and obligation to maintain the channel or waterway of the river for the purpose of navigation gives the right to object to any temporary occupation of any part of the shore within high-water mark. I am disposed to hold that the word waterway' occurring in the Statute is not to be construed as limited to the navigable channel, as the respondents maintain, but includes every part of the river at high water, and certainly every part used practically for navigation. But the purpose for which the complainers' rights in the channel and waterway are conferred is that of navigation only: and it appears to me their right to interfere with operations on the foreshore is limited by what is necessary and proper for that purpose. The intention of the Legislature evidently was, that the complainers should make and maintain a navigable channel of 17 feet deep and of such breadth as they should think fit, the breadth of course varying at different parts of the river, and the provisions of the Statute conferring powers on the Trustees must be read with reference to this intention, and so as fully to give effect to it. I am of opinion that, reading the Statute in this way, and assuming that the river up to high-water mark is subject to the control of the complainers in so far as necessary to enable them to carry out the intention of the Statute, the result is that the complainers have a title to object to any operation which interferes with any purpose they have in view for the improvement of the navigation of the river, but have no title to complain of operations which they cannot say will have that effect.

"The complainers allege in this instance that the timber-ponds in question 'may become injurious to the said river and the navigation thereof.' I do not read this averment as meaning that the complainers have any reason to think that the timber-ponds, at so great a distance as they are from any part of the river used for the purpose of navigation, will really affect the navigation of the river in any way. If the engineer of the Clyde Trust, or the Trustees themselves, entertain that view, it must be much more definitely expressed. If the case of the complainers really were that the respondent's operations will have an injurious effect on the uses of the river for the purposes of navigation, it is not maintained that their title could be objected to.

"In the view now stated it does not appear to me that a proof is necessary for the decision of the case. The respondent's operations are really those of Mr Buchanan, the riparian proprietor, for they have been executed under authority granted by him. Whether in a question between him and the Crown these operations are lawful, it is not, I think, necessary here to inquire. The Crown, at least, has acquiesced, and the respondents are entitled to the benefit of this. The fact that the Crown might have a title to object will not give the complainers such a title. If the complainers would have no title to complain of operations by the admitted owner of the foreshore, it appears to me that, equally, they have no title to complain of the respondents' operations, which are permitted by the true owner on his property—*Mackenzie* v. *Gilchrist*, 20th January 1829, 7 S. 297; *Mackenzie* v. *Houston*, August 1831, 5 W. and S. 422. If the powers of the complainers be limited by the purposes of the trust under which they act, as I have now stated, they have no title to complain of operations on the property of others which they cannot say interfere with the purposes of their trust.

"If a valuable use of the foreshore can be made by the proprietor without injury to the navigation or any other public right, I do not think the complainers are entitled to prevent such use by requiring that their sanction shall be previously obtained."

The Trustees of the Clyde Navigation reclaimed, and after hearing counsel the Court adhered to the Lord Ordinary's interlocutor, adding a reservation of the rights of the Clyde Trustees to require the removal of the timber ponds and the restoration of the foreshore when required for the purposes of their Act, and a provision to prevent the running of prescription against the Clyde Trustees by reason of the possession of the ponds by the Greenock Harbour Trustees.

Counsel for the Clyde Trustees—Solicitor-General (Watson), Balfour, and Asher. Agents—Webster & Will, S.S.C.

Counsel for Greenock Harbour Trustees—Dean of Faculty (Clark), Q.C., and Macdonald. Agent—W. Archibald, S.S.C.

Friday, July 9.

FIRST DIVISION.

[Lord Craighill, Ordinary.

FINDLAY *v.* MACKENZIE.

Succession — Mortis Causa *Deed* — *Construction* — *Survivorship.*

A testator, in his disposition and settlement, on the narrative that he was desirous to settle his affairs in event of his death, and considering that he had already fully provided for his daughter, and that he was desirous to provide for his wife "in the event of her surviving me" over and above the provisions already conceived in her favour, "therefore" he disponed to his wife, and "her heirs and assignees whomsoever," his whole means and estate. The previous provisions to his wife were only in liferent. *Held* that the disposition to the wife in the settlement was dependent on her survivance.

This was an action at the instance of William Findlay against James Mackenzie of Glentore, for reduction of a will in favour of the defender, executed by the deceased John Todd of Glenduffhill on 8th October 1872, on the ground that it had been obtained by the defender by fraud and circumvention when the said John Todd was weak and facile in mind. The pursuer was one of the next of kin of Mr Todd, and the defender was his son-in-law.

Preliminary defences were lodged to the effect that if the deed of 1872 was reduced the succession of Mr Todd would be regulated by a prior disposition and deed of settlement of date 27th April 1866, found in Mr Todd's repositories after his death, and that thus the pursuer had no title to sue.

The following is the important part of the deed of 1866:—"I, John Todd, Esquire, of Glenduffhill, near Shettleston, being desirous to settle my

affairs for the event of death; and considering that I have already fully provided for my daughter Mrs Janet Todd or Mackenzie, wife of James Mackenzie, Esq., of Glentore, in an antenuptial contract of marriage, entered into and executed by and between the said James Mackenzie and my said daughter, with my advice and consent; and that it is my wish to provide farther for my wife Mrs Helen Coats or Todd, in the event of her surviving me, over and above the provisions already conceived in her favour in an antenuptial contract of marriage between me and her, and in the foresaid marriage contract of my said daughter: Therefore I do hereby dispone, assign, and convey to and in favour of my said wife Mrs Helen Coats or Todd, and her heirs and assignees whomsoever, heritably and irredeemably, my whole means and estate, heritable and moveable, real and personal, wherever situated or addebted, which shall belong and be addebted and owing to me at the time of my death, with the whole vouchers and instructions of the said moveable and personal estate, and the writs and evidents of my said heritable estate." The testator further appointed his wife his sole executrix, and dispensed with delivery of the deed. The previous provisions for Mrs Todd alluded to in this deed had been only in liferent.

The Lord Ordinary (CRAIGHILL) pronounced the following interlocutor:—

"*Edinburgh, 5th June* 1875.—The Lord Ordinary having heard parties' procurators on the preliminary defences, and more particularly on the first and second pleas in law for the defender, and considered the debate and whole process, finds that, according to the sound construction of the general disposition and settlement executed by the now deceased John Todd of Glenduffhill, of date 27th April 1866, referred to and founded on in the defences, the disposition of the testator's whole means and estate, heritable and moveable, real and personal, thereby granted to his 'wife Mrs Helen Coats or Todd, and her heirs and assignees whomsoever,' was evacuated by her predecease: Therefore repels the said defences, and appoints the cause to be enrolled with a view to further procedure, and decerns; and, in respect the defender now gives notice of his intention to bring this judgment under review, finds him liable to the pursuer in the expense of this preliminary discussion: Allows an account thereof to be given in, and remits that account to the Auditor to tax and report.

"*Note.*—This is an action to reduce the last will and testament of the late John Todd of Glenduffhill. The pursuer is one of the next of kin or representatives *in mobilibus* of Mr Todd. The defender is the executor and universal legatory under that will, and has lodged preliminary defences, the import of which is, that the pursuer's title to sue is excluded by the settlement mentioned in the foregoing interlocutor. The pleas in which this defence is presented have been the subjects of an anxious debate, and the conclusion to which the Lord Ordinary has been brought is, that these pleas must be repelled. The pleas referred to are rested on a general disposition and settlement executed by the late Mr Todd of Glenduffhill, of date 27th April 1866, whereby he disponed and assigned to his 'wife Mrs Helen Coats or Todd, and her heirs and assignees whomsoever,' heritably and redeemably his 'whole means and estate, heritable and movable, real and personal.' Mrs Todd died in 1869. Mr Todd survived till 1873, and as a consequence, the disposition being testamentary, Mrs Todd took nothing under it. This is a point as to which both parties are at one, but as the disposition, according to the words of the dispositive clause, is not to her only, but to her and her 'heirs and assignees whomsoever,' the defender contends that her heirs were conditional institutes, and but for the ultimate settlement, executed in 1872, which is now challenged, would have been entitled to the property left by her husband. The result, in this view of the matter, is, that the setting aside of the will of 1872 would, in place of opening up the succession to the heirs *in mobilibus* of Mr Todd, of whom the pursuer is one, throw it open to the next of kin of Mrs Todd; and there being in such a case as the present no title where there is no interest challenged by the pursuer to the will of 1872, they would thus be excluded. The pursuer, as was to be expected, resists the contention maintained on the subject by the defender. He says that, correctly construed, the deed of 1866 is a disposition to Mrs Todd only, and not a disposition failing her to her heirs and assignees as conditional institutes; and if this is the true reading, the decease of Mrs Todd necessarily rendered that settlement as inoperative as if it had been revoked. The Lord Ordinary, as already intimated, has adopted and has given effect to the view presented by the pursuer, for the reasons which will now be briefly explained.

"Two things, however, may be premised. The first is, that both parties are agreed that the passage now to be quoted from Erskine's Institutes (B. iii. T. 9. S. 9.) is good law. He there says that 'a legacy, where it is devised to a legatee and his executors, is not evacuated by the predecease of the legatee, but passes after the testator's decease to the legatee's executors, not by any right which these executors derive from the legatee to whom that legacy never belonged, he having died before it could have effect by the testator's death, but in their own right as conditional institutes in the legacy.' There is, the Lord Ordinary thinks, no room for distinction between a legacy which, as generally happens, is only a sum charged upon or payable out of the executry, and one which is a bequest or disposition of the whole moveable succession, and therefore on the present occasion the question is not whether Mr Todd could by disponing his estate to his wife and her heirs and assignees constitute these heirs conditional institutes, but whether this was done by the deed in which such words are used in the dispositive clause. The second of the things to be premised is, that as the deed in question is a *mortis causa* deed, the intention of the testator, as that is evidenced, not by one part of the deed, but by the deed as a whole, is the rule by which the present controversy must be determined. This, the Lord Ordinary understood, was not disputed at the debate; and, at anyrate, the point is one which, as he thinks, is firmly fixed. Taking, then, the deed as a whole, or, in other words, reading the dispositive clause in the light thrown upon it by the context, what is the result established?

"The dispositive clause mentions heirs and assignees, but this is not conclusive, otherwise the rule last-mentioned would be displaced. Indeed, *assignees*, as was admitted by the counsel for the defender, could and would take nothing, Mrs Todd having predeceased the testator. They, whether

deriving their right through an *inter vivos* or through a *mortis causa* deed, could claim nothing which was not vested in their author. This of itself shows that there may in the dispositive clause be a grant in form of words to representatives of a legatee, who, nevertheless, will be entitled to nothing unless the legatee shall acquire the succession. Heirs or executors undoubtedly occupy a more favoured position. They *may* take though the *nominatim* disponee or legatee died before the testator; but whether they shall or shall not take depends on the purpose for which they were introduced into the destination. Are they conditional institutes, or, in other words, independent legatees called to the succession in case of the predecease of the *nominatim* legatee? Or are they mentioned merely by way of limitation? The context must be referred to before these questions can be answered.

"Turning, then, to the context, which has here to be consulted, the Lord Ordinary, in the first place, thinks that the purpose for which the general disposition and settlement of 1866 was granted, as explained by the testator in the clause introductory to that containing the disposition, leads almost necessarily to the conclusion that the disposition as granted was contingent on the survivance of Mrs Todd. The testator's wish was to increase the provisions already conferred on her 'in the event of her surviving' the testator. The 'therefore' with which the dispositive clause begins has for its antecedent this purpose, and it is hardly conceivable that the heirs of Mrs Todd, for whom, independently, no desire to provide was expressed, were to be free from the condition by which the right conceived in her favour was effected. In the second place, the clause of the deed in which the executor is nominated also shows that the heirs of Mrs Todd were not regarded by the testator as conditional institutes. Had they been so, they, in case of her predecease, would have been appointed, but they are neither named or referred to in the clause containing the nomination. The testator nominates and appoints 'my said wife Mrs Helen Coats or Todd to be my sole executor.' This is all that was required if she was the only person intended to take under the disposition, but it is not all which was required, and certainly was not all which was to be expected, if the will of the testator was that her heirs were to take in the event of her predeceasing the testator. Their omission from the nomination seems plainly to suggest that, though mentioned in the dispositive clause, they were mentioned because they might take through Mrs Todd, and not because the testator intended to make them independent legatees, or, in other words, conditional institutes.

"Numerous decisions were referred to at the debate, and these have been taken into consideration by the Lord Ordinary, but there is in truth little, if any, controversy between the parties as to the law of the case, and therefore he thinks it unnecessary to bring them here under review. All will be found collected on pp. 634-36 of the first volume of Mr M'Laren's Treatise on Wills."

The defender reclaimed.

Argued for him—It was admitted that a settlement to A and his heirs inured to the heir although A predeceased the testator. But it was said that the disposition here was subject to the condition of survivorship. There was certainly no express condition of that sort, but it was sought to derive one by implication from the narrative or cause of granting. But it was not legitimate to construe a legacy by the cause of granting, and what was set forth in the narrative clause here was simply an expression of the testator's wish to benefit his wife. By such reference to the narrative clause it was not competent to override the clear and unambiguous words of the dispositive clause.

Argued for the pursuer—The words "heirs and assignees," though fixed as to meaning in one sense, varied in meaning according to the variation of the terms of the disposition. The plain meaning of the words here—looking at the whole context—was, that the wife was to take absolutely if she survived. The defender confounded the cause of granting with the intention of granting. There was here no question of *falsa causa*, but whether the testator had expressed his purpose in making the deed.

Authorities—1 M'Laren (Wills and Succession), pp. 634-36; *Inglis* v. *Miller*, 1760, M. 8084; *Boston* v. *Horsburgh*, 1781, M. 8099; *Torrie* v. *Munsie*, 31st May 1832, 10 Sh. 797; *Donald's Trs.* v. *Donald*, 26th March 1864, 2 Macph. 922.

At advising—

Lord Deas—The now deceased John Todd, afterwards of Glenduffhill, was married to the also now deceased Helen Coats in 1844. On that occasion an antenuptial contract of marriage was executed between the spouses, to which James Todd, then of Glenduffhill, father of John, became a party and conveyed the lands of Glenduffhill to the spouses in conjunct fee and liferent, but for the wife's liferent only, and to the children of the marriage in fee, but under the real burden of payment to the wife if she survived her husband of £15 for mournings, and a liferent annuity or jointure of £40, restrictable to £12 in the event of her second marriage, and also under the real burden of her liferent, in the event of her survivance, of the upper flat and garrets of the mansion house of Glenduffhill, to be suitably furnished, and a convenient garden, and the driving of her coals, but all to be forfeited in the event of her second marriage. In June 1865 Mr Todd's daughter Janet, who was the only surviving child of his then subsisting marriage with the said Helen Coats, was married to the defender James Mackenzie. Mr Todd on that occasion became a party to an antenuptial marriage contract between these spouses, whereby he conveyed his estate of Glenduffhill to "himself in liferent, for his liferent use allenarly, and to the said Janet Todd and the heirs of her body or her assignees and disponees, whom all failing to the nearest heirs whomsoever of the said John Todd" himself, but under the reservations and burdens following: 1st, under reservation of the said John Todd's liferent allenarly; 2d, under the burden of implementing the whole provisions exigible from the said lands in favour of Mrs Todd (Janet Coats) contained in the antenuptial contract of marriage of 1844 between her and the said John Todd, but excluding the liferent thereby provided to her of the upper flat and garrets of the old mansion house; 3d, under the burden of the liferent use, in the event of her survivance, of the new mansion house, (erected by Mr Todd) offices and garden, in lieu of the upper flat and garrets and garden, of the old mansion house; 4th, under

the burden of payment to Mrs Todd if she survived her husband of a liferent annuity of £20; and 5th, under reservation of Mr Todd's right to feu for buildings, and to work minerals, etc. The destination of the estate of Glenduffhill in this deed became afterwards the subject of decision in this Court on 18th July 1874.

In the meantime, on 2d April 1866 Mr Todd executed the *mortis causa* deed now under consideration. That deed proceeds on the narrative that the granter had already fully provided for his daughter (Mrs Mackenzie) by the antenuptial contract executed, with his advice and consent, between her and James Mackenzie, "and that it is my wish to provide farther for my wife Mrs Helen Coats or Todd in the event of her surviving me, over and above the provisions already conceived in her favour in an antenuptial contract of marriage between me and her, and in the foresaid marriage contract of my said daughter." On this narrative the deed proceeds, "therefore, I do hereby dispone, assign, and convey, to and in favour of my said wife Mrs Helen Coats or Todd, and her heirs and assignees whomsoever, heritably and irredeemably, my whole means and estate, heritable and moveable," under the burden of his debts, funeral expenses, and such gifts or legacies as he might leave,—"and I hereby nominate and appoint my said wife, Mrs Helen Coats or Todd to be my sole executrix,"—reserving power to alter, and dispensing with delivery in usual form.

Mrs Todd predeceased her husband, having died on 2d February 1869. Their daughter, Mrs Mackenzie, died without issue on 7th September 1872, having survived her mother, but predeceased her father. After the death of his wife and daughter Mr Todd executed two deeds, both dated 3d October 1872, the one conveying his estate of Glenduffhill to Mr Mackenzie under burden of the granter's debts and a variety of legacies; and the other conveying his personal estate to Mr Mackenzie.

Mr Todd died on 7th June 1873, leaving a sister Mrs Frame, several neices by another sister Mrs Findlay, and a nephew, James Todd, who was his heir-at-law, being the son of a deceased brother.

The deed conveying Glenduffhill to Mr Mackenzie has been reduced on the ground of want of capacity, facility and circumvention, and the present pursuer, as one of Mr Todd's next of kin, now seeks, on similar grounds, to reduce the deed which conveys the personal estate to Mr Mackenzie. The pursuer is met by the preliminary objection that the title and interest to reduce this last mentioned deed is not in the pursuer, but in the heirs of Mrs Todd under Mr Todd's *mortis causa* deed of April 1866. These heirs, who have hitherto made no claim, are said to be her nephew James Coats in regard to heritable succession, and her brother James Coats, and two sisters, as regards moveable succession. It is not said, however, whether Mr Todd left any other heritable estate than the lands of Glenduffhill; but we know from previous litigations that the inventory of his personal estate was given up at £1,277 odds, including a debt of £1,068 odds due by Mr Mackenzie himself. The Lord Ordinary has repelled the defence that the pursuer's title and interest are excluded by the deed of 1866—holding that Mrs Todd's heirs were not conditional institutes under that deed, but that the conveyance in favour of Mrs Todd was conditional on her surviving her husband, which she did not do, and in the result arrived at by the Lord Ordinary I entirely concur, although I do not adopt all the observations contained in his note.

As regards legacies, properly so called, the general rule is that they become void by the predecease of the legatee, because they are presumed to have been bequeathed from personal favour to the individual. Lord Stair accordingly states the rule thus—"This is common to all legacies, that if the legator die before the testator the legacy becomes void, and is not transmitted to the heirs and successors of the legator." (Stair 3, 8, 21.)

Mr Erskine in the passage cited at the bar, and quoted in the Lord Ordinary's note, states what is really an exception to or qualification of the general rule, and he states the reason for it, namely, that where the legacy is bequeathed to an individual and his executors, the executors take not as succeeding to the *nominatim* legatee, but as conditional institute, by the direct and expressed will of the testator. That is quite a reasonable exception or qualification, because the natural and ordinary way of bequeathing a legacy, properly so called, is to bequeath it *simpliciter* to the individual; and if the testator adds "and his executors," or what would be the same thing "and his heirs," the true inference is that he has extended his personal favour to these heirs or executors, and this inference has been so often given effect to that, although originally exceptional, it may now be said to be equally well established with the more general rule laid down by Lord Stair.

It is not however quite safe to regard the rules applicable to proper legacies which are made a burden on the heritable or moveable succession, as equally applicable to a dispositive clause either of heritable or moveable estate. It may be either more or less difficult in the one case than in the other to construe the words heirs and assignees as importing a conditional institution. I do not go into that question. All I say, is that I am not prepared to concur in the Lord Ordinary's remark, that there is no room for distinction between the language of a legacy and the language of a dispositive clause in a *mortis causa* deed. The last is the case we have to deal with here; and in dealing with it I go entirely upon two things—in the first place, that this is a deed granted in implement of a natural obligation, and, in that respect, more analogous to deeds of provision by a parent in favour of a child than to any other class of deeds; and, in the second place, that in its very terms it imports a provision for the wife in the event of her survivance only.

In the case of *Russel*, 10th March 1769, M. 6372, a father granted a bond of provision in favour of his second son David, his heirs, executors, and assignees, payable at the first term after the death of the granter. David died before his father, and his sister Marion claimed the provision, but the successful argument was—"Bonds of provision are granted in implement of the natural obligation, and as that ceaseth by the death of the child they are understood to fall." The observation was made that if David had left a child there might have been a *conjectura pietatis* in favour of that child, (Hailes p. 288), and this observation was given effect to as sound in the subsequent case of *Wood* v. *Aitchison*, June 26, 1789, M. 13043.

The law thus applicable to provisions to children has been long quite settled. Heirs and assignees are held to mean heirs and assignees of the child if the implied condition of survivance is

implemented, but not otherwise. The provision is held to have been made from affection for the particular child, and to provide for the maintenance of that child after the death of the father. Much of the same reasoning is applicable to provisions for a widow. But in the present case it is not necessary to resort to presumptions, for the terms of the deed, read in connection with the two deeds to which it refers, make the testator's meaning unmistakable. All the provisions conferred by the marriage contract between the testator and his wife, and all the provisions conferred on her in their daughter's contract of marriage, were expressly made conditional upon her survivance of her husband, and when the testator narrates these provisions, and his wish to provide farther for her, over and above these provisions, and then says, "therefore" he conveys to her his means and estate so far as not already conveyed to his daughter, I cannot doubt that he meant the additional provisions to be equally conditional with the provisions to which they were added. The appointment of his wife to be his sole executrix points in the same direction. She could not be his executrix unless she survived him. Of course a man may convey his means and estate by a *mortis causa* deed to his wife and her heirs, meaning these heirs to be conditional institutes, just as he may convey them to any body else. But here I think the testator neither meant to do so nor actually did so.

The case of *Boston*, M. 8099, was altogether different. The conveyance by the testator in that case was in favour of his brother John, his heirs and assignees. That was not a conveyance in implement of what the law regards as a natural obligation. John married and had a son Alexander, who survived his father for several years in the lifetime of the testator, who nevertheless left the deed uncancelled and unrevoked, and the Court (altering the judgment of the Lord Ordinary) "found the disposition effectual to the heir of John." I have no fault to find with that decision. I rather think I should have concurred in it. But it is altogether different from the present case, in regard to which I have no hesitation in concurring in the result arrived at by the Lord Ordinary.

LORD ARDMILLAN concurred.

LORD MURE—I also concur in the result arrived at by the Lord Ordinary, and particularly upon the second ground specified in the note, namely, that the deed is a *mortis causa* deed. The use of the words "heirs and assignees" undoubtedly create a difficulty, but the deed being *mortis causa* must be construed with reference to the intention of the testator as shown by the whole of the deed, and especially the purpose of the deed as set forth in the narrative. But in construing this deed in the way to which I have alluded we are thrown back upon what the testator had already done for his wife. All the former provisions are made conditional on the survivance of the wife, and it is said that the provisions here given are to be of the same nature.

Then going on to the dispositive clause, we find that it is also connected with the former deeds, because after having referred to them in his narrative of the cause of granting he says "therefore I dispone," &c. I do do not think that the words "heirs and assignees" must necessarily be construed as a conditional institution, and to construe it in that way would be to make the testator do just what he says he is not going to do, and looking to the narrative of the deed I do not think it is necessary so to construe it. Therefore I am of opinion that Mrs Todd having predeceased her husband the provisions fall.

THE LORD PRESIDENT—As I concur in the result arrived at I did not think it would be necessary to make any observations, but as the case is one of considerable importance in law, it is desirable that we should make distinct the grounds of our decision.

I cannot concur in some of the reasoning of the Lord Ordinary, nor in some of the opinions expressed by your Lordships to-day. In the first place, I am of opinion that on a true construction of the deed, the benefit given to Mrs Todd is contingent on her survivorship. The disposition is in general and I may also add in common terms. As a general rule, a dispositive clause in the terms here used imports an out and out conveyance, not merely to the disponee, but failing him to his heir, and the words "heirs and assignees whomsoever" are common in our conveyancing. But the words have not the same meaning in every kind of deed. Thus a disposition preceding a sale is invariably taken to "heirs and assignees." But that means nothing more than that the disposition is to the disponee himself, the other words being only a matter of style. But when these words are used in an ordinary conveyance either of heritable estate, or of a mixed estate, or of a moveable estate, and the disponee fails, his heir takes. One suggestion was made as to the construction of this clause which I cannot adopt. It is suggested that the addition of the word "assignees" rather takes off from the effect of the word "heirs." I do not think that there is anything inconsistent in conveying to the heir in case the disponee should not survive, and his assignees if he should survive and assign. In some cases a competition has arisen under such a conveyance between an assignee and the heir at law, where the disponee assigned his right although he died before the testator, and in such cases the heir has been preferred because the disponee was not vested in the right when he assigned it. This shows that the failure of the disponee does not militate against the heir's right. So the general rule in a deed of this description is, that failing the disponee the heir takes. But that is only a general rule, and the words not being appropriate to a deed of this kind are liable to construction. If from the deed itself, or the circumstances under which it was made, or from the nature of the provisions, or from the character of the relation of the testator to the beneficiary, the meaning of the deed can be gathered, it is competent to do so. Here we are bound to consider that the beneficiary was the wife of the testator, and as a general rule provisions in favour of a wife are personal to the beneficiary, and intended only to take effect in the case of survivance. It must also be kept in mind that in the previous provisions to the wife everything depended on her survivance. Under her own and her daughter's marriage contract that condition was introduced, and in the inductive clause of this deed the express purpose of it is to supplement the wife's provisions. The testator says that he is settling his affairs. That might look like something more than a mere provision for his wife—but it must be remembered that he had already provided for his

daughter and wants to provide for his wife. Then come the words "in the event of her surviving me, over and above the provisions already conceived in her favour." I am far from saying that the inductive cause of a deed in the narrative clause must be commensurate with the dispositive clause. But *in dubio* it is fair to refer back to the narrative in order to see the probable meaning of the dispositive clause. If in all cases the words in the dispositive clause were *voces signatæ*, then nothing could derogate from their effect, except the inductive clause being so strong as to be equivalent to express direction. But in a case of this sort no such fixed effect is given to the words in the dispositive clause.

I do not attach much importance to the word "therefore," for if that word had been missed out the meaning would have remained exactly the same. In any case we would have been quite entitled to go back to the narrative in order to construe the deed. I think that the beneficiary here being a wife brings the case very nearly within the rule regulating bonds of provision. It is not a deed to settle in succession on a stranger, but to make a suitable provision for a particular individual, and although this deed contains a general conveyance of heritable and moveable estate, it must be kept in mind that the bulk of the estate was Glenduffhill, the moveable property being of small amount. The only respect in which this provision differs from former provisions is, that in them the provision is in liferent as well as being dependent on survivorship, whereas here the disposition is out and out, and I think that it was that difference which led the testator to use the words "heirs and assignees." And that is quite an intelligible and legitimate use of the words known to our law, as in a disposition by a seller to a purchaser they are always used to show that the conveyance is absolute. In some such sense the words are used here. To show that, although in supplement of the former provisions the conveyance is not in liferent but out and out. I therefore arrive at the same result as the Lord Ordinary, but I think that it is necessary to recal his interlocutor, as we do not arrive at the conclusion on the same grounds.

The Court pronounced this interlocutor:—

"The Lords having heard counsel on the reclaiming-note for the defender against Lord Craighill's interlocutor, dated 5th June 1875, Vary the said interlocutor by deleting the words 'evacuated by her predecease,' and substituting in place of them the words 'conditional on her surviving her husband:' *Quoad ultra* adhere to the said interlocutor, and refuse the reclaiming-note," &c.

Counsel for the Pursuer — Solicitor-General Watson) and Trayner. Agents — Duncan & Black, W.S.

Counsel for Defender—Dean of Faculty (Clark) and Balfour. Agents—Drummond & Reid, W.S.

Saturday, July 10.

FIRST DIVISION.

YOUNG *v.* SOLICITOR OF INLAND REVENUE.

Income Tax—Act 5 *and* 6 *Vict., c.* 35, § 39—*Temporary Residence—Ship Captain.*

Held that the master of a vessel trading between Glasgow, the Mediterranean, and New York, who earned the greater part of his income upon the high seas, and did not reside in the United Kingdom for three months in the year, but was tenant of a house in Glasgow, occupied by his wife and family, and by himself when in Scotland, was not entitled to exemption from income tax as a temporary resident under the 39th section of the Act 5 and 6 Vict., cap. 35.

The following Case for the opinion of the Court was stated by the Commissioners under the Customs and Inland Revenue Act, 1874:—

Mr H. Young, master of the steamship "Olympia," belonging to Henderson Brothers, of Glasgow, appealed against an assessment for the year 1874-5, made upon him under schedule D of the income tax, in respect of his salary as master mariner, on the ground that he had not been resident within the United Kingdom for a period of three months during the year of assessment.

It was stated on behalf of the appellant that he trades between Glasgow, the Mediterranean, and New York, and that the greater part of his income is earned upon the high seas, and beyond the limits of the United Kingdom; that his arrivals in, and departures from, the United Kingdom were as follows:—

	Period of Residence in United Kingdom.
He left Glasgow for New York on 20th March 1874.	
Arrived, Glasgow, from New York on 17th May 1874.	
Left Glasgow for New York on 28th May 1874, . . .	11 days
Arrived, Glasgow, from New York on 5th July 1874.	
Left Glasgow for New York on 21st August 1874, . . .	47 ...
Arrived, Glasgow, from New York on 28th September 1874.	
Left Glasgow for Mediterranean and New York on 13th October 1874,	15 ...
Arrived, Glasgow, from Mediterranean and New York on 19th January 1875.	
Left Glasgow for Mediterranean and New York on 3d February 1875,	15 ...
Arrived, Glasgow, from Mediterranean and New York on May 1875.	
Total,	88 days

And that his detention in the United Kingdom during the year of assessment was, on account of dull trade, double that of previous years.

That he was therefore only a temporary resident in the United Kingdom during the year of assessment, and as such entitled to exemption under the 39th section of the Act 5th and 6th Victoria, cap. 35.