

view the Lord Ordinary's interlocutor should be affirmed with the variation which I have mentioned.

Your Lordship in the chair, while holding that the pursuer did not fulfil his contract in regard to the outband rybats and that he is liable in any damages which the defenders have sustained in consequence of that breach of contract, is prepared to affirm the Lord Ordinary's interlocutor without making any deduction from the amount of the final measurement in respect of the pursuer's failure to perform the work described in items 44-48 of the estimate. We are agreed, as I understand, in holding that the defenders have waived their right to insist upon the pursuer removing the buildings and rebuilding them in strict accordance with the contract. It is unnecessary to inquire whether this waiver took effect from time to time as and when the defenders paid each instalment of the price, or whether the defenders might have compelled the pursuer to pull down the buildings and rebuild them in strict conformity with the contract even so late as August 1912, when, according to Mr Turnbull, one of their two directors, they for the first time became aware from Mr Lukeman's report that the rybats were disconform to the estimate. It is enough for the decision of this case that the defenders' actings make it inequitable for them to insist upon the pursuer specifically and precisely fulfilling his contract and preclude them from retaining the balance of the price until the contract has been performed *modo et forma*. But I can find nothing in the defenders' actings from which it is possible or legitimate to infer a new agreement on their part to accept as due or substituted implement of the contract stones which are not rybats, or at any rate which are not 24 inch or 17 inch rybats. In fact and in law the defenders have not made a new agreement of any kind with the pursuer but have merely lost one of the remedies which would otherwise have been open to them in consequence of his breach of contract. The result, in my opinion, is that the defenders remain liable to pay for the work under and in terms of their original contract, but that they are not bound to pay for work executed by the pursuer in violation of his contract.

The Court adhered.

Counsel for Pursuer (Respondent)—Blackburn, K.C.—T. G. Robertson. Agent—David Dougal, W.S.

Counsel for Defenders (Reclaimers)—Wilson, K.C.—D. M. Wilson. Agents—Fraser & Davidson, W.S.

Tuesday, November 17.

EXTRA DIVISION.

CAMPBELL'S TRUSTEES v.

CAMPBELL AND OTHERS.

*Succession—Vesting—Gifts to Classes—Conversion—Conditio si sine liberis—Per capita or per stirpes.*

A testatrix directed that her three unmarried daughters and the survivor of them should enjoy the liferent of her estate, and on the death or marriage of her said three daughters she directed her trustees "to divide the whole estates and effects hereby conveyed and to pay the free proceeds thereof among and to the whole of my sons and daughters that may then be in life, share and share alike, and failing any of them by death, to any child or children they may have respectively left, also in equal portions." The other children of the testatrix predeceased the survivor of the liferent-tees, who all died unmarried. In a Special Case brought by the grandchildren of the testatrix and the issue or representatives of grandchildren who died before the period of payment, held (1) that the gift to grandchildren vested in them on their survivance of their parents—*Martin v. Holgate*, L.R., 1 (H.L.) 175, followed; (2) that the children of grandchildren were entitled to the benefit of the *conditio si sine liberis decesserit*; (3) that great-grandchildren entitled to participate took only an original share, not also an interest in accrescing shares; (4) that the division of the estate fell to be made *per stirpes*; and (5) that the settlement operated conversion of the heritable portions of the estate.

Mrs Mary Hasluck or Campbell, who resided in Stirling, widow of Robert Campbell, writer there, died on or about 1st January 1851, leaving a trust-disposition and settlement dated 2nd October 1850.

Questions having arisen as to the construction of the said trust-disposition and settlement, a Special Case was presented to the Court, to which there were eleven parties, representing the various interests in the testatrix's estate, of her grandchildren and great-grandchildren.

The following *narrative* is taken from the opinion of Lord Cullen—"The deceased Mrs Campbell, by her trust-disposition and settlement mentioned in the Case, directed that her three unmarried daughters Ann, Mary, and Charlotte, and the survivors and survivor of them, should enjoy the liferent of her estates so long as they remained unmarried; and on the marriage or death of her said three daughters she directed her trustees 'to divide the whole estates and effects hereby conveyed, and to pay the free proceeds thereof among and to the whole of my sons and daughters that may then be in life, share and share alike, and failing any of them by death to any child or children they may have respectively left, also

in equal portions.' The testatrix, who died in 1851, had thirteen children, of whom five predeceased her unmarried. The eight who survived her included the liferenters, Ann, Mary, and Charlotte, none of whom married. Ann died in 1883, Mary in 1891, and Charlotte in 1912. The other five children of the testatrix who survived her all died before Charlotte. One of them, Robert, died in 1879, leaving children. Another, John, died in 1882 without issue. Another, Marion, who died in 1883, had five children, of whom three survived her, and one, Robert C. Forbes, predeceased her, leaving two children, of whom the eleventh party to the case is one. Another, Thomas, died in 1896, leaving children. The fifth, William, died in 1886, predeceased by his only child."

The following questions of law were submitted—"1. (a) On the death of a child of the testatrix leaving children, did such children acquire a vested right in the trust estate? or (b) Did vesting in such children take place on the death of the last liferentrix? 2. (a) Has the trust estate vested in grandchildren of the testatrix, to the exclusion of great-grandchildren whose respective parents (grandchildren of the testatrix) have predeceased the last liferentrix? or (b) Are these great-grandchildren entitled to a share of the trust estate? 3. In the event of question 2 (b) being answered in the affirmative, (a) Are the said great-grandchildren entitled only to the original shares which their said respective parents would have taken had they survived the last liferentrix? or (b) Are they entitled also to participate in the shares of grandchildren who predeceased the last liferentrix without leaving issue? 4. Does the trust estate fall to be distributed *per stirpes* or *per capita*? 5. Did the trust-disposition and settlement of the testatrix operate conversion of the heritable property which she left? 6. In the event of question 2 (b) being answered in the affirmative and question 5 in the negative, (a) Does the share which would have been taken by a grandchild of the testatrix, had he or she survived the date of vesting, fall to be made over to the heir-at-law of such grandchild? or (b) Does such share fall to be distributed equally among all the children of such grandchild?"

At the hearing the following authorities were referred to:—*On First Question*.—*Martin v. Holgate*, 1866, L.R., 1 (H.L.) 175; *Addie's Trustees v. Jackson*, 1913 S.C. 681, 50 S.L.R. 586; *Macfarlane's Trustees*, 1906, 8 F. 787, 43 S.L.R. 494; *Banks' Trustees*, 1907 S.C. 125, 44 S.L.R. 121; *in re Woolley*, 1903, 2 Ch. 206; *Carter's Trustees v. Carter*, 1892, 19 R. 408, 29 S.L.R. 347; *Thompson's Trustees v. Jamieson*, 1900, 2 F. 470, 37 S.L.R. 346. *On Second Question*.—*Blain's Executors v. Taylor*, 1876, 3 R. 362, 13 S.L.R. 217; *Irvine*, 1873, 11 M. 892, 10 S.L.R. 625; *Grant v. Brooke*, 1882, 10 R. 92, 20 S.L.R. 69; *Roughhead*, 1796, M. 6403; *Taylor's Trustees*, 1884, 11 R. 423, 21 S.L.R. 298; *Grant's Trustees*, 1862, 24 D. 1211. *On Third Question*.—*Farquharson v. Kelly*, 1900, 2 F. 808, 37 S.L.R. 574; *Neville v. Shepherd*, 1895, 23 R. 351, 33 S.L.R. 248; *Henderson*, 1890, 17 R. 293, 27 S.L.R.

247; *Young v. Robertson*, 1862, 4 Macq. 337. *On Fourth Question*.—*Inglis v. M'Neils*, 1892, 19 R. 924, 29 S.L.R. 795; *Binnie's Trustees v. Prendergust*, 1909 S.C. 219, 47 S.L.R. 271, and 1911 S.C. (H.L.) 6, 48 S.L.R. 251; *Living's Trustees v. Sanson*, 1879, 7 R. 244, 17 S.L.R. 128; *Tristram v. M'Haffies*, 1894, 22 R. 121, 32 S.L.R. 114; *Davis*, (1862) 4 de G. F. & J. 327; *Bogie's Trustees v. Christie*, 1882, 9 R. 453, 19 S.L.R. 363; *Home's Trustees v. Ramsay*, 1884, 12 R. 314, 22 S.L.R. 221; *Allen v. Flint*, 1886, 13 R. 975, 23 S.L.R. 703; *Buchanan's Trustees*, 1883, 20 S.L.R. 666; *Inglis v. M'Neils*, 1892, 19 R. 924, 29 S.L.R. 795. *On Fifth Question*.—*Brown's Trustees*, 1890, 18 R. 185, 28 S.L.R. 138; *Galloway's Trustees*, 1897, 25 R. 28, 35 S.L.R. 23; *Watson's Trustees*, 1902, 4 F. 795, 39 S.L.R. 628; *Duncan's Trustees v. Thomas*, 1882, 9 R. 731, 19 S.L.R. 502; *Sheppard's Trustees*, 1885, 12 R. 1193, 22 S.L.R. 801; *Aitken v. Munro*, 1883, 10 R. 1097, 20 S.L.R. 741; *Buchanan v. Angus*, 1862, 4 Macq. 374; *Anderson's Trustees*, 1895, 22 R. 254, 32 S.L.R. 209; *Hogg v. Hamilton*, 1877, 4 R. 845, 14 S.L.R. 542.

At advising—

LORD MACKENZIE—Under the settlement of Mrs Campbell, who died in 1851, a liferent was given to the testatrix's three unmarried daughters Ann, Mary, and Charlotte, and the survivors or survivor of them. The third purpose of the trust settlement was in the following terms:—"Upon the marriage or death of my said daughters I direct my trustees to divide the whole estates and effects hereby conveyed, and to pay the free proceeds thereof, among and to the whole of my sons and daughters that may then be in life, share and share alike, and failing any of them by death to any child or children they may have left, also in equal portions."

The first question that arises is as to the date of vesting. The liferentresses died in 1883, 1891, and 1912 respectively. One of the rival contentions presented in argument was that vesting was postponed until 1912, on the death of the last liferentrix. At this date none of the sons and daughters of the testatrix were then in life. The other contention was that vesting took place on the death of each of the children of the testatrix who left a child or children, and that the condition of survivorship which applied to sons and daughters of the testatrix did not apply to her grandchildren. The latter contention involves the application in the present case of the principle laid down in *Martin v. Holgate*, L.R., 1 E. & L. Appeal Cases, p. 175. In that case the direction to the trustees was to pay the proceeds to the wife of the testator for life, and "after her decease to distribute and divide the whole, &c. amongst such of my four nephews and two nieces" (naming them) "as shall be living at the time of her decease, but if any or either of them should then be dead leaving issue such issue shall be entitled to their father's or mother's share." Three of the nephews died in the lifetime of the testator's widow, two of them without ever having had a child, one of them leaving a daughter. The daughter also died before the widow. It was there held that the gift to the chil-

dren was original, not substitutional, and that this daughter upon her father's death took a vested interest in the share which, if he had survived, he would have taken. The fact that the gift to the parent was contingent did not affect the nature of the gift to the issue, which was an independent bequest. I am unable to construe the gift in the present case as different in terms to the gift in *Martin v. Holgate*. In the recent case of *Addie's Trustees*, 1913 S.C. 681, the doctrine applied to the construction of the will in the case of *Martin v. Holgate* was carefully considered. The conclusion reached in *Addie's* case was that the gift to issue was substitutional and not original. Here, as in *Martin v. Holgate*, it appears to me it is not the duty of the Court to introduce a clause of survivorship which is not expressed. Accordingly I am of opinion that the first question, branch 1 (a), should be answered in the affirmative, and 1 (b) in the negative, and that on the death of a child of the testatrix leaving children such children did acquire a vested right in the trust estate.

The next question is, whether the *conditio si sine liberis* applies in favour of great-grandchildren of the testatrix. In the view I take of the period of vesting this question becomes really only of interest in the case of the tenth and eleventh parties, who are great-grandchildren, the issue of a grandchild Robert who predeceased his mother Marion. It was maintained that as Marion had not "left" Robert, neither Robert nor children could come in under the destination in the concluding branch of the third purpose. It was further maintained that there was no case of the *conditio* having been applied in favour of children of one who was himself a conditional institute. In favour of this proposition the case of *Carter's Trustees v. Carter*, 19 R. 408, was cited. The leading principle laid down in that case, derived from the decision in *Greig v. Malcolm*, 13 S. 611, is thus stated by the Lord President—"The *conditio si sine liberis* is applicable where the terms of the settlement are such as to conduce to the conclusion that the testator has not taken into account that one of his children may die survived by issue." It has also been recognised that the *conditio si sine liberis* when applicable embraces all the descendants of the parties called to the succession towards whom the testator stands in *loco parentis*—*Irvine v. Irvine*, 11 Macph. 892. It appears to me on a construction of the present settlement that the testatrix had not taken into account the event which has happened in regard to the family of her daughter Marion. The testatrix was *in loco parentis* to her great-grandchildren Harry and Mary. It therefore appears to me that the equity upon which the *conditio si sine liberis* rests should be applied to the present case.

With regard to the doubt expressed by Lord Adam in *Carter's Trustees* as to the application of the *conditio* in the case of a conditional institute, I may refer to the cases of *Roughead*, M. 6403, and *Taylor, &c.*, 11 R. 423, as instances where the *conditio si sine liberis* was applied by the

Court in the case of failure of a conditional institute. The case of *Grant's Trustees*, 24 D. 1211, which was cited as another instance, appears to me hardly to answer that description, the principle which was there applied being the principle of implied will, rather than that of the *conditio si sine liberis*. The result is that in my opinion query 2 (a) as amended should be answered in the negative, 2 (b) as amended, in the affirmative.

As regards query 3, parties were agreed that (a) should be answered in the affirmative and (b) in the negative.

Query 4 is as to whether the trust-estate falls to be distributed *per stirpes* or *per capita*. The argument in favour of *per capita* distribution was that the grand-children got as direct legatees and not as substitutes. The wording of the clause, however, appears to me conclusive against distribution *per capita*. The direction is, first of all, that the division is to be "share and share alike" as regards sons and daughters, and what their respective *stirpes* are to receive is to be given in equal portions. The double use of terms which import equality appears to me to indicate an intention that the division should be *per stirpes*. If the division was to be *per capita* there would only be one period of division, and it would only have been necessary to use words indicating equality once. The use in the last branch of the third purpose of the word "respectively" appears to give weight to the argument I am disposed to sustain. Query 4 ought, therefore, in my opinion, to be answered by finding that the estate should be distributed *per stirpes*.

Query 5 deals with the question of conversion. In my opinion the trust-settlement did operate conversion of the heritable property which the testatrix left. In reaching this conclusion I accept, as one is bound to do, the canon laid down in *Buchanan v. Angus*, 4 Macq. 381. The question is one of intention depending on the nature and effect of the directions given, and the Lord Chancellor there adopted the language of Lord Fullerton in the case of *Blackburn*, 10 D. 166, where it was laid down that before the conclusion could be reached that conversion was intended, it must be inferred that a sale was indispensable to the execution of the trust. Whether the sale is here indispensable to the execution of the trust or not depends upon the construction to be put upon the third purpose. The direction is "to divide the whole estates and effects hereby conveyed and to pay the free proceeds thereof." The direction to divide applies to something which is to be done before payment is made. Now the word "pay" by itself may not be sufficient to operate conversion, but when coupled with the expression "free proceeds" it seems to me conclusive of the matter. No doubt the heritage in question seems to have been held for a considerable period, but it is stated to consist partly of six shops with rentals varying from £11, 10s. to £45, and partly of forty small flatted houses with rentals varying from £4, 11s. 6d. to £9, 12s., all either one room and kitchen

or two rooms and kitchen. It is impossible with reference to subjects such as these, having in view the direction above quoted, to do otherwise than hold that a sale is indispensable to the execution of the trust. There are some seventeen beneficiaries according to the view taken. Although the number of beneficiaries has in some cases been disregarded, it is an element not to be left out of sight. I therefore think Query 5 should be answered in the affirmative.

Query 6 is superseded.

LORD CULLEN—[After narrative already quoted]—In these circumstances various questions have arisen regarding the distribution of Mrs Campbell's estate directed to be made on the occurrence of the death of her daughter Charlotte, who was the last survivor of the three liferenters.

The first question raised is whether on the death of a child of the testatrix leaving children such surviving grandchildren then acquired a vested right in the trust estate, or whether vesting in such grandchildren only took place on the death of the last liferenter.

The original gift to the testatrix's own children at the death of the last liferenter is expressly conditioned on such children being "then in life." This condition failed as regards all of the testatrix's children, none of whom was in life at the said period. Failing them there is a conditional institution in favour of "any child or children they may have respectively left." This gift is not expressed as conditional on said grandchildren surviving the last liferenter. The question under this head is whether such a condition of survivance should be held as implied. The parties to the case interested to maintain that it should not found on the well-known case of *Martin v. Holgate*, L.R. 1 H.L. 175. There the testator directed his estate, after the death of his wife, who was given a life interest, to be divided among such of his nephews and nieces as should be living at the time of her decease, but if any of these should be then dead leaving issue, such issue were to be entitled to their parents' share. It was held that the contingency of survivance of the widow which was expressly attached to the gift to the parents could not be read into the gift to their issue, which was an independent bequest. Now I am unable to see any material distinction between the terms of bequest in that case and those in Mrs Campbell's settlement. That being so, I think that we are bound to follow *Martin v. Holgate*, and to hold that the gift to the grandchildren here vested in them on their survivance of their parents, and was not conditioned on their being still in life at the death of the last liferenter.

The next question relates to the *conditio si institutus sine liberis decesserit*. It is raised by the claim of the eleventh party. She is a granddaughter of Marion, one of the children of the testatrix. Her father Robert C. Forbes predeceased his mother Marion, and did not therefore take a

vested right. The eleventh party claims the benefit of the *conditio*.

So far as the nature of the settlement goes it is one entirely favourable to an admission of the *conditio*, being a general settlement by a parent in favour of her own children and their children. The argument against the application of the *conditio* proposed by the eleventh party is that the testatrix has made an express provision to meet the case of her children, the institutes, dying before the period of vesting, namely, that their shares should go to any issue they may have left. This express provision must, it is argued, exclude implication, and therefore excludes Robert C. Forbes and his issue, seeing that he did not survive his mother. Now while it is true that the *conditio* may be excluded by an express provision, I hesitate to affirm the proposition that every express provision will have this effect. In any such case one must be satisfied on a consideration of the whole settlement that the express provision was intended to have this operation. Now, as I have said, the present settlement is one which is entirely favourable to a liberal admission of the *conditio*. The original institutes are the children of the testatrix. Failing them there is a conditional institution of grandchildren. It is at this point that the difficulty arises. Because the grandchildren so conditionally instituted are described as children who may be "left" by the testatrix's own children. And unless the *conditio* is allowed a benignant operation there are cut out from the family succession the issue of grandchildren who predeceased their parents, children of the testatrix. This is a harsh result. I do not think we are driven to it. In the case of a settlement of this character the authorities are, I think, favourable to the view that a liberal admission of the *conditio* should be given. I may refer, for example, to the case of *Gauld's Trustees v. Duncan*, 4 R. 691. There the testator gave a liferent of his estate to his brother, and directed that it should "after his death, be divided equally among the lawful children of my living and deceased sisters who may be alive at the time." On a strict application of the description of the institutes, children of the testator's sisters not alive "at the time" would have been excluded from the succession. It was held, however, that the issue of children who had predeceased were entitled to participate under the *conditio*, and that on the view that the testator had presumably forgotten to provide for them. Now in the present case I do not perceive any greater difficulty in supposing that when Mrs Campbell directed that, failing her own children, children whom they might leave should come in their place, she failed to take into consideration and provide for the case of issue of such of her grandchildren as might fail to take through predeceasing their parents. I am therefore for upholding the contention of the eleventh party.

The next question raised is, whether great-grandchildren entitled to participate in the division take only the original shares which

their parents would have taken, or are entitled to participate in accreting shares. At the hearing the former view was admitted to be correct.

The next question is, whether the division of the trust estate should be *per stirpes* or *per capita*. I am of opinion that it falls to be made *per stirpes*.

The last question is, whether the settlement of the deceased operated conversion of the heritable portions of her estate. The estate is mainly composed of heritance, in the form of six shops and forty small flatted houses. It was substantially in the same condition at the time of the death. The settlement gives the trustees power to sell, but contains no express direction to sell. The direction for distribution is in these terms—“Upon the marriage or death of my said daughters I direct my trustees to divide the whole estate and effects hereby conveyed and to pay the free proceeds thereof among” &c.

The law is clearly settled to the effect that conversion is only operated by an express direction to convert, or by a scheme of distribution which implies a direction to convert.

Now I construe the directions for distribution given by Mrs Campbell as meaning that the trustees are to divide the whole estate by paying the free proceeds thereof among the beneficiaries. The specified mode of distribution is payment, and what falls to be paid are the “free proceeds” of the estate. Taking the word “pay” and the words “free proceeds” together, it appears to me that the testatrix must have intended that the estate should be realised by her trustees in order to a division by payment of the proceeds among the beneficiaries. It was argued that the true meaning of the direction for distribution is that the trustees should, on the one hand, divide, *in forma specifica*, the estate so far as unrealised during the previous course of administration, and should, on the other hand, pay over the free proceeds of the estate so far as it might have been realised. This view is not supported by the terms of the clause. The direction to “divide” applies in terms to the whole estate. Similarly the direction to “pay the free proceeds thereof” applies to the free proceeds of the whole estate. The direction appears to me to mean, as I have said, that the trustees should divide the whole estate by paying over the free proceeds thereof among the beneficiaries. And this direction implies conversion.

There is, I think, nothing in the scheme of the settlement otherwise to displace the natural meaning of the words “pay the free proceeds.” The word “proceeds” is used by the testatrix in the immediately preceding purpose of the settlement as meaning the proceeds of estate realised. The character of the heritable property comprised in the trust estate is that of property held for investment; and the number of the possible beneficiaries presumably within the contemplation of the testatrix does not tend to suggest the likelihood of her having intended a division of the heritance *in forma specifica*.

There is therefore, as it seems to me, nothing in the general scheme of the settlement to take off the meaning which the words “pay the free proceeds” naturally bear. I am therefore of opinion that these words should be held as importing an implied direction to realise and convert the heritance in order to distribution.

Following the views above expressed, I am of opinion that question 1 (a) should be answered in the affirmative and question 1 (b) should be answered in the negative; that question 2 should be answered to the effect that the estate has vested in grandchildren of the testatrix who survived their parents, children of the testatrix, along with great-grandchildren, being issue of grand children who predeceased their parents, such great-grandchildren taking under the *conditio si institutus sine liberis decesserit*; that question 3 should be answered to the effect that great-grandchildren entitled to participate take only an original share and not also an interest in accreting shares; that question 4 should be answered to the effect that the trust estate falls to be distributed *per stirpes*; that question 5 should be answered in the affirmative; and that the sixth question is superseded by the answers to the preceding questions.

LORD DUNDAS—I concur.

The Court pronounced this interlocutor—

“Answer the questions therein stated as follows, viz.—The first alternative of the first question in the affirmative, and the second alternative of the said question in the negative; the first alternative of the second question in the negative, the second alternative of the second question in the affirmative; the first alternative of the third question in the affirmative, and the second alternative of the third question in the negative: Find in answer to the fourth question that the trust estate referred to in the Special Case falls to be distributed *per stirpes*: Answer the fifth question in the affirmative.”

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