

Dock is relevantly averred to be a factory or not. I think that it was incumbent upon the applicant to show that this dock was a factory for one of two reasons—either that it was then being occupied for the purpose of loading or unloading, and that the accident occurred in the course of loading or unloading the particular ship, or, otherwise, that it was being used for proper factory work, such as repairing the ship or the ship's machinery, and I mean repairing in the proper sense of the term, viz., executing such repairs as are not merely incidental to every voyage on which the ship is engaged, but such as might be let out to a proper contractor or engineer to perform. Now there is no suggestion of either of these requirements here. It is not said that the applicant was engaged in loading or unloading; and as to proper factory work, we are told, first, that he "was engaged in repairing and cleaning the boilers, tubes, engines, and fittings of said ship." That is the general averment. Coming to the particular averment as to what he was doing when the accident actually happened, we are told that he "was engaged sponging the tubes," and that while so engaged the sponging-rod he was using broke, and the plank on which he was standing slipped. Now, this sponging of boiler-tubes is just such work as a fireman, which the applicant was, is bound to do. It is just part of his ordinary work when the ship comes into a port and when there is time to let the fires out and allow the boilers and machinery to be thoroughly cleaned before going on to another seaport. The applicant was employed as a fireman on this steamship, and was engaged to join her at Greenock and to proceed with her to a number of seaports. The port she was in at the time was Manchester, and there the ordinary work of cleaning the boilers was engaged in, and in that ordinary work this fireman was employed, and there is no averment to show that he was not doing just such work as is the usual work of a fireman on board a vessel of this description. When counsel for the applicant was asked if he had anything more to aver on this subject he told us that he really was not in a position to do so. In that state of matters I do not think there is any option left to this Court but to hold that the Sheriff has done rightly in holding that this statement is irrelevant. The applicant has stated what his employment at the time of the accident was, and I do not think that that employment was such as to bring him within the provisions of the Workmen's Compensation Act.

The Court answered the question in the negative, dismissed the appeal and remitted to the Sheriff to proceed as might be just.

Counsel for the Appellant—Morison, K.C.—Munro. Agents—Sinclair, Swanson, & Manson, W.S.

Counsel for the Respondents—Scott Dickson, K.C.—Spens. Agents—J. & J. Ross, W.S.

Thursday, November 29.

SECOND DIVISION.

RITCHIE AND ANOTHER (BANKS' TRUSTEES) v. BANKS' TRUSTEES AND OTHERS.

Succession—Trust—Vesting—Gift on Expiry of Widow's Life-Interest to Children, and "if any Child shall die without a Vested Interest" "their Issue shall be Entitled" to said Gift—"Provision"—"Share"—Income.

A testator conveyed his whole estate to trustees and, *inter alia*, directed them to pay one-half of the income of the residue of his estate to his widow, and as regarded the remaining half "to divide the same among his children equally." He further directed—"And (Lastly) I direct my trustees at my death, or on the death of my wife in the event of her surviving me, or upon her entering into another marriage, to pay and make over to such of my children as have arrived at the age of twenty-one years, or as they respectively reach that age, the residue and remainder of the whole of my means and estate among them. . . . And it is hereby declared, in the case of provisions to children under these presents, that if any child shall die, either before or after me, leaving lawful issue, and without having acquired a vested interest in such provision, such issue shall be entitled to the share or shares, original and accruing, which their parent would have taken by survivorship; and the share of any child dying without leaving lawful issue, shall be divided among the surviving children and the lawful issue of such children as may have died leaving such issue, in equal shares, *per stirpes*."

The testator was survived by his widow and five children, all of whom attained the age of 21, but subsequently one of them, W., predeceased the widow (who had not married again), leaving an only child, F. who had not attained majority.

Held in a special case (1) that the share of the residue destined to W. had not vested in him; (2) that vesting of the said share did not take place in F. on the death of her father, but was postponed until the death (or second marriage) of the widow, though not to the attainment of majority by F. (*Martin v. Holgate*, 1866, L.R., 1 H.L. 175 *distinguishing*); (3) that the one-tenth part of the interest of the estate accruing after the death of W. was payable to his daughter F.

This was a special case presented for the opinion and judgment of the Court upon certain questions arising as to the construction of the trust disposition and settlement of Alexander Banks, engraver, Fountainhall Road, Edinburgh, who died on 27th May 1886.

The testator was survived by his widow Mrs Mary Addison or Banks, who at the date of this case was still alive and had not married again, and by five children, all of whom had attained majority by 1896, and all of whom were at the date of this case still alive with one exception, viz., William Addison Banks, who died on 18th September 1905, survived by his wife and by an only child Frances Isobel Banks, who, born on 2nd November 1900, was therefore still in pupilarity. . . . William left a trust-disposition and settlement whereby he conveyed his whole estate to trustees for the ends and purposes therein set forth, and appointed his trustees tutors and curators for his children.

Alexander Banks by his trust-disposition and settlement conveyed his whole estate to trustees, and provided, *inter alia*, as follows:—“(Fourth) . . . And my trustees shall pay over the one-half of the rents and interests, income or revenue, to be derived from the residue of my whole means and estate to my wife during her life so long as she shall remain my widow, . . . but in the event of the said Mrs Mary Addison or Banks entering into a second marriage, the provisions in her favour contained herein shall cease and determine: Declaring that the provisions herein contained in favour of the said Mrs Mary Addison or Banks are and shall be in full satisfaction to her of terce, *jus relictae*, and every other claim competent to her against my means and estate in the event of her survivance: And the same shall be alimentary allenarly and not affectable by her debts or deeds or diligence of her creditors: (Fifth) As regards the remaining half of the rents and interest, income or revenue to be derived from the residue of my whole means and estate, I direct and appoint my trustees to divide the same among my children equally; and they shall apply to or for behoof of such of my children as may be under age, in such way and manner as my said trustees shall see fit, of which they shall be the sole judges, the share thereof falling to such children, or so much thereof as my trustees may consider necessary, and the balance, if any, of each such child's share shall be retained by my said trustees until such child shall attain twenty-one years of age, and shall then be paid over to such child; and they shall pay to such of my children as have attained or may attain twenty-one years of age their respective shares of said income.”

The seventh purpose gave the trustees power to make such advances to any of the children of their shares of the residue for their welfare or advancement in life as they might think expedient, up to the amount of their respective shares; for these advances the trustees were empowered to charge or not to charge interest as they thought fit

By the last purpose the testator provided as follows:—“(Lastly) I direct my trustees at my death, or on the death of my wife in the event of her surviving me, or upon her entering into another marriage, to pay and make over to such of my children as have arrived at the age of twenty-one years, or as they respectively reach that

age, the residue and remainder of the whole of my means and estate among them. . . . And it is hereby declared further that my trustees shall take the sum which the children of my present marriage may be or are entitled to from their grandfather's estate as at the date when the first payment of residue takes place under this settlement as the sum to which they are entitled to under their grandfather's settlement, and the division of my estate shall take place on this basis, notwithstanding that the sum to which they may ultimately be entitled may be less than or exceed that sum: And it is hereby declared, in the case of provisions to children under these presents, that if any child shall die, either before or after me, leaving lawful issue and without having acquired a vested interest in such provision, such issue shall be entitled to the share or shares, original and accruing, which their parent would have taken by survivance; and the share of any child dying without leaving lawful issue shall be divided among the surviving children and the lawful issue of such children as may have died leaving such issue in equal shares, *per stirpes*: And it is hereby declared that the sums hereby provided to my children are and shall be in full satisfaction to them, and each of them, of legitim, bairns' part of gear, and all other claims competent to them by or through my decease in any manner of way.”

Owing to the death of William Addison Banks, questions arose as to the period of vesting of the share of residue destined to him, and as to the disposal of the one-tenth part of the income of the testator's estate; and this special case was presented in order that these questions might be determined.

The parties to the case were (1) Charles Ritchie and another (Alexander Banks' trustees), first parties; (2) the trustees of William Addison Banks, second parties; (3) the tutors of Frances Isobel Banks, third parties.

The first parties maintained that the vesting of said share of residue would not take place until the death or second marriage of the testator's widow and the attainment of majority by Frances Isobel Banks, should she survive the widow or her second marriage; and failing survivance of the widow or of her second marriage and the attainment of majority by Frances, that said share would vest on the widow's death or second marriage, or on the death thereafter of Frances before majority, in the testator's surviving children. The first parties further maintained that they were entitled, under the terms of the testator's trust-disposition and settlement, to distribute the whole of the free income of the estate accruing after the death of William Addison Banks amongst the surviving children of the testator.

The second parties maintained that said share of residue vested in William Addison Banks, and that one-tenth part of said income was payable to them.

The third parties maintained that the said share did not vest in William Addison Banks, but that it vested in Frances Isobel

Banks on the death of her father, or, alternatively, that it would vest in her on the death or second marriage of the testator's widow or on the attainment of majority by Frances. They further maintained that the said one-tenth part of the income was payable to them.

The questions of law for the opinion and judgment of the Court were as follows—“(1) Did the share of residue destined in the testator's trust-disposition and settlement to William Addison Banks vest in him? or (2) Did the said share vest in the said Frances Isobel Banks on the death of her father the said William Addison Banks? or (3) Is the vesting of the said share postponed (a) until the death or second marriage of the said Mrs Mary Addison or Banks, or (b) until the said Frances Isobel Banks shall attain majority, or (c) until the occurrence of both these events? (4) Is one-tenth part of the interest of the estate accruing after the death of the said William Addison Banks payable to the parties of the second part or to the parties of the third part, or does the whole free income fall to be distributed by the parties of the first part among the surviving children of the testator?”

Argued for the first parties—There was no vesting in William Addison Banks. Vesting was postponed till the death or second marriage of the widow. There was here nothing in favour of vesting *a morte* but the general presumption, and the power of making advances, while against it were the elements that the testator had expressly contemplated children dying without vested interests; that the word “accruing” would otherwise have no meaning, and the fact, which also told against vesting in the children as they respectively attained majority, that the only words of gift referred to the widow's death or second marriage, being in effect a survivorship clause. Nor was there vesting in Frances on her father's death. The word “accruing” indicated that there was not an independent original bequest to issue, but a mere substitution of them to their parents, subject to the same conditions; this distinguished the present case from that of *Martin v. Holgate*, 1866, L.R., 1 H.L. 175. As to the income in question, though issue of children who had not taken a vested right were entitled to the “share” which their parent would have taken, “share” did not include income. The testator's directions as to income were in the prior clauses of the deed and were separate from those dealing with the capital.

Argued for the third parties—On the death of her father the share destined to him vested in Frances. The contingency of surviving the widow's death or second marriage applied only to William Banks, not to his daughter Frances—*Martin v. Holgate* (*cit. supra*). This was so whether the gift to Frances was original or substitutional—Theobald on Wills, 6th ed., p. 649, and the cases there cited. As to income, Frances was entitled to the share (one-tenth) of the income of the residue

which would have gone to her father. It was intended in the case of “provisions”—a very wide word—to children, that their issue should take the parents' share, whether income or capital.

Argued for the second parties—Vesting took place in the children as they respectively attained majority. In favour of this were the elements (1) that from the beginning half of the income was to be divided up and held in distinctive shares; (2) that there was power to make advances—*Wilson's Trustees v. Quick*, February 28, 1878, 5 R. 697, 15 S.L.R. 395; (3) the declaration that provisions were in lieu of legitim—*Waters' Trustees v. Waters*, December 6, 1884, 12 R. 253, 22 S.L.R. 176. The postponement of payment was merely to provide for the widow's liferent. The contingency having been purified the whole class benefited, or, if any predeceased the period of payment, their representatives—*Hickling's Trustees v. Garland's Trustees*, August 1, 1898, 1 F. (H.L.) 7, 35 S.L.R. 975. Survivance meant surviving the attainment of majority—*Young v. Stewart*, October 21, 1875, 13 S.L.R. 5. If a share vested in a son on majority the interest would follow.

At advising—

LORD LOW—The first question in this case is whether William Addison Banks, a son of the testator, who survived the latter and attained majority but predeceased his stepmother the testator's widow, took a vested right to a share of the residue?

By the last purpose of his trust-disposition and settlement the testator directed his trustees on the death of his wife in the event (which happened) of her surviving him, or upon her entering into another marriage, to pay and make over the residue of his estate to such of his children as should have arrived at the age of twenty-one years, or as they respectively reached that age.

All the children of the testator attained the age of twenty-one, and had done so when William died, and accordingly the residue will fall to be divided when the widow dies or marries.

The question as to the term of vesting of the residue in the testator's children does not depend only upon the construction of the residue clause, because there is a clause of survivorship. It is in these terms—“And it is hereby declared, in the case of provisions to children under these presents, that if any child shall die, either before or after me, leaving lawful issue, and without having acquired a vested interest in such provision, such issue shall be entitled to the share or shares, original and accruing, which their parent would have taken by survivorship, and the share of any child dying without leaving lawful issue shall be divided among the surviving children, and the lawful issue of such children as may have died leaving such issue, in equal shares, *per stirpes*.”

The first branch of that clause has not much bearing upon the question which I

am now considering, but the second branch seems to me to show that vesting was postponed until the period of payment, because I can find nothing in the context to take the case out of the well-established rule that unless a contrary intention is expressed or clearly implied words of survivorship are referable to the period of payment or distribution. As therefore William Banks died before that period he took no vested right to the share of the residue destined to him.

A more difficult question is whether, although Willfam Banks took no vested right, the share of the residue which would have fallen to him if he had survived vested in his only child at the date of his death? It was settled by the judgment of the House of Lords in *Martin v. Holgate* (1 Eng. & Irish App. 175) that where there is a destination to such a plurality of persons as shall survive a certain event—for example, the death of a life-tenant—and it is provided that if any of these persons predeceases the term of payment leaving children, such children shall be entitled to their parent's share—the share which the parent would have taken if he or she had survived will vest in the children at their parent's death. Of course such a result could only happen where the gift to the children of the immediate beneficiary was not made subject to the contingency attached to the parent's right; and if by express declaration or by sufficiently clear implication the gift to the children is given under the same conditions as the gift to the parent such conditions must receive effect.

The question in this case depends upon the construction of the clause which I have already quoted, and especially the first branch of it.

If it had not been for the words "original and accruing" in that clause I think that the rule of *Martin v. Holgate* would have been applicable, and that the daughter of William Banks would have taken an immediate vested right to the original share destined to him, because the gift to her in the event of her father dying before the period of payment would have been subject to no contingency, express or implied.

The mention, however, of an "accruing" share seems to me to be a very material element in determining what is the true meaning and effect of the clause. What is meant by an accruing share is shown by the second part of the clause. It is a share set free by the death of one of the testator's children without leaving lawful issue before the period of payment and vesting, and such a share is to be divided among the surviving children "and the lawful issue of such children as may have died leaving issue." I think that it is plain that the lawful issue there referred to are issue who shall be in existence at the period of payment, because the clause has reference to that period only, and further, it would be absurd to provide that payment should be made to persons who had ceased to exist. Now, suppose that Frances Banks (Wil-

liam's daughter) were to die before the period of payment, and that after her death, and also before the period of payment, another child of the testator were to die without leaving lawful issue, could it be held that a portion of that child's share had vested in Frances Banks at the date of her father's death? I can find nothing in the settlement which would support that view, nor do I know of any rule of construction by which such a result could be reached. It further seems to me to be plain that it was not intended to give to the lawful issue of a child who should die leaving lawful issue rights of a different character in regard to the original share of their parent, and in regard to a share which might have accrued to their parent if he had survived—that is to say, I do not think it possible to spell out of the language used an intention that the original share of the parent should vest in his issue upon his death, but that their right to a share which might afterwards accrue depended upon their survivance of the period of payment, just as their parent's right would have done.

The result is that in my opinion the only construction which satisfies the language actually used is that the lawful issue of a child predeceasing the period of payment were substituted to their parent, and were subject to the contingencies as regarded survivorship which qualified his right.

The next question is, who is entitled to the share set free by the death of William Banks of the one-half of the income of the residue which the trustees are directed to pay to the truster's children?

That share of the income is claimed by all the parties to this case. The first parties—the testamentary trustees of the testator—maintain that it falls to be divided by them among the surviving children of the testator. Whether that contention is or is not well founded depends upon whether upon a sound construction of the settlement the share of the income of a child dying before the period of payment accretes to the surviving children? I am of opinion that that question must be answered in the negative. There is no express provision dealing with the share of a child who predeceases the term of payment, and I do not think that it can be held to be implied that the surviving children are to take such child's share. Although the income is destined to a class—the testator's children—it is to be divided equally among them, and the trustees are only authorised to pay to the children their "respective shares of the said income." Therefore, to give effect to the contention of the first parties, it would be necessary to read into the settlement by implication a declaration to the effect that if any of the testator's children should die, whether leaving issue or not, that child's share should be divided among the surviving children. I think that to read in such words would be to take an unwarrantable liberty with the settlement.

Further, if the income set free were divided among the surviving children, then the

latter might receive a share of the income greater than that which effeired to the share of the capital which they would ultimately take. To illustrate what I mean, suppose that the child dying left lawful issue, such issue would at the period of payment take their parent's share of the capital, but if the contention of the first parties be sound the surviving children would in the meantime draw the portion of the income effeiring to that share. I think that such a result would be contrary to the plain intention of the testator. I am therefore of opinion that the first parties are not entitled to the share of the income in question.

The ground upon which the second parties (the testamentary trustees of William Banks) claim the share of the income is that his share of the residue (that is, of the capital) had already vested in him, and that that being so he had right to the income as an accessory to the capital sum. As in my judgment William Banks had not taken a vested right in the residue, that ground of claim to the income falls.

It was, however, suggested that the second parties might claim the income on another ground—namely, that although right to a share of the capital of the residue had not vested in William Banks, yet, he having attained majority, had a vested right to a share of the income until the period of payment. Now, I do not doubt that a testator could confer a right to the income yielded by a fund up to a certain date, even although the beneficiary should predecease that date, but I am unable to read the settlement in this case as conferring such a right. The gift of the income to the children takes the form of a direction to the trustees to “divide the same among my children equally,” and when a child attains majority to “pay” to him or her a share of the income. Therefore all that the trustees were authorised to do was to pay the share of the income as it accrued to the child and to no one else, and the child and no one else could demand payment. I am therefore unable to see how, if a child died, his personal representatives or his assignee could have any claim to the income on the ground that right thereto up to the period of payment of the capital had vested in him.

The question remains whether William's daughter Frances Banks has right to the share of income. If she has not, I think that it must fall into intestacy—a result which is to be avoided if upon any reasonable construction of the settlement that can be done. Now I think that the clauses to which I have already referred, namely, those giving a deceasing child's share to his issue, and the survivorship clause, can be fairly read as applicable to income as well as to capital, although I admit that these clauses, if intended to apply to income as well as to capital, are badly framed. It is, however, to be observed that the clauses are introduced with these words—“In the case of provisions to children under these presents”—words which are wide enough to include, and if read alone would include,

the provisions not only of capital, but of income. Further, the clauses are throughout expressed in such general terms that there is no difficulty in applying them to the provisions in regard to income. If they were so applied, the result would be as follows:—If a child died leaving lawful issue, his share of income would go to the issue; and if a child died without leaving issue, his share would be divided among the surviving children and the issue of predeceasing children. That would provide for every event, and would carry out what I think was plainly the intention of the testator, namely, that every child or the issue of a predeceasing child should draw a portion of the income corresponding to the portion of the capital to which the individual or the *stirps* had at the time a prospective although contingent right.

I am therefore of opinion that Frances Banks is entitled to the one-tenth of the income set free by her father's death.

The only other question is, whether vesting of the share of the capital which has fallen to Frances Banks is postponed not only until the death or second marriage of the widow but until she herself attains majority?

I am of opinion that that question must be answered in the negative. Frances Banks takes, not as an individual, but as a *stirps*. The fact that she was an only child is a mere accident which cannot affect the quality of her right, and the question would have been the same if, instead of one child, William Banks had left several. I do not see how the provision in regard to the attainment of majority which the testator made in regard to his immediate children could be applied to a family of grandchildren who as a *stirps* became entitled to their parent's share.

LORD JUSTICE-CLERK—That is the opinion of the Court (the Lord Justice-Clerk, Lord Kyllachy, Lord Stormonth Darling, and Lord Low).

The Court pronounced this interlocutor:—

“Answer the first and second questions of law therein stated in the negative, branch (a) of the third question of law in the affirmative, and branches (b) and (c) in the negative: Answer question four therein stated by declaring that one-tenth part of the interest there referred to is payable to the parties of the third part: Find and declare accordingly, and decern.”

Counsel for the First Parties—C. H. Brown. Agents—Ronald & Ritchie, S.S.C.
 Counsel for the Second Parties—R. C. Henderson. Agent—George Alexander Porter, Solicitor.

Counsel for the Third Parties—J. Macdonald. Agent—Ernest T. Skae, Solicitor.