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Tuesday, July 17.

SECOND DIVISION.

SPECIAL CASE—DUNCAN'S TRUSTEES AND OTHERS.

Succession—Vesting.

A testator directed his trustees to hold the sum of £5000 "for behoof of such of the children of E. as shall at her death be then surviving, and shall have attained or shall afterwards attain the age of twenty-five years complete." *Held* that the attainment of the age of twenty-five years was a condition essential to any of E.'s children as individuals taking a vested interest in the fund.

Succession—Vesting—Annual proceeds.

Circumstances in which *held* that beneficiaries were entitled to have the income of provisions which had not vested in them applied for their behoof.

This was a Special Case presented by Macfie and others, trustees of the late James Duncan, of Rothesay, formerly merchant in Valparaiso, parties of the first part; John Abbey Ellison and others, children of the deceased Mrs Maria Lyall or Ellison, wife of John Ellison, Liverpool, and the said John Ellison, as curator and administrator for some of his children, parties of the second part; and Janet Duncan M'Callum and others, the whole persons, other than the second parties, interested in the residue of the trust-estate, two of them being the sole surviving next-of-kin of the truster, parties of the third part.

Mr Duncan died on 21st October 1874, leaving a trust-disposition and settlement dated 28th November 1867, and a codicil dated 19th October 1874, under which he appointed the first parties trustees and executors.

The important clauses of the trust-disposition were as follows:—"*In the Seventh place,* . . . . (*Third*) I direct and appoint my trustees, at the first term of Whitsunday or Martinmas happening six months after my decease, to set aside and hold, and when opportunity offers to invest, in their own names, as trustees foresaid, the sum of £5000 sterling, and, in the event of my sister the said Mary Duncan being then in life, to pay and make over the annual income or produce thereof, as and when the same shall arise, to my said sister during all the days of her lifetime, for her alimentary use allenarly; and, failing my said sister, whether before or after me, survived by the said Maria Lyall or Ellison, I direct and appoint my trustees to make payment of the said annual income or produce, as and when the same shall arise, to the said Maria Lyall or Ellison for her separate alimentary use allenarly; and upon the decease of the longest liver of the said Mary Duncan and Maria Lyall or Ellison, or in the event of their both predeceasing the said last-mentioned term of Whitsunday or Martinmas happening as aforesaid, then at said term my trustees shall hold the fee of the said sum of £5000 for behoof of such of the children of the said Maria Lyall or Ellison, whether by her present or any future marriage, as shall be then surviving, and shall have attained or shall afterwards attain the age of twenty-five years complete, and for behoof of the issue of any child or children who may have predeceased the cessation of said liferents, or if there be no liferenter who may have predeceased said last-mentioned term, or who may die before attaining the foresaid age leaving issue; and I direct and appoint my trustees to pay and divide said sum to and among said children and issue upon their respectively attaining the foresaid age of twenty-five years complete, the division being *per stirpes* . . . and I direct and appoint my trustees, until they shall invest the five sums of £5000 last hereinbefore mentioned, to pay to the person or persons entitled to the liferent of said sums, or, should there be no liferenter, to add to the capital of said sums, and dispose of the same along therewith and as a part thereof, the interest of the said sums respectively, at the rate of 4 per centum per annum, beginning the first term's payment thereof at the first term of Whitsunday or Martinmas happening six months after my decease, for the whole period between my decease and said term, and the next payment at the first of these terms thereafter, and so forth half-yearly and termly, until the foresaid sums respectively be invested; but upon the said sums being once invested, no further payments of interest shall be made from my estate, although the various investments made may yield a less rate of interest than 4 per cent. or be afterwards paid up or realised, my trustees being the only judges as to the making and the continuance of the foresaid investments." . . . .

"*In the Ninth place,* I direct and appoint my trustees, after implementing and fulfilling, or providing for the due implement or fulfilment of, the preceding purposes of this trust, to divide the residue and remainder of my means and estate into five equal shares, and to hold, retain, and invest in their own names, as trustees foresaid, one of the said shares for behoof of my brother the said Colin Duncan in liferent, and another of the said shares for behoof of my niece the said Janet Duncan M'Callum in liferent, and to pay over the annual income or produce of each of said shares as and when the same shall arise to my said brother and niece respectively during all the days of their respective lives, for his and her alimentary use allenarly; and with reference to the disposal of the fee of the said two shares, I direct and appoint my trustees upon the decease of the said liferenters respectively to divide the shares liferented by them respectively into three equal proportions, and to hold, apply, and dispose of the same according to the destination, and in the same way and manner in all respects (subject always to the provision as to vesting hereinafter written), as is hereinafter appointed with reference to the three remaining shares of said residue and remainder: But, notwithstanding what is before written, I provide and declare that none of the proportions of said two shares, or any part thereof, shall become vested interests in the persons who may become entitled thereto until the same shall be paid over to them respectively." . . . .

"With reference to the disposal of the three

remaining shares of the residue and remainder of my means and estate, I direct and appoint my trustees to hold, apply, and dispose of one of the said shares for behoof of the said Mary Duncan and Maria Lyall or Ellison, and the children of the said Maria Lyall or Ellison, and the issue of predeceasing children, for their respective rights of liferent and fee . . . . all in the same way and manner in all respects (excepting only as after mentioned) as is hereinbefore provided with reference to the three several legacies of £5000 hereinbefore conceived in favour of the said persons: But I provide and declare that the direction hereinbefore contained to pay interest at the rate of 4 per cent. per annum on said legacies until invested shall not apply to any of the shares of the residue and remainder of my means and estate, the actual annual income or produce only of said shares being to be paid over to the persons entitled thereto at the time respectively."

The truster was survived by the two liferenters, Mary Duncan and Mrs Ellison. The former died on 26th September 1875, the latter on 25th May 1876. Mrs Ellison was survived by eight children, who, along with their father, were the second parties. None of the said children had attained twenty-five years of age, and only two had attained majority. Of the remaining six two were between the ages of fourteen and twenty-one, and the four youngest all in pupillarity. The sums which the trustees held for behoof of the second parties consisted of—(1) legacy of £5000; (2) one-third (or about £16,000) of the two shares set apart for the liferent use of the testator's brother Colin (who predeceased the testator) and his niece Janet Duncan M'Callum, the fee of which, under the clause above recited, was destined to the three remaining classes of residuary legatees, of whom the second parties formed one; and (3) one-fifth (or about £24,000) of the residue, according to the original division thereof. The third parties were, along with the second parties, the whole persons interested in the residue of Mr Duncan's estate; and Miss Janet Duncan M'Callum and Mrs Margaret Ann M'Callum or Johnstone, two of the third parties, were the sole surviving next-of-kin *ab intestato* of the truster. It was admitted that, from the circumstances of the children, the application of the whole or the greater portion of the income on their respective shares was urgently required for their maintenance and education, if the trustees had power to make such application. It was also admitted that the truster in the end of 1872 intimated to Mr John Ellison an intention of giving to his wife, the said Mrs Maria Lyall or Ellison, for herself and family, £100 every six months, and that the truster thereafter during his lifetime regularly made payments to Mrs Ellison in accordance with said intimated intention.

The following questions were submitted to the Court:—"(1) Have the second parties a vested interest in the provisions contained in the said recited clauses of the settlement, or in any and which of them? (2) Are the second parties entitled to have the income of any of said provisions paid over to them or applied for their behoof before they become entitled to payment of their shares of the capital, and, if so, to which of the provisions does this apply? (3) If the second parties are so entitled, are the trustees bound to pay over or apply, in the manner stated, the whole income, or, if not, how much? (4) If they are not so entitled, how does the income, or the unappropriated portion thereof, fall to be applied?"

The trustees argued that there was no power in the settlement sanctioning the advancement of any portion of the income for either of the above purposes, and that the children had at present no vested interest in their said provisions, or any of them.

The second parties argued, with reference to each of the provisions, (1) that the children collectively had such an interest in their said provisions as entitled the trustees to apply the income thereof, or so much as might be necessary, for the purposes of their maintenance and education; and (2) that the second parties had a vested interest in all the three recited provisions, or one or more of them.

Authorities—*Beckford* v. *Tobin*, 1 Vesey senior, 308; *Hill* v. *Hill*, 3 Ves. and Beam. 183; *Campbell* v. *Reid*, 2 D. 1084; *Ogilvie* v. *Cumming*, Jan. 27, 1852, 14 D. 363; *Maitland's Trs.* v. *M'Diarmid*, March 15, 1861, 23 D. 732; *Hardman* v. *Guthrie*, June 1, 1828, 6 S. 920; *Templar* v. *Templar*, April 1, 1828, 3 W. and S. 47.

At advising—

Lord Justice-Clerk—[*After reading the questions stated and the clauses of the settlement*]—The first provision of residue to the second parties could certainly not vest against the declaration of the truster, and I do not think that vesting has occurred as regards the other provisions. The more important question relates to the accruing income. The Court will not direct this to be paid over for behoof of the children as a class until the fee vests. This is quite clear from the terms of the settlement of the £5000, of which there is no ulterior destination. The case of *Maitland* shews that there is vesting of the fund, though not of the separate shares. Now, if the sole interest in a fund vests in a family, it is most reasonable that the children should be entitled to receive the accruing income, so far as required for aliment and education. The law of England is quite fixed to that effect, though the rule is confined to cases where the truster is *in loco parentis*. The Case states that there is an urgent necessity for the income being so applied. The authorities which have been cited shew that in England the decree for payment is generally qualified by some such clause as "so far as required." But I do not think it necessary here to qualify the judgment, and we shall make no distinction between those children who have attained twenty-one and those who have not.

Lord Ormidale—In regard to the provision of £5000 referred to in the third branch of the seventh purpose of the testator's settlement, it seems to me to be too clear for doubt that it has not vested and cannot vest in the second parties till, in the words of the testator, they "shall attain the age of twenty-five years complete," which none of them have yet done. Not only is this expressly declared, but there is a survivorship and also ulterior interests attached to the destination of the provision, which would require

to be disregarded in order to its being held as now vested.

The other provisions, consisting of one-third of the two shares of residue referred to in the ninth purpose of the deed of settlement, although dealt with by the testator in peculiar terms, must, I think, be held to stand in the same position as the £5000 provision already noticed. The argument founded upon the phraseology employed by the testator in regard to the provisions now in question raise too slight an implication, if any at all, to entitle the Court to distinguish them as regards the matter of vesting from the other provision of £5000.

And so, also, I am unable to hold it implied that the testator meant and intended any of the provisions to vest in the beneficiaries before they attained the age of twenty-five years merely because there is to be found in his deed of settlement an appointment of tutors and curators to all persons taking benefit under it "who may be in pupillarity or minority *quoad* such benefit during their respective pupillarities and minorities." I am not satisfied there might not have been persons beneficiaries under his settlement, other than the second parties to the present case, to whom the appointment of tutors and curators might not have been applicable when the deed of settlement was executed. For example, there are several persons referred to in the fourth purpose of the deed, legatees to the extent of £250, some of whom may have been in pupillarity or minority when the deed was executed in 1867. There are also legacies bequeathed by the testator in his codicil to children expressly; and it may very well be that the general clause as to the appointment of tutors and curators was inserted in his settlement in order to meet the case of pupil or minor legatees whom he might favour in any codicil he might afterwards execute.

In regard to the second question, relating to the interest or income of the residue, I have more difficulty. In the general case, interest or income cannot well be held to be payable to any party in whom the capital has not yet vested, unless there is a direction, express or implied, to that effect. But in the present case, although there is no express direction, yet when I keep in view the rule which appears from the cases which were cited at the debate, and, as explained by your Lordship to operate in the Equity Courts in England, to the effect that parties, and more especially children as a class, as heirs having merely prospective contingent interests in a capital sum, may be entitled to the interest of it—a principle which seems to have been given effect to in this Court in the case of *Campbell* v. *Reid*—I am not disposed to dissent from what I understand is the opinion of both your Lordships, that the interest or income in question, which is not directed to be otherwise accumulated, may be paid to or applied to the benefit of the second parties.

Lord Gifford—The will of the late James Duncan, on the construction of which depend the questions raised under the present Special Case, is a somewhat complicated instrument, and I have found some of the questions to which it gives rise attended with considerable nicety and difficulty.

The first question relates to the period of vesting of the provisions which the testator makes for the children of Mrs Maria Lyall or Ellison. These provisions are three in number—1st, a sum of £5000, which the testator directs to be set aside, held, and applied in the third sub-section of the seventh purpose of his deed; 2d, one-third of two-fifth shares of the residue of the estate, which two-fifth shares were to be liferented by Colin Duncan and Janet Duncan M'Callum, as provided in the ninth purpose of the trust-deed; and 3d, one-fifth share of the residue of the estate, also provided in the ninth purpose of the deed.

I am of opinion, on a construction of the terms of the whole deed, that none of these provisions have yet become vested interests in any of the children of the late Mrs Maria Lyall or Ellison, who are the second parties to this Special Case. I think that no vesting can take place under Mr Duncan's deed until the children of Mrs Ellison respectively attain the age of 25 years. The main clause in the trust-deed, so far as the question of vesting is concerned, is the third sub-section of the seventh purpose of the deed, for although this clause only refers to the first provision, the legacy of £5000, it really governs all the other provisions in favour of the Ellison family, and the testator expressly refers back to it in constituting the subsequent provisions.

Now, in reference to the fee of this £5000, the interest of which was to be paid to Mary Duncan and to Mrs Ellison in succession, the testator provides that after the death of Mary Duncan or Mrs Ellison "my trustees shall hold the fee of the said sum of £5000 for behoof of such of the children of the said Maria Lyall or Ellison, whether by her present or any future marriage, as shall be then surviving, and shall have attained or shall afterwards attain the age of twenty-five years complete." And then there is a destination to the issue of such children as may die before attaining that age. It appears to me that the attainment of 25 years is a proper condition essential to any of Mrs Ellison's children, as individuals taking a vested interest in the provision. The condition is imposed in the strongest way, namely, by way of limiting the class who are to take. The bequest is not to all Mrs Ellison's children, with a mere postponement of payment; it is a bequest only to "such of the children" as may attain 25, so that if any child predeceases that age, he or she is not an ultimate beneficiary or legatee at all. I think this is conclusive against the vesting in any child until the age of 25.

Nor is the case different with regard to the other two provisions, which consist of shares of the general residue of the trust-estate. These shares of residue are given to Mary Duncan and Mrs Ellison, and to the children of Mrs Ellison, "for their respective rights of liferent and fee," "all in the same way and manner in all respects (excepting only as after-mentioned) as is hereinbefore provided with reference to the three several legacies of £5000 hereinbefore conceived in favour of the said persons." The exception here mentioned only relates to the estimated interest which is to be added to the legacy of £5000, and which estimated interest at 4 per cent. is not to apply to residue which will only receive the actual interest which may accrue thereon. The result appears to be, in so far as

relates to the fee of the residuary bequests, that the same will not vest in any of Mrs Ellison's children individually until such children respectively attain the age of 25 years complete. The same rule is applicable to the residue as to the legacy of £5000. Both are only to belong to "such of the children" as attain that age. I am of opinion, therefore, that the first question put in the Special Case should be answered in the negative. No vesting of any of the provisions has yet taken place.

The remaining questions in the Special Case are attended with still greater difficulty, and it is not without considerable hesitation that I have come to think that although no part of the capital or fee of the provisions has yet vested in any of Mrs Ellison's children, the interest now accruing on these provisions is available for the necessary maintenance and education of the whole of Mrs Ellison's family.

The general rule is, that where a money legacy is only due and payable upon the occurrence of an uncertain event—that is, upon the purifying of a proper or uncertain condition—no interest is due until the condition is purified and the legacy becomes payable. Interest is not due upon legacies any more than upon debts until they fall due and become payable. This rule is necessarily subject to an exception when the legacy consists of a general residue or of a share thereof, for in such cases the intermediate interest must necessarily go along with and accrue to the legacy itself. Accruing interest on residue is really just a part of that residue when it is not otherwise disposed of. It is a different question whether, in the case of a conditional or contingent bequest of residue, the accruing interest can be paid before the term of vesting of the residue itself, or whether it must not accumulate for behoof of the legatees who may ultimately take the residue.

Still it is always an important element that in bequests of residue the accruing interest does not go to any third party, but necessarily belongs to the residuary legatees whether it be paid *ad interim* or whether it accumulate till the final payment of the residue itself. In the present case, although the first provision is not residue but a money legacy of £5000, I think the rule will apply that the interest thereon must be dealt with as interest upon residue, for the same parties who are entitled thereto are entitled to the corresponding shares of residue, so that their provision is really a provision of residue increased by £5000, the other residuary legatees having a like share of residue increased by a like increment. I think, therefore, I may deal with the question of interest as if it were all interest accruing on shares of residue.

Now, in the first place, when a residue or a share of residue is to be liferented by a parent and the fee thereof destined to her children, and where there is no provision for accumulation of interest, I think there is a strong presumption that the testator did not intend the payment of the annual interest on the residue to stop at the mother's death, however young and unprovided for her children might then be, although the fee of the residue might only be given to such of the children as might attain majority or be married. Accumulation is not to be presumed where not specially directed, and it would be a very hard and somewhat inequitable result if Mrs Ellison's young family should by their mother's death be deprived of the income or interest which their mother enjoyed, and should be obliged to do without that interest in the meantime, and without the means of support, and to wait for that interest accumulating for them till they respectively attain the age of twenty-five. Wherever interest of residue is payable to a parent in liferent, and the ultimate fee destined to the children, but payment thereof postponed, it will be very easy to presume that the testator intended the pupil or minor children to get the same benefit of annual proceeds as their father or mother had enjoyed. Accordingly, it seems to be quite settled by the authorities that where a parent himself provides to his children shares of residue, or even simple legacies, the payment or vesting of which is postponed till majority or marriage or other contingent event, the children will nevertheless be entitled to the intermediate accruing interest for the purposes of maintenance. But this principle has been extended beyond the case of children, to cases where the testator held or assumed the position of being in *loco parentis* to the children to whom he destined the fee of the provision. This rule has been established by the following among other cases—*Acherly* v. *Vernor*, 1 P. Williams 783; *Beckford* v. *Tobin*, 1 Vesey senr. 308; *Hill* v. *Hill*, 3 Ves. and Beam. 183; *Campbell* v. *Reid*, 2 D. 1084; *Ogilvie* v. *Cumming*, Jan. 27, 1852, 14 D. 363; *Maitland's Trustees* v. *M'Diarmid*, 23 D. 732; *Hardman* v. *Guthrie*, June 1, 1828, 6 S. 920; *Templar* v. *Templar*, April 1, 1828, 3 W. & S. 47.

In the present Special Case it is expressly admitted that the truster placed himself in *loco parentis* to Mrs Ellison's children, and that for at least two years before his death he promised to pay and did actually pay to Mrs Ellison for behoof of herself "and family" the sum of £100 every six months. The precise relationship between the testator and Mrs Ellison's family is not stated in the Case, but I understand it was very close, although perhaps not bearing a legal character.

In the whole circumstances, though not without hesitation, I am of opinion that Mrs Ellison's children are entitled to the interest of their provisions, and that before the capital thereof vests in them by their attaining respectively the age of twenty-five, and although the accruing interest is of considerable amount, I think that the trustees are entitled to pay the whole in equal proportions to or for behoof of the eight children of Mrs Ellison. It is stated in the Case that the whole or nearly the whole income is urgently required for the maintenance and education of the children, and the trustees should see that it is applied for the children's benefit. The second and third questions therefore should be answered to this effect, and the fourth question is superseded.

The Court answered the first question in the negative, and the second and third in the affirmative.

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