

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

before referred to dying prior to the division of said residue, leaving lawful issue, such issue shall succeed equally, share and share alike, to that portion of my said means and estate which would have devolved on their parent under the destination above written, and as if such parent had survived said period of division. . . . And to enable my said trustees and their foresaids to carry these presents into effect, I authorise and empower them to sell by private bargain or public roup all or any portion of my said means and estate before conveyed, and that at such times as they may consider advantageous, and to invest, if they think proper, in such securities as they may approve of, sums sufficient for the payment of the annuities before provided, or to purchase said annuities or to allow them to remain burdens on any portion of the heritable property left by me, the said annuities being hereby declared by me to be real liens and burdens on said heritable property until such investiture or purchase, and further, with power either to postpone the division of the residue of my means and estate until the whole has been realised, or to make interim divisions, one or more, as the realisation proceeds, and in general to manage and dispose of the means and estate hereby conveyed as fully, freely, and effectually as I could have done myself before executing these presents. But I recommend to my said trustees first to be cautious in selling or feuing any portions of the lands of Plantation for some years after my death, my conviction being that the value of these lands is increasing every year, but at the same time if an offer which they consider eligible be made for the whole or any portion of said lands, it is not my wish that they should reject or lose sight of such offer, but, on the contrary, that they should use their own discretion and sound judgment in the circumstances."

The trustor was survived by his widow, his sister, two sons mentioned in the former part of his disposition, and the children and grandchildren mentioned in the last purpose quoted above.

Charles M'Lean, who died in 1896, survived by a widow and two daughters—Olivia Rachel Nora M'Lean, and Elfrida Mary Hamilton M'Lean—executed in 1882 an assignation to certain trustees of the whole right, title, and interest so far as not alimentary then pertaining to him, or which he might thereafter acquire or succeed to, *inter alia*, in the estate of his father. Mr William M'Lean left moveable estate amounting to £117,000 or thereby, and was also at the date of his death proprietor of the estate of Plantation so far as not feued or sold by him. After his death the trustees disposed of the greater part of the estate, and from time to time made payment of the proceeds of the sale to the residuary legatees, the amount thus paid being £331,500. No resolution was passed by the trustees postponing division of the estate. After the date of the assignation by Charles M'Lean the amount of these interim divisions due to him was paid to the trustees named therein.

A special case was presented for the purpose of determining the disposal of one-sixth of the residue of the trustor's estate still in the hands of the trustees. The parties to the case were (1st) Mr William M'Lean's trustees, (2nd and 3rd) Mr Charles M'Lean's two daughters and his widow, and (4th) the trustees under his assignation.

The contentions of the parties as stated in the case were—"The fourth parties maintain that one-sixth of said residue was vested in Charles M'Lean at the date of said assignation, or at least prior to the date of his death, and that said one-sixth share was effectually carried by said assignation, and falls to be paid to the fourth parties. The second parties, on the other hand, maintain that the one-sixth of the residue still remaining unrealised in the hands of the first parties was not vested in Charles M'Lean at or prior to the date of his death, and that it, if vested at all in him, was vested in him subject to defeasance in the event of his dying prior to the realisation thereof leaving lawful issue, and therefore does not fall to be paid to the fourth parties, but that said share vested in the two daughters of the said Charles M'Lean on his death, or otherwise that it will vest in them when the first parties have realised and paid over the remaining residue of the trustor's estate, and will fall to be paid to them, or retained by the first parties for their behoof until majority or marriage."

The questions submitted to the Court were—" (1) Was the one-sixth of the residue of the estate of the trustor, the said William M'Lean, still in the possession of the first parties, vested in the deceased Charles M'Lean at the date of his death, and if so, was said one-sixth validly assigned by said assignation granted by him? or (2) In the event of the preceding question being answered in the negative, did said one-sixth of said residue vest in the said Olivia Rachel Nora M'Lean and Elfrida Mary Hamilton M'Lean on the death of their father, so far as the same is still in the possession of the first parties as trustees? or otherwise, is vesting thereof postponed until the first parties have realised and divided said part of said residue?"

Argued for fourth parties—There was a direction to divide the residue, and no postponement of payment except for the purpose of realisation. The survivorship referred to the date of the testator's death, and not to any later period. There was only one period of division referred to, and that must be the testator's death, at which date the class to benefit must be ascertained. The discretion given to the trustees to postpone division was merely an administrative one and could not postpone vesting—*Richard's Trustees v. Roland*, December 7, 1894, 23 R. 140. The case of *White's Trs. v. White*, June 20, 1896, 23 R. 836, was in contrast with the present case, because there the trustees had express power to postpone payment of the capital if they considered it to be to the interest of a child, and to pay him the income.

Argued for the second and third parties—

There were successive periods of vesting for each share, as it was in point of fact divided by the trustees. It was by no means an impossible conclusion to hold that a truster intended his trustees to have a discretion in saying whether, and if so, when, rights were to vest in beneficiaries.—*White's Trs. v. White, supra; Adam's Trs. v. Carrick, June 18, 1896, 23 R. 828.* There was here a survivorship clause, which in the vast majority of cases had been held to refer not to the death of the testator but to the period of payment. The direction was to divide "after" certain purposes—among which was the payment of certain annuities—had been served; and further, there was a conditional institution. A consideration of these points, coupled with the discretion given to the trustees, made the theory of vesting *a morte* quite untenable. That being so, the only other period for vesting was that contended for, viz., of each share as it was in fact divided and paid over.

At advising—

LORD M'LAREN—The question raised in this case is one which it was very proper to bring under the consideration of the Court in this form, because there are cases where the distribution or division of the estate upon which vesting depends may in certain circumstances be affected by the acts of trustees. In a case like the present, where the truster evidently contemplated a trust of long duration, and gave the trustees power to realise the heritage at successive times, it is quite possible that he might have intended that the right to the estates successively realised should belong to his sons and daughters surviving at these times. A slight variation of the language used might possibly have led to this result. In such cases it is safe to begin with the proposition that it is not to be presumed that the period of vesting is referred to the discretion of the trustees, though I am far from saying that this is impossible or that if the truster says so in plain terms his expressed intention is not to receive effect.

If we hold vesting to be postponed our decision must proceed on some definite expression of intention on the part of the testator. Now, I find nothing in the clauses under consideration except directions in regard to the administration and distribution of the estate. The direction is that the residue is to be divided among children named and the issue of a deceased daughter, and the survivors, and then follows a general substitution of issue to their parents in terms which I do not need to read. It is agreed that in the great majority of cases where the Court has had to construe clauses directing estate to be divided among persons named and the survivors it has been held that the survivorship is referable to a period subsequent to the death of the testator. If that is so, I think the reason is not difficult to divine. It is that where there is no postponement of the division, no one would think of coming to the Court, because if the direction is to divide a residue amongst the members of a class and the survivors, and there is no postponement of the distribution, survivors can only mean

survivors at the testator's death. Now, when we come to consider the period to which survivorship is referable in this case, the terms of the clause point only to the period of the testator's death, because the division is to be made "after the foregoing purposes are served." There might have been purposes so conceived as to make it impossible to proceed to a division of the estate, but the purposes referred to are merely the provision of certain annuities, and annuities which the testator himself has said may be provided for by the purchase of securities. I think that in directing the residue to be divided the testator means only what remains after this has been done—the word "after," while primarily referable to time, referring here not to time but to the amount remaining when the annuities have been provided for. When we come to the discretionary part of the will, where the trustees are directed to sell with the view of obtaining as large a sum as possible, I find no expressions referring back to the previous part of the will so as to affect the vesting under the residuary clause. It therefore appears to me to be clear that a division of the estate is to be made at the testator's death for the purpose of ascertaining the persons entitled to succeed, though it may be that the sale and payment of the proceeds would not take place till long after, and only upon the realisation of successive portions of the estate. In my opinion Charles M'Lean took a vested interest, and was entitled to grant an assignation which was effectual to carry his share of what had been divided as well as what remained to be divided.

LORD ADAM and LORD KINNEAR concurred.

The LORD PRESIDENT was absent.

The Court answered the first question in the affirmative.

Counsel for the First Parties—Craigie Agents—Millar, Robson, & M'Lean, W.S.

Counsel for the Second and Third Parties—Constable. Agents—J. A. Campbell & Lamond, C.S.

Counsel for the Fourth Parties—Younger. Agents—Webster, Will, & Ritchie, S.S.C.

Wednesday, June 30.

SECOND DIVISION.

[Sheriff-Substitute at Glasgow.]

EARL OF LEITRIM'S TRUSTEES (OWNERS OF "ROSSGULL") v. G. & J. BURNS (OWNERS OF "SPANIEL").

Shipping Law—Collision—Fog—Regulations for Preventing Collisions at Sea, Articles 13 and 18.

Article 13 of the Regulations for Preventing Collisions at Sea under Order of Council 11th August 1884 provides—