutors pronounced between adverse litigant parties; p. 404.

Per Lord Cranworth: The enactments of the statute are framed with a view to regulate the proceedings of parties engaged in hostile litigation, and I should be slow to admit that by any of its provisions it could have been intended to compel the Court to hand over a fund *in medio* to a party appearing on the record not to be entitled; p. 410.

Per the Lord Chancellor: When the sole object of an action in a Court of Justice is to ascertain the true construction of a trust settlement or will, and to declare the consequent rights of the several parties, no party can be considered as finally bound by a claim or statement founded on a construction of the instrument which is erroneous in law; p. 404.

Per Lord Cranworth: Whenever the Legislature imposes restrictions or regulations on the action of the Superior Courts, it is not unreasonable to say that its language must be looked to with a strong inclination to construe it in the mode best calculated to promote obvious justice; p. 403.

THIS was an action of multiplepoinding (*a*) and exoneration, brought by the trustees and executors of

(*a*) Interpleader.

the late John Ferguson of Cairnbrock Esquire, to ascertain the right to certain legacies, of large amount, left by him to sundry distant relatives.

The summons, dated the 18th November 1856, was followed by a condescendence and answers, from which it appeared that the testator, by trust disposition and testamentary settlement, dated the 13th May 1853, and by codicil thereto, dated the 22nd September 1855, disponed, devised, and bequeathed to certain persons, whom he appointed to be his trustees, his whole means and estate, for certain purposes therein specified. In particular he directed his trustees "to "pay to James Hamilton, in life-rent, and his children, "equally among them, in fee, 5,000*l.*;" and also "to "pay to John Hamilton, in life-rent, and his children, "equally among them, in fee, 20,000*l.*"

The testator died on the 8th January 1856. James Hamilton was then living, a bachelor. John Hamilton was also then living, having four living children. A fifth child of John Hamilton, Marion, *in utero* at the testator's death, was born a few days thereafter; and a sixth child, Peter, was begotten as well as born in course of the litigation.

The usual record of pleadings and averments having been made up before Lord *Handyside* (Ordinary), he, on the 17th July 1857, decided in favour of James Hamilton in terms of his claim, which was a claim to the fee absolutely. As to the gift in favour of John Hamilton, Lord *Handyside* held that the fee was in the children, including Marion, she "being at the death of the testator a child *in utero*." He pronounced no judgment as to Peter, who in fact was not born till April 1858.

The trustees reclaimed to the Judges of the Inner House (First Division), who, on the 18th March 1859,

recalled Lord *Handyside's* Interlocutor, and remitted the case to Lord *Kinloch* (*a*), "with power to open up "the record, and to allow the claims to be amended, "or new claims to be given in."

New claims were accordingly lodged before Lord *Kinloch*, whereby James Hamilton claimed the fee of the legacy of 5,000*l.*, and John Hamilton claimed the fee of the legacy of 20,000*l.*

Lord *Kinloch*, on the 24th February 1860, found that John Hamilton was entitled to the life-rent only of the legacy of 20,000*l.*, and that the fee belonged to his children, "whether then existing, or still to come "into existence, equally among them;" and he found that James Hamilton was entitled to the life-rent only of the legacy of 5,000*l.*, and that the fee belonged to his children, "who might come into existence, equally among them."

The parties severally reclaimed against this Interlocutor to the Judges of the Inner House (First Division), who, on the 13th June 1860, altered Lord *Kinloch's* Interlocutor, and found that "the legacy "of 5,000*l.*, bequeathed to James Hamilton and his "children, belonged and was payable, directly and "immediately, to the said James Hamilton in fee; "and that in like manner the legacy of 20,000*l.*, "bequeathed to John Hamilton and his children, "belonged and was payable directly and immediately "to the said John Hamilton in fee."

Against this judgment the trustees appealed to the House, and the cause having come on for argument on the 8th May 1862, there appeared, as Counsel for the Appellants, Mr. *Bacon*, Mr. *Muir*, and Mr. *Pearson*.

(*a*) Lord Handyside had died not long after pronouncing his Interlocutor of the 17th July 1857.

The *Lord Advocate* (a), the *Solicitor-General* (b), Mr. *Rolt*, Sir *Hugh Cairns*, Mr. *Lee*, Mr. *Boyle*, Mr. *Millar*, Mr. *Lamond*, and Mr. *Lefevre* for the several claimants.

The case is very minutely gone into in the following opinions, which leave none of the arguments untouched, and which exhaust all the authorities.

Lord Chancellor's opinion.

The LORD CHANCELLOR (c):

My Lords, the merits of this case lie in a small compass. They are involved in the question, what is the true construction in law of a bequest contained in the trust disposition and settlement of the testator John Ferguson, and which bequest is expressed in these words, "To John Hamilton, baker, in Irvine, in liferent, and his children equally among them in fee 20,000*l.*?" The testator died upon the 8th January 1856. At the time of his death, John Hamilton had four children, who were infants. Two other children have since been born to him, one named Marion shortly after the trustee's death, another named Peter in the month of April 1858.

The legacy became payable on the 9th September 1856, and there are abundant means wherewith to pay it, but no one of the parties interested has as yet derived any benefit from the bequest in consequence of this litigation.

The difficulty on the present Appeal is almost entirely of a technical nature. The question may be thus generally stated. An action of multiplepoinding and exoneration having been raised by the trustees acting under the trust disposition, which I will henceforth call the will of the truster, against the beneficiaries under that will, certain proceedings were taken

(a) Mr. Moncreiff. (b) Sir Roundell Palmer.
(c) Lord Westbury.

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on behalf of John Hamilton, in which, as it appeared to the Lords of the Second Division, before whom the matter was brought by the reclaiming note of the trustees, an erroneous interpretation had been put on the bequest to John Hamilton and his children, and accordingly the Court, by its Interlocutor of the 18th of March 1859, directed the record to be opened and allowed the claims to be amended in order that the true construction of the bequest might be again considered.

In doing so the Court recalled an Interlocutor of the *Lord Ordinary* of the 17th July 1857, in which John Hamilton the father was found to be a life-renter only of the legacy in question, and from which decision John Hamilton had not reclaimed. It is insisted that the Court had no power to do this, and that the course taken is in contravention of the Act 6 Geo. 4. c. 120.

It must be remembered that the object of the action is the exoneration of the trustees by ascertaining the true construction and effect of the bequests contained in the will. The trustees therefore have an interest in the true interpretation of the will and especially of a bequest under which future children of John Hamilton might be entitled to claim.

Although therefore neither John Hamilton nor the curator of his infant children had reclaimed against the Interlocutor of 1857 or disputed the construction thereby put on the bequests, the trustees had a right to do so, and to bring the whole Interlocutor, so far as it affected the construction of the bequest, before the Inner House by a reclaiming note. And in my judgment, regard being had to the generality of the concluding portion of the prayer, this was in effect done by the reclaiming note of the trustees. That reclaiming note empowered the Inner House to consider the whole question of the construction of the bequest, and to take such course as might appear to them to be

necessary for the exoneration of the trustees by ascertaining and declaring the true rights of the beneficiaries.

Whilst this reclaiming note was in dependence the matter was still further set at large by the birth of Peter, the youngest child of John Hamilton, and by his being sisted as a party to the process then pending by virtue of the reclaiming note before the Lords of Session.

The claim of Peter is made in the following words: "On the supposition that the legacy of 20,000*l.* should not be found to be vested in John Hamilton as fiar, the pupil claimant, Peter Hamilton, should be preferred to one-sixth share thereof under burden of his father's life-rent." This claim immediately suggests the right of the father as fiar to the whole of the legacy.

Now, Peter was in no respect named by the Interlocutor of the *Lord Ordinary* in 1857; nor, having regard to his claim, could he bind his father by that Interlocutor.

Under these circumstances it would appear to me that the course taken by the Court of Session, in their Interlocutor of March 1859, of opening the record was proper and competent.

But then it is insisted that under the 17th and 18th sections of the 6 Geo. 4. c. 120, the Interlocutor of the *Lord Ordinary* finding the father entitled to a life-rent only, was final, that it was not competent to the Court to relieve the father from the effect of that Interlocutor, and that the Interlocutor of March 1859, is therefore erroneous.

In my opinion this is not the effect of the statute in the present case. I have already observed that the whole of the Interlocutor of the *Lord Ordinary* may be considered as brought up on appeal by the reclaiming note of the trustees, and that the sisting and claim

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of Peter involved the necessity of reconsidering the construction of the bequest.

But further, the 17th and 18th sections of the statute appear to me to apply only to Interlocutors pronounced between adverse litigant parties. Now, as between the father and the children existing at the death no controversy or issue had been raised. Under the process of multiplepoinding, the father and the four elder children had brought in one joint claim, in which the father and curator of the children submitted that the father was entitled to a liferent, and the children to the fee of the legacy. Afterwards Marion was added to the class of children entitled, on the ground that though *in utero*, she was a child *in esse* at the death of the testator.

The Interlocutor of the *Lord Ordinary*, therefore, as regards the father, was the necessary result of the submission contained in this form of claim. It seems unreasonable that the father should be bound by his submission, when the four children for whom it was made can no longer have the benefit of it. But further, I am of opinion that where the whole object of an action in a Court of Justice is to ascertain the true construction of a trust settlement or will, and to declare the rights of the several parties as consequent on that, no party can be considered as finally bound by a claim or statement founded on a construction of the instrument which is erroneous in law.

On considering the claim of Peter, the Judges of the Inner House perceived that the true point of law had not been raised as between the father and the children. They opened the record, and gave the power of making new statements for the purpose of raising it, and in so doing they acted in conformity with the 11th section of the statute.

For these reasons I submit to your Lordships that

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the Interlocutor of March 1859 was right, and ought to be affirmed.

We now come to the merits, namely, the true construction of the bequest. It must be remembered that the rules which govern the transmission of property are the creatures of positive law, and that when once established and recognized, their justice or injustice in the abstract is of less importance to the community than that the rules themselves shall be constant and invariable.

Now, if the subject of this gift had been heritable property, I should have considered it a clear proposition in the law of Scotland that the father was absolute fiar. I consider it to be also established by decisions that the same rule of construction must be applied to the words when the subject of the gift is moveable or personal property. I am fully sensible of the absurdity of the legal reasoning on which this last proposition is founded. It begins by confining the father to a life-rent in order to arrive at an enlarged construction of the word "children;" and having thus affixed to the word a construction founded on the existence of a life-rent, it uses that construction for the purpose of destroying the very basis on which it is founded. The only answer is, that the law is so settled; for I cannot oppose the obscure case of Turnbull (*a*) to the current of subsequent decisions and opinion.

(*a*) The case here referred to by the Lord Chancellor is that of *Ann Turnbull* against *George Turnbull and others,* decided by the Court of Session on the 17th July 1778, Morrison's Dict. 4248, having the following cautious, but not very instructive marginal note or rubrick, namely, "Import of a legacy to the parent in life-rent and children in fee." It requires a careful study to make out what this "import" really was; but it would appear that the feudal rule as to the impossibility of a fee remaining *in pendente* was held inapplicable to the case of a provision of 2,000 marks given by a testator to his niece in life-rent, and to her children in fee.

I, therefore, humbly advise your Lordships that the Interlocutors appealed from ought to be affirmed, and the Appeals dismissed.

Lord Cranworth's opinion.

Lord CRANWORTH :

My Lords, on the question decided by the Judges of the Second Division of the Court of Session, namely, that by the law of Scotland John Hamilton was absolutely entitled to the fee of the legacy of 20,000*l.*, none of your Lordships had, I believe, any doubt.

There might formerly have been fair ground for contending that the doctrine applicable to real estate, under which a gift to one in life-rent and to his children *nascituri*, was held to vest the absolute fee in the parent, ought not to regulate the construction of pecuniary legacies. But this is one of a numerous class of questions in which it is of far greater importance that a rule once laid down should be strictly adhered to than that the rule itself should be abstractedly the best which could be proposed; and it seems to me clear that the rule, as acted on by the Court of Session in this case, has long been understood to be an established principle in the law of Scotland, and to have been recognized by this House as applicable to pecuniary legacies, in the case of *Mackintosh* v. *Gordon* (*a*).

It was contended that here the gift to the children of John did not include children *nascituri*, but only those in existence or *in utero* at the testator's death. But there is evidently no foundation for such an argument. As to James Hamilton, the gift to whom and whose children immediately precedes, and is in the very same words as that to John and his children, children to be born must have been intended, for he was at the date of the will a bachelor. And it is

(*a*) 4 Bell's App. Cas. 105.

impossible to hold that the word "children" was used in one sense when applied to James, and in another when applied to John. Of the propriety of the decision of the Court, if they had authority to adjudicate on the subject, I have no doubt.

But it was argued that the Court was acting *ultra vires;* for that by the Judicature Act, 6 Geo. 4. c. 120. an Interlocutor of the *Lord Ordinary* is binding on those who have not reclaimed against it. And here it was said Lord *Handyside's* Interlocutor of the 17th of July 1857 decided that John was a life-renter only, and that by that he must be taken to be concluded, as he did not reclaim. But is this so?

The *contention* of John and his four children born in the testator's lifetime was that they, and they alone, were entitled to the legacy of 20,000*l.*

The *contention* of Marion, the child born shortly after the testator's decease, was that she was entitled to the same rights as the four other children, her brothers and sisters.

The *contention* of the trustees was, that John was a mere life-renter, and that all children of John, whensoever born, were entitled to the fee, and so that they were bound to retain the fund.

Lord *Handyside* decided that Marion was to be treated as a child born in the testator's lifetime, and that John and the children then born (including Marion as one) were entitled, to the exclusion of after-born children, and so repelled the claim of the trustees to retain the fund.

The trustees reclaimed; and on the argument of the case before the Inner House the Court saw that, from the form of the record, though the question between the children born and those to be thereafter born, might be decided, yet that another question apparently overlooked by John, namely, the question

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between him and his children whether he was not the fiar, could not be decided.

The Court, therefore, remitted the record to the *Lord Ordinary*, with power to open up the record and allow the claims to be amended, or new claims to be given in.

This was accordingly done, and John and his children made separate claims, John claiming to be fiar, and the children claiming that he was a mere life-renter, the fee being in them.

The result of the proceedings on the record thus amended has been to decide that John is the fiar, and so entitled to the whole 20,000*l.* absolutely.

This judgment is, in the opinion of your Lordships, correct. Any other decision would have had the effect of handing over the money to a person or persons not entitled to it, and consequently of depriving John of his just right.

The only question is, whether the Inner House had the power so to remit the cause, and enable John to insist on his true right. I think it had. If such a power is excluded by the Judicature Act, this must have been a result contrary to the real intention of the Legislature. It cannot have been intended to compel the Court to order trustees who have a fund in hand and who are seeking the directions of the Court as to the persons to whom it ought to be paid, to hand it over to persons not entitled, though it appears on the record who the person is who has really the right.

But I do not think that the Judicature Act does prohibit the Court from taking the course which it followed.

Whenever the Legislature imposes restrictions or regulations on the action of the Superior Courts, it is not unreasonable to say that its language must be

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looked to with a strong inclination to construe it in the mode best calculated to promote obvious justice. And I think, that, if necessary, we may fairly understand such a proceeding as is now in discussion to have been sanctioned by the 11th section.

That section contains a proviso that where any new plea or ground of law (*i.e.*, some ground of law not brought forward by the pleas appearing in the closed record) shall be suggested by the Judges of the Inner House as fit to be discussed in relation to the facts already set forth, it shall be competent to add such plea to the pleas already on the record.

The obvious object of this proviso is, to enable the Court, when justice requires it, to allow the record to be amended, so that all questions of law, arising on the facts before it, may be fairly and fully raised.

I am aware that what has been done in this case is not merely to add new pleas, but also to withdraw others, and in fact to add pleas, not only in addition to, but also at variance with, some already on the record. This is true, but considering the nature and object of the proviso, I think the greatest latitude of construction ought to be allowed. Here the Court saw that two parties having conflicting interests had (evidently mistaking their rights) joined in making a common claim, with the view of negativing the claim of a third party. To a certain extent the claim was rightly asserted, *i.e.*, the parties were right in their contention against the third party. But the Court said, that as among themselves there was a question which the record in its actual form did not allow to be raised, and as to which the parties were in error. Surely on a fair construction of the 11th section the Court was at liberty to allow any amendment to be made which would bring for decision the real rights of all parties concerned.

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The children to whom Lord *Handyside's* Interlocutor gives the fee have clearly no right except what arises from the estoppel affecting their father (I use an English expression, but the meaning is obvious) from the circumstance of his having joined with them in an erroneous statement of the true construction of the will.

But on that ground it is clear that Marion had no title whatever. No child could claim against its father on the ground of his being bound by the way in which he had framed his claim, except those expressly named by him.

It follows that the Interlocutor which lets in Marion (*a*) cannot be right.

I must add that though I think the 11th section authorized the course taken, I am by no means satisfied that there would not be a power inherent in the Court to take the course it did, even independently of that section.

The enactments of that statute are framed with a view to regulate the proceedings of parties engaged in hostile litigation, and I should be slow to admit that by any of its provisions it could have been intended to compel the Court to hand over a fund *in medio* to a party appearing on the record not to be entitled.

This is an action of multiplepoinding. By an Act of Sederunt made in July 1828 proceedings in such action are to be assimilated, as far as may be, to those in ordinary actions. But there is no specific Act of Sederunt applying to such a case as that now before us; and I do not think we are bound, by the general language of the Act of Sederunt of July 1828, to follow all the enactments of the Judicature Act. The analogy, if it is necessary to find an analogy between

(*a*) See *suprà*, p. 399.

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this proceeding in multiplepoinding and the proceedings in an ordinary action, goes no further, in my view of the case, than to decide that Lord *Handyside's* Interlocutor established conclusively against parties not reclaiming, that as between, on the one hand, John and his children born at the death of the testator, treating the child *in utero* as then alive, and on the other hand children of John to be afterwards born, the latter had no interest in the legacy.

This appears to me a fair and reasonable view of the case, and one which warranted the Court in the course they took. I am, therefore, of opinion with the *Lord Chancellor* that the Interlocutors appealed against ought to be affirmed.

Lord Chelmsford's opinion.

Lord CHELMSFORD :

My Lords, before the claims of John Hamilton and his children can be determined upon this Appeal, it is necessary to ascertain whether the competition is open to him, or whether he is not precluded from questioning the Interlocutor of Lord *Handyside*, which found that he was entitled to the legacy of 20,000*l.* in life-rent only, and that his children born at the death of the testator, including a child *in utero* at that period, were entitled to the legacy amongst them in fee.

It was strongly contended on the part of John Hamilton's children that as neither he nor they had appealed against this Interlocutor it became final as between them, although it might be open to Peter Hamilton the son, who was born pending the proceedings in the Inner House, and was sisted as a party, to contend against that part of it which confined the fee of the legacy to the children in existence at the death of the testator; and that the Interlocutor of the Second Division recalling the Interlocutor of Lord

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Handyside and remitting to Lord *Kinloch* (Ordinary) with power to open up the record, and allow the claims to be amended, or new claims to be given in, was *ultra vires*, and ought to be reversed.

The objection to this exercise of jurisdiction was grounded principally on the provisions of the Act 6 Geo. 4. c. 120, commonly called the Scotch Judicature Act, the 17th section of which enacts that every "Interlocutor of the *Lord Ordinary* shall be final in the Outer House, subject, however, to the review of the Inner House in manner herein-after directed;" the 18th section, that when any Interlocutor shall have been pronounced by the *Lord Ordinary*, either of the parties dissatisfied therewith shall be entitled to apply for a review of it to the Inner House, praying the Court to alter the same, in whole or in part; and the 21st section, that the judgment pronounced by the Inner House shall in all cases be final in the Court of Session.

The application for a review of the *Lord Ordinary's* Interlocutor was by the reclaiming note of the trustees, which was directed to that part of the Interlocutor giving the fee of the legacy amongst the children of John Hamilton living at the death of the testator, and merely prayed that it might be found they were bound to retain the fee of the legacy of 20,000*l.* (*inter alia*) until it was seen whether any other children might be procreated of John Hamilton, and by the claim of Peter Hamilton, the child born pending the proceedings, claiming to be preferred to a sixth share, under burden of his father's life-rent. It was insisted that there being no attempt to disturb the Interlocutor so far as it gave John Hamilton the legacy in life-rent and his children in fee, the Inner House was bound to confine itself to the only part of the Interlocutor upon which the application was made

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for a review, and to decide the cause upon that ground.

On the part of John Hamilton it was argued, that the provisions of the 6 Geo. 4. c. 120, relied upon by the other side, did not apply to cases of multiplepoinding, but were confined to ordinary actions of the description mentioned in the 1st section, to which all the subsequent sections impliedly referred. To which it was answered, that an Act of Sederunt of the 11th July 1828, sect. 48, after prescribing to claimants in multiplepoinding the forms of proceeding as to condescendences, objections to claims, and note of pleas, enacts, that "thereafter in every instance the procedure shall correspond as nearly as may be to what is provided in the case of an ordinary action."

Now, if this had been the case of an ordinary action I should have felt great difficulty in saying that the Court would have had power to open the record, not upon any application of the parties themselves, but *proprio motu*, and with the view of allowing a claim to be made totally different from that which was originally preferred.

Various authorities were cited to establish the right of the Court to deal with the record in the manner they have done, but none of them appear to me to meet this case. The case of *Crawford and others* v. *Bennet* (a), which was much relied upon, differs from the present in one essential particular, that the Court there acted on the application of one of the parties, who had to pay the expenses as the price of the indulgence granted. I have not been able to find any authority for the Court itself directing the record to be opened, except where there has been some irregularity in preparing or closing it, or where it has not

(a) 10 Shaw, Dunlop, & Bell, 537.

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been made up in a shape so correct and full as to enable the Court to give judgment upon it, as in the cases cited in argument, of *Melville* v. *Douglas's Trustees* (a), *Lothian* v. *Tods* (b), to which may be added the recent case of *Inglis* v. *Douglas* (c).

If this, therefore, had been an ordinary action I should have been disposed to think that there had been an excess of authority by the Inner House in giving power by their Interlocutor to open the record and to allow new claims to be given in. But after some hesitation I have come to the conclusion that this course was competent, from the peculiar nature of the proceedings in multiplepoinding, and from the mode in which the case was presented for review. I have not lost sight of the Act of Sederunt, which assimilates the procedure in multiplepoinding to that in an ordinary action. But I do not think that the discretion exercised by the Court, of remitting the cause, and opening the record can be said to come within the proper meaning of the term "procedure." An action of multiplepoinding is not like an ordinary action, brought by one person against another, to recover a debt or damages, or to establish some right, in which the Pursuer must necessarily be bound to prove the claim or title which he has chosen to allege. In a proceeding of multiplepoinding the fund upon which the different claims are made is brought into or at least is within the authority of the Court, and while it remains in *medio* all parties claiming any interest in it may appear although not cited, and assert their claims. The duty of the Court is to adjust these claims, and to distribute the fund in the words of the summons "to such of the several defenders,

(a) 7 Shaw & D. 183.
(b) 7 Shaw & D. 525.
(c) 22 Sec. Ser. 505.

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and others as may be found to have best right thereto." If upon the proceedings being brought before them it appears that some of the claimants have proceeded upon a mistaken view of their rights, and therefore that the record as it stands precludes a determination of the true title, it seems scarcely consistent with the duty which the Court are called upon to discharge, or with reason and justice, that they should be forced to decree payment to parties who according to their own more correct judgment have no just claim upon the fund. It was admitted by the *Lord Advocate* that unless the Court had power to recall the record it would not be open to them to determine that the parents and children had other rights than those which the Interlocutor had decided. Both the reclaiming note of the trustees and the claim of Peter, the after-born son of John Hamilton, challenged the Interlocutor only so far as it confined the fee in the legacy to the children born at the death of the testator. These claims proceeded entirely upon the supposition that the legacy was not vested in John Hamilton as fiar, and in this respect the Interlocutor was not brought in review before the Inner House.

Attention was called in the course of the argument for John Hamilton to the closing prayer of the reclaiming note, "or to do otherwise in the premises as to your Lordships shall seem proper." And the case of *Somerville* v. *Darlington* (a) was referred to. I did not entirely comprehend the drift of the argument upon these words in the reclaiming note. If it were meant to be said that the prayer for general relief enabled the Court of Session to go into questions not specifically raised before them, it would appear to be

(a) 21 Sec. Ser. 467.

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adverse to John Hamilton's contention in favour of their Interlocutor, for they should then have dealt finally with the case themselves, and not have remitted and given power to open the record. But there is no authority for saying that this general prayer authorized the Court to decide the case upon totally different grounds from those expressly mentioned in the reclaiming note. The case of *Somerville* v. *Darlington* was a case of sequestration, in which there was a note of appeal to the Court from an Interlocutor of the Sheriff, deciding upon the validity of the votes of creditors in favour of a resolution for the re-examination of the bankrupt. The note of appeal concluded with the prayer for general relief, and the Court held that it was competent to them to consider the merits of the resolution itself. The *Lord Justice-Clerk* said, "I think the Appeal would have been good without any prayer at all, and if a prayer is necessary I am inclined to construe this prayer on much the same liberal principles as we should the prayer of a reclaiming note. Under such a prayer, appended to a reclaiming note, the Court has got over as formidable a difficulty." I am unable to gather from this passage whether the *Lord Justice-Clerk* intended to refer to the particular part of the note now under consideration, or to the note generally. It is difficult to suppose that he meant that the concluding prayer opened questions to the Court into which they could not otherwise have entered, because the very same words in the present case were not deemed sufficient to enable them to determine according to their own view in favour of a title which was not specifically raised upon the record. It was because the Interlocutor prevented a decision, which they thought the just rights of all the claimants called for, that they found it necessary to remove it out of the way, and to afford

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an opportunity to the parties who had mistaken their title, to amend their claims, so as to raise the real question for determination. To some small extent the Interlocutor of the *Lord Ordinary* interfered with the rights of a party who was not in any degree bound by acquiescence in his judgment. The decision of the *Lord Ordinary*, even supposing he was right in excluding after-born children of John Hamilton from participation in the fee of the legacy, by confining the interest of the parent to a life-rent, shut out entirely the *spes successionis* of these children. This, it is true, is an interest of a very trifling character amounting to a mere expectancy ; but such as it is, the decision of the *Lord Ordinary* entirely excludes it, while the judgment of the Inner House determining the fee to be in the parent, if held to be correct, will open it to them. But I prefer resting my opinion upon the peculiar nature of the action of multiplepoinding, in which the Court is called upon to adjust the claims of different parties upon a fund *in medio*, and in which the object and end of the proceeding seem to render it their duty to ascertain and determine, not upon the footing of what the parties may respectively claim, but upon their own judgment of the true right of all, whether original defenders or others, who may have claims upon the funds. It appears to me that the Court of Session were not prevented by any of the provisions of the Scotch Judicature Act, or by any of their own previous decisions, from pursuing the course which they adopted on this occasion. And in expressing my opinion upon this part of the case, I would borrow the words of the *Lord Justice-Clerk*, in the case last referred to, and say, that "I should think it very unfortunate if under the Appeal to the Court, owing to the terms of the prayer, it was not in a position to do justice to the parties."

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The Interlocutor of Lord *Handyside* being thus removed out of the way, the case is open as to the construction of the bequest upon the competition between the parents and the children. I agree that this is a question of intention, to be collected from the words of the trust disposition, but if certain words are employed which have obtained a known and settled meaning by law, we are not at liberty to look behind them in order to discover some other intention in the mind of the testator, different from their legal import. The trustees contend that in this case the difference of language used by the testator as to the different bequests plainly shows a difference of intention in each instance; that where he has intended the fee of the legacy to go to the legatee, he has said so in express terms, and that, therefore, where he has given a legacy to a parent in life-rent, and to his children amongst them in fee, he must be supposed to have intended what his words naturally express.

But in answer to this argument it must be observed, that the words in which the legacies in question are given have received a settled construction, which cannot bend to a presumed different intention. No authority has been cited, except Turnbull's case, in which a gift simply to the parent in life-rent and to the children in fee has been held to carry the fee to the children, and not to give it to the parent. The Appellants admit that the rule of construction against which they are contending has been long settled as to heritable subjects, but they say that the principle that the fee cannot be *in pendente*, upon which it was founded, is not applicable to moveables, and that there is no authoritative decision which extends it to them. But it has been generally assumed that there is no distinction in the construction of gifts of these different subjects; and it may be sufficient to answer

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the objection by referring to the language of Lord *Campbell* and Lord *Brougham*, in *Mackintosh* v. *Gordon* (*a*).

The Appellants, however, contend that the rule is not so rigid as not to bend the intention, and that various exceptions to it have been from time to time introduced. Thus it has been held that any expressions which clearly and unequivocally show that it was the intention of the testator that the parent should be confined to an interest for life in the legacy have been allowed to prevail. The word "allenarly," for instance, or any word of equivalent meaning in a gift of legacy in life-rent to the parent, and to the children in fee, has been held sufficient to prevent the fee vesting in the parent. Lord *Campbell*, in *Mackintosh* v. *Gordon*, observes, "that he cannot say that the word 'allenarly' more clearly expresses the intention of the settler, who when he gives a life interest to the parent, and fee to the children, can hardly intend that the parent should take the fee; but," (he adds) "I consider that we are bound by the long and uniform current of authorities." It appears to me that these words suggest a remark which is hostile to the Appellants' argument. The deed in question was evidently drawn by a person of legal knowledge. He must have known that if it were really the intention of the truster that in the gift of the legacies in question the parents' interest should be limited to their lives, one single word would have effected the object; and by adopting a form of gift without the restrictive expression he must be taken to have intended to leave it to its legal effect.

But the Appellants rely upon the exception which

(*a*) 4 Bell's Appeal Cases, 119, 120.

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has been introduced into the rule in cases where the fee of the subject is given in trust to apply to the objects of the gift, it being held that the trust fee satisfies the maxim that the fee cannot be *in pendente,* and that the life rent may, therefore, be construed according to the true meaning of the words. Cases of this description were cited, amongst which it is necessary only to mention Seton's case (*a*) and *Mein* v. *Taylor* (*b*). But in order that this construction should obtain, the trust must be of such a nature as to render it necessary that the trustees in the execution of their duty should hold the trust estate, and not merely have to do some act with respect to it, by which they at once divest themselves of it, either by paying it over to the parties entitled, or by conveying it in such manner and form as is expressly designated in the trust disposition. This was the nature of the trust in the case of Hutton's trustees (*c*), and in *Robertson* v. *Duke of Athol* (*d*).

The Appellants, however, contend that a trust was created in this case, which would exclude the operation of the rule; and if I understand their argument it was carried to this extent, that whenever executors are named they are trustees. This is certainly true in a sense; but the question here is whether their trust is of such a character as to render it necessary that the fee should be in them, so as to obviate the influence of the rule of not allowing it to be *in pendente* upon the construction of a gift to the parent in lifetime and to the children in fee. Now all that the executors are required to do in respect of the legacies in question is to pay to the parties who are entitled at the Whit Sunday or Martinmas that shall occur after the date

(*a*) Morr. 4219. (*b*) 4 Wils. & Shaw, 22.
(*c*) 9 Sec. Ser. 639. (*d*) 13 Faculty Decisions, 580.

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of twelve months of the testator's decease, so far as they shall have realized funds sufficient for the purpose, and to pay into the Bank, where the legatees shall not be ready to receive and discharge the same. This latter direction appears to be applicable only to such of the legatees as were in existence and immediately entitled, but who, from some circumstance, might be unable to take their legacies at the appointed time, and give a receipt for them. To argue that there was a trust for the children of John Hamilton and of James Hamilton, which required the trustees to hold the fee of the legacies, is to assume the very point to be proved, viz. that the parents had nothing more than a life-rent, and that the fee belonged to the children.

There is nothing, therefore, to prevent the ordinary operation of the words in which the gifts in question are made to the legatees, and no decision which favours the view of the Appellants but that of Turnbull (*a*), which was so much commented upon in the Court of Session, and during the argument at your Lordships' bar. The majority of the learned Judges of the Court of Session did not consider that case as any authority, an opinion which the meagre report we have of it may perhaps justify. But Lord *Benholme* said, "Had this been an heritable subject, and not a mere money provision, I should have had no doubt upon the question. My doubt is applicable only to money, provisions, or legacies. And with reference to this legacy, I confess that I have felt extreme difficulty in this part of the case, arising exclusively from this case of Turnbull." Probably the explanation of this decision is that which is given by Lord *Cowan*, who in observing upon Turnbull's

(*a*) Morr. 4248.

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case says, "Besides the peculiarity of the circumstances attending the competition, there is this further circumstance, that the subject of the destination was a money provision," which is the view taken of it in the subsequent case of Porterfield (*a*), and in the case of *Williamson* v. *Cochran,* in 1827 (*b*). It was not then so firmly fixed that the rule of construction applied to moveables as well as to land, as it came afterwards to be. If Turnbull's case was founded upon this distinction, the ground of it has been long ago removed; and if it proceeded upon the construction of the words of the gift, it is opposed to numerous decisions, both before and after it was pronounced. I may be disposed to acquiesce in the remarks made by the *Lord Justice-Clerk* in the case of *Ramsay* v. *Beveridge* (*c*), "that the decisions proceeded originally upon the feudal subtlety as to the fee of heritage not being *in pendente;* that the notions then adopted, and unfortunately applied at last to money provisions, were directly adverse originally to the presumed intention and object of the settlement, the plan of which was thereby defeated; and that rules of construction were introduced which have been the subject of much regret among lawyers." But I feel bound by the long and almost unbroken current of authorities to agree with the Interlocutors of the Court of Second Division, which I therefore think ought to be affirmed.

Lord CRANWORTH: I ought to say that I am desired by my noble and learned friend, Lord *Kingsdown*, to state that he is unable to attend here this morning, but that he entirely concurs in the result at which we have arrived.

(*a*) Morr. 4277; 2 Patt. 537. (*b*) 6 Shaw & D. 1035.
(*c*) 16 Sec. Ser. 769.

The *Lord Advocate:* My Lords, upon the matter of costs——

The LORD CHANCELLOR: The House has considered the question of costs, and is of opinion that the Appeals should be simply dismissed, and nothing further said about costs.

Interlocutors affirmed.

DEANS & STEIN—LOCH & MACLAURIN—MAITLAND & GRAHAM.