

by the trust-deed, they are each of them entitled, in respect of the obligation undertaken by the trustor under the third head of the conditions of separation, to the expense of a suitable education from the date of the said deed of separation until they respectively attain to majority: Therefore ranks and prefers the said Philip Harper for the sum of £2000, with legal interest from the first term of Whitsunday or Martinmas after the death of the trustor. But, in respect that the said Ada Harper has not yet attained majority, supersedes in the meantime the further disposal of her claim; and appoints the case to be put to the Roll, that parties may be heard as to the amount of the sum which ought to be allowed for the expense of a suitable education, and decerns: Reserving in the meantime all questions of expenses.

“*Note.*—Although the wording of the provision contained in the third purpose of the trust-deed, by which £2000 is settled on each of the claimants, is somewhat different from the wording of the obligation come under by the deed of separation, that provision appears to the Lord Ordinary to be substantially a settlement of £2000 in fulfilment of the obligation. The only difference is in regard to the term of payment, which, by the trust-deed, is not to be actually made till majority, whereas, by the deed of separation it is fixed as at the first term of Whitsunday or Martinmas after the trustor's death. But although payment is not, under the trust-deed, to be made till majority, there is an express provision that it is then to be made ‘with legal interest until that period from the first term of Whitsunday or Martinmas’ after the trustor's death; and as this declaration as to interest appears to the Lord Ordinary to place the claimants in very much the same position, in a pecuniary point of view, as they would have been if the money had been paid on the death of the trustor and invested on their account, the provision in the trust-deed must, he conceives, be dealt with as the stipulated settlement of £2000 upon each of them, and not as a separate and additional bequest.

“But the Lord Ordinary is unable to adopt the view contended for by the trustees, to the effect that this provision in the trust-deed is to be regarded as a fulfilment of the obligation in the deed of separation, to provide for the education of the claimants, as well as of that to settle £2000 upon each of them. For the declaration as to the payment of interest, which it was contended had been inserted in order to meet the necessary expenses of education during the minority of the claimants, cannot, it is thought, be so imputed; because, in the view the Lord Ordinary takes of the case, the third purpose of the trust, without that declaration as to interest, would not have been a substantial fulfilment of the obligation in the second head of the deed of separation. And as there is nothing in the wording of the third head of the condition to show that the obligation there undertaken was to be limited to the expense of education during Mr Meiklam's life, the Lord Ordinary has come to the conclusion that the claimants are entitled to have the expense of a suitable education made good to them out of the trust-estate.”

Philip and Ada Harper reclaimed.

CLARK and DUNCAN for reclaimers.

YOUNG and W. IVORY for respondents.

At advising—

LORD PRESIDENT—I have no doubt on either question. The contract of separation, which contains the obligation on Meiklam to settle £2000 on his son and daughter, was a present obligation,

and became binding from the date of that contract. His settlement could not come into operation until after his death, and, though of the same date as the other deed, it was contemplated that it might not come into operation for some considerable time. What did he do in that revocable deed, which remained revocable and ambulatory until his death? He settled £2000 on his two children, and the question occurs, was that in performance of the obligation in the contract of separation? That obligation was not to “pay” but to “settle” a sum of £2000. But that is just an obligation to leave them £2000, and that is the very thing he does. No doubt in the deed of settlement it is provided that the £2000 shall not be paid till majority, but that does not make any practical difference between the one obligation and the other, for though the deed provides that the sums are not to be paid until majority, the testator made them bear interest from the time of his death, the effect being to make his family trustees for these children. Therefore I can hardly conceive a case in which it is so impossible to read the provision in the testamentary deed as anything but a fulfilment of the thing which stood *in obligatione* in the other deed. The principle founded on the maxim *debitor non presumitur donare* is, that where a sum is provided in an onerous deed, and the same sum is provided in a testamentary deed, the one is in fulfilment of the other. This is one of the strongest cases for applying the principle.

As to the education of the children, that is matter of express stipulation. It is contained in the third head of the contract of separation, and that is clearly over and above the obligation to settle £2000. It was not in Meiklam's power to depart from that obligation.

I am therefore for adhering to the interlocutor of the Lord Ordinary.

The other judges concurred.

Adhere.

Agents for Reclaimers—Horne, Horne & Lyell, W.S.

Agents for Respondents—Maclachlan, Ivory & Rodger, W.S.

Thursday, October 15.

STEWART'S TRUSTEES v. STEWART AND OTHERS.

Trust—Legacy—Liferent—Failure of Children. A testator left the liferent of his estate, deducting certain annuities, to his brother George, and failing him, to his cousin John. After their death and the termination of the annuities, the trustees were to hold for payment and delivery to the children of George, and in the event of his leaving no children, for payment, out of the residue, of a specific sum in a certain way, and the balance to the children of Archibald, whom failing, the children of William. At the death of all the annuitants, and of John and George—George leaving no children—Archibald was alive, but had no children. Held that the only child of William was entitled to immediate payment of the whole fund.

The late Abbe Chevalier Thomas Stewart left a trust-disposition and settlement whereby he provided that certain annuities should be paid out of the yearly proceeds of his trust-estate, and that the balance of these proceeds should be made over year

by year to his brother George Stewart, and failing him, to John Stewart, his cousin. After the termination of these annuities, and the death of his brother and cousin, certain legacies were appointed to be paid out of the estate; and, *quoad ultra*, it was provided: "After all the foresaid purposes of the trust are fulfilled, for payment and delivery to the children of the said George Stewart, my brother, equally among them, of the free residue and remainder of my estate and effects, heritable and moveable, above conveyed; and in the event of his leaving no children, for payment out of and from the said residue of the sum of £3500, to the heir then in possession of the estate of Grandtully, in order to extinguish a like sum left to me by my late father, under the powers of Lord Aberdeen's Act, such heir being bound, in consideration thereof, to cancel the above part of the burden on the said estate, and not to raise other money upon that provision which was assigned to me; and the balance or remainder of the said free residue to the children of Archibald Douglas Stewart, my brother-german, equally among them; whom failing, to the children of Sir William Drummond Stewart of Grandtully, my other brother-german, equally among them; whom all failing, to my own nearest in kin."

The annuitants, and George and John Stewart, are all dead. George Stewart died unmarried. The payment of £3500 has been otherwise provided for. And the question now arises—to whom the free residue of the trust-estate is to be paid?

Archibald Douglas Stewart, to whose children it is above provided in the first instance, is unmarried and sixty years of age. Sir William Drummond Stewart is a widower, upwards of seventy years of age, with only one child, Major William George Drummond Stewart. This last-mentioned gentleman claims the whole fund in respect of the failure of children of Archibald Douglas Stewart. On the other hand, the trustees of Abbe Stewart contend that they are entitled to retain the trust-estate till it be seen, 1st, whether Archibald Douglas Stewart will still have children; and 2dly, whether, if he have not, Sir William Drummond Stewart will have any other children than Major Drummond Stewart.

The Lord Ordinary (KINLOCH) sustained the claim of Major Stewart.

In a note his Lordship, after a narrative of the facts as above, said—"The Lord Ordinary is of opinion that Major Drummond Stewart is entitled to the fund *in medio*, and to have it immediately made over to him. He considers it a fixed general principle that, when a bequest is made to the children of any individual, it is the children in existence at the time the bequest became payable who are entitled to take, and that children afterwards emerging have no right to partake in it. Whilst this is the general rule, it is competent to show from the terms of the deed that the testator meant something different, and intended the *whole* children born and to be born of the individual to share in the bequest. It would, in like manner, be competent to show that he intended the children in existence at the date of the deed, and no others. But unless there be made out an exceptional case, the general rule will hold good; and the children in existence at the time the bequest became payable will be exclusively entitled to it.

"In the present case, the trustees contended that, as in the primary bequest to the children of George Stewart it was only 'in the event of his

leaving no children' that the substitution to the others took place, the same must be held the case in regard to the two other brothers, and the death of each must successively be waited for in order thereby to find out whether any or how many children he would have. But the reason of the special provision in the case of George is manifest. George Stewart was to enjoy during his life the interest of the fund, and as the fee did not open to his children till after his death, it was natural and fitting that the bequest should embrace all the children left by him. But the case of the other two brothers presents not a repetition of the case of George, but a contrast to it. The payment is to be made so soon as the fund is disengaged. It is provided to be made at exactly the same time with the payment of the £3500 to be paid to the heir of Grandtully; that is to say, it is to be an immediate cash payment. There is no liferent of the interest, and no provision for accumulation. The Lord Ordinary is of opinion that, the time of payment of the fund having arrived, payment must be made to the children who now answer the description contained in the settlement. Major Drummond Stewart is in this view the only one qualified to take."

The trustees reclaimed.

GIFFORD and WATSON for reclaimers.

FRASER and SCOTT for respondent.

At advising—

LORD PRESIDENT—The testator left a variety of small legacies, and constituted several small annuities, and further gave to his brother George a liferent of the balance of the estate.—[*Reads second purpose.*]—Now the annuities of all the parties have come to an end. If George Stewart had left children, the fee of the residue would have been theirs, and would have been immediately payable to them. That is clear from the deed itself, for the trustees held for payment and delivery to them. But George Stewart left no children, and that contingency was also provided for. The testator says, that in the event of George Stewart leaving no children, a certain sum is to be deducted, and the "balance or remainder of the said free residue to the children of Archibald Douglas Stewart." There is no doubt that the meaning of that is for payment and delivery to them of the balance. These words over-ride the whole clause. Archibald Douglas Stewart, though alive, has no children. What then? The deed says, "whom failing, to the children of Sir William Drummond Stewart." That I read as "whom failing, for delivery and payment." And if the testator has provided that, failing George leaving children, there shall be immediate payment to the children of Archibald, whom failing, to the children of William, it is plain, looking at the matter as a question of intention, that if there is no person at the time of payment answering to the description of children of Archibald, those next in order shall take. I do not think there is any canon of construction here by which we must be guided. I rest my judgment on the words of the deed, especially the fourth purpose, which contemplates that the trust shall end on the death of George Stewart, and immediate payment shall then be made to some class or other. Major Stewart answers the description in this deed, and therefore the Lord Ordinary has rightly decided.

The other judges concurred.

Adhere.

Agent for Reclaimers—J. N. Forman, W.S.

Agent for Respondents—J. Galletly, S.S.C.