

but resident in London. It could not have been the intention of the Court in laying down this rule to make it necessary to try the question of domicile in order to the application of the rule.

Therefore I am of opinion that Mr Dessau, though neither naturalised nor said to be domiciled in England, is still in the position of a person resident in England, and therefore is not under ordinary circumstances to be required to sist a mandatory.

I agree also with what your Lordship in the chair has said on the second ground. The Lord Ordinary has not proceeded upon the ground of poverty, and I agree that poverty is no reason for compelling a person to sist a mandatory. While the Court may not have strictly defined a rule, the usual case of requiring a person to find security for expenses is where he is either bankrupt or has granted a trust-disposition for behoof of creditors so as to take the administration of his fortune—be it great or small—out of his own hands.

LORD KINNEAR—I am entirely of the same opinion. The defender's counsel says that it is the rule that a foreigner requires to sist a mandatory. I am not aware that the rule ever obtained that a foreigner, irrespective of his residence, could not sue without a mandatory. The rule was that a resident abroad required to sist a mandatory, but in applying that rule, which was always a matter for the discretion of the Court, it was never suggested that the Court should inquire into the place of the pursuer's birth, domicile, or allegiance. The only question was as to his residence, and, if it appeared that he was resident abroad, it did not matter whether he was a Scotsman or an Englishman, or a subject of some other country. The one condition which was indispensable to the operation of the rule was that he should not be resident in Scotland. The rule has been modified in consequence of the Judgments Extension Act, because the decrees of this Court may now be enforced in other parts of the United Kingdom; and for the purpose of this question residence in some other part of the United Kingdom is thus practically equivalent to residence in Scotland.

With regard to the pursuer's alleged impecuniosity, I confess I am not inclined to draw any inference from the letters. All that they show is that the pursuer was pressing the defender for money on the ground apparently that he had some claim against him. That may or may not be the case, but it appears to me that demands of that kind, and the urgency with which they are pressed, afford no safe ground for any conclusion as to the pecuniary condition of a letter writer who has not been examined as a witness or given an opportunity of explaining the circumstances in which his letters were written. If it were safe to draw any such conclusion, I agree that mere impecuniosity is no reason whatever for requiring a party to find security for expenses or to sist a mandatory.

The LORD PRESIDENT was absent.

The Court recalled the interlocutor reclaimed against.

Counsel for the Pursuer—Clyde. Agents—Hope, Todd, & Kirk, W.S.

Counsel for the Defender—J. C. Watt. Agent—James Gibson, S.S.C.

Tuesday, June 29.

FIRST DIVISION.

MACKINNON'S TRUSTEES v. MACNEILL AND OTHERS.

Succession — Vesting — Postponement of Date of Payment till Majority—Substitution of Issue to Predecessors.

A trustor directed his trustees "to make payment to my nephew, the said D, of another sum of £60,000, and that for his life rent use only, and on his death I direct the said sum of £60,000 to be paid to and among his children, equally among them, share and share alike, on their respectively attaining the age of twenty-one, payable as such children, after their father's death, respectively attain majority, the interest or annual produce being, however, in the meantime available for their maintenance and education, the issue of any of the said children who have predeceased taking the parent's share." D having predeceased the testator, one of his children, who survived the testator, died before attaining majority.

Held that she had a vested right in her share of the legacy.

Observed by the Court (following the cases of *Waters' Trustees v. Waters*, December 6, 1884, 12 R. 253, and *Wilson's Trustees v. Quick*, February 28, 1878, 5 R. 697) that the substitution of the issue of any children predeceasing to their parent's share was not a destination-over properly so-called, but merely an expression of what would be implied by law, viz., of the *conditio si sine liberis institutus decesserit*.

Process — Special Case — Questions Stated in Case but not Argued.

The Court will not, in a special case, answer questions which, while submitted in the case for the judgment and opinion of the Court, are not disputed, or have not been argued by the parties.

Sir William Mackinnon, of Loup and Balinakill, died on the 22nd June 1893, leaving a trust-disposition and settlement dated 21st April 1884, by which he disposed his whole estate to trustees.

The tenth purpose of the trust was as follows—"I direct and appoint my said trustees to make payment to my nephew, the said Duncan MacNeill, of another sum of £60,000, and that in life rent use only, and on his death I direct the said sum of £60,000 to be paid to and among his children, equally among them, share

and share alike, on their respectively attaining the age of twenty-one, payable as such children, after their father's death, respectively attain majority, the interest or annual produce being, however, in the meantime available for their maintenance and education, the issue of any of the said children who may have predeceased taking the parent's share."

The thirty-fourth purpose was—"The rest, residue, and remainder of my means and estate I direct and appoint my trustees and executors to dispoise, convey, or pay and deliver to my nephews, the said Peter Matheson Mackinnon, Duncan Mackinnon, John Mackinnon, Duncan MacNeill, and the sons of the said deceased Archibald Gray (the latter taking one portion only), equally among them, the issue of any of them who may have predeceased taking the parent's share equally among them, it being my intention that in case of any of my said nephews dying without issue before the said residue or any portion thereof falls to be divided, the share destined to him shall fall, accrue, and belong to the survivors or survivor of them, equally among the survivors or survivor, or their heirs respectively."

Duncan MacNeill predeceased the testator on 23rd June 1892, survived by his widow and by seven children. Of these Miss Janet MacNeill died on October 1st, 1894, aged six. The interest of the legacy of £60,000 not being required for the maintenance of the beneficiaries was accumulated by the trustees and invested on separate account, and securities representing the capital of the legacy were placed on a separate account for the MacNeill family. Interim divisions of residue were made, but owing to the subsistence of liferents and annuities no final distribution could be made.

A special case was presented for the purpose of ascertaining whether a share in the legacy of £60,000 and in the residue had vested in Miss Janet MacNeill at the time of her death.

The parties to the case were (1) Sir William Mackinnon's trustees; (2) Mrs MacNeill as administratrix of her daughter; (3) Mrs MacNeill as an individual; (4) Miss Janet MacNeill's eldest brother as her representative in heritage; and (5) her other brothers and sisters.

The second and third parties contended that as regards the £60,000, vesting took place in the children of Duncan MacNeill *a morte testatoris*, and that the second party, as administratrix of Miss Janet MacNeill, was entitled to payment of her share. They made the same contention along with the fourth party as regards the residue. The first, fourth, and fifth parties contended that vesting in the £60,000 was suspended till each child attained majority, and that consequently no share vested in Janet MacNeill; and the first and fifth parties contended that no right to a share of the residue vested in her.

The questions submitted to the Court were—" (1) Whether one-seventh share of the said legacy of £60,000 had vested in the

said Janet Mackinnon MacNeill at the date of her death? (2) Whether one-seventh of the share of residue provided to the said Duncan MacNeill and his issue had vested in the said Janet Mackinnon MacNeill at the date of her death? (3) If these questions be answered in the affirmative, whether the second party is entitled to demand payment, transfer, or conveyance now, of the share of said legacy, including accumulated interest, and whether the second and fourth parties are entitled to payment, transfer, or conveyance of the share of said residue, including accumulated interest, rents, and profits to which the said Janet Mackinnon MacNeill was entitled?"

Argued for first, fourth, and fifth parties, *on the first question*—There was no gift apart from the direction to convey at a certain date, and that being so, it was for those maintaining vesting *a morte* to show that a direct gift was intended—*Adam's Trustees v. Carrick*, June 13, 1896, 23 R. 828. The result was that there were as many periods of vesting as there were children. It was true that there was a direction to pay interest, but that was only for the purpose of maintenance, and there was no division to be made before the period of payment of the capital. Such a direction was in no way conclusive in favour of vesting.—*Bogle's Trustees v. Cochrane*, November 29, 1892, 20 R. 108; *Trucker v. Wintle* (1896), 2 Ch. 711, where *Fox v. Fox* (*infra*) was dissented from.

Argued for second and third parties—The direction to pay applied primarily, not to the attainment of majority, but to the death of the beneficiaries' father, the attainment of majority applying only to the time of payment, and not being a condition of the gift—*Alves' Trustees v. Grant*, June 23, 1871, 1 R. 969, at 972. There was here no clause of survivorship among the children themselves, and no destination-over, for the gift to the issue of predeceasing children really meant nothing but a statement of the doctrine of *si sine liberis institutus decesserit*—*Waters' Trustees v. Waters*, December 6, 1884, 12 R. 253; *Wilson's Trustees v. Quick*, February 28, 1878, 5 R. 697. In *Adam's Trustees v. Carrick* (*supra*), on the other hand, it was clear that the conditional institution was intended as a destination-over. Moreover, the destination as to payment of income was in favour of vesting—*Ralston v. Ralston*, July 8, 1842, 4 D. 1496; *Kennedy v. Crawford*, July 20, 1841, 3 D. 1266; *Fox v. Fox*, February 1, 1875, L.R., 19 Eq. 286. Postponement of vesting would involve intestacy, and there must accordingly be very strong and definite grounds for the Court to admit it.

No argument was submitted by the parties on the second and third questions.

LORD ADAM—The only question argued, and therefore the only question which we have to answer, is, whether a share of the legacy of £60,000 was vested in Janet Mackinnon MacNeill at the date of her death. The other questions in the case not having

been argued, we can give no opinion upon them. The question argued to us arises in the tenth purpose of the settlement of Sir William Mackinnon — [*his Lordship read the clause*].

The facts which give rise to the question are that Duncan MacNeill predeceased the testator leaving a daughter Janet, who survived the testator, but died unmarried before attaining majority, and the parties whose interests are in conflict are Janet's mother, who is entitled, as the child was domiciled in England, to one-half of whatever vested in her, and Janet's brothers and sisters, who claim to take under the settlement on the footing that no share vested in Janet.

In construing the tenth purpose the first thing which occurs to me is that there is clearly no benefit of survivorship given to the children *inter se*. There is a gift to a class, to those children—not more or less—in existence at the date of vesting, whatever that may be, but there is certainly no survivorship clause. The next material point is that there is no destination-over. No doubt there is a substitution of the issue, if any, of the children who may have predeceased to their parent's share, but that is not a proper destination-over, and has never been so treated, because it merely expresses what the law itself would imply, namely, the *conditio si sine liberis decesserit*.

Taking the question as one of general intention, I think the testator meant to give the liferent of this sum of £60,000 to his nephew, and the fee to his children at once. I think the words of the clause point in that direction, as I find nothing in the clause inconsistent with that view. It will be observed that, as Mr Johnston pointed out, the direction is that on the death of the nephew, the liferenter, the said sum is to be paid to and among his children, equally among them, share and share alike. Now, if one were to stop there, as was suggested, there could be very little doubt that a bequest in these terms vested *a morte*, the direction being to pay to the children on the death of the liferenter, and no destination-over. But then we have these words, "on their respectively attaining the age of twenty-one;" and the question is, whether we are to read that as merely an administrative direction. Now, it appears to me that it is not a condition of the gift but a direction as to payment, because that direction is repeated, and is repeated in these words, "payable as such children after their father's death respectively attain majority." It was contended that these words have no other meaning than to direct the trustees to pay to the children on their attaining majority, and neither they have, but I think the form of expression in this latter clause goes to support the view that the words do not import a condition of the gift, but a mere direction as to when the share is to be payable. The conclusion I arrive at is, therefore, that a share of the legacy vested in Janet *a morte testatoris*.

The case of *Carrick's Trustees* was pressed on us as ruling this case, but it appears to me to do nothing of the kind. Of

course all these cases have to be considered with reference to the terms of the settlement, which is the subject of construction, and the case of *Carrick's Trustees* is quite distinct from the present, in respect that in that case there was a very clear direction to pay on the youngest of the children attaining the age of twenty-one years. That was, if I remember aright, the only period pointed at in the deed at which payment was to be made. Here the direction is to pay as each of the children respectively attains majority, and that direction, it appears to me, if construed as attaching a condition to the gift, would be quite inconsistent with the other direction in the deed, namely, that each child is to get an equal share of the £60,000. The direction, as I read it, means that each child when it reaches the period of payment, that is, attains majority, is entitled to get its share and go away with it, and has no further claim on the estate. In my opinion, therefore, the question should be answered in the affirmative.

LORD M'LAREN—The only question which your Lordships propose to answer is the question put to the effect of determining whether Miss Janet MacNeill took a vested interest under the tenth purpose of Sir William Mackinnon's will, whereby a legacy of £60,000 is given to be enjoyed in liferent by Mr MacNeill, and to be shared by his family in the manner there pointed out in fee.

The gift is in the form of a direction to trustees, and the direction seems to be qualified by three conditions—First, that the sum is to be paid after the death of Duncan MacNeill; second, that it is to be paid only on the respective majorities of each member of his family; and third, that in case of the death of any child leaving issue, payment shall be made to the issue in place of the parent to the extent of that parent's original share. Now, as was pointed out by Lord Moncreiff in the case of *Alves' Trustees*, 1 R. 972, which has been cited, these questions of conditional vesting generally resolve into this inquiry—whether the conditions only have relation to the time and mode of payment, or whether they are intended to be a condition of the right of the legatee. In the former case the condition is consistent with the existence of a vested right in the person of the legatee; in the latter case of course it is not; for to say that a gift is affected by condition is just another way of expressing that no right is given until the condition is purified.

With regard to the first of these conditions—the survivance by the children of their father—it is enough to say that Duncan MacNeill died in the testator's lifetime, and therefore no question arises with reference to the survivance of him. I cannot see that if the father had survived the testator, there is anything in the terms of this deed which would make that a material consideration or suggest a different construction. But then Duncan MacNeill did not in fact survive the testator, and there-

fore it was possible to ascertain the class of his children as at the date of the testator's death—I mean that class could not be increased by the birth of objects after the testator's death.

Coming to the next condition—the condition of payment at majority—there are cases where a fund is directed to be divided, once for all, when the youngest member of the family shall attain a certain age, and where it may be a reasonable consideration that the class could not be ascertained until that event occurred. But it is a clear point in the construction of the clause before us that the class of objects must be fixed before any part of the fund is paid away, because each child as he or she attains majority is to be paid out his share, his aliquot share of £60,000. Now, this direction to pay the child his share would, in the absence of anything repugnant to the condition, imply that as soon as the oldest child had attained majority the trustees were in a position to pay, because they must know into how many shares the fund is to be divided. This is to my mind conclusive of the question that the attainment of majority was not intended in this case to be a condition of the gift, because the class being defined and ascertained before the younger children respectively attain majority, it follows that the attainment of majority is not a condition of the gift in their favour.

Then in regard to the condition arising out of the words substituting children to parents, I concur with what your Lordship in the chair has said, that there is a body of decisions of the House of Lords and of this Court to the effect that such words are fully satisfied by the supposition that they were inserted only to prevent a lapse by the death of an object during the testator's lifetime. In that view the words of substitution express nothing more than the condition which we have borrowed from the Roman law—*si sine liberis decesserit*. In any case I should not myself be disposed to hold that a cause in general terms substituting children in place of parents, even in a case in which the *conditio si sine liberis* would not apply, was to be read as importing a condition or having the effect of postponing vesting.

The result is that the conditions which have been introduced into this very carefully guarded and carefully drawn will appear to me to have reference only to payment, and are not inconsistent with the general intention—the intention that the right to the fee of the sum of £60,000 should vest in the class. I am therefore of opinion that the share in question vested in Janet MacNeill.

LORD KINNEAR—I am of the same opinion, and agree with your Lordships that this child's interest in her share of the legacy of £60,000 vested at the death of the testator, notwithstanding that she had not attained majority, but died in pupilarity. I have come to that conclusion for the same reason that your Lordships have already explained, and therefore I shall only add that

I think the material considerations are three in number.

In the first place, I think the testator has very clearly directed that the fee of this legacy, on the death of the liferenter, shall be divided equally among a class of persons, the members of which are to be ascertained at a period which may be long anterior to this particular child's majority, and in point of fact has turned out to be anterior to the period at which she would have attained twenty-one years of age had she lived. I think this is clear from the direction that upon the death of the liferenter—on the father's death—the sum is to be divided among his children equally among them, share and share alike, and paid to each child on his or her attaining majority. The eldest child who first attains majority is to take an equal share with all the other children of the sum of £60,000, and that must be paid over to him, and his claim paid off and discharged on his attaining majority irrespective altogether of the ages of his brothers and sisters. The decision therefore must be made at a certain point of time, and once for all, although the period of payment of the younger children's shares may not have arrived, and it appears to me to follow that the extent of the interest of each child cannot be dependent upon the arrival of their postponed period of payment. The number of children must be ascertained once for all when the first payment comes to be made, and therefore the vesting cannot be postponed until any later date.

The second point which I think material is that there is no gift to survivors of the children themselves; and that the third is that there is no destination-over, because I entirely agree with what has been said by your Lordships, that a gift to issue, which is really equivalent to the implication of law in favour of children, does not operate as a destination-over.

The result of these three considerations seems to me to be that the testator has clearly directed that this sum of money is to be divided among the members of a certain class who are to be ascertained irrespective of the period of majority of the younger children, and that he has not intended that anybody else shall take any interest in that particular sum. The postponement of payment, therefore, is in the first place necessary merely for the payment of the liferent to their father, and, secondly, till the time shall arrive when the child shall attain majority and be able to take payment of his own money and discharge the trustees. On general considerations, therefore, I should not consider the question one of very great difficulty when once one has come to see what is the precise effect of the direction which the testator has given in reference to payment.

But in addition to these main grounds Mr Johnston brought forward two other considerations to which I think some weight is to be attached, although he said he used them rather as confirming his argument—as what he called make-weights—than as having very great force and substance in

themselves. The first is that although the principal of a child's share is not to be paid over until it attains majority, the interest or annual produce is in the meantime to be available for that child's maintenance and education; and so far as that goes it is a consideration in favour of the view that the child had already taken a vested interest in the sum, out of the income of which it was to be supported during minority and pupilarity.

The second confirmatory point on which he founded was this—that whereas in the case of many of the other legacies in this will, the testator has taken care to provide that if all the persons whom he has called *nominatim* to benefit from these legacies shall die without issue the sum bequeathed shall revert to the trustees and form part of the trust-estate, there is no similar provision as to this particular sum; and the inference Mr Johnston draws—and I think fairly enough—from that is that the testator did not contemplate the probability of this sum falling into residue at all, but thought he had provided sufficiently for it by leaving it to the children of his nephew Duncan MacNeill who were alive at the time that his will came into operation by his death. Therefore it is said—I think with some force—that he cannot be supposed to have contemplated that there should in any case be intestacy with reference to this particular legacy.

These last two considerations are not, I think, without force; but at the same time I agree with your Lordships that the main ground of judgment ought to be what you have already stated in the opinions with which I concur.

I agree also that it is quite impossible for us to answer questions which the parties do not choose to argue. It is not the purpose of special cases to obtain an opinion of the Court on questions which are not brought before it in such a way as to enable the Court not only to express an opinion but to give a decisive judgment on them. It is said that trustees ought to be advised as to what course they should take in particular circumstances, and that is quite true provided the questions have arisen in such a way as to give rise to a litigation upon which a judgment *inter partes* may be given. If that cannot be done—if there is no room for judgment *inter partes*—then the opinion of the Court is not binding upon the parties interested and gives no protection to the trustees. What protects trustees is a judgment and decision of the Court, and we are not in the practice of deciding questions which are not disputed, or which counsel for the respective parties have declined to argue.

The Court answered the first question in the case in the affirmative, and refused to answer the second and third questions.

Counsel for the First, Fourth, and Fifth Parties—Guthrie—C. K. Mackenzie.

Counsel for the Second and Third Parties—H. Johnston—W. C. Smith.

Agents for Parties—Murray, Beith, & Murray, W.S.

Tuesday, June 29.

FIRST DIVISION.

M'LEAN'S TRUSTEES v. M'LEAN.

Succession — Vesting — Postponement of Period of Payment.

A trustor directed his trustees to make payment of his debts and of certain annuities, to secure which he authorised them to invest sufficient capital, and with regard to the residue of his estate he directed—"After the foregoing purposes are served, my said trustees shall divide the residue of my said means and estate equally, share and share alike," among five of his remaining children, and the issue of a deceased daughter, who were to take the sixth share which would have fallen to their parent, "and to the survivors of my said five children and grandchildren." There followed a provision in favour of the issue of any of the trustor's aforesaid children or grandchildren dying "prior to the division of said residue." The trustees were given power, in order "to carry these presents into effect," to sell any of the trust-estate at such times as they should think advantageous, "and further, "with power either to postpone the division of the residue of my means and estate till the whole has been realised, or to make interim divisions, one or more, as the realisation proceeds." There followed a recommendation to be cautious in the sale of certain lands which the trustor expected to rise in value. Interim divisions of the residue were made by the trustees.

One of the trustor's surviving children died before the trustees had divided and paid over the whole of the residue. *Held* that he had a vested right in a share of the residue still in the possession of the trustees.

Mr William M'Lean of Plantation, Glasgow, died on 22nd February 1867 leaving a trust-disposition and settlement with relative codicil dated respectively 26th May and 18th December 1866.

By his trust-disposition Mr M'Lean disposed his whole estate to trustees, and after directing them as to the payment of his debts and certain annuities he proceeded—"Lastly, After the foregoing purposes are served, my said trustees shall divide the residue and remainder of my said means and estate, equally share and share alike, among my remaining children William M'Lean, Joseph M'Lean, Mary M'Lean or Niven, Charles M'Lean, and Rachel M'Lean, and the children of my deceased daughter Jane M'Lean or Clark, such children coming in the place of their mother, and receiving equally among them the share that would have fallen to her if she had survived me and formed one of my residuary legatees, and to the survivors of my said five children and grandchildren: declaring that in the event of any of my children before named or grandchildren