M'Morland took the shares on the faith of the prospectus. Mr M'Morland being dead, we had not the advantage of his evidence, but it appears very clearly from the letters which he wrote to his agent on 17th and 23rd November 1892 that in agreeing to take the shares he relied entirely upon his partner Mr M'Killop's declared confidence in the concern (the *bona fides* of which I see no reason to doubt), and the examination which he had personally made of the mines. In the latter letter he says—"Had Mr M'Killop not been interested and surveyed the mine for himself, I would not have put a penny into it, as I don't believe much in mining unless the subjects are good, from good authority, and also the management." From his business relationship with Mr M'Killop it is plain that Mr M'Morland must have known perfectly well what collieries Mr M'Killop was personally carrying on, and cannot have been influenced by the erroneous supposition that Mr M'Killop had been carrying on the Bryndu Collieries previous to the formation of the company. Mr M'Killop says "he (that is, M'Morland) was led to associate himself with the company entirely through my individual position and connection with it." So far as I can see from the evidence before us, that is the truth. It may be assumed—I think it must be assumed—that M'Morland saw the prospectus, but I do not think it is proved that he bought on the faith of it, or that he was induced to buy by misrepresentations made to him by any of the defenders.

In this view it is not necessary to consider the next question, viz., whether the minute of agreement of 18th August 1892 was or was not a contract of which notice should have been given under section 38 of the Companies Act of 1867. I prefer to reserve my opinion upon that point, and also on the question whether, assuming that notice should have been given of the contract, Mr M'Morland's waiver contained in his letter of application was or was not effectual to free the defenders from liability. If the case depended on these questions, I think, looking to their importance and the great difference in judicial opinion in the English courts, that it would have been proper to submit the questions to the whole Court or a Court of seven Judges.

The Court adhered.

Counsel for the Pursuers—Vary Campbell—Wilson. Agent—Keith R. Maitland, W.S.

Counsel for the Defenders — Dean of Faculty, Q.C.—Ure—M'Clure. Agents—J. W. & J. Mackenzie, W.S.

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*Friday, November 6.*

## SECOND DIVISION.

[Lord Kyllachy, Ordinary.

## SMITH'S JUDICIAL FACTOR *v.* NEILL'S TRUSTEES.

*Succession—Vesting—Survivorship Clause—Whether Vesting a morte or on Realisation and Distribution.*

In his trust-disposition and settlement a testator directed his trustees "at the first term of Whitsunday or Martinmas making twelve months after my death, or as soon thereafter and from time to time as the same may be realised, to divide and pay over the residue of my estate equally amongst all my four children above named, their heirs or assignees respectively." This direction was qualified by a destination-over to the issue "of my said children dying leaving lawful issue" and a survivorship clause providing that "should any of my said children die without being married or leaving lawful issue, then the provisions hereby made in their favour shall fall to and be divisible amongst my other surviving children, including the issue of anyone who may have died, such issue always coming in their parents' room."

The periods at which different parts of the estate could be realised were necessarily different, and some of them were subsequent to the expiry of the year from the testator's death.

There was no liferent protected by the trust.

In a special direction as to the retention by the trustees of a daughter's share of residue until she attained the age of thirty-two or was married, her interest in residue was referred to as "her capital" and "her means and estate," and the interest was payable to her.

*Held* (*reversing* the judgment of Lord Kyllachy) that the presumption that a clause of survivorship refers to the period of distribution was overcome by the indications of a contrary intention, and that there was vesting *a morte testatoris.*

*Young* v. *Robertson*, February 14, 1862, 4 Macq. 314, and *Howat's Trustees* v. *Howat*, December 17, 1869, 8 Macph. 337, *distinguished.*

By trust-disposition and settlement, dated 5th September 1839, David Neill, who died in 1847, conveyed to trustees his whole estate, heritable and moveable, then belonging or which might belong to him at the time of his death, for the trust purposes therein set forth. The material parts of the trust-disposition and settlement were as follows:—"*Third*, Out of the remainder of my said estate, after paying all my debts and others foresaid, and any legacies or sums which I may by any memorandum, promissory-note, or any other writing under

my hand order to be paid, and for which such document, though not formal or tested, shall be full authority, I appoint my said trustees or their foresaids to lay out and invest a sum of £4000 on good heritable or personal security, or set aside funds or property out of my estate to that amount, or as nearly, less or more, as may be, and to continue the full control and management of said fund ay and until my youngest daughter reach the age of twenty-one years, or if dead before that time, then at the period at which she would, if alive, have reached that age, on which event, or at all events at the first term of Whitsunday or Martinmas thereafter, I appoint my said trustees to apportion the said fund as follows, viz.—To pay my son William £500, Robert £800, and my said daughter Margaret, but subject to the directions after mentioned, £1000, or the heirs and assignees of my said sons and daughter respectively; which legacies are granted in order to equalise the provisions of my said children with those already made to my daughter Susan through her mother's relations and me, and to complete the education of Margaret, and the balance thereof shall be equally divided amongst all my children, the said William and Robert Neill, my said daughter Susan, spouse of the said Peter Ballingall, and Margaret aforesaid, their respective heirs or assignees; and until the period of said division arrives, I appoint my said trustees to pay over the annual interest or proceeds of the fund so to be invested to my said four children and their foresaids in the same proportions as the said capital sum is to be divided, each child drawing interest or proceeds according to the amount of his or her legacy and shares respectively: *Fourth*, At the first term of Whitsunday or Martinmas making twelve months after my death, or as soon thereafter and from time to time as the same may be realised, to divide and pay over the residue of my estate equally amongst all my four children above named, their heirs or assignees respectively, the share of my daughter Margaret, including her share and interest in the fund to be set aside under the preceding article, to be subject to the conditions after mentioned: *Fifth*, I appoint the whole provisions above mentioned in favour of my said daughter Margaret to be retained and managed by my said trustees, and lent out and invested, so far as not invested under article third, in their names on good heritable or personal security for her behoof until her marriage or attaining the age of thirty-two years complete; meantime to apply the annual proceeds thereof for her maintenance, and in particular to the completion of her education, for which purpose I have given her a larger legacy under article third, and therefore with power to encroach on her capital for that purpose to an extent not exceeding £200, with power to my trustees on the marriage of my said daughter (should that occur prior to her reaching the said age of thirty-two years), and after advancing her a reasonable outfit, to settle and secure the whole of her means and estate then remaining in their hands by contract of marriage or otherwise on herself and the heirs of the body, whom failing, her own nearest heirs or assignees, but expressly secluding the *jus mariti* of any husband she may marry, and declaring that the same shall not be subject to his debts or deeds; with power nevertheless to my said trustees, should they deem it expedient or the party be deserving, to lend to any husband she may marry any sum not exceeding one-third part of her free capital, taking security for the amount by life insurance or otherwise, as they may see fit; and with power also to my said trustees, if thought expedient, to create a trust under such contract of marriage, and to denude of my said daughters funds under the directions above mentioned in favour of the trustees therein appointed; but in the event of my daughter Margaret not being married by the time she reached the foresaid age of thirty-two, then I direct my said trustees, should they deem it advisable and conducive to my daughter's comfort, to lay out a sum, not exceeding one-half of her free capital, in purchasing an annuity on her own life, and then to pay over to her the balance or the whole of her funds then in their hands, as the case may be: *Lastly*, In the event of any of my said children dying leaving lawful issue, the provisions hereby made in their favour shall fall to such issue respectively in such shares as their parents may have appointed by any writing under their hands, which failing, equally among them; and in like manner, should any of my said children die without being married or leaving lawful issue, then the provisions hereby made in their favours shall fall to and be divisible amongst my other surviving children, including the issue of anyone who may have died, such issue always coming in their parents' room: Which provisions to my said children are hereby declared to be in full of all legitim, bairns' part of gear, executory, or others, which they or any of them can demand by and through my death or the death of their mother: And in case any of them shall repudiate their settlement and claim their legal rights, whether legitim or their mother's share of the goods in communion at her death, in place of the provisions herein, or by any means prevent this settlement from taking full effect, then such child or children shall forfeit all right to that part of my heritable and moveable estate which I am by law entitled to dispose of, and which I hereby accordingly dispone, assign, and convey to my other children and their foresaids who may abide by these presents."

In 1848 the trustees, on the narrative of the powers given them in the trust-disposition and settlement, conveyed the whole provisions to which Margaret Brand Neill, the testator's daughter, above referred to, was then or might thereafter become entitled under the trust-disposition and codicil of her father, under deduction of advances, to her marriage-contract trustees, and bound themselves, as consenters to the marriage-contract, to pay over Mar-

garet's share to the marriage-contract trustees from time to time as the same was realised.

In 1861, upon the petition of Mrs Margaret Brand Neill or Smith, a judicial factor was appointed on the marriage-contract trust-estate, and after his death in 1892 William Alexander Wood, C.A., Edinburgh, was appointed judicial factor in his place, conform to act and warrant in his favour dated 6th June 1895.

In the year 1847 David Neill purchased a piece of ground with a house thereon, taking the title to the subjects in the following terms:—"To and in favour of Mrs Susan Laird Neill or Ballingall, wife of Peter Ballingall, farmer, Aytoun, and Margaret Brand Neill, residing at Bridge of Allan, both daughters of the said David Neill, and the survivor of them, in liferent, for their and her liferent use allenarly, and declaring that the said Susan Laird Neill or Ballingall shall be entitled to the exclusive liferent use and enjoyment of the said piece of ground and others hereby disponed during the whole period of her lifetime, and to and in favour of the said David Neill, his heirs and assignees whomsoever, in fee."

Mrs Susan Laird Neill or Ballingall died on 20th January 1852, and Mrs Margaret Brand Neill or Smith died on 9th September 1895.

The subjects acquired by David Neill in 1847 were sold on 19th January 1896, for £750.

In these circumstances Mr William Alexander Wood, as judicial factor on the marriage-contract trust estate, brought the present action concluding (1) for declarator "that the pursuer, as judicial factor foresaid, had full and undoubted right and title to one-fourth *pro indiviso*" of the subjects acquired by David Neill in 1847 above referred to, or alternately to one-fourth of the price or proceeds of the subjects, in the event of the same being sold or otherwise realised by the trustees of David Neill, and (2) for decree ordaining the trustees "to transfer, *habili modo*, the foresaid one-fourth *pro indiviso* of the said subjects to the pursuer as judicial factor foresaid, or alternatively, in the event of the same being sold or otherwise realised, to pay and deliver to the said pursuer, as judicial factor foresaid, one-fourth of the free proceeds of said subjects.

The testamentary trustees of David Neill, the surviving descendants of David Neill, the children of Margaret Brand Neill or Smith, her executors-nominate, and the beneficiaries under her settlement, were all called as defenders, but David Neill's trustees were the only defenders who lodged defences.

They maintained that "on a sound construction of the trust-disposition and settlement of the deceased David Neill, read in the light of the destination in the said disposition of the heritable property in question, and especially in view of the survivorship clause contained in the said trust-disposition and settlement, vesting was postponed until the date of the death of the liferentrix, Mrs M. B. Neill or Smith, on 9th September 1895, and that in consequence of the testator's children having all predeceased Mrs Neill, the last liferentrix, the succession thereto has devolved on their issue *per stirpes* as conditional institutes, and that if the vesting was so postponed, the division of the proceeds of the property in question would be tripartite, and the pursuer would have no interest in the present case."

The pursuer pleaded, *inter alia*—"(2) The said Mrs Margaret Brand Neill or Smith having had right, as one of the four children of her said father, to one-fourth of the residue of his estate, the pursuer, as her assignee, in the circumstances condescended on, is entitled to decree in terms of the conclusions of the summons."

The defenders pleaded—"(1) Vesting having been postponed as stated in the defences, the pursuer never acquired any interest in the property in question."

After a discussion in the procedure roll the Lord Ordinary (KYLLACHY), by interlocutor dated 4th July 1896, sustained the first plea-in-law for the defenders, and assoilzied them from the conclusions of the summons.

*Opinion.*—"This case raises a question under the settlement of the late David Neill, who died so far back as the year 1847. The question is as to the date at which vesting took place in a certain part of his succession, viz., a house which he had bought at the Bridge of Allan. There is no doubt that, although subject to a liferent created by the deceased himself, that house formed part of the residue of his estate, and with respect to that residue, his settlement, which we have here to construe, contains the following provision:—His trustees are directed, at the first term of Whitsunday or 'Martinmas making twelve months after my death, or as soon thereafter and from time to time as the same may be realised, to divide and pay over the residue of my estate equally amongst all my four children above named, their heirs or assignees respectively.' Now, here it will be observed that there is, on the one hand, no gift of any share in the residue until the period of realisation. On the other hand, there is a destination-over, or what is called a destination-over, 'to heirs and assignees,' and therefore if this clause had stood alone there would have been room to argue, on the one hand, that there was vesting *a morte*—heirs and assignees being merely called as substitutes after vesting. There might, on the other hand, have been room to argue that the 'heirs' at all events were conditional institutes, and that therefore there was postponement of vesting until the period of realisation. How that question should have been decided had the clause in question stood alone I do not think it necessary to inquire, because the settlement contains in its last purpose a further provision in these terms—'Lastly, in the event of any of my said children dying leaving lawful issue, the provisions hereby made in their favour shall fall to such issue respectively in such shares

as their parents may have appointed by any writing under their hands, which failing, equally among them; and in like manner should any of my said children die without being married or leaving lawful issue, then the provisions hereby made in their favours shall fall to and be divisible amongst my other surviving children, including the issue of any one who may have died, such issue always coming in their parent's room.' There is here, it will be noted, first a destination-over to issue, and then failing issue a clause of survivorship among the original legatees.

"Now, the question is, whether this destination-over and clause of survivorship can be read as referring to the event of predecease of the testator, or must, according to the general rule of construction, be read as referring to predecease of the period of distribution—that is to say, in the case of this residue to the period of realisation.

"I am of opinion that there is nothing in this present case to take it out of the general rule—the general rule which I take to have been settled as far back as the case of *Young* v. *Robertson*. And the fact which I have pointed out, that there is here no gift prior to the period of realisation appears to me to create a special difficulty in the way of holding that vesting to this residue took place *a morte testatoris*.

"The pursuer no doubt founds on the third purpose of the settlement, which deals with the sum of £4000, as to which the direction is that the sum is to be set aside until the youngest daughter reaches the age of twenty-one, and then divided in certain proportions amongst the sons and daughters or their 'heirs and assignees.' It seemed to be argued that in this third purpose vesting was plainly *a morte*, and that the presumption is against different periods of vesting as applicable to different parts of the fund. All I can say is, that it does not appear to me to be by any means clear that vesting under this clause was *a morte*. On the contrary, I think the question is practically the same question which arises with respect to the residue, and I see no more reason for holding that vesting took place under this clause before the period of distribution than I see reason for holding that the residue vested before distribution.

"The pursuer, however, also founds on the special provision in the fifth purpose of the settlement, which deals with the whole provisions (residue included) in favour of Margaret Neill, whose share, as it happens, is that specially in question. It is certainly true that the trustees are here directed to retain and manage the whole of Margaret Neill's provisions until she attains the age of thirty-two years or is married; and in the event of her marriage before she reaches thirty-two, to settle the whole of her means and estate then remaining in her hands by contract of marriage on herself and the heirs of her body. That is quite true, and, but for the provision in the last purpose of the settlement to which I have referred, I do not doubt that the result would have been to make Margaret's provisions vest at latest at the date of her marriage. But then I cannot leave the last clause out of view in construing this clause, any more than I can leave it out of view in construing the other clauses, and the scheme of the settlement being for vesting at the period of distribution, I am not able to hold that Margaret's provisions formed an exception. It is true that her whole means were directed to be settled at her marriage by marriage-contract, but I apprehend that there may quite well be a conveyance, by marriage-contract or otherwise, of unvested and contingent rights—a conveyance quite as effectual (or which may be quite as effectual) as a conveyance of absolute rights. Therefore I am not prepared to hold that the provisions with respect to the share of Margaret derogate from the general scheme of the settlement as expressed in the last purpose. I think that vesting took place only at the period of distribution, and that being so, I suppose what happens is that I assoilzie the defenders from the conclusions of the summons."

The pursuer reclaimed, and argued—The whole scheme of this settlement was consistent only with vesting *a morte*. The contrary view involved (1) different periods of vesting in different parts of the estate, according to the period at which it was realised and paid over, which would be somewhat extraordinary; (2) ultimate inequality in the shares of different children, whereas the prevailing idea of the deed was equality in their provisions; (3) that the period of vesting would be made to depend on the accident of when the trustees saw fit to realise (as to which see *Ferrier* v. *Ferrier* May 18, 1872, 10 Macph. 711, at p. 714). An interpretation which involved such consequences ought not to be adopted. On the other hand, the view that vesting took place *a morte* was supported by the words used in referring to (1) the children's shares at the end of the third purpose, and (2) to Margaret's share of residue in the fifth purpose, and also (3) by the fact that the provisions of the settlement were declared to be in full of legitim. Even if the period of vesting was determined by the period of realisation, it took place not at the actual period of realisation and distribution, but at the earliest period at which realisation and distribution could have lawfully taken place —*Scott* v. *Scott's Executrix*, January 27, 1877, 4 R. 384. In this view the pursuer would equally be entitled to decree. This house might have been sold subject to the liferents long before the death of the last liferentrix, or she might have renounced her liferent for or without consideration. The case of *Young* v. *Robertson*, February 14, 1862, 4 Macq. 314, was entirely different from the present. There it was expressly provided that the trustees were to pay on the death of the liferentrix only.

Argued for the defenders—It was a settled rule of construction that words of survivorship occurring in a settlement should be referred to the period of distribution, which in this case could not arrive till the estate had been realised—*Young* v. *Robertson, cit. per* Lord Westbury, L.C., at pages 319 and

320. This case was practically the same as *Howat's Trustees* v. *Howat*, December 17, 1869, 8 Macph. 337. The only difference was that there the survivorship clause contained the expression "dying before receiving payment of their shares." That case, though commented on by Lord Young, was nevertheless followed in *Macdougall* v. *M'Farlane's Trustees*, May 16, 1890, 17 R. 761. There might be more periods of vesting than one under a settlement—*Marshall* v. *King*, October 30, 1888, 16 R. 40, *per* L.P. Inglis at page 43, foot. Where, as here, there was no right conferred except by way of a direction to divide and pay, nothing could vest until actual payment or division took place —*Bryson's Trustees* v. *Clark*, November 26, 1880, 8 R. 142. As to the effect on vesting of the renunciation of a liferent, see *per* Lord Watson in *Muirhead* v. *Muirhead*, May 12, 1890, 17 R. (H.L.) 45, at page 48, on the result of the law laid down in *Pretty* v. *Newbigging*, March 2, 1854, 16 D. 667.

At advising—

LORD JUSTICE-CLERK — The testator's deed in this case is framed with a view to the division of the residue of his estate in equal proportions among his family, there being a separate provision for an unequal division of a special sum of £4000, this unequal division being declared to be for the purpose of equalising the provisions to the children, one daughter Susan having before his death received certain advantages, and one daughter Margaret requiring to have her education completed. The trustees were directed to retain this sum till the time when this latter daughter should, or would if alive, have attained majority, and then to apportion it in a certain manner. It was also directed that during the period they retained the capital, they were to pay the interest to the children in the same proportions as those in which the capital sum was to be divided.

As regards the residue, the trustees were directed by the fourth purpose—[*his Lordship read the fourth purpose quoted above*]; and by the fifth purpose certain directions were given as to Margaret's share, in view of education and marriage, which is there described as "her capital" and "her means and estate," and her funds.

The last clause states—[*his Lordship read the clause "Lastly" quoted above*], and then followed a clause of forfeiture in the event of any of the children repudiating the settlement.

The question is whether the survivorship clause in the last clause is to be read as relating to any beneficiary predeceasing the testator or to any beneficiary predeceasing the period of distribution. It appears to me that the deed in its whole scope is against the idea of intention on the part of the testator to postpone vesting to some indefinite period occurring at an interval after his death. I cannot read the words of the fourth purpose as fixing a time for vesting by stating a time for division. They are a reasonable provision for giving a time to the trustees for realisation, quite common in such cases as this, and do not indicate an intention to postpone vesting. They do not make it necessary to read in the last clause such words as "before receiving payment," words which have occurred in testamentary writings, and to which effect has been given. The provisions relating to the disposal of the £4000 are, I think, not indicative of an intention to postpone vesting, for he speaks of the proportions payable respectively as "their shares," and appoints the interest to be paid pending the arrival of the period of payment. And if this provision thus vested *a morte*, it is difficult to see how there should be a different period of vesting for the residue, in regard to which the apportionment of this £4000 was to act as an equalising of provisions.

This view is confirmed by the fifth purpose, which relates to the share of the youngest daughter Margaret. Many of the expressions point to a gift to her, to be held by the trustees "as her means and estate," "her free capital," and "her funds"—indeed, it is treated as belonging to her, and they are empowered to secure it, and that at once, as being "her means and estate," she being entitled to receive the interest as her own. And if Margaret marries they are to secure to herself and the heirs of her body. That does not point to the security of a mere expectancy. It points distinctly to a provision made, to be secured on marriage to her.

Taking all these indications of intention along with the clause of declaration as regards legitim, and of forfeiture against impugning children, I feel justified in holding the testator's intention to have been vesting *a morte*, and that the pursuer is entitled to prevail in regard to the property which forms the subject of the present litigation.

LORD YOUNG—I am of the same opinion. From the first I had no doubt that under the provisions of this settlement there was vesting *a morte testatoris*. No reasonable argument against that view has occurred to me. It would be sufficient if it were shown that this was so with reference to Margaret's provisions, but I think it is also true with regard to the provisions of all the children that vesting took place *a morte testatoris*. The question here is limited to a house purchased by the testator shortly before his death. The title is in the name of the trustees, and the property vested in them in trust at the testator's death. It seems to have been argued in the Outer House—and the Lord Ordinary was apparently impressed with the argument—that as there is a direction to pay only twelve months after the testator's death, and a destination-over to the issue of children, and further a clause of survivorship in similar terms to that found in the case of *Robertson*, vesting must be taken to be postponed till the period of distribution. The expression used in the deed is as follows:—"At the first term of Whitsunday or Martinmas, making twelve months after my death, or as soon thereafter and from time to time as the same may be realised, to divide and pay over the residue of

my estate equally amongst all my four children above named, their heirs or assignees respectively." That is just the provision found in most wills, that trustees are to pay and divide as soon after the testator's death as the estate can be realised. It cannot well be paid and divided sooner. The law allows executors time for that purpose. The usual rule is that they have six months after the testator's death to realise, and that is also the usual provision in wills. The trustees are usually directed to divide at the first term of Whitsunday or Martinmas making six months after the testator's death, or as soon thereafter as the same may be realised. But it is a new idea to me that such a clause could postpone vesting. It is a novelty to me that the period allowed for distribution should be supposed to have anything to do with vesting. To postpone the period of distribution for twelve months would not postpone vesting, and neither would the postponement of distribution till the estate can be realised. With regard to the house, as to which the question in this case arises, there can be no difficulty as to realisation or distribution. It has stood on the same title since shortly after the testator's death. It was not turned into money. Neither is money in bank. But it was as much realised as anything else. The estate must be invested in something. This house, as it stood, without being turned into money at all, was just as completely vested in the beneficiaries as anything could be. The proposition that vesting was to take place from time to time, as it was found convenient to turn the various investments into money, is extravagant. The intention of the testator, as gathered from the deed—and that is the only source from which we can ascertain his intention—is perfectly clear. [*His Lordship then quoted the fifth purpose above set forth.*] In face of that language, to express even a doubt that her share was vested in her and liable for her debts and deeds, appears to me entirely without foundation. I think, therefore, that the Lord Ordinary's interlocutor must be reversed, and that we must give decree in favour of the pursuer, and find and declare accordingly, in terms of the alternative conclusions of the summons.

LORD TRAYNER—I am of the same opinion. The Lord Ordinary has held that this case is ruled by the case of *Young* v. *Robertson*. In that view I cannot concur. In that case the truster conveyed his whole estate to trustees, directing them to pay the income to his wife if she should survive him (as was the case), and to account for, pay, and divide, or convey the residue after the death of the last liver of himself and his wife to certain persons named, with a clause of survivorship; and it was held that under that destination no right vested in the beneficiaries until the period of distribution arrived, that is, until the death of the liferentrix. Now, if in this case, as is maintained by the respondents, and as the Lord Ordinary thinks, nothing vested till the estate was realised and payment of the shares actually made, the case of *Robertson* would probably be in point. But the whole scope of the trust-deed before us is adverse to such a contention, and it is from the whole scope of the trust-deed that we must look for the truster's intention. There was here no liferent to be protected. The only interest to be protected by the creation of a trust was that of the persons to whom the fee was given. Not that a liferent would prevent vesting *a morte testatoris*, but it is a consideration to be taken account of in deciding questions of vesting. The trust here had nothing to protect but the interests directly conferred on the children. As regards the sum of £4000 dealt with in the third trust purpose, I think that it vested *a morte testatoris*. The legal presumption is in favour of vesting at that date. Moreover, here it is provided that during the whole period during which the £4000 is to be retained by the trustees, the whole income is to be paid to the children. Those who are to receive the revenue of a fund may generally be taken, in the absence of any provision to the contrary, to be the persons entitled to the capital from which the revenue arises. As regards the fourth purpose, I concur in what Lord Young has said as to the meaning, effect, and purpose of that clause, and have little, if anything, to add. Payment and division may be postponed without postponing vesting, and we are entitled to assume that it was so here. But that no postponement of vesting was intended may fairly be gathered from the terms of the fifth purpose, and with it we are now more immediately concerned. We find there a provision that the trustees are to retain and manage Margaret's share, and to invest it in their names for her behoof until her marriage, or attaining the age of thirty-two years, and meantime to apply the whole income for her maintenance and education. As she was to get the whole income, and no one else had anything to do with it, this indicates that she was then the proprietor of what was yielding the income. If she married before she was thirty-two—and she might very well marry long before that—what was to be done with the capital? The trustees are to settle it by contract of marriage or otherwise on herself and the heirs of her body, whom failing, her own nearest heirs and assignees, but expressly secluding the *jus mariti* of any husband she might marry. Did the truster mean that his trustees were by marriage-contract to settle upon his daughter and her heirs, and to protect from her husband, a mere expectancy? That is the view of the respondents, but I cannot think it was what the truster meant. His idea rather seems to be that his trustees were, on his daughter's marriage, to deal with Margaret's share (then in their hands) as her property. Whenever she married, however soon, the share was to be handed over for her behoof, under settlement, as being her estate. It is so described—"the whole of her means and estate then remaining in their hands." I cannot suppose that the testator meant by such language to describe a mere expectancy. The last trust purpose, on which

the Lord Ordinary principally founds, provides—"In the event of any of my said children dying leaving lawful issue, the provisions hereby made in their favour shall fall to such issue respectively in such shares as their parents may have appointed by any writing under their hands, which failing, equally among them; and in like manner, should any of my said children die without being married or leaving lawful issue, then the provisions hereby made in their favour shall fall to and be divisible amongst my other surviving children, including the issue of anyone who may have died, such issue always coming in their parents' room." That I take to be a declaration that if any of the truster's children predeceased him, the legacy or provision in favour of that child should not lapse but descend to issue of the predeceaser, and failing such issue, then to the surviving children of the truster. On the whole matter, I concur in the result at which your Lordships have arrived.

LORD MONCREIFF—As a general rule of construction, in the absence of a fixed period of vesting, a survivorship clause in a family settlement when payment is postponed, is held to relate to the period of payment or distribution. Such a clause is usually not required if it is intended that the bequest shall vest *a morte testatoris*.

But this presumption may be rebutted by evidence of contrary intention.

The property in question in the present case is part of the residue of David Neill's estate, the title to the subjects having been taken by him to his daughters in liferent and himself, his heirs and assignees in fee. Now, the directions as to the disposal of the residue of his estate in his settlement are —[*His Lordship read the fourth purpose quoted above.*] In connection with this we must consider the following provisions of the trust — [*His Lordship read the clause "Lastly"*].

The question we have to decide is whether in the clause last quoted after the word "dying" there are to be read in the words "before me," or the words "before receiving payment."

The question is a somewhat narrow one, on account of the presumption which I have mentioned. On the one hand there is the survivorship clause coupled with the fact that partly from express directions and partly from the way in which the testator's funds were invested, realisation, division, and payment of the whole of the estate could not, in all probability, take place for some time after the testator's death.

But on the other hand, the settlement contains many indications that it was not the testator's intention to postpone vesting. It is to be observed that in the clause "lastly," which I have quoted, the words "before receiving payment" do not occur, as was the case in *Howat's Trustees* v. *Howat*, 8 Macph. 337. I would also observe that in the fourth purpose the language used may quite well be read as simply meaning that the trustees are to have a reasonable time for realising and making payment of the children's shares. We are therefore not hampered by considerations which influenced the Court in *Howat's Trustees* and similar cases.

We proceed now to the evidence of intention. As regards the third purpose, I think it sufficiently appears from the terms of that clause, that although payment of the proportions of the sum of £4000 is postponed until the youngest daughter should reach the age of twenty-one years, it was not the truster's intention that vesting should be postponed. He makes the shares payable to the children or their heirs and assignees; he appoints the interest of the shares to be paid to the children, and speaks of the shares as being their shares, "his or her legacy and shares."

Now, if this provision vested *a morte*, it is improbable that there should be two periods of vesting in the absence of exceptional reasons.

But further, the whole of the fifth purpose is in favour of immediate vesting. That purpose relates to the whole provisions "above mentioned in favour of my daughter Margaret." Now, these provisions were (1) her share of the £4000 under the third purpose; and (2) her share of residue, including her share of the property in the present case. Without examining the fifth purpose in detail, I may say that the whole of the language used is indicative of immediate vesting. The provisions are spoken of as Margaret's capital, and power is given to the trustees to make advances from this capital for certain purposes. Towards the close of the purpose it is provided that in the event of her reaching the age of thirty-two without being married, the trustees are to denude of her share in the way there described. The trustees are directed "to lay out a sum not exceeding one-half of her free capital in purchasing an annuity on her own life, and then to pay over to her the balance, or the whole of her funds then in their hands as the case may be."

One or two other points may be mentioned. If, as regards the property in question, vesting was postponed until the termination of the liferents, no right to the fee or capital could possibly vest in Margaret.

Lastly, the provisions are declared to be in full of legitim, which is an element in favour of immediate vesting in determining such questions.

On the whole matter I think the pursuer is entitled to declarator and decree in terms of one or other of the alternative branches of the summons.

The Court pronounced the following interlocutor:—

> "Having heard counsel for parties in the reclaiming-note for the pursuer against Lord Kyllachy's interlocutor dated 4th July 1896, Recal said interlocutor: Find and declare in terms of the alternative conclusions of the summons, and decern: Find no expenses due to or by either party."

Counsel for the Pursuer—Jameson—Macphail. Agents—Melville & Lindesay, W.S.

Counsel for the Defenders — Wilson — Clyde. Agents—Mitchell & Baxter, W.S.

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*Wednesday, November 4.*

## SECOND DIVISION.

[Sheriff of Renfrew.

## SIBSON AND OTHERS *v.* SHIP "BARCRAIG" COMPANY, LIMITED.

*Shipping Law — Charter-Party — Commission on Freight Payable to Charterers — Condition-Precedent.*

By a charter-party for the charter of a vessel on its arrival at the port of loading, it was stipulated that "a commission of three and three-quarters per cent. shall be paid to charterers on the estimated gross freight . . . on the completion of loading, or should vessel be lost." The charter-party also provided that the vessel, which was then on a voyage from A to B, should receive a cargo at C for carriage to a port as ordered by the charterers, the rate of freight being different for different ports of discharge, and freight being payable on delivery of cargo. The charterers were to have the right of ordering the ship from one port of loading to another, and also of cancelling the charter-party in the event of the vessel not passing survey at the port of loading, or not arriving at the port of loading by a certain date. The ship was lost on its voyage from A to B.

*Held* that the obligation to pay commission on freight was subject, like the other provisions of the charter-party, to the condition that the ship should arrive at the port of loading, and that this condition not having been fulfilled the commission was not due.

*Opinion* (*per* Lord Young) that the contract was *ab initio* void, the ship not being in existence when it was entered into.

This was an action brought in the Sheriff Court at Greenock by W. S. Sibson and Peter Kerr, merchants, Portland, Oregon, in the United States of America, trading under the firm of Sibson & Kerr, and Dewar & Webb, commission agents, London, their mandatories, against the Ship "Barcraig" Company, Limited, Glasgow, and Thomas Wylie Hamilton, shipowner, Port-Glasgow, the liquidator of the said company. The pursuers craved decree for £239, 1s. 1d. as commission alleged to be due to them in terms of a charter-party dated 14th May 1895 entered into between Messrs Sibson & Kerr and the owners of the "Barcraig." The following were the material clauses of the charter-party: — "This charter-party this day made and concluded upon between *Messrs Hamilton, Harvey & Co.*, owners of the '*Barcraig,' steel, of Glasgow*, of the measurement of 2061 tons register, or thereabouts, now *on passage New York to Shanghai, and with liberty to take not exceeding* 1500 *tons cargo thence to loading port for owners' benefit*, of the first part, and *Messrs Sibson & Kerr*, of Portland, Oregon, of the second part. The party of the first part agrees on the chartering to arrive of the whole of the said vessel (with the exception of the deck, cabin, and the necessary room for the crew, and the stowage of provisions, sails, and cables), or sufficient room for the cargo hereinafter mentioned, unto the said parties of the second part, for a voyage as follows:— The said vessel being tight, staunch, strong, and in every way fitted and provided for said voyage, shall, after discharge of inward cargo or ballast, be made ready, and shall receive on board at Portland, Oregon, and/or other loading-places as hereinafter provided, a full and complete cargo of wheat in sacks . . . . which the said parties of the second part bind themselves to ship, and being so loaded shall, upon receiving orders from the charterers, therewith proceed to Queenstown or Falmouth for orders, to discharge at a safe port (as instructed by charterers' agents) in the United Kingdom or on the Continent between *Havre* and *Hamburg*, both included, and there deliver the same as hereinafter provided, on being paid freight. If discharged at a port in the United Kingdom, as above, or at Havre, Antwerp, or Dunkirk, at the rate of 35*s.*, *say thirty-five shillings* sterling. If discharged at a port on the Continent, as above, other than Havre, Antwerp, or Dunkirk, at the rate of 40*s.*, *say forty shillings* sterling. *If discharged at Hamburg at the rate of* 37*s.*, *say thirty-seven shillings.* Freight payable in cash without discount, on true and faithful delivery of cargo at port of discharge (if on the Continent, at current rates of exchange on London) per ton of 2240 lbs. English gross weight, delivered. Charterers to have the option of ordering vessel from port of loading direct to any safe port in the United Kingdom or on the Continent as above, in which case freight to be *one* shilling and *three*pence less per like ton. . . . Vessel to be properly stowed and dunnaged; and certificate thereof, and of good general condition, draft of water and ventilation, to be furnished to charterers from *charterers' competent* surveyor. If the captain or charterers be dissatified with the certificate given, the matter in dispute shall at once be submitted to two other regular port marine surveyors, one chosen by the captain and one by the charterers, who, if they cannot agree, shall call upon a third surveyor; a majority decision and certificate shall determine the matter in dispute, and the cost of said special survey shall be borne by the party against whom said decision may be rendered. Should the vessel fail to pass a satisfactory preliminary survey, or in case of submission to arbitration should the decision be against the vessel, or should she be detained more than ten days for repairs, this charter to be void at charterers' option, such option to be declared at