

the case of *Bennett v. Wordie*, 1 F. 855, two points were decided in this Court—*first*, that a “claim” in the sense of the statute meant a demand for a definite and specified sum as compensation for the injuries received; *second*, that the demand must be made judicially. In the subsequent case of *Powell v. Main Colliery Company* [1900], A.C. 366, the House of Lords approved of the decision in *Bennett* on the first point, but, by a majority, disapproved of it upon the second point. In these circumstances it appears to me to be quite impossible to hold that the letter in this case—the letter of 20th September 1904—was a “claim” in the sense of the statute.

LORD LOW—I am of the same opinion. There is no substantial difference between the notice given in the case of *Bennett v. Wordie & Company*, 1 F. 855, and the notice given here. In neither case is there a specific claim for compensation but only a notice that a claim will be made. That was held in the case of *Bennett* not to constitute a “claim for compensation” within the meaning of section 2 of the Act, and that interpretation of the statute was subsequently expressly approved of by the House of Lords in the case of *Powell v. Main Colliery Company*, [1900] A.C. 366. I am therefore of opinion that the question of law stated in the case falls to be answered in the negative.

LORD STORMONTH DARLING was absent.

The Court answered the question of law in the negative, recalled the award of the arbitrator, and remitted to him to dismiss the claim.

Counsel for the Appellant—Orr, K.C.—Spens. Agents—Clark & Macdonald, S.S.C.

Counsel for the Respondent—Hunter, K.C.—Macmillan. Agent—Andrew Newlands, S.S.C.

Saturday, December 16.

FIRST DIVISION.

(Before the Lord President, Lord M'Laren, Lord Kinnear, Lord Kyllachy, Lord Stormonth Darling, and Lord Low.)

MARQUIS OF TWEEDDALE'S TRUSTEES v. MARQUIS OF TWEEDDALE AND OTHERS.

Succession — Vesting — Liferent or Fee — Direction to Pay subject to Subsequent Declaration to Hold for Legatee in Liferent and her Children in Fee—Death of Legatee without Issue.

A testator by his trust-disposition and settlement directed his trustees “to make payment” at a certain term after his death of a certain sum to each of his daughters, “but . . . subject always to the provisions, declarations, powers, directions, and others hereinafter written.” In a subsequent pur-

pose of the settlement he provided and declared that, “notwithstanding anything to the contrary herein before written,” the trustees were to “set aside and hold and retain and invest in their own names,” as trustees, the several provisions granted to each of his daughters for behoof of the daughters “in liferent for their respective liferent uses allenerly . . . and for behoof of their respective children equally among them in fee.” The *jus mariti* and right of administration of the daughters' husbands were excluded, and the daughters' liferents were declared to be alimentary and not liable to the diligence of creditors. There was no destination-over of the daughters' shares in the event of their dying without issue.

Held (1) that the daughters took a fee of the sums directed to be paid to them respectively, which was reducible to a liferent only in the event of their having issue, and (2) that on the death of a daughter without issue her share fell to be disposed of as part of her moveable estate.

The late Marquis of Tweeddale died on 10th October 1876, leaving a trust-disposition and settlement dated 9th April 1870, which, with various codicils, was registered in the Books of Council and Session on 18th October 1876.

The trust-disposition provided as follows—(Fifth purpose)—“I direct and appoint my trustees to make payment at the first term of Whitsunday or Martinmas that shall happen six months after my decease, to each of my daughters Elizabeth Duchess of Wellington, Lady Louisa Jane Wardlaw Ramsay, Lady Hannah Charlotte Watson Taylor, Lady Emily Peel, and Lady Jane Taylor, of the sum of £8500; to my daughter Lady Julia Hay of the sum of £13,500; to each of my sons Lord William Montagu Hay and Lord John Hay of the sum of £505; and to each of my sons Lord Charles Edward Hay and Lord Frederick Hay of the sum of £13,905; the lawful issue of any of my said children who may predecease me leaving issue coming in place of their parents, and taking equally among them the said sums which would have been payable to their deceased parents if in life, but subject always, in the case of my sons the said Lord Charles Edward Hay and Lord Frederick Hay, and my said whole daughters, to the provisions, declarations, powers, directions, and others hereinafter written applicable to them respectively.” (Seventh purpose)—“I direct and appoint my trustees (subject always as regards any provisions falling to my sons the said Lord Charles Edward Hay and Lord Frederick Hay, and my said whole daughters, to the provisions declarations, powers, directions, and others hereinafter written applicable to them respectively) to pay, convey, and make over, as soon as conveniently may be, after implement and fulfilment of the preceding purposes of this trust, the whole residue and remainder of my said means and estate, heritable and moveable, real and personal, to my son the said Viscount

Walden, in the event of his surviving me, and in the event of his predeceasing me then to the heir-male of his body succeeding to the foresaid entailed estates; and in the event of the said Viscount Walden leaving no such heir-male of his body, or if such heir-male of his body shall predecease me, then to the whole of my other children (other than and except the heir of entail succeeding to said entailed estates) alive at the time of my death, and the lawful issue of such of my children (other than the said heir of entail) as shall have predeceased me leaving lawful issue, equally among them, share and share alike, such issue coming in place of their parents and taking equally among them the shares which would have fallen to their deceased parents if in life; providing always, and declaring in regard to the several provisions herein conceived in favour of my said sons Lord Charles Edward Hay and Lord Frederick Hay, as it is hereby expressly provided and declared, that notwithstanding anything to the contrary hereinbefore written my trustees shall set aside and hold and retain and invest in their own names as trustees foresaid the several provisions hereby granted to each of my said sons Lord Charles Edward Hay and Lord Frederick Hay, and shall during all the years of their respective lifetimes after my decease apply the interest or other annual produce thereof as an alimentary fund for their use and behoof respectively: With full and ample power to my trustees either to pay the said interest or other annual produce, or so much thereof as my trustees shall think proper, to my said sons Lord Charles Edward Hay and Lord Frederick Hay respectively, or to apply the same, or so much thereof as my trustees shall think proper, for their use and behoof and for their proper support and maintenance, the remainder being accumulated for their use and behoof respectively and added to the capital of their said provisions, and also if my trustees shall deem it expedient and proper to give or make over to either of my said sons Lord Charles Edward Hay or Lord Frederick Hay the whole or any part of their said respective provisions, including any accumulations of interest or annual produce added thereto: With full power also, if my trustees shall think it necessary or expedient, to invest the capital of the said provisions, or either of my said sons Lord Charles Edward Hay or Lord Frederick Hay, including any accumulations of interest or annual produce added thereto, in the purchase of an alimentary annuity for either of them, or otherwise to encroach upon the capital of such provisions and accumulations for their proper support and maintenance: Declaring always that neither of my said sons Lord Charles Edward Hay and Lord Frederick Hay shall be entitled to control my trustees in any way whatsoever in the exercise of the powers hereby given to them in relation to the foresaid provisions, it being my desire that the matter shall be left entirely to the discretion of my trustees, and that they shall not be responsible to any one for the exercise or non-exercise

of the said powers or any of them; and declaring further that the said several provisions hereby granted to my said sons Lord Charles Edward Hay and Lord Frederick Hay respectively, and the interest and produce thereof, are and shall be strictly alimentary, and shall not be assignable or capable of anticipation by them or attachable by the diligence of their creditors; and upon the respective periods of decease of my said sons Lord Charles Edward Hay and Lord Frederick Hay, without leaving lawful issue, I direct and appoint my trustees to pay and make over the capital of the said several provisions hereby granted to each of my said sons Lord Charles Edward Hay and Lord Frederick Hay respectively, and any accumulations of interest and annual produce added thereto, or such part thereof as shall not have been disposed of by my trustees under the foresaid powers, to my son the said Viscount Walden, in the event of his surviving my said sons Lord Charles Edward Hay and Lord Frederick Hay respectively, and in the event of his predeceasing them respectively, then to the heir-male of his body succeeding to the foresaid entailed estates, and in the event of the said Viscount Walden leaving no such heir-male of his body, or if such heir-male of his body shall have predeceased my said sons Lord Charles Edward Hay and Lord Frederick Hay respectively, then to their whole surviving brothers and sisters (including the survivor of the said Lord Charles Edward Hay and Lord Frederick Hay, but excepting the heir of entail succeeding to said entailed estates) and the lawful issue of such of their brothers and sisters (including and excepting as aforesaid) as shall have predeceased them leaving lawful issue, equally among them share and share alike, such issue coming in place of their parents and taking equally among them the shares which would have fallen to their deceased parents if in life: Declaring that the shares or share so succeeded to by the survivors of the said Lord Charles Edward Hay and Lord Frederick Hay and of my said daughters shall be taken subject to the same provisions, declarations, powers, directions, and others as are herein before and after written in regard to their foresaid provisions so far as applicable to them respectively: And providing and declaring further in regard to the several provisions herein conceived in favour of my said whole daughters, as it is hereby specially provided and declared, that notwithstanding anything to the contrary hereinbefore written, my trustees shall set aside and hold and retain and invest in their own names, as trustees foresaid, the several provisions hereby granted to each of my said daughters for behoof of my said daughters in life for their respective life interests allenerly during all the days of their respective lifetimes after my decease, and exclusive of the *ius mariti* and right of administration of their husbands or of any husbands they or any of them may marry, and for behoof of their respective children equally among them in fee, and that the life interests of the said several

provisions shall be purely alimentary and shall not be assignable or capable of anticipation by my said daughters respectively, nor liable to the diligence of their creditors, and not affectable by the debts or deeds of their husbands, or of any husbands they or any of them may marry, or attachable by the diligence of such husbands' creditors, the *jus mariti* and right of administration of all such husbands being hereby expressly excluded and debarred . . . and the said legacies, shares, and provisions hereby granted and bequeathed to my children respectively, and the other sums and provisions above mentioned, are and shall be accepted by them and each of them, and are hereby declared, to be in full satisfaction to them and each of them of all legitim, executry, and everything else which they or any of them can ask or claim by or through my decease. . . . and with reference to the beforewritten distribution of my means and estate, it has always been my anxious desire to make as ample provision for my children (other than my said heir of entail who will succeed to my said entailed estates and is therefore well provided for) as my circumstances will permit, and also to do justice to all my younger children by placing each of them on a footing as nearly equal as circumstances render prudent, and where I have attached conditions or restrictions to the provisions left to any of them, I desire it to be understood that as my children are all equally dear to me I have conceived and executed this deed solely from an anxious regard for the welfare of each and all of them. . . ."

Viscount Walden survived the testator, and died on 28th December 1878 without issue. The present Marquis of Tweeddale was his residuary legatee.

One of the daughters of the testator was the late Dowager-Duchess of Wellington. She died on 13th August 1904, and at the date of her death she was a widow and had no issue. Until the date of her death she enjoyed the liferent of £8415, being the £8500 provided to her by the trust-disposition and settlement, after deduction of the legacy-duty of £85 paid thereon.

In these circumstances, questions having arisen as to the nature of the Dowager-Duchess of Wellington's interest in the said sum of £8415 provided to her by said trust-disposition and settlement, the present special case was presented.

The parties to the special case were (1) General Sir Richard Chambre Hayes Taylor and others, the trustees acting under the testator's trust-disposition, first parties; (2) the present Marquis of Tweeddale, the residuary legatee of Viscount Walden, second party; (3) the Duke of Wellington and another, the testamentary executors of the late Dowager-Duchess of Wellington.

The second party maintained that the said Dowager-Duchess of Wellington had a mere liferent of said sum, and that on her death it fell to be disposed of as residue and to be paid to the second party as in right of the said Viscount Walden, the residuary legatee.

The third parties maintained that the bequest of the said sum to the Dowager-Duchess of Wellington was a gift of the fee, and that the subsequent clause providing for the restriction of her enjoyment of the same to a liferent was intended to apply only in the event of her leaving children to the effect of giving the fee to such children. They accordingly contended that the said sum vested in her and fell to be disposed of as part of her moveable estate and to be paid to them as her trustees.

The questions for the opinion and judgment of the Court were—“(1) Was the right of the said Dowager-Duchess of Wellington in said sum of £8415 limited to a liferent thereof, and did said sum on her death fall into residue of the testator her father, and become payable to the second party, or those in his right? or, (2) Did the said sum of £8415 on the death of the said Dowager-Duchess of Wellington fall to be disposed of as part of her moveable estate, and to be paid to her assignees *inter vivos* or *mortis causa*, or, failing her disposal thereof, to her heirs *in mobilibus*?”

Argued for the second party—There was no absolute disposition to the daughters of the fee of the sums which the testator had directed his trustees to pay them. In this respect the case was different from *Lindsay's Trustees v. Lindsay*, December 14, 1880, 8 R. 281, 18 S.L.R. 199; *Dalglish's Trustees v. Bannerman's Executors*, March 6, 1889, 16 R. 559, 26 S.L.R. 424; *Logan's Trustees v. Ellis*, February 7, 1890, 17 R. 425, 27 S.L.R. 322. It had been held that a direction to “hold and invest” did not infer a gift of fee—*Muir's Trustees v. Muir's Trustees*, March 19, 1895, 22 R. 553, 32 S.L.R. 370. The construction here contended for had been adopted in a case where the testamentary provisions were very similar—*Young's Trustees v. Young*, March 5, 1901, 3 F. 616, 38 S.L.R. 434. The directions in the seventh purpose were exegetical of what the testator meant by the direction to pay in the fifth purpose. So read there was no repugnancy between the direction to pay in the fifth purpose and the directions in the seventh purpose. *Fulton v. Fulton's Trustees*, February 6, 1880, 7 R. 566, 17 S.L.R. 377, was a direct authority in favour of this contention. *Gibson's Trustees v. Ross*, July 12, 1877, 4 R. 1038, 14 S.L.R. 694, was also referred to.

Argued for the third parties—The direction to the trustees to pay at a term after the testator's death a specified sum to each of his daughters amounted to the gift of a fee. There were several cases in which, where a daughter died without issue, she was held to have taken a fee in a share of the estate, her enjoyment of which during her life was limited to a liferent—*Lindsay's Trustees v. Lindsay*; *Dalglish's Trustees v. Bannerman's Executor*; *Logan's Trustees v. Ellis* (*cit. sup.*); *Dunlop's Trustees v. Sprol's Executor*, March 9, 1899, 1 F. 722, 36 S.L.R. 531. The sole object of the testator in restricting the daughter's enjoyment of her share during her life to a

liferent was to protect and secure the succession of her children if she had children. Accordingly it was just the ordinary case of a fee burdened with a gift-over to children if there should be any—*Mackay's Trustees v. Mackay's Trustees*, June 8, 1897, 24 R. 904, 34 S.L.R. 683; *Stewart's Trustees v. Stewart*, January 22, 1896, 23 R. 416, 33 S.L.R. 297. This construction was the only one under which the original gift and the subsequent liferent clauses could both receive effect. The absence of a destination-over strongly supported this construction, and the other clauses of the deed pointed in the same direction.

At advising—

LORD PRESIDENT—This case was sent for consideration by Seven Judges for two reasons—first, because we thought the question a narrow and difficult one on the construction of the deed, and secondly, because it seemed advisable to consider whether there was any repugnancy between the cases of which *Fulton's Trustees* may be taken as a type on the one hand, and *Lindsay's Trustees* as a type on the other.

On the construction of the deed I am of opinion with your Lordships. I have had the advantage of perusing the opinions now delivered by Lord Stormonth Darling and Lord Low, and I content myself with saying that I concur in the view they have taken as to the inference to be drawn from the clauses of the deed.

But on the wider question I wish to say a few words.

In one sense it is true that no decision in this branch of the law can ever be authority for another, for as different instruments are being construed, and the sole question is what is the true meaning of each, the decision of the proper construction of the will of A can never as authority rule the construction of the will of B.

But none the less the dicta of Judges in giving the reasons for holding a certain construction of the will of A to be the true one may and often do act as guide-posts to direct the inquirer for what *indicia* he should look in construing the will of B, and in this sense it is convenient if not strictly accurate to speak of the principle of so-and-so as laid down in a case or a series of cases.

I do not propose to examine separately the cases which were brought before our notice in the very satisfactory argument we had from the bar, but using the word principle in the sense I have explained, I do deduce from them certain principles.

As a person's testamentary writings must always be viewed as a whole, it, in one sense, makes no difference whether two or more directions as to one fund or interest are contained in one part or in several parts of one deed, or in different deeds. The whole of the sentences, wherever found, must be read together. But in another sense it does make a difference. There is an antecedent improbability that a rational being—and testators are in the eyes of the law presumed to be rational—intends to contradict at the end of a sentence or clause what he has said at the beginning of it.

But there is no antecedent improbability that a testator intends to contradict in his codicil what he has said in his will. Codicils are often written for no other purpose. If the codicil in terms revokes or alters the will or a portion of it, no question remains. If it does not do so in terms, there is still no antecedent improbability that it may not do so; only, as the revocation or alteration alleged is now not express but implied, we must be sure that the implication is a necessary inference from the words used.

Passing away from the position of the directions, the next point I gather is this.

When in the beginning of an instrument you find words which purport to bestow a certain gift or interest, and then subsequently find further provisions or declarations which obviously deal with the gift or interest of the same donee, then the further expression of the donor's will must have been inserted by him for one of two purposes, either (1) to enlarge or abridge the gift from what, had the original words remained unadded to, it would have been or might have seemed on a certain construction of the words to be; or (2) leaving the gift the same, to adhibit further conditions or directions as to the way in which the gift is to be enjoyed. Let me interpolate, that it does not seem to me that these propositions are affected by the point whether there is or is not what I may call a warning expression in the first clause that there is more on the same subject to come.

The final proposition I take to be this—that where the subsequent declaration does not in terms purport to affect the first purpose—*i.e.*, to enlarge or abridge the gift itself—then on the well-known view of allowing continued effect to *all* the testator has said, that construction will *in dubio* be preferred which assigns it to the second rather than to the first category.

I do not think that any of the cases cited will be found not to square with these propositions. I should only wish to add that a difficulty which pressed me a good deal as to the case of *Fulton v. Fulton's Trustees* has been removed by a perusal of the session papers. From the deeds, which are there printed *in extenso*, it appears clearly that the original gift in the will, which in expression clearly purported a fee, was in terms revoked by a codicil, and that what was substituted therefor was a gift, which with equal clearness purported a liferent and nothing more. The case is not therefore, as it at first sight appeared to be, in any way inconsistent with the case of *Stewart's Trustees*.

LORD M'LAREN—I have had the opportunity of studying the opinion of Lord Low, in which I wish to concur, and I am also entirely at one with your Lordship in the chair and with Lord Stormonth Darling in your observations. I should only add one word about the question of principles of construction. So far as principles of construction are rules of logic, I am afraid we cannot get on without them, but in so far as they are arbitrary rules, I think there is a

general concurrence of judicial opinion at the present time that it is undesirable to lay down rules which might have a tendency to obscure the real question, which is the meaning of the testator in a particular case. Now nothing that we decide to-day, as it seems to me, can have that effect, because we only decide two things—first, that according to Lord Tweeddale's intention, as made manifest in his will, he desired to give a right of fee to his younger children, and at the same time to surround them with such protection as the law enabled him to give, by directing his trustees to pay them the income for life and to keep the fee for the children. The other proposition which is involved in the judgment is this, that where such is a testator's intention there is no rule of law or rule of construction that should prevent us from giving effect to that intention, and in my opinion the intention in this case is sufficiently clear to enable us with some degree of confidence to pronounce a judgment.

LORD KINNEAR—I have had considerable difficulty in this case, not because of any conflict of decision, but because of the complexity of the will itself, and because it appeared to me to be a case in which there was a serious danger of our being led to force upon a complicated will a construction not exactly in conformity with the testator's intention, out of deference to a supposed principle or canon of construction established by previous decisions. But my difficulty has been removed both by the examination of the will which has been made by Lord Stormonth Darling and by Lord Low, and also by the observations that your Lordship in the chair has made on the proper use of those previous decisions, with all of which I desire to express my concurrence, and I therefore agree that we should answer the questions in the manner proposed by Lord Stormonth Darling.

LORD KYLLACHY—I also have had some difficulty as to the just construction of this particular deed, but in the end I have come to concur with the rest of your Lordships, that on the just construction of the deed the first question falls to be answered in the negative and the second in the affirmative.

LORD STORMONTH DARLING—Nothing in the decided cases can relieve us of the necessity of construing this will by itself; and we must do so by reading the will as a whole, and, if possible, in such a way as to harmonise all its provisions. So construing it, I reach the conclusion that the sum of £8415, on the death of the Duchess-Dowager of Wellington fell to be disposed of as part of her moveable estate, and to be paid to her executors.

I admit that this result can only be reached if you find in the will words which on their just construction are capable of conferring a fee. But I find such words in the directions to the testator's trustees to make payment at a particular term after his death of a specified sum to each of his

daughters, including the Duchess. I do not think that the words which almost immediately follow—"but subject always in the case of my sons the said Lord Charles Edward Hay and Lord Frederick Hay, and my said whole daughters, to the provisions, declarations, powers, directions, and others hereinafter written applicable to them respectively"—impart any other or greater qualification of the original gift than would be constituted by the clause which is printed in the appendix, and by which the trustees are directed to "set aside and hold and retain and invest in their own names as trustees foresaid the several provisions hereby granted to each of my said daughters for behoof of my said daughters in liferent for their respective liferent uses allenarly during all the days of their respective lifetimes after my decease, and exclusive of the *jus mariti* and right of administration of their husbands or of any husbands they or any of them may marry, and for behoof of their respective children equally among them in fee." And then follows a declaration that the liferents are to be alimentary and not assignable. In short, I do not see much force in what I may call the *in gremio* argument.

This clause (the seventh) undoubtedly imparts an important qualification of the original gift, and that in a double sense. It leaves the money in the hands of the trustees during the whole life of each daughter, in order to secure that she shall only have the income as an alimentary provision, and it gives the fee to her children, if any. But beyond effecting these two purposes it does not go, at all events expressly. The second party, as representing the residuary legatee, maintains that it goes much further and reduces the daughters' right to a liferent whether they had children or not. If that contention be adopted it is impossible to reconcile the two clauses—they are mutually repugnant. If, on the other hand, you adopt the construction for which the Duchess's executors contend, you find a reason for the testator having left the two clauses standing in the same deed. In the events which have happened both clauses receive effect—the liferent clause by the protection afforded to the lady herself during her life, and the original gift by conferring upon her the *jus disponendi*.

There are other clauses in the will which in my opinion support that view. In particular, the provisions to Lord Frederick and Lord Charles Hay, although first directed to be paid to them at a particular term after the testator's death, just as in the case of the daughters, are afterwards so dealt with as to make it perfectly clear that if these younger sons should die without leaving lawful issue the capital of their provisions is to go to the testator's eldest son in the event of his surviving these younger sons, and to certain other persons in the event of his predeceasing them. In their case, therefore, it would have been impossible to contend that they had a fee subject to divestiture. But there

is no such special provision with regard to the daughters, and the contrast seems to me significant.

With regard to the cases, there is a series, beginning with *Lindsay's Trustees* in 1880, and coming down to *Dunlop's Trustees* in 1899, in which both Divisions of this Court have given effect to the principle that a clause reducing a beneficiary's interest to a life interest may be reconciled with a clause capable of being read as conferring upon her a fee, by treating the life interest as conditional on her having issue. The principle seems not only a sound one but is firmly established, and it ought, I think, to be applied wherever the will permits of such reconciliation, as this will in my opinion does.

LORD LOW—The questions in this case are whether the fee of the provision which the late Marquis of Tweeddale made in his trust-disposition and settlement for his daughter the Duchess of Wellington vested in her in the event, which happened, of her dying without issue, or whether her right was restricted to a life interest only.

The answer to these questions depends upon the construction of the trust-disposition and settlement, and in particular of the fifth and seventh purposes thereof.

By the fifth purpose the trust directed his trustees "to make payment at the first term of Whitsunday or Martinmas that shall happen six months after my decease" to each of his daughters "of the sum of £8500, but subject always . . . to the provisions, declarations, powers, directions, and others hereinafter written." These provisions and declarations are to be found in the seventh purpose, and are in the following terms:—"Providing and declaring further that, notwithstanding anything to the contrary hereinbefore written, my trustees shall set aside and hold and retain and invest in their own names as trustees foresaid the several provisions hereby granted to each of my said daughters, for behoof of my said daughters in life interest for their respective life interests uses alienably . . . and for behoof of their respective children equally among them in fee." The *jus mariti* and right of administration of husbands were excluded, and the life interests were declared to be purely alimentary, and not liable to the diligence of creditors. There was no destination over in the event of failure of children.

It was argued that that clause must be read as defining what the trust meant by the direction to pay in the fifth purpose, and as prescribing the way in which that direction was to be carried out. I am unable to take that view because the direction to pay to each daughter the capital sum of £8500 in the fifth purpose is distinct and unequivocal, and the direction in the seventh purpose not to pay any part of the capital sum to the daughters is equally distinct and unequivocal. No doubt the former direction is to pay subject to the provisions and declarations after written, but that does not alter the fact that the direction is to pay the capital sum. There

is, therefore, an apparent contradiction between the two directions, and if upon a fair construction of the settlement they cannot be reconciled that which comes last must prevail. A construction of a settlement, however, which gives no effect to an unambiguous direction is not to be adopted if it be possible, upon a fair construction of the settlement as a whole, and without unduly straining the language used, to ascribe to the direction an intelligible meaning and purpose.

In my opinion the direction to pay in the fifth purpose and the direction to hold in the seventh purpose can be reconciled without doing any violence to the language used, by reading the direction to pay according to the natural meaning of the words as conferring a fee on the daughters, and by reading the directions in the seventh purpose as merely limiting or burdening that fee to the extent of the trust thereby created, the object of which was to secure the capital sum to the daughters' children, if they had children, and to make more secure to the daughters themselves the enjoyment of the income so long as they lived. If that is a sound construction then upon the death of a daughter without children the original gift of the fee to her took effect and the capital passed to her heirs and assignees.

There are several considerations which seem to me to favour that construction. In the first place there is no destination-over of the fee, and I think that it is plain that the trust did not contemplate that the provisions to daughters should in any event either fall into residue or become intestate succession. If, however, a fee was given to the daughters subject only to the limitations of the trust constituted by the seventh purpose, no destination-over was required, because in the event of the death of a daughter without children the trust came to an end and the initial gift of the fee took effect.

Further, unless the omission of any destination-over failing children is to be accounted for by there being no necessity to insert such a destination, the clause with which I am dealing is in marked contrast to other clauses in the settlement, where most careful provision is made for every contingency. Thus the trustees are directed to pay the residue to Viscount Walden, the trust's eldest surviving son, and failing him by predecease to the heir-male of his body succeeding to the entailed estates, and failing such heir-male to the whole other children of the trust alive at his death, and the issue of such children as might have predeceased him. In like manner the trustees are directed to pay the sums provided to two of the trust's sons, Lord Charles and Lord Frederick Hay, in the event of their deaths without leaving lawful issue, to the Viscount Walden, whom failing to the heir-male of his body, whom failing to the trust's other children as directed in regard to the residue.

Now, all these directions are contained in the seventh purpose, that relating to the provisions to Lord Charles and Lord

Frederick Hay immediately preceding the direction in regard to the provisions to daughters. It is therefore most unlikely that the failure to give express directions for the disposal of the daughters' provisions failing children was due to an oversight, and that, I think, aids the view that such a direction was not given because it was unnecessary, a fee having already been conferred upon the daughters, and the trustor's intention being that the gift of the fee should take effect except in so far as it was limited and burdened.

In the next place, the words with which the directions in the seventh purpose are introduced—"notwithstanding anything to the contrary hereinbefore written"—appear to me to be not without importance. These words were founded upon as an expression of the trustor's intention that the daughters' rights should be limited to a *lifereint* allanarly. Perhaps they are capable of that meaning, but I think that the sounder view is that they point in an opposite direction. If the intention had been to give the daughters nothing but a *lifereint*, and the framer of the deed had found when he came to give effect to that intention that he had already inserted a clause which *prima facie* gave them a fee, I think that he would have deleted or altered that clause. I cannot imagine him allowing the clause to stand with an explanation that it did not express what the trustor meant. Accordingly I read the words as recognising and approving the direction to pay in the fifth purpose, and as being in effect a declaration that, notwithstanding any apparent contradiction between that direction and those about to be written, the former should still be regarded as expressing the trustor's intention.

There is another circumstance which I do not think was referred to in argument, but which appears to me to be worthy of observation. The residue clause begins with the declaration that the directions which it contains shall be "subject always as regards any provisions falling to . . . my whole daughters to the provisions, declarations, powers, directions, and others hereinafter written." In like manner, it is declared in regard to the ultimate destination-over of the provisions to Lord Charles and Lord Frederick Hay—the destination, namely, to the surviving brothers and sisters of these gentlemen, and the issue of predeceasing brothers and sisters—that "the shares or share so succeeded to by the survivors . . . of my said daughters shall be taken subject to the provisions, declarations," and so forth, "as are hereinbefore and after written in regard to their foresaid provisions."

If therefore a share of the residue or of the provisions to Lord Charles and Lord Frederick Hay had fallen to a daughter, the trustees would have been bound to hold such share for the daughter in *lifereint* allanarly and for her children in fee, just as if it had been part of the original provision to her.

Now, suppose (what might possibly have happened) that the whole of the residue,

and the whole of the sums provided to Lord Charles and Lord Frederick Hay had fallen to daughters, and that all the daughters had died without children. In that event, if the right of daughters was limited to a *lifereint* allanarly, the result would have been that practically the whole personal estate of the trustor would have been undisposed of, and would have fallen into intestacy. A construction of the settlement under which such a result would be possible is not to be favoured; and it can be avoided by holding that when the trustor directed payment to be made to a beneficiary he intended to give a fee, subject only to such burdens and limitations as he might subsequently impose.

The construction which in my opinion should be adopted seems to me to receive support from the series of cases which were cited, beginning with *Lindsay's Trustees*, 8 R. 281. The principle recognised in all these cases seems to me to be that where there is a direct bequest, or a direction to trustees to pay or convey to a daughter in terms which according to the natural meaning of the language used import a gift, that gift will not be recalled by a subsequent direction to the trustees to hold the fund for, or settle it upon, the daughter in *lifereint* for her *lifereint* use allanarly and her children in fee, except in so far as may be requisite to give effect to these purposes, and accordingly if there are no children the fee will vest absolutely in the daughter and be *in bonis* of her at her death.

Perhaps in one of the cases (namely, *Stewart's Trustees*, 23 R. 416) the principle was carried too far, or rather was applied to circumstances to which it was not truly applicable. The present case, however, appears to me to be one to which the principle is plainly applicable, because it renders it possible to give an intelligible meaning and purpose to every clause in the settlement, and avoids the necessity of regarding one clause (unambiguous in itself) as altogether inoperative.

I am therefore of opinion that the first question in the special case should be answered in the negative, and the second in the affirmative.

LORD ADAM was present at the hearing, but had resigned before judgment was given.

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

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