

Trustees v. Walker, June 19, 1878, 5 R. 965. There were no such indications in the present disposition. The statement that the spouses had no other estate to deal with was not admitted and was not conclusive against this view. The fact that the disposition dealt with *acquirenda* indicated that they might have expected to acquire other estate, and therefore might not have intended to deal with the lease in question. The case of *Gray v. Gray's Trustees* was a very special one, there being many circumstances besides the fact of the disposer having no other estate which induced the Court to determine as they did.

At advising—

LORD M'LAREN—I am of opinion that the title offered in this case is sufficient. The foundation of the title is an assignation to the subject (a 99 years' lease) in favour of David Deans and his spouse in conjunct fee, and to the survivors of these in fee. The Lord Ordinary construes this destination as if it were equivalent to a destination to the spouses in conjunct fee and liferent, in which case the ordinary rule of construction is that the wife is liferenter and the husband fiar. But I know of no authority for giving to the words "conjunct fee," in a destination to spouses, a different construction from the construction which would be put on them in a destination to persons not connected by marriage, and no authority was cited to us in support of the Lord Ordinary's opinion on this point. In my opinion the assignation gave equal rights to the husband and wife, the subject being vested in them jointly, with benefit of survivorship.

In this view of the meaning of the assignation the question raised as to the mutual settlement granted by the spouses in 1882 disappears. They were then dealing with a subject of which they were the joint owners, unfettered by any limitations other than a destination-over to their heirs which it was in their power to evacuate by making a new destination. In such circumstances they, by a deed in proper form, limited the right of the survivor to a liferent, and vested the fee subject to that life interest (and subject of course to the usual liferent by reservation during their joint lives) in John and William Paton, the sons of Mrs Deans by a previous marriage. It is not disputed that the title offered flows from the Patons.

The Lord Ordinary notices another objection which he is disposed to sustain, but without, as I understand, expressing an unqualified opinion upon it. The objection is that the mutual settlement is a general conveyance, and that a destination inserted in a conveyance, presumably by desire of the grantee, is not necessarily revoked or evacuated by a subsequent general settlement.

This is substantially the same question as the question of the revocation of a specific bequest by a subsequent general settlement. It is, as the Lord Ordinary has observed, a question of intention, and there are two reasons which in my opinion lead to the conclusion that it was the intention of the spouses to evacuate the destination. The

first is, that it does not appear that the spouses had any other joint estate on which the mutual settlement could take effect. The second is, that the destination of the joint estate contained in the previous deed was a destination to the heirs of the spouses equally between them. This is not a special destination in the sense of the rule referred to. No claim to the estate has been made by the heirs of David Deans, and I think that the pursuer has a good title and is entitled to decree of declarator in terms of his first conclusion.

The LORD PRESIDENT, LORD ADAM, and LORD KINNEAR concurred.

The defender craved the Court for expenses. He argued that though unsuccessful he had been within his rights in refusing to take the title offered him till its validity had been judicially determined—*Howard & Wyndham v. Richmond's Trustees*, June 20, 1890, 17 R. 990.

The Court pronounced the following interlocutor:—

"The Lords having considered the reclaiming note for the pursuer against the interlocutor of Lord Moncreiff dated 17th July 1895, and heard counsel for the parties, Recal the said interlocutor and decern: Find the defender entitled to expenses both in the Inner and the Outer House," &c.

Counsel for the Pursuer—Dundas—Craigie, Agents—Cowan & Dalmahey, W.S.

Counsel for the Defender—Ure—Cook, Agents—Emslie & Guthrie, S.S.C.

Saturday, December 21.

FIRST DIVISION.

NEVILLE AND OTHERS *v.* SHEPHERD AND OTHERS.

Succession—Trust-Disposition—Vesting—Implied Conditional Institution of Children to Parents' Share—Accresced and Original Shares—Conditio si sine liberis.

By trust-disposition and settlement a testator conveyed his whole property to trustees, and directed them, *inter alia*, at the first term of Whitsunday or Martinmas after the termination of a certain liferent, to divide, pay, and make over the whole residue of his estate equally among the whole children born or to be born of his daughter's marriage, and to the survivors or last survivor of said children. The deed proceeded:—"Further, in the event of its happening that all of my said grandchildren predeceased the terms of payment of their respective provisions without leaving lawful issue, and all of which provisions it is hereby declared shall vest at the said terms of payment so fixed by me, then, and in that case, but in that case only," he directed his trustees to make over the

residue equally to his nephews and nieces, declaring that the issue of predeceasing nephews and nieces should take the share which would have fallen to their parents.

The testator died leaving an only child, who by her marriage had seven children, of whom one predeceased the truster. Of the remainder, two only, Mrs N. and Miss S., survived the termination of the liferent. Mrs N., however, predeceased the first term of Whitsunday after that date, leaving four children.

In a question between the children of Mrs N. and Miss S. as to the shares of residue to which they were entitled, held (1) that Mrs N. not having survived the term of vesting, which was the term of payment, had no vested interest in the residue, but (2) that the children of Mrs N. were entitled, in virtue of the conditional institution implied in the terms of the destination-over to nephews and nieces, to the accresced as well as the original share of residue which their parent would have taken had she survived the period of vesting.

Observations per Lord McLaren on the conditio si sine liberis.

By trust-disposition and settlement the late Dr James Gloag conveyed his whole estate to trustees for certain purposes.

By the seventh purpose thereof he directed his trustees, on the death of the survivor of himself and his wife, to hold the residue of the estate, and apply the interest thereof for the liferent use of his daughter Mrs Shepherd, and in the event of her death to pay the said liferent to her husband John Shepherd.

By the eighth purpose the trustees were directed, on the termination of the liferent by the death of the longest liver of Mr and Mrs Shepherd, or by Mr Shepherd's second marriage, "then at the first term of Whitsunday or Martinmas which shall happen after that event, to divide, pay, and make over the whole residue and remainder of my said whole estates above disposed and conveyed, or the proceeds thereof, including any income accruing thereon between the expiry of the liferent thereof hereinbefore settled on my said daughter and her husband, and the said term of payment, equally, share and share alike, among the whole children already born or to be born of the marriage between the said John Shepherd and Mrs Janet Black Gloag or Shepherd, and to the survivors or last survivor of said children (under the declaration after mentioned.)" That declaration was to the effect that payment of their respective shares was to be superseded till the first term of Whitsunday or Martinmas after they attained majority in the case of grandsons, after they attained majority or were married in the case of granddaughters.

The trust-disposition proceeded,—“And further, in the event of any of my said grandchildren predeceasing me leaving a lawful child or lawful children, I hereby appoint and declare that such child or chil-

dren shall succeed equally to the share of my said estates which would have fallen to his or her deceased parent under these presents if he or she had been alive.” Power was then given to the trustees to advance in whole or in part to the grandchildren the provisions “which such grandchildren or any of them may be entitled to,” and to postpone payment of their provisions to any or all of the grandchildren till they attained the age of twenty-five. The trust-disposition continued,—“Further, in the event of its happening that all of my said grandchildren predeceased the terms of payment of their respective provisions without leaving lawful issue, and all of which provisions it is hereby declared shall vest at the said terms of payment so fixed by me, then, and in that case, but in that case only, I direct my trustees (after expiry always of the liferents hereinbefore provided) to divide, pay, and make over my estate hereinbefore settled on my said grandchildren” among his nephews and nieces; “declaring that in the event of any of my said nephews and nieces predeceasing the period at which they would have become entitled to participate in my said estate (and which shall not become a vested interest till the period of payment arrives), leaving a lawful child or lawful children, then, and in that case, such child or children shall be entitled, equally among them, *per stirpes*, to the share which would have fallen to their deceasing parent or parents.”

Dr Gloag died on 23rd January 1870, predeceased by his wife, and survived by his only child Mrs Shepherd, who enjoyed the liferent of the residue of Dr Gloag's estate till her death in 1873. Thereafter her husband received the liferent of the estate till his death on 21st March 1895.

Mr and Mrs Shepherd had seven children, of whom one predeceased the truster, while two daughters only survived their father,—Mrs Elizabeth Muir Shepherd or Neville, and Miss Jessie Shepherd.

Mrs Neville died on 17th April 1895, prior to the first term of Whitsunday after her father's death. She was survived by her husband and four pupil children.

The residue of Dr Gloag's estate amounted to £3800.

This special case was brought by Mrs Neville's children (first parties) and Miss Jessie Shepherd (second party) to determine certain questions with regard to the division of the residue of Dr Gloag's estate. Dr Gloag's trustees appeared as third parties.

The first parties maintained that Mrs Neville having survived her father, acquired a vested interest in one-half of the residue, the other half being payable to Miss Shepherd. Alternatively they maintained that they were entitled to one-half of the residue, in virtue either of an implied substitution to their mother or of the *conditio si sine liberis*.

The second party maintained that Mrs Neville, having predeceased the term of payment, did not acquire a vested interest in the residue of her father's estate, and that the first parties could only succeed in

virtue of the *conditio si sine liberis* to her original share, viz., one-sixth of the residue, the second party being entitled by survivorship to the remainder of the residue.

The questions of law upon which the opinion of the Court was asked were these:—“(1) Did Mrs Elizabeth Muir Shepherd or Neville acquire a vested right to one-half of the residue of the estate of the said Dr James Gloag? (2) In the event of the preceding question being answered in the negative, are the parties hereto of the first part, the children of the said Mrs Elizabeth Muir Shepherd or Neville, entitled to one-half share of the said residue? or (3) are they only entitled to one-sixth thereof?”

Argued for the first parties—(1) Mrs Neville had a vested interest, for the period of vesting was either the termination of the lifeferent or the death of the testator, as was indicated by his providing for the event of any of his grandchildren predeceasing him. (2) No doubt there was an artificial rule of construction by which the application of the *conditio si sine liberis*, or the express substitution of children to a parent's share, was limited to the parent's original share exclusive of anything that would have accresced to the parent—*Young v. Robertson*, February 14, 1862, 4 Macq. 337; *Aitken's Trustees v. Wright*, December 22, 1871, 10 Macph. 275; *M'Nish v. Donald's Trustees*, October 25, 1879, 7 R. 96; and *Henderson v. Hendersons*, January 9, 1890, 17 R. 293. But the present case was distinguishable from *M'Nish*, in respect that here there was a bequest to a class and not to grandchildren *nominatim*—an important point (*Aitken's Trustees, ut supra*, per Lord Kinloch, p. 280); there was no direct institution of issue, and the contingent accretion had occurred before Mrs Shepherd's death, while in *M'Nish* there was an intermediate failure between the death of the parent and the period of payment. Even the technical rule of construction laid down in *Young v. Robertson* and followed in *M'Nish* had been questioned by Lord McLaren in *M'Culloch's Trustees*, May 14, 1892, 19 R. 777, at p. 779. But at all events here in the deed itself there was a clear indication of the testator's intention that issue should take everything that a predeceasing parent would have taken had he survived. There was the clause dealing with grandchildren “predeceasing me”; there was the clause substituting the children of nephews and nieces to their parents failing grandchildren and their issue; above all, there was the clause providing for the event of all the grandchildren predeceasing the term of payment “without leaving lawful issue.” It was only in that event that the nephews and nieces were to take. Therefore the sentence must be completed by adding, “If any grandchildren do leave lawful issue, they shall take.”

Argued for the second party—(1) There was no vesting in Mrs Neville. The testator intended that there should be no division until a certain period, that period being the Whitsunday or Martinmas after the termination of the lifeferent. There

could therefore only be vesting at the date of the first division or of payment. But there was a positive declaration of the testator as to when he intended vesting to take place, viz., the date of payment, and Mrs Neville had not survived that date. The only difficulty arose from the clause dealing with the event of any grandchildren “predeceasing me.” But that single expression could not overcome his expressly declared intention. (2) The rule of construction illustrated in *Young v. Robertson* and *M'Nish* applied here. It had been given effect to not only in the cases distinguished by the first parties, but also in *The Earl of Lauderdale, &c.*, May 19, 1838, 8 S. 771; *Clelland v. Gray*, June 20, 1839, 1 D, 1031; and *Thornhill v. Macpherson*, January 20, 1841, 3 D. 394, per Lord Medwyn, 407, per Lord Moncreiff, 410. In *M'Culloch* the terms of the deed spoke of shares original and accresced. If there had been no survivorship clause here, there would have been intestacy as regards the shares of predeceasing grandchildren, for there was no conditional institution to anything except the original share of parents. The logical result of the argument of the first parties with regard to *M'Nish* was that there must be different results according to the order of the predecease. No warrant for any such proposition could be found in the cases.

At advising—

LORD ADAM—The questions in this special case relate to the construction of the trust-disposition and settlement of the late Dr Gloag, and in particular of the 8th purpose of that settlement. It is only necessary to mention that Dr Gloag died upon 23rd January 1870. He had only one child, who subsequently became Mrs Shepherd, and who died on the 10th July 1873. She was survived by her husband, who died on 21st March 1895. They had several children, of whom the only one now alive is Miss Shepherd, the second party in this case. Another daughter, Mrs Neville, survived her father, but did not survive the first term of Whitsunday after her father's death, having died on 17th April 1895. Dr Gloag left the lifeferent of the residue of his estate to the longest liver of Mr and Mrs Shepherd, and after that he directed the fee of the residue to be divided as specified in the 8th purpose, and that, it seems to me, is the only one which requires immediate attention. The first question put to us is this—Did Mrs Neville acquire a vested right to one-half of the residue of Dr Gloag's estate? Now, the 8th purpose deals with that thus: He directs the trustees at the first term of Whitsunday or Martinmas which shall happen after the death of the longest liver of Mrs Shepherd and John Shepherd, on the termination of their said lifeferent, “to divide, pay, and make over the whole residue and remainder of my said whole estates, or the proceeds thereof, including any income accruing thereon between the expiry of the lifeferent . . . and the said term of payment, equally share and share alike among the whole children already born or to be born between Mr and

Mrs Shepherd, and to the survivors or last survivor of said children." Then there is a declaration postponing payment if any of the grandchildren should be under twenty-one. Now, had the directions of the trust stopped there, very possibly we should have thought it was a case of vesting *a morte testatoris* with postponed payment, but there is a clause later on which in my opinion settles the matter—"In the event of its happening that all of my said grandchildren predeceased the terms of payment of their respective provisions without leaving lawful issue, and all of which provisions it is hereby declared shall vest at the said terms of payment so fixed by me, then," &c. That is a declaration that all the provisions to the grandchildren are to vest at the term of payment, and not at an earlier date. What, then, is the term of payment? It is very clearly the first term of Whitsunday or Martinmas occurring after the death of the survivor of Mr and Mrs Shepherd. It appears to me that there can be no vesting of the share in any of the grandchildren before the term of Whitsunday or Martinmas of the year in which Mr Shepherd died. Mrs Neville predeceased the term of payment, therefore she predeceased the term of vesting, and I think there is no doubt that we must answer the first question in the negative.

Then comes the second question—Are the children of Mrs Neville entitled to one-half or to one-sixth share of the residue? That depends upon the construction of the same clause, and perhaps is not so clear. As I have pointed out, the trust directed his trustees to divide, pay, and make over the residue or the proceeds thereof among the whole children already born or to be born and to the survivor. There is certainly no substitution of the issue of these children, but there are other clauses dealing with the issue of the grandchildren of the trustor, and the first of these is this—And further, in the event of any of my said grandchildren predeceasing me leaving a lawful child or lawful children, I hereby appoint and declare that such child or children shall succeed equally to the share of my said estates which would have fallen to his or her deceased parent under these presents if he or she had been alive." Now, I do not think there is any ambiguity about this clause requiring construction. It provides for the case only of the grandchildren predeceasing the trustor himself. But it is to be observed that it contains no provision for the case of grandchildren who survived the trustor but predeceased the term of vesting. They are not provided for in this clause. We may conjecture that perhaps the words "predeceasing me are a slip or mistake for the words "predeceasing the term of payment," but I think the words are clear. Therefore if it depended upon this clause only, it would be difficult to see that there was any substitution of the issue of grandchildren generally to their parents. But before leaving that clause I may say that I think the clause itself would be sufficient to exclude the presumption that children are substituted to their parents by

the application of the doctrine of *si sine liberis*, for Dr Gloag is here dealing with the issue of grandchildren, and dealing with those in a particular position, because he was applying his mind to the very parties to whom the *conditio* would otherwise apply. But there is a general clause which deals with the whole matter, that, namely, which I have already referred to, "Further, in the event," &c. Now, it appears to me to be quite clear that if any issue of any of the grandchildren were alive at the date of vesting, that destination over to the trustor's nephews and nieces could not take effect, because it was only upon the failure of issue of grandchildren that the destination was to take effect. And for what reason? Simply, because if there were any issue of grandchildren surviving the term of vesting, they were to come in place of their parents. Therefore it appears to me that we have an implied substitution or rather conditional institution of the issue of grandchildren predeceasing, and predeceasing the term of payment. Now, if that be so, we have a clearly implied substitution of the issue of grandchildren to their parents in the event of their parents dying. I think that clause is sufficient for the determination of this case, and therefore I think we should answer the second question in the affirmative, to the effect that the children of Mrs Neville are entitled to take one-half of the estate.

LORD M'LAREN—I concur in the opinion of Lord Adam on both points. I do not say anything on the question of vesting, but on the question of the extent of the shares taken by children as representing their parents in a destination I desire to state my views because of its general importance.

The second question as originally put invited us to answer what share might be taken by a child or issue claiming under the *conditio si sine liberis*, and if the question had remained unaltered I think that only one answer could be given, because it is settled as matter of legal implication, as distinguished from construction, that a child under the *conditio* never takes more than what is described as the parents' original share, that is, the share which the parent would take supposing everyone in the destination to survive the period of payment. But that principle or implication does not go very far to solve a case like the present. The reason is this, that the right of children under the *conditio* is an equitable extension of the will, and cannot reasonably be extended beyond this, that what the trustor thought a reasonable provision for one to whom he was *in loco parentis* shall pass to that person's children. The extent of what is considered a reasonable provision is fixed by the provision which the parent has actually made on the assumption that all his children survived.

When, on the contrary, the substitution is contained in a will or deed, the language used in the deed determines the extent of the right of the substituted legatee. In

Young v. Robertson the scheme of the destination was that the testator made a division amongst a family of grandchildren, and then he proceeded to deal first with the case of a member of the family who might die without leaving issue, and then with the case of a member who should die leaving issue. In the first case he gave that person's share to the survivors exclusively, therefore excluding the issue of any other member of the family from participation. But in well-drawn destinations of this kind it is provided that on the death of a child leaving issue, the issue shall take the same share which the parent would take if he survived, or, as it is sometimes put, the parent's share whether original or by accretion, or, again, the principle is sometimes carried out by dealing with the case of a person who shall die childless and stating that his share shall go to the remaining members of the family and the issue of those who have predeceased.

Now, if we are to consider what words are to be inserted in this deed by implication, it seems to me that we ought to give the issue of this family of grandchildren the right which we may assume to have been in the testator's mind. In the passage relating to the event of the death of all the members of this family without leaving issue and bringing in the destination-over to collaterals, the testator plainly contemplates that if any members of the family die before the distribution of the residue, their issue are to come in their place, and I agree that the true implication is that issue are to succeed to whatever the parent would have taken had he survived. That construction receives support from the passage in which the testator ineffectually attempted to provide for the event of children dying without issue. That clause is not strictly applicable to the event which has happened. Nevertheless we get some insight as to what the intention was when we find the testator saying that "such child or children shall succeed equally to the share of my said estates which would have fallen to his or her deceased parent if he or she had been alive." It appears to me that we cannot be wrong in holding that the testator meant to give the same right in the event for which he only provides by implication, as he has expressly given in the event of any of his grandchildren predeceasing himself.

LORD KINNEAR—I agree, for the reasons given by Lord Adam. I also agree that the question which we should have to consider as to the share which the grandchildren of Mrs Shepherd are to take would have been entirely different if their interest had depended on the *conditio si sine liberis*. I do not consider what the share would have been in that case. But in the case as it stands we are relieved of the question which might have arisen had it been presented upon the *conditio*.

The LORD PRESIDENT concurred.

The Court answered the first question in the negative, and the second question in the affirmative, finding Mrs Neville's children entitled to one-half of the residue of Dr Gloag's estate.

Counsel for First and Third Parties—Balfour, Q.C. — Cook. Agents — Morton, Smart, & Macdonald, W.S.

Counsel for Second Party—H. Johnston — Wilton. Agent—Arthur S. Muir, S.S.C.

Saturday, December 21.

FIRST DIVISION.

[Lord Moncreiff, Ordinary.]

GRAHAME AND ANOTHER v. DUKE OF ARGYLL AND OTHERS.

Road—Roads and Bridges Act 1878 (41 and 42 Vict. cap. 51), sec. 90—Road Debt—Valuation and Allocation of Debt—Consignation.

A turnpike road was constructed out of money borrowed partly from Government and partly from private persons. In 1852 a railway company bought up and took over the private creditor's debts, under an agreement with the road trustees, by which all surplus revenue, or other funds to which the Government might abandon its claim, should be divided equally between the company and the private creditors.

In course of time there had accumulated (1) a sum representing surplus revenue for three years down to 1848, due to and unclaimed by sixty-three of the private creditors; (2) a sum representing unclaimed dividends accruing and allocated to certain private creditors before 1852; and (3) a sum representing one-half of a fund abandoned by the Government in 1887, the other half having been paid in terms of the agreement to the railway company.

In a competition for the whole fund *in medio* between (1) the road authorities, (2) the railway company, and (3) certain private creditors, held (a) (*aff. judgment* of Lord Moncreiff) that the comparing creditors were entitled, as against the railway company, and as against the road authorities, to the shares of the first and second funds standing in their names, and to a share of the third fund proportionate to their original subscriptions, and that their claims, being to money specifically appropriated to meet them, did not require to be valued and allocated under the Roads and Bridges Act, sec. 90; and (b) (*rev. judgment* of Lord Moncreiff) that the balance of the sums in question was not to be consigned, but must remain in the hands of the road authorities as statutory successors of the road trustees, subject to any claims upon it by future comparing creditors.