

personal obligations of his author, that only holds good when he is in *bona fide*. In this case I think—(1) That Stodart was bound to implement Taylor's obligation and grant a feu. When C buys from A a subject on which B has a house, he must inquire into B's title, and I am of opinion that we have enough to make Stodart liable for all the obligations of his author; (2) I also think that with the *rei interventus* the receipts are sufficient to establish a title. They are very precise. I may add that I should have been quite ready to hold that the Dalzells' were bound to take that feu if the case had been reversed. With a possession of twenty-five years, and the house built as it was, Stodart was bound at the time of his purchase to make inquiry.

The Court adhered.

Counsel for Pursuer—Darling. Agent—A Morison, S.S.C.

Counsel for Defender—Lorimer. Agent—D. Macbrair, S.S.C.

Wednesday, December 20.

FIRST DIVISION.

[Lord Shand, Ordinary.

WALLACE AND OTHERS *v.* FRASERBURGH HARBOUR COMMISSIONERS.

Harbour—Dues—Wreckage.

The Fraserburgh Harbour Commissioners were by Act of Parliament empowered to exact dues for "goods or merchandise that should be imported into the harbour or unloaded out of any ship or vessel coming into said harbour." A vessel was cast ashore within the precincts of the harbour; certain timber, casks, empty barrels, brass, &c., forming part of the vessel, were brought into the harbour and landed there.—*Held* (affirming the Lord Ordinary's judgment) that no dues were exigible on such articles under the Act of Parliament.

Counsel for Pursuers—Trayner—Hunter. Agents—Pearson, Robertson, & Finlay, W.S.

Counsel for Defenders—Asher—Robertson. Agent—Alexander Morison, S.S.C.

Thursday, December 21.

SECOND DIVISION.

[Lord Craighill, Ordinary.

GRAYS (RAMSAY'S TRUSTEES) *v.* BISHOP AND OTHERS.

Succession—Settlement—Construction—Vesting—Fee and Liferent.

A testator directed his trustees to pay the free annual interests and proceeds of his

whole means and estate in equal portions to his brother and four sisters, "and that during all the days of their respective lives, whom failing without issue, to the survivors and survivor." He further directed his trustees, "upon the death of any one or other of my brother or sisters herein-before named, to pay to the child or children of such deceased brother or sisters, in equal portions, the capital sum liferented by the parent so deceasing;" and on the death of his wife he directed his trustees to "settle his whole heritable and moveable means and estate, and that in equal shares, upon my said brother and sisters, in liferent for their liferent use allanarly, in terms and under the conditions before specified, and the issue of their bodies respectively, whom failing to the issue of the survivors or survivor in fee." The brother and two of the remaining sisters left issue, and the last survivor was the fourth sister, who died unmarried.—*Held* (1) that the share of the trust-estate liferented by the unmarried sister who survived the others did not fall into intestate succession of the testator, but vested at the death of the liferentrix in the issue of the brother and the two sisters who left family; and (2) (*diss.* Lord Gifford) that the division of the share among the issue must be *per stirpes*.

This was an action of multiplepounding raised by John Gray, accountant to the Union Bank, Glasgow, and George Gray, as trustees of the late John Ramsay, merchant, Edinburgh, calling as defenders the issue of the testator's brother and sisters and their representatives. The circumstances under which the action arose are as follows:—

Mr Ramsay died on 31st August 1843, leaving a trust-disposition dated 2d February 1838, and a codicil dated 14th February 1840. The purposes of the deed were—1st, payment of debts; 2d, implement of marriage-contract obligations to the truster's wife; 3d, additional annuity of £125 to Mrs Ramsay; 4th, payment of all legacies; and the remaining purposes were in these terms:—"Fifthly, I hereby direct and appoint my said trustees to pay the free annual interest and proceeds of my means and estate (under deduction of the annuity and other provisions herein-before settled, and the necessary expense of this trust) in equal portions to the said James Ramsay, my brother, Mrs Catherine Ramsay or Finlay, Mrs Jess Ramsay or Young, Mrs Sylvester Ramsay or Duncan, and Isabella Ramsay, my sisters, and that during all the days of their respective lives, whom failing without issue to the survivors and survivor; Declaring always, as it is hereby specially provided and declared, that the said proceeds and annual interest shall not be assignable or affectable by the diligence of creditors, nor subject to the *jus mariti* of husbands, but it is of an alimentary nature, and shall be payable to my said brother and sisters on their own respective receipts allanarly: Sixthly, I hereby further direct and appoint my said trustees or trustee acting for the time, upon the death of any one or other of my brother or sisters herein-before named, to pay to the child or children of such deceased brother or sister in equal portions the capital sum liferented by the parent so deceasing (the issue of such children being en-

titled to the share of their parent if also predeceased), and that in so far as the same can be done with a due regard to the foregoing purposes of this trust, of which my said trustees shall be the sole judges; And on the death of the said Mrs Elizabeth Broomfield or Ramsay, my said trustees shall make over and settle my whole heritable and moveable means and estate, including that conveyed to me by the disposition and assignment by the said Mrs Elizabeth Broomfield or Ramsay, herein in part before recited, and that in equal shares, upon my said brother and sisters in liferent for their liferent use alienarily, in the terms and under the conditions before specified, and the issue of their bodies respectively, whom failing to the issue of the survivors or survivor in fee: And Lastly, in respect that I hold a policy of insurance from the Scottish Widows' Fund and Life Insurance Company on the life of the said James Ramsay, my brother, for the sum of £600 sterling, I hereby direct my said trustees to pay the annual premiums due thereon, and on his death to uplift the sum thereby insured, in order that the same may form part of my means and effects hereby conveyed."

The codicil directed the trustees to give Mrs Ramsay a liferent of a house, and of all the furniture, plate, &c. At Mr Ramsay's death there were surviving him, besides his widow, one brother, James, and four sisters, Mrs Young, Mrs Duncan, Mrs Finlay, and Miss Isabella Ramsay. Mrs Young died without issue in 1851, and the trustees then increased the liferent interests of the survivors to one-fourth instead of one-fifth. James died in 1861, Mrs Duncan in 1863, and Mrs Finlay in 1865, all leaving issue, and on each of these deaths the children of the deceasers received payment of the capital liferented by the deceasing parent. In May 1865 the truster's widow died. The last surviving sister, Miss Isabella Ramsay, died on 17th February 1873, and the questions raised had reference to the capital of the share of the trust-estate liferented by her, viz., one-fourth part. The estate consisted partly of heritage and partly of moveables. John Ramsay Bishop and his brother and sister, as children of the eldest son of the testator, contended that the capital of the share liferented by Miss Ramsay lapsed and fell into intestacy. John Ramsay Bishop, as the testator's heir-at-law, claimed said share so far as heritable. Other descendants of the deceased brother and sisters of the truster maintained that the fee vested as at the death of the widow in the issue of the truster's brother and sisters then surviving, and that the conditional destination of the residue "to the issue of the survivors or survivor in fee" imported a destination to the issue of the testator's brother and sisters other than those who should die without leaving issue, or to the issue of such of his brother and sisters as survived the testator himself. It was also contended that the whole share liferented by Miss Ramsay was moveable, in virtue of powers of sale contained in the trust-deed.

The Lord Ordinary (CRAIGHILL), by interlocutor of 25th March 1876, found "that according to the sound interpretation of the fifth and sixth purposes of the testamentary trust-deed of the late John Ramsay, the parties who are entitled to the fee of the share of the trust-estate liferented by the late Miss Isabella Ramsay are the issue of

the truster's brother and sisters who survived the truster and afterwards died leaving issue.

"*Note.*—According to the conception of the fifth and sixth purposes of the trust-deed, there might be two periods at which the fee of the estate should be divided among the fiars. The last of these is the death of the truster's widow, by which event the burden of her annuity was extinguished, and the estate so far as undivided was left free for distribution. But, as the Lord Ordinary reads the clauses referred to, the vesting was not postponed till that period. On the contrary, that took place at the death of the truster, and consequently 'the issue of the survivors or survivor' who are referred to at the close of the sixth purpose of the deed are the issue of the brother and sisters by whom the truster was survived. This view of the destination, which appears to the Lord Ordinary to be a reasonable view upon the words of the deed, not only prevents the intestacy contended for by the claimants John Ramsay Bishop and another, but also avoids the difficulty inseparable from the construction which, on the assumption that the death of the widow should be found to be the period of vesting, was presented by the other claimants as the true interpretation."

John Ramsay Bishop reclaimed.

Authorities—Williams on Executors, 7th ed., 1466; Jarman on Wills, ii. 648-659; *Hawkins v. Hameston*, 16 Simon's Repts. 410; *Badger v. Gregory*, 1869, 8 L. R., Eq. 78; *Browne v. Rainsford*, Irish Repts., 1 Eq. 384; *Arnold's Trustees*, 1870, 10 L. R., Eq. 252.

At advising—

LORD ORMDALE—In this case the Lord Ordinary has found that the issue of the truster's brother and sisters who survived the truster and afterwards died leaving issue are entitled to the fund in dispute; and he explains in the note to his interlocutor that he has come to this conclusion on the assumption that vesting must be held to have taken place *a morte testatoris*.

I cannot concur with the Lord Ordinary in holding that the period of vesting was the death of the truster. I am unable to see how this can be held consistently with the truster's directions. He directs in the fifth purpose of his settlement that the income of his estate, after meeting his widow's annuity, shall be enjoyed in equal portions by his brother and four sisters; and in the sixth purpose he directs that on the death of his brother or any of his sisters the capital of the sum or sums, the income of which had been liferented by the deceiver or deceasers, shall be paid in equal portions to their issue. In this way the truster disposes of the sums—capital as well as income—so far as pertaining to his brother and sisters who died before his widow, leaving issue.

He then goes on to dispose of what might remain of his estate at the death of his widow, by directing his trustees to make over and settle the same upon his brother and sisters—meaning, of course, such of them as had not previously died—in liferent for their liferent use alienarily, and "the issue of their bodies respectively, whom failing to the issue of the survivor or survivors in fee." Now, although this direction is awkwardly expressed, I think the intention of the truster may be fairly held to have been, that while his brother and sisters surviving his widow were to

enjoy the liferent of that part of his estate not disposed of prior to his widow's death, the capital of their respective shares was to go to their issue (including grandchildren by that expression, as I understand it) surviving the longest liver of them. That is, as the event happened, surviving his sister Miss Isabella Ramsay.

The result is that, in the view now explained, the capital liferented by Miss Isabella Ramsay must be held to belong to the truster's brother's and sisters' issue *per stirpes*, and not *per capita*, who survived Miss Isabella Ramsay.

I have come to this conclusion on the assumption that vesting of the truster's estate, so far as it is here in question, did not take place either at his own death or at the death of his widow, but on the death of Miss Isabella Ramsay, the last survivor of his brother and sisters, as till that event it could not be known whether there would be then alive any issue of the truster's brother and sisters; and neither could it be known till that event whether Miss Isabella Ramsay might not herself leave issue. If she had left issue, they would be entitled to a share with those to whom, in the absence of such issue, I am of opinion it must be held to belong.

I have only to add that the conclusion I have come to is the only one which, in my opinion, could be reached consistently with the terms of the truster's directions without inferring intestacy, which is not only not to be presumed, but which I am satisfied was neither contemplated nor intended by the testator.

LORD GIFFORD—The Lord Ordinary by the interlocutor under review has disposed of only one single point arising in the case. He has found that the share of the trust-estate liferented by the late Miss Isabella Ramsay belongs in fee to the issue of her brother and sisters who survived the truster and died leaving issue, but he has not determined by the interlocutor whether the whole of the said issue are entitled to participate, or at what date such issue are to be sought, or in what proportions the division is to take place. In particular, he has not determined whether issue who may happen to have predeceased either the widow Mrs Ramsay or the liferentrix Miss Isabella Ramsay have taken any vested right in the fee of what is called Isabella Ramsay's share.

In the circumstances, we thought that it would not be a satisfactory course simply to affirm the Lord Ordinary's interlocutor (assuming we agree with him so far), but that it was necessary, or at least expedient, to consider and determine more precisely than the Lord Ordinary has done the exact nature of the rights created by Mr Ramsay's settlement, and to fix precisely the parties in whom the said rights are now beneficially vested; and with this view we had an additional argument from the parties.

In his note the Lord Ordinary has indicated an opinion that the whole residue of the trust-estate vested a *morte testatoris* in the issue of the testator's brother and sisters, but he has not made any finding to this effect in the interlocutor, beyond the general finding that such issue are entitled to the fee of Isabella Ramsay's share.

I am not prepared to affirm with the Lord Ordinary that the whole residue of the trust-estate vested a *morte testatoris*. On the contrary, I am of opinion that upon a sound construction of the

trust-deed and codicil different periods of vesting are fixed for the different shares into which the residue of the trust-estate is divided, and that it is necessary in determining the question of vesting to consider the precise position of each share.

The testator was survived by his widow Mrs Ramsay, by one brother James Ramsay, and by four sisters, Mrs Jessie Ramsay or Young, Mrs Sylvester Ramsay or Duncan, Mrs Catherine Ramsay or Finlay, and Miss Isabella Ramsay. By the trust-deed the interests of the widow and of the testator's brother and sisters were all limited to mere liferents—to liferents alienarily. Neither the widow nor the brother and sisters were to have any share of the fee of the trust-estate; and it appears to me that in determining the questions regarding the vesting of the different shares of the fee, the mere liferents—that is, the liferents alienarily, and most of which are declared alimentary and not assignable—may be left entirely out of view. In particular, I think even the widow's liferent may be disregarded, for besides her liferent of the house in Blacket Place, and of the furniture, she was really merely an annuitant, and the mere existence of an annuitant, apart from any special provisions in the trust-deed, does not prevent vesting. Of course, while annuitants or liferenters survived, this might prevent the final division of the estate, but the period of vesting must be determined by the terms of the deed, and will not be necessarily postponed by the existence of liferenters or annuitants.

The provision in the trust-deed upon which the vesting of the fee depends is the sixth purpose, which is in these terms:—"Sixthly, I hereby further direct and appoint my said trustees or trustee acting for the time, upon the death of any one or other of my brother or sisters herein-before named, to pay to the child or children of such deceased brother or sister, in equal portions, the capital sum liferented by the parent so deceasing (the issue of such children being entitled to the share of their parent if also predeceased), and that in so far as the same can be done with a due regard to the foregoing purposes of the trust, of which my said trustees shall be the sole judges; and on the death of the said Mrs Elizabeth Broomfield or Ramsay my said trustees shall make over and settle my whole heritable and moveable means and estate, including that conveyed to me by the disposition and assignment by the said Mrs Elizabeth Broomfield or Ramsay, herein in part before recited, and that in equal shares, upon my said brother and sisters in liferent for their liferent use alienarily, in the terms and under the conditions before specified, and the issue of their bodies respectively, whom failing to the issue of the survivors or survivor in fee." This sixth purpose of the deed is expressed in some respects in very peculiar terms, and it raises questions of some nicety as to the vesting.

As already mentioned, the testator died on 31st August 1843, survived by his widow, his brother, and four sisters. Of these the testator's sister Mrs Young died first, in April 1851, leaving no issue, and on this event the liferent of the surviving brother and three sisters was increased under the fifth purpose of the deed, each survivor being then entitled to a liferent of a fourth of the residue instead of a liferent of the fifth. As Mrs Young left no issue, the fee of the share life-

rented by her, I think, simply accresced to and increased the share of the surviving brother and sisters.

In 1861, 1863, and 1865 the brother James Ramsay and two of the sisters, Mrs Duncan and Mrs Finlay, died, all leaving issue, and on their deaths respectively the shares of the residue life-rented by them became divisible among their respective children (so far as the trustees might think proper, having regard to the subsisting life-rent and annuity of the widow). I am of opinion that the shares of the residue belonging to the issue of James Ramsay, and of Mrs Duncan and Mrs Finlay, vested *a morte testatoris*, or as soon thereafter as any of such issue respectively came into existence, in each case vesting in the issue as a class, though not payable till after the parent's death. This practically disposes of three-fourths of the whole residue which vested in the families of James Ramsay, Mrs Duncan, and Mrs Finlay respectively, payable on the death of their parents respectively, so far as could be done consistently with the security of the widow's annuity and life-rent.

The widow next died, on 22d May 1865, and I think the only effect of her death was to enable the trustees to pay to the issue of James Ramsay, Mrs Duncan, and Mrs Finlay the balance of the three-fourths of the residue which had previously vested in this issue respectively, and thus there was left in the trustees' hands only one-fourth of the residue, being the one-fourth then life-rented by the surviving sister Miss Isabella Ramsay. Of this fourth Miss Isabella Ramsay had only a life-rent alienably.

Now, the fee of this fourth, that is the fourth life-rented by Miss Isabella Ramsay, was destined under the sixth purpose to the issue of her body, and it is only in the event of her having no issue of her body that other substitutes are called. She was then unmarried, and as in the eye of the law her having issue of her body was a possible and uncertain event, I think that the fee of her share did not vest till her death on 17th February 1873, on which event the uncertain condition was purified, for she died without issue. I think, therefore, that the fee of Isabella's share vested at her death on 17th February 1873, and vested then, and then only, in the substitutes called by the deed. The substitutes called by the deed failing Isabella's own issue are the issue of the survivors or survivor, but as Isabella herself was the last survivor, if this were to be read as meaning that no issue should take unless Isabella's brother or sisters should survive her, this would produce intestacy. But I think intestacy is excluded by the conception of the deed, and therefore I am compelled to read "survivor or survivors" as if the words had been "other or others." I think it clear that the testator intended, failing the issue of any of his brother or sisters, to give the fee to the issue of any others who might leave issue, and as the parties directly substituted are issue, I read the provision just as if it had run in favour of "my nephews or nieces." It would come to the same thing if we were to read the words "survivors or survivor" as referring to the survivors of the testator himself.

The result is, that the fee of the one-fourth life-rented by Isabella Ramsay will belong to all her nephews and nieces who survived her, and (although this also is a different question) I think

they will take *per capita* and not *per stirpes*. They take in their own right, and not as in right of their respective parents. If any of Isabella's nephews and nieces predeceased her leaving issue, such issue will take their parent's share, the vesting being at Isabella's death on 17th February 1873. The word "issue" is a general word, which includes grandchildren as well as children in cases like the present.

The direction given to the trustees to make over and settle the residue on the death of the widow does not, I think, make any real difference as to the fee of Isabella's share, which was the only share the fee of which had not vested prior to the widow's death. If the trustees had so settled Isabella's share, they must have done so in the precise terms of Mr Ramsay's trust-deed, and that would have raised exactly the same question which now arises.

Findings to the effect now explained, and decrees of preference in conformity therewith, will, I think, enable the trustees, who are the pursuers and real raisers of this multiplepointing, to distribute the residue now in their hands.

LORD JUSTICE-CLEEK—I concur in the result, although I am not prepared to say that I concur in all the views which have been expressed, for the deed now before us is very inaccurately worded, and in order to arrive at your Lordships' opinions it is necessary to give to certain words a meaning and interpretation not native to them; however, as I have said, I agree with the result attained. The question here only relates to the share of Isabella, and I think your Lordships have proposed a reasonable mode of dealing with it. I concur however with Lord Ormisdale in the opinion that the succession should be *per stirpes* and not *per capita*, and the interlocutor will run accordingly.

LORD NEAVES—Absent.

The Court pronounced the following interlocutor:—

"Recal the interlocutor complained of: Find that according to the true construction of the fifth and sixth purposes of the testamentary trust-deed of the late John Ramsay, the parties who are entitled to the fee of the share of the trust-deed life-rented by the late Miss Isabella Ramage are such of the issue of the brother and other sisters of the truster, or their descendants, who survived the said Isabella Ramsay, and that *per stirpes*: Find the parties to this discussion entitled to their expenses out of the trust-estate, and remit to the Auditor to tax the same and to report; and remit the cause to the Lord Ordinary, with power to decern for the expenses now found due, and decern."

Counsel for Reclaimers—Fraser—Crichton.
Agent—J. C. Murray, W.S.

Counsel for Respondents—M'Laren—Rutherford—Mackintosh. Agents—Duncan & Black, W.S.,—Drummond & Reid, W.S., &c.