

absolutely. If the present case depended upon the decision of that question, I think we ought to follow *Morton v. Abercromby*. But apart from that consideration I agree with the Lord Ordinary that it is a perfectly sufficient ground of judgment that before the right to stop was exercised the bill of lading had been endorsed for value to a *bona fide* transferee.

LORD M'LAREN—I concur entirely in the opinion which has been delivered by Lord Kinnear, and I have really very little to add.

As regards the first point in the case, and which suffices for its disposal, I think there can be no doubt whatever that the bill of lading in this case had been lawfully transferred for an onerous cause before the right to stop *in transitu* was asserted. It makes no difference, in my judgment, in regard to the onerosity of the transaction, that instead of an immediate advance being made by the bank simultaneously with the arrival of the bill of lading, that advance had been made on the previous day in reliance on a promise that the bill would be sent in course of post. In mercantile transactions a contract is understood to be for present payment, provided the payment is sent in course of post, without any excusable delay, to the person who is entitled to receive it.

Supposing our decision had been otherwise on the first point, then the question would have arisen whether the goods at the time when they reached the vessel at Burntisland were within the *transitus* from buyer to seller; and on this subject also I concur in Lord Kinnear's opinion. There is, as was pointed out in the argument, an apparent conflict, not so much in the decisions as in the expressions which have been used by eminent judges in defining the right of the seller to stop his goods *in transitu*. But from the analysis of the decisions which has been given it appears that there is no real conflict; and when Lord Cranworth and Lord Justice Cotton said that the *transitus* must be in the course of the carriage of the goods from the seller to the purchaser they meant exactly the same thing as Lord Esher meant when he expressed the thing more fully, that the goods must be on their way from the seller to the purchaser, or to *his order, i.e.*, to some person to whom he has directed them to be sent. Now, with that addition, which I think is clearly implied and must have been in the minds of the learned judges in the earlier cases, the whole of the decisions seem to be reconcilable and to stand perfectly consistent with the decision in *Morton v. Abercromby*. There is one case which was cited to us where the seller was directed to send the goods to a definite port, but the name of the eventual destinee was not communicated to him, and the goods were held to be *in transitu* until they reached Australia, although no name was known to the seller except the name of the party with whom he contracted. That decision appears to me to be quite consistent with the general doctrine, because if a purchaser in London directed his goods to be sent to Australia, and did

not communicate the name of his sub-vendee, then it follows that until the goods arrive in Australia they are on their way to the original purchaser himself; and it is for him or his agent, on the arrival of the goods, to come forward and claim them and say to whom they are to be delivered. In the present case I apprehend that the contract was for delivery of the goods at Burntisland. It was not perhaps very material whether the ship was named, but the ship was named and the port of delivery was disclosed; and there, so far as the Cowdenbeath Coal Company was concerned, the journey was to be at an end. They no doubt sold for exportation, but that was not to be exportation by them, but on a contract made by their vendee. Therefore it appears to me that there can be no place for the application of the right of stoppage *in transitu* after the goods were put on board the ship at Burntisland, because when put on board the goods were competently delivered and the *transitus* was at an end.

LORD ADAM concurred.

The LORD PRESIDENT was absent.

The Court pronounced the following interlocutor:—

“The Lords having considered the reclaiming-note for the pursuers against Lord Low's interlocutor, dated 15th November 1894, and whole cause, and heard counsel for the parties, Recal said interlocutor: Of new sustain the 4th and 5th pleas-in-law for the defenders, and assolzie them from the conclusions of the summons, and decern: Find the pursuers liable in expenses,” &c.

Counsel for the Pursuers—Dickson—Dundas. Agents—Dundas & Wilson, C.S.

Counsel for the Defenders—Ure—King. Agents—Ronald & Ritchie, S.S.C.

Friday, June 21.

SECOND DIVISION.

HAYWARD'S EXECUTORS v. YOUNG.

Succession—Vesting—Direction to Divide among Children of Cousin “Lawfully Begotten, or who shall be Lawfully Begotten” — Whether Child Born after Testator's Death Entitled to Participate.

A testator directed his executors to divide the residue of his funds “among the children lawfully begotten, or who shall be lawfully begotten, of my cousins,” T, A, and J, share and share alike, on each of them attaining the age of twenty-one years.

Held that the residue vested *a morte testatoris* in equal shares in the children of T, A, and J born at that date, and that no child born after the testator's death was entitled to participate.

By his last will and testament Robert Newton Hayward, after bequeathing a large number of specific and pecuniary legacies, directed "that the residue of my funds be divided among the children lawfully begotten, or who shall be lawfully begotten, of my cousins Thomas Young, Alexander Kincaid Young, and John Shaw Young aforesaid, share and share alike, on each of them attaining the age of twenty-one years. And I appoint my cousins aforesaid, Thomas James Woodhouse, M.D., and Thomas Young, to be my executors for the fulfilment of the purposes of this my will, written by myself."

Robert Newton Hayward died on 10th April 1894 unmarried. The residue of his estate amounted to over £11,000. At the date of his death his cousins Thomas Young, Alexander Kincaid Young, and John Shaw Young were married and had children as follows—Thomas, three children, of whom one was a minor and two were pupils; Alexander, one child, a pupil; John one child, a female pupil.

On 6th February 1895 a second child, Jane Kincaid Young, was born to John Shaw Young.

A question having arisen as to whether this child was entitled to a share of the residue of the estate of Robert Newton Hayward along with her sisters and cousins, a special case was presented for the opinion of the Court by (1) Mr Hayward's executors; (2) the minor and pupil children of Thomas Young, Alexander Kincaid Young, and John Shaw Young, other than Jane Kincaid Young, and their fathers as their administrators-in-law; (3) John Shaw Young as tutor and administrator-in-law for Jane Kincaid Young.

The questions of law were—" (1) Are the said Jane Kincaid Young (daughter of the said John Shaw Young), and any other children who may yet be born to the testator's said cousins, entitled to participate in the said bequest of residue? or Is it limited to the children of the said cousins alive at the date of the testator's death? (2) Under either alternative is vesting suspended until the several children respectively attain majority?"

Argued for the second parties—The residue vested in equal shares *a morte testatoris* in the children alive at that date, and no child born after 10th April 1894 had any right to a share of the residue. This was plainly the intention of the testator. There was no continuing trust as only executors had been appointed. One period of division was alone contemplated by the testator. The words "shall be" were used in reference to the period between the making of the will and the death of the testator—*Kennedy v. Crawford*, July 20, 1841, 3 D. 1266; *Matthew v. Scott*, February 21, 1844, 6 D. 718; *Biggar's Trustees v. Biggar*, November 17, 1858, 21 D. 4; *Wood v. Wood*, January 18, 1861, 23 D. 338; *Macdougall v. Macdougall*, February 6, 1866, 4 Macph. 372; *Stafford Blair's Executors v. Heron Maxwell's Executors*, May 31, 1872, 10 Macph. 760; *Ross v. Dunlop*, May 31, 1878, 5 R. 833.

Argued for the third party—Jane Kincaid Young was entitled to a share of the residue along with her sister and cousins. No vesting took place in any individual child until the date when he or she respectively attained majority. The legacy was uncertain both as to time and as to existence—Bell's Principles, sec. 1883. Two considerations which argued for vesting *a morte testatoris* were absent here, namely (1) there was no unqualified direction to pay to children and their assignees; and (2) there was no direction to trustees to pay the interest of the children's shares to them until they attained majority. The testator had specifically defined the children among whom the residue was to be divided, namely, all the children "begotten, or who shall be begotten," of certain persons, and his will must receive effect—M'Laren on Wills and Successions, pp. 699 and 796. The deed showed a continuing trust, and an executor was nothing but a trustee. Vesting was postponed till payment was made—*Bryson's Trustees v. Clark*, November 26, 1880, 8 R. 142. In any event, vesting was postponed till the eldest of the children had attained the age of twenty-one, and Jane Kincaid Young having been born before that event was entitled to a share of the residue. This was a well-known rule of English law—Jarman on Wills, 1015—and had been adopted into the law of Scotland—*Buchanan's Trustees v. Buchanan*, May 26, 1877, 4 R. 756.

At advising--

LORD JUSTICE-CLERK—The question in this case arises in connection with the clause dealing with the residue. We have had a full and learned debate on the question involved, and a great mass of authority has been cited, but I do not think that there is any real difficulty in dealing with the terms of Mr Hayward's settlement.

It appears to me it can be read only on the footing that he intended that there should be one division of the residue of his estate, namely, that at a certain time it should be divided into a certain set of shares once and for all.

Now, the clause is "be divided among the children lawfully begotten or who shall be lawfully begotten of" three cousins, and I take the clause to mean "children already begotten or to be begotten and in existence at the time of the death of the testator." Now, if that be so, and if the only question is whether the testator intended to have a division or not, it appears to me that the intention of the testator was that while the shares vested at his death in the children of his cousins then alive, the shares should be protected for a certain period during the lives of the children, viz., each share till the child in whom it had vested attained the years of discretion, twenty-one years of age. All that is necessary is to read the word "payable" before "on each of them attaining the age of twenty-one years." Taking the clause so it reads intelligibly. I think the meaning of it is that children in existence at the time

of the testator's death are to have the fund divided among them, payment being withheld in the case of each until that child attains twenty-one years of age.

LORD YOUNG—I am of the same opinion, I confess without much difficulty, although I appreciate Mr Mackay's argument against the view I have arrived at. I shall read the clause trying to omit the words which I consider superfluous. "I direct that the residue of my funds be divided among the children of my cousins, share and share alike, on each of them attaining the age of twenty-one years." I omit as superfluous "lawfully begotten or who shall be lawfully begotten." I think it is a pity that such words are ever put in either by conveyancers or by parties making their own wills. We are quite familiar with a testator making a bequest in favour of his own children, and the words will naturally be inserted "in favour of my children lawfully begotten or who shall be lawfully begotten by me." Of course in such a case no question of this sort could arise. It is just the familiar use of that expression that is the explanation of the words occurring here.

I read the bequest as being one made to the children of the testator's cousins on each of them attaining the age of twenty-one. Now, I think the presumption arising from that is that the period of distribution,—the period of vesting—is the testator's death. For considerations of convenience almost amounting to necessity we take the first term occurring within a reasonable interval after the testator's death for the ingathering and distribution in the sense of payment of his estate, but the period of distribution, in the sense of the period at which the rights of parties under the will are ascertained and vest, so that on their decease they will be subject to their debts and deeds, and pass according to their wills, is, in the absence of anything to the contrary, the testator's death. Therefore a direction to divide the testator's estate implies, in the absence of anything to the contrary, that it vests at the testator's death. I think the meaning of the will is that, while the residue vested at the testator's death among the children of his three cousins then alive, the executors are to withhold payment till each child attains twenty-one years of age. The estate vested *a morte testatoris*, and the duty of the executors was at that date to divide the estate into as many parts as there were children then in existence. A child coming into existence after the testator's death has no more right to a share of the estate than a child who predeceased the testator.

LORD ADAM—I am of the same opinion. I confess that there are certain words in the deed which point to a different conclusion, viz., "who shall be lawfully begotten." In interpreting a will of this kind we are not to suppose that words are put in without a definite meaning. *Ex facie*, if the bequest vests *a morte testatoris*, the words I have quoted are superfluous; if vesting is

to take place at a later period than the death, then this expression has a meaning, viz., "who shall be lawfully begotten before payment." I also agree that a direction to divide postpones vesting till all the beneficiaries can be ascertained. But there are here insuperable difficulties to giving effect to Mr Mackay's contention. In the first place one division is contemplated by the deed. If you read the clause as meaning that the residue was to be divided on each of the children attaining majority, this would lead to any number of divisions. That is, I think, an impossible reading. It was suggested by Mr Mackay that there had been introduced into our law an arbitrary rule of the English law, which holds that under a will of this kind the estate would vest in those children who were alive when the eldest attained majority. But Mr Mackay admitted that we could not give effect to this rule if we were to carry out the express words of the deed. I do not see how in such circumstances we can give effect to an arbitrary rule of English law. It is clear that there must be one division and one only.

In the second place, there must be a division in which all the children must share alike. It has not been shown to be possible to carry out this direction except by holding that vesting was *a morte testatoris*, and that the division was to take place at that time. Vesting *a morte testatoris* is the only reading which makes one division possible.

If the intention of the testator can only be carried out by holding that there was vesting *a morte testatoris*, we must so hold. I am therefore of opinion that the estate vested *a morte testatoris*, and must be divided among the children then alive.

LORD RUTHERFURD CLARK and LORD TRAYNER were absent.

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

Counsel for the First and Second Parties—Jameson—Salvesen. Agent—F. J. Martin, W.S.

Counsel for the Third Party—Mackay—Burnet. Agents—Henderson & Clark, W.S.