

ment in another way. And though I have a strong impression that the draughtsman of the Order overlooked altogether the phraseology of the 1892 Act, yet I think that he has drawn a code which is complete in itself, and is not inconsistent with that Act. I therefore think, keeping in view the terms of this Provisional Order, that the Lord Ordinary in Exchequer had jurisdiction to grant this petition.

LORD KINNEAR—I am of the same opinion.

LORD PEARSON—I agree.

LORD M'LAREN was absent.

The Court remitted to the Lord Ordinary in Exchequer Causes to grant the prayer of the petition.

Counsel for the Petitioners—Lyon MacKenzie. Agents—Guild & Shepherd, W.S.

Saturday, January 9.

FIRST DIVISION.

MACGREGOR'S TRUSTEES v. MACGREGOR AND OTHERS.

Succession—Vesting—Liferent or Fee—Direction to Hold for Behoof of Testator's Children Equally, Share and Share Alike, Restricted in the Case of Daughters to Liferent with Fee to Issue—Daughter Surviving Testator but Dying Intestate without Issue—Accretion—Intestacy.

A testator directed his trustees to hold the residue of his estate for such of his children as should survive him "equally, share and share alike, subject to the conditions following, viz., . . . in the case of my daughters I direct my trustees to retain and hold their shares, original and accreting, for their liferent alimentary use allanarly, . . . and for the issue of their bodies equally among such issue in fee. . . ." Power was conferred on the trustees to make advances to daughters out of the capital of the shares liferented by them.

Held that the one-fifth share of the residue of the testator's estate, liferented by one of his daughters who survived him but died intestate and without issue, had not vested in her, and that on her death it did not accrete to the residuary legatees but fell into intestacy.

John Nicholson, manager of the Clydesdale Bank, Limited, Edinburgh, and others, the trustees acting under the trust-disposition and settlement of the late Donald MacGregor, Ardgartan, Argyllshire (*first parties*); Gregor MacGregor, stockbroker, London, and others, beneficiaries and residuary legatees (*second parties*); Donald MacGregor, underwriter, Lloyd's, London, as an individual (*third party*); Mrs Euphemia Watt or MacGregor, the testator's widow (*fourth party*); and the

said Donald MacGregor, as executor-dative of the deceased Miss Effie Watt MacGregor, a daughter of the testator (*fifth party*), brought a Special Case for the determination of their rights in the one-fifth share of the residue of the testator's estate liferented by the said Miss Effie Watt MacGregor.

By his trust-disposition and settlement the testator provided as follows—"Tenth. As to the residue of my means and estate, including the part thereof which may be set aside to provide Mrs MacGregor's annuity, I direct my trustees to hold the same in trust for behoof of such of my children as shall survive me, or who having died shall leave issue surviving me who shall attain majority, equally share and share alike, subject to the conditions following, viz., subject to the condition and right to postpone payment hereinafter conferred on my trustees I direct my trustees to pay the shares of my sons to them as the same become available for distribution, but in the case of my daughters I direct my trustees to retain and hold their shares, original and accreting, for their liferent alimentary use allanarly, exclusive of their husband's *jus relicti*, *jus mariti*, and rights of administration, and for the issue of their bodies equally among such issue in fee, provided such issue attain the age of twenty-one years complete; declaring always, however, that notwithstanding the direction to my trustees to pay and hold the shares of my children in the residue of my estate as above written, such direction is subject always to the power hereby conferred on my trustees to postpone for such period or successive periods as they may think fit the payment of the shares of residue hereinbefore provided in the case of all or any of my children or of their issue, and to apply the interest or annual produce of the same during the period of such postponement for the alimentary use and behoof of such children or their issue as aforesaid, and should they see cause and think proper to exercise the power, my trustees are hereby authorised, instead of making actual payment to any one or more of my children or of their issue of their shares of my estate at the interim or final divisions thereof, to settle, limit, and destine the whole or any part of the share of any of my children or their issue by investing the same in the names of my trustees themselves or otherwise, so that the same may be enjoyed by such child or children or issue as an alimentary fund for their liferent allanarly, and their issue in fee, or in such other way and manner as my trustees shall deem right and proper, having regard to the position and circumstances of each child, of the expediency and the time and manner of exercising which power to limit the rights of my children and their issue as aforesaid my trustees shall be the sole and final judges. Further, I provide that my trustees shall have power to advance and pay to any one or more of my daughters from time to time out of the capital liferented by her or them such sums as my trustees may think neces-

sary for such daughter's more comfortable maintenance or otherwise for her benefit or the benefit of any of her children, which advances shall be made on such terms and conditions as my trustees shall think fit, and of the propriety of making which they shall be the sole judges."

The testator died on 14th December 1904. His daughter, Miss Effie Watt MacGregor, died unmarried and intestate on 26th November 1906. Her brother, the said Donald MacGregor, the third party to the case, was her heir-at-law.

The first and second parties maintained that the said one-fifth share of residue which was liferented by the late Miss E. W. MacGregor accresced to the surviving children of the testator, and fell to be administered by the first parties in terms of the trust-disposition and settlement.

The fifth party maintained that the said share of residue was vested in the said Effie Watt MacGregor at the date of her death.

The third and fourth parties maintained that the said share of residue did not vest in the said Effie Watt MacGregor, and not being otherwise disposed of by the testator's settlement, formed intestate estate of the testator, and fell to be distributed accordingly.

The questions of law included the following—“(1) Was the one-fifth share of residue of the testator's estate held by the first parties in trust for behoof of the said Effie Watt MacGregor vested in her at the date of her death. Or (2) Did the said share accresce to the testator's surviving children and issue of predeceasing children *per stirpes*. Or (3) Did the said share fall into intestacy of the testator.”

Argued for fifth party—Miss Effie W. MacGregor took a fee. The direction was to hold for behoof of such of the testator's children as survived him. There was power to make advances, and the fee was not otherwise disposed of. The subsequent conditions did not take away the gift of the fee in the event, which had happened here, of the beneficiary dying without issue. It was only in the event of her having issue that the gift of fee was to be restricted to a liferent. The case was ruled by *Tweeddale's Trustees v. Tweeddale*, December 16, 1905, 8 F. 264, 43 S.L.R. 193.

Argued for second parties—No fee was conferred on Miss Effie MacGregor, for the contingency attached to the bequest prevented vesting *a morte*. There was no initial gift, for the direction was “to hold.” There was no direction “to pay” as in *Tweeddale (supra)*. Miss E. MacGregor could not have demanded payment of her share at any time during her life. *Esto* that there was no vesting, there must be either accretion or intestacy. The presumption was in favour of the former. The words “share and share alike” when occurring in a gift to a family, as was the case here, were mere surplusage, and the rule in *Paxton's Trustees v. Cowie*, July 16, 1886, 13 R. 1191, 23 S.L.R. 830, was inapplicable; *Roberts' Trustees v. Roberts*, March 3,

1903, 5 F. 541, *per* Lord Kinnear at 544, 40 S.L.R. 387. The testator himself spoke of his daughters' shares as “original and accrescing,” and that implied accretion rather than intestacy.

Counsel for the third party was not called on.

LORD PRESIDENT—The point here arises upon the will of the late Mr MacGregor, and upon the tenth purpose thereof. By that tenth purpose he provided that “as to the residue of my means and estate I direct my trustees to hold the same in trust for behoof of such of my children as shall survive me, or who having died shall leave issue surviving me who shall attain majority, equally share and share alike, subject to the conditions following, viz: subject to the condition and right to postpone payment hereinafter conferred on my trustees, I direct my trustees to pay the shares of my sons to them as the same become available for distribution, but in the case of my daughters I direct my trustees to retain and hold their shares, original and accrescing, for their liferent alimentary use alienarily, exclusive of their husband's *jus relicti*, *jus mariti*, and rights of administration, and for the issue of their bodies equally among such issue in fee, provided such issue attain the age of twenty-one years, complete.” Then come a certain set of declarations with regard to the power of postponing the payment of the shares, which obviously is chiefly intended for the case of the sons, and a power of making advances on the shares, with which I need not trouble your Lordships. Mr MacGregor died survived by several children, one of whom was a Miss Effie MacGregor. Miss Effie MacGregor was unmarried, never did marry, and survived her father only two years and then died intestate; and the question raised before your Lordships is, What is to become of the share which, had Miss Effie MacGregor continued to live, would still have been held for her and for her issue in terms of the provision which I have already read. The various contentions are—First, it is contended by the representatives of Miss Effie MacGregor herself that this share vested in her. Now that can only be if somewhere or other we can find a gift of the fee in favour of Miss Effie MacGregor. I do not think one has any more to say than was said in the case of *Tweeddale*, 1908, 8 F. 264; and dealing there with this class of cases I find there that I say—“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 a 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 con-

ditions or directions as to the way in which the gift is to be enjoyed." Then I go on to say what are the rules which affect those cases, but of course the antecedent necessity for introducing these rules at all is that you first find words which purport to bestow a certain gift or interest. Now, here there is no direct provision of a gift or interest at all. There is no direction, as there was in *Tweeddale's* case, to pay to each child. All we are told is that the trustees are to hold the residue for behoof of such children as survive, and then comes the provision as to what those children are to take. Well, it is quite clear that the daughter only took a life interest; her issue if she had any took a fee, and then there is no provision at all for what is to be done with the fee if as a matter of fact that daughter has no children. So I do not think the claim of the representatives of Miss Effie MacGregor in this deed can be given effect to. Well then, if that is so, the next claimants for the fee are first of all the other residuary legatees, who say this portion of the fee accretes to them, and contradicting them the heir *ab intestato* of the testator. I am bound to say it is impossible to hold that there is accretion to the other residuary legatees, because here the dividing of the estate into shares was an operation which necessarily took place at the death of the testator, and which did take place and effectually took place as to the share of Miss Effie MacGregor, which share was separated from the others and perfectly properly held for the purpose of providing her with her life interest all her life during the period she survived her father, and when she dies I do not see how it ever can come back again to have an operation performed which has already been performed once and for all. It therefore seems to me perfectly different from the class of case that was quoted to us, viz., *Roberts' Trustees*, 1903, 5 F. 541, where the question was whether severalty should prevent a gift taking effect in favour of a family as a whole as that family existed at the testator's death. Here the family at the testator's death is distinctly described by the testator to be the family surviving at his death. Then the separation of the provision is to take place, and did take place, and I do not think you can ever go back and do it again. In point of fact the only argument that those thus contending could bring forward at all is that there is an expression as to the shares of the daughters in which they are called "original and accreting." Well, I confess I think that probably those words "original and accreting" are words of style which were floating in the ears of the person who wrote the deed. Probably there was a sort of idea either that "accreting" might mean that they had got a bigger share than under the original circumstances they would have got, owing to some of the family having died before the death of the testator, or else it may have been meant to refer to the periodical payments of shares that might take place through the

fact that some of the testator's residue might be distributed at his death, whereas the rest of it might not be available for distribution until the termination of her life interest provided for the widow. But in any case I do not think the mere use of that epithet can upset the whole scheme, which otherwise seems to me quite clear. Accordingly I am driven to the last alternative, that this is just an interest which the testator has omitted to dispose of, and which accordingly falls into intestacy. The case here has not been argued by the whole of the heirs *ab intestato*, but by the heir-at-law of the testator, we being told that about five-sixths of the estate consists *de facto* of heritage. But I do not think that matters, because the interest of the heir-at-law of the testator is just the same as that of the heirs *in mobilibus*, and he therefore practically represents their interest as well as his own. Accordingly I think that the questions ought to be answered as follows—The first question in the negative, the second question in the negative, and the third question in the affirmative. The others do not arise.

LORD M'LAREN—I am of the same opinion. This is not a gift to the testator's children by name, in which case we should have had to consider the application of such cases as *Paxton's Trustees*, 1886, 13 R. 1191, but it is a gift of his residue to a class of persons, viz., his family surviving him at his death. In such a case the addition of the words "share and share alike" have no technical meaning or effect upon the destination, and can only mean that in the division the trustees are not to give a larger share to one child than to another. That being so, the next question is, what is the nature of the interest which each child takes? Without going further than the initial direction, we see that the interests were not intended to be all the same, because the direction is to hold the shares of his children, and so on, "subject to the conditions following." Now there are cases where an original gift has been followed by conditions restricting the benefit of the legatee in certain events, and where it has been held that as the event never took place the legatee was entitled to take under the terms of the original gift, but I think that the principle is not applicable in the present case, because the gift is qualified in its inception by the words "subject to the conditions following," and that means that you must read all the conditions into the original gift in order to get at the original intention. Now, when I combine the different parts of the residuary clause I find that the lady who died, Miss Effie MacGregor, had only a life interest, and that in the event which has occurred, she never marrying and having no issue, there is no disposal. I therefore agree that we must answer the questions to the effect that the fee of the share so far as consisting of heritage, has fallen to Mr MacGregor's heir-at-law, and so far as consisting of personalty to his heirs *in mobilibus*.

LORD KINNEAR — I agree with your Lordships.

LORD PEARSON — I am of the same opinion.

The Court answered the first and second questions in the negative and the third in the affirmative.

Counsel for First and Second Parties—Macmillan. Agents—Webster, Will, & Company, S.S.C.

Counsel for Third and Fourth Parties—J. H. Millar. Agents—Gillespie & Paterson, W.S.

Counsel for Fifth Party—Sandeman. Agents—Mackay & Hay, W.S.

Tuesday, January 12.

FIRST DIVISION

[Sheriff Court at Edinburgh.]

MACKINNON v. MILLER.

Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 1 (1)—Accident Arising out of and in Course of Employment—Evidence—Seaman Found Drowned Beside Vessel—No Direct Evidence as to how Death Occurred—Inference by Arbitrator that Death Due to Accident Arising out of and in Course of Employment—Review.

M., who was employed as an engineer on board a small steam tug, was last seen asleep in his bunk at 5 a.m. An hour afterwards he had disappeared, leaving his working clothes lying at the side of his bunk. The tug was to commence towing at 7 a.m. that morning, and steam had been ordered to be got up for that hour. The deck was a place where between 5 and 7 a.m. M. was entitled to be. Two days afterwards M's body, clad in his ordinary sleeping clothes, was found in the water near the place where the tug had been moored on the morning in question. In the opinion of the doctor who examined the body, M.'s death was due to drowning. There was no direct evidence as to how M. (who was unable to swim) had met with his death.

Held that the arbitrator was entitled to draw (as he had drawn) the inference of fact that M. had accidentally fallen overboard and been drowned, and that the accident arose out of and in the course of his employment, and that accordingly it was not for the Court to interfere with his decision.

Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, c. 58), secs. 7 and 13—Seaman—Vessel Let to Charterers—"Employer"—Whether Charterer or Owner—Crew Provided and Paid by Owner, who Alone could Dismiss them.

A, the registered owner of a steam tug, chartered her to B. Under the

charter-party A was bound to provide and pay a crew of two men, including M., and A alone had power to dismiss them. The possession, control, and management of the vessel under the charter-party belonged to B.

Held that A, and not B, was M.'s employer within the meaning of the Workmen's Compensation Act 1906.

The Workmen's Compensation Act 1906 (6 Edw. VII, c. 58) enacts—sec. 7 (1)—“This Act shall apply to . . . seamen, . . . provided that such persons are workmen within the meaning of this Act, and are members of the crew of any ship registered in the United Kingdom. . . .” Section 13 enacts—“In this Act, unless the context otherwise requires, ‘employer’ includes any body of persons, . . . and where the services of a workman are temporarily lent or let on hire to another person by the person with whom the workman has entered into a contract of service or apprenticeship, the latter shall, for the purposes of this Act, be deemed to continue to be the employer of the workman whilst he is working for that other person. . . .”

Mrs Helen Moncrieff Whitecross or Miller, 38 Hawthornvale, Leith, widow of George Aitken Miller, engineer, Leith, as an individual, and also as tutrix and administratrix-in-law for G. A. Miller, her pupil child, claimed compensation from Archibald Mackinnon, steam-tug owner, Leith, in respect of the death of her husband, the said George Aitken Miller. The Sheriff-Substitute (GUY) having awarded compensation, a case for appeal was stated.

The case stated—“This is an arbitration in which the respondent claimed compensation from the appellant under the Workmen's Compensation Act 1906 for herself and child, as being wholly dependent upon the earnings of her late husband George Aitken Miller, who met his death by drowning at Ballachulish on the morning of Saturday, 15th February 1908.

“The following facts were admitted or proved:— . . . (1) The appellant is the registered owner of the steam tug ‘Renown’ of Leith. (2) The ‘Renown’ is a small screw steamer of 15·22 tons register, 70 feet in length, and 16·5 feet beam. (3) The deck of the ‘Renown,’ which is of iron except the forward part, which is planked with wood, is all practically flush, but in the centre of the deck the boiler casing projects from it to a height of about a foot at the part nearest the bulwarks, and to a greater height in the centre of the vessel, while the wheel by which the vessel is steered is placed at the forward end of the boiler casing. (4) Bunks for the crew were provided in the part of the vessel forward of the engine and boiler space. (5) Access to the fore cabin was obtained by a small hatch on the deck a few feet forward from the wheel. (6) On the deck in front of the boiler casing and wheel were a water-tank and a chain chest of a about 2 feet in height. (7) Access to the engines and to the firehole