

Friday, November 13.

## EXTRA DIVISION.

COBBAN'S TRUSTEES v. COBBAN  
AND OTHERS.*Succession—Will—Destination—“Between.”*

A testator bequeathed his estate “to be divided equally between my brother P and his children and my brother G and his children.” *Held* that the division fell to be made among the whole members of the two brothers’ families, including the brothers themselves, *per capita*.

*Succession—Legacy—Ademption.*

A testator left his nephew “the £100 due to me from H.” also two endowment policies of £100 each. The debt was repaid before the testator’s death, and it was ascertained that the policies were assigned to the testator only in security of the said debt. In a codicil subsequent to the repayment the testator confirmed the legacies contained in his will. *Held* that the legacy was ademed.

Henry Edwin Veal and another, executors of the deceased Alexander Cobban, sometime residing at Alford, Aberdeenshire, acting under his last will and testament, dated 16th December 1907, and two codicils (*first parties*); Peter Cobban and George Cobban, brothers of the said deceased (*second parties*); the said Peter Cobban and his children, not excluded by the will from participating in the residue of the deceased’s estate (*third parties*); the said George Cobban and his children (*fourth parties*); and Alexander Cobban, a son of Peter Cobban, who was by the will excluded from participating in the residue of the deceased’s estate (*fifth party*), presented a Special Case dealing with the provisions of the deceased’s will.

By the said *last will and testament* the testator, who died on 16th May 1911, after bequeathing a number of specific and pecuniary legacies, including a bequest to the fifth party in these terms—“To my nephew Alexander Cobban (the above-named executor) the one hundred pounds due to me from the above-named Henry Edwin Veal (whose security the said Alexander Cobban holds), also the two endowment policies of one hundred pounds each with profits due on the said policies. It is my wish that my nephew Alexander Cobban shall not press his claim against the said Henry Edwin Veal during the next four years, after which he may approach him as regards settlement of aforesaid one hundred pounds with interest,” &c.—went on to deal with the residue of his estate in the following terms:—“After my just debts, expenses, &c., shall have been settled by my executors, I bequeath the remainder of my estate and effects (when realised) to be divided equally between my brother Peter and his children, and my brother George Cobban and his children, my nephews John Cobban and Alexander Cobban, sons of my brother Peter Cobban, not to participate in this last bequest.”

The *codicil* dated 21st April 1911, *inter alia*,

provided—“ . . . I direct my said executors to give effect generally to the bequests of the said will, but only subject to the following additions and alterations. . . . And I confirm the whole bequests of my said last will so far as not modified by these presents. . . .”

The Case stated—“ A question has arisen between the parties as to whether the meaning and effect of the residuary clause above quoted was to institute (subject to the exceptions therein mentioned) the children of the testator’s two brothers *along with* their parents, or only, in the event of their parents or either of them having predeceased the testator, to institute the children of such predeceaser to the parent’s share. In the event of the first of these two alternative views being sustained, there will arise the further question whether the division is to be between the two families equally *per stirpes*, *i.e.*, a bipartite division carrying with it a sub-division of each half into equal shares corresponding to the number of the children called to share along with their parent, or between the whole members of the two combined families (under the exceptions already referred to) *per capita*, in which event, as Peter Cobban has only two children participating, while George Cobban has six children, all of whom participate, the division would be into ten equal shares. A further question arises out of the will in regard to the legacy of £100 and ‘two endowment policies’ forming the subject of a special legacy to the testator’s nephew Alexander Cobban, the fifth party hereto. . . . It has been ascertained that the £100 debt here referred to was repaid to the deceased on 29th March 1911, *i.e.*, seven weeks before he died, and that the two endowment policies (both of which were policies on Mr Veal’s life) were never assigned to the testator absolutely but merely in security of the debt, and consequently formed no part of the testator’s estate. One of the policies became a claim on 1st July 1910, and by arrangement with the deceased the proceeds were paid to the insured, the debt due by him still subsisting and being thereafter secured only by the remaining policy, which matured about eight months later, *viz.*, in March 1911, when the insured attained the age of 45 years. On the arrival of that date the deceased obtained payment of the proceeds of the second policy amounting to £126, 10s., which sum is found duly credited to his bank account under date 29th March 1911, and he handed the insured a cheque for £24, 10s., retaining the balance in repayment of the debt and accrued interest. The first parties, as the deceased’s executors, have satisfied themselves that this debt was thus duly repaid to the deceased, and the whole parties hereto are agreed as to the accuracy of the facts above narrated, and are satisfied that the said sum of £100 was not outstanding as a debt due to the deceased at the date of his death, that the said two policies were at that date no longer in existence as claims, and that they had never been truly the property of the deceased. The sum of £100 represents approximately the share which would have fallen to Alexander Cobban out of residue

had he not been specifically excluded therefrom. The testator suffered from a long illness, and some time before the date of his will he sent for his nephew Alexander Cobban (the fifth party) to live with him and nurse him, and the latter did so. Alexander Cobban (the fifth party) had previously been in employment earning an income, and was thereby prevented from taking another situation and continuing to do so. At the time of making his will the testator handed to Alexander Cobban the said two endowment policies, telling him that he was to take charge of the policies upon the testator's death. At the testator's request Alexander Cobban shortly afterwards placed the policies in a drawer belonging to the testator. Alexander Cobban understood that the said handing over of the policies and relative instructions by the testator were intended by the testator to signify Alexander Cobban's right to the £100 legacy. Alexander Cobban thereafter continued for a considerable period of time to live with and to nurse the testator in his illness."

The following *questions of law* were submitted to the Court—“(1) Does the residue of the deceased's estate fall to be divided between his two surviving brothers equally, or does it fall to be divided amongst the whole members of the two brothers' families, including the two brothers themselves, with the exception of the two excluded nephews? (2) In the event of the second branch of the first question being answered in the affirmative, does the residue fall to be divided into two equal parts, one of which will be shared by Peter Cobban and his children, other than the two excluded children of Peter Cobban, equally among them, and the other shared by George Cobban and his children equally among them, or does it fall to be divided *per capita* between Peter Cobban and his children, other than the two excluded children, and George Cobban and his children? (3) Does the bequest of £100 and endowment policies to the fifth party subsist as a legacy of £100 to be implemented out of the deceased's estate?”

Argued for the second parties—(1) The intention of the testator was that the residue of his estate should be divided between his two brothers if they survived him, and the destination to children was merely intended to come into operation if their parents predeceased the testator. The word “and” had been held to be capable of importing a conditional institution—*Currie v. Hay*, June 18, 1890, 17 R. 961, 27 S.L.R. 771; *Bowman v. Bowman*, July 25, 1899, 1 F. (H.L.) 69, 36 S.L.R. 959; *Thompson's Trustees v. Jamieson*, January 26, 1900, 2 F. 470, 37 S.L.R. 366; *Grant v. Gunn's Trustees*, February 28, 1883, 11 S.L.R. 484; *M'Laren on Wills*, vol. ii, 769; *Henderson*, Law of Vesting, p. 49, and cases quoted there; *Bannatyne's Trustees v. Watson*, 1914 S.C. 693, 51 S.L.R. 605. (2) The bequest to the fifth party was a special legacy, and as the subject of it had ceased to exist before the death of the testator it must be held to be adeemed—*Pagan v. Pagan*, January 26, 1838, 16 S. 383; *Maclean v. Maclean*, 1908 S.C. 838,

45 S.L.R. 672; *Ersk.* iii, 9, 10. The clause in the codicil confirming the legacies was merely formal, and could not bear the weight which the fifth party sought to place upon it.

Argued for the third party—(1) The third and fourth parties had a right to share in the estate along with their respective fathers. The use of the word “and” showed this, for its ordinary meaning was conjunctive, and the cases in which it had been held equivalent to “whom failing” were cases where a conjunctive legacy was impracticable—for example, a bequest to a man “and his heirs.” It was an altogether inappropriate word for “whom failing”—*Thompson's Trustees v. Jamieson (cit.)*; *Wright v. Fraser*, November 16, 1843, 6 D. 78; *Marshall's Trustees v. Campbell*, 1914 S.C. 443, 51 S.L.R. 397. (2) The division fell to be made *per stirpes*. Where there were only two brothers of the testator a bipartite division was probable, and this was supported by the use of the word “between.” It was unlikely that the testator intended that the size of one brother's share should be dependent upon the size of the other brother's family—*Laing & Sanson v. Eisdale*, November 18, 1879, 7 R. 244, 17 S.L.R. 128; *Cunningham's Trustees*, January 13, 1891, 18 R. 380, 28 S.L.R. 266; *Searey's Trustees v. Albury*, 1907 S.C. 803, 44 S.L.R. 537.

Argued for the fourth parties—The residue fell to be divided among the second, third, and fourth parties, but the division should be *per capita*. It had been held that the word “between” often merely meant “among,” and in this case that was its obvious meaning—*Bogie's Trustees v. Christie*, January 26, 1882, 9 R. 453, 19 S.L.R. 363; *Macdougall v. Macdougall*, February 6, 1866, 4 Macph. 372; *Cunningham's Trustees v. Blackwell*, 1909 S.C. 219, 46 S.L.R. 175; *Binnie's Trustees v. Prendergast*, 1911 S.C. (H.L.) 6, 28 S.L.R. 251; *Pitcairn v. Thomson*, June 8, 1853, 15 D. 741. Apart from the cases cited the grammatical construction of the sentence showed that a division *per capita* was intended.

Argued for the fifth party—The legacy to this party was a demonstrative not a special legacy. The distinction between these two classes, though not dealt with by the Scottish institutional writers, was well recognised both by the civil law and by English law. A demonstrative legacy was merely a species of general legacy, and accordingly the mention of the debt here was only meant to show the source from which the legacy was to come, and the legacy was not adeemed by the payment of the debt—*M'Laren on Wills and Succession* (3rd ed.), vol. i, p. 575; *White & Tudor's Leading Cases*, vol. i, p. 836; *Melvin v. Nicol*, May 20, 1824, 3 S. 31; *M'Kenzie v. Barker's Trustees*, 1905, 13 S.L.T. 501; *Jarman on Wills* (6th ed.), vol. ii, p. 1067. In regard to the policies the doctrine of *res aliena scienter legata* applied—*M'Laren on Wills*, vol. i, p. 578; *Catto v. Gordons*, 1748, M. 8076; *Drummond v. Drummond*, 1624, M. 2261. In determining this question the intention of the testator must be looked at—*Anderson v. Thomson*, July 17, 1877, 4 R.

1101, 14 S.L.R. 654. Here the fact that the fifth party, although he had specially devoted himself to taking care of the testator was excluded from participation in the residue, showed that he was intended to receive this legacy. In any case the testator had specifically confirmed all the legacies.

At advising—

LORD DUNDAS—The testator Alexander Cobban, a retired butler, died on 16th May 1911 a domiciled Scotsman. He left a last will and testament, dated in 1907, with two relative codicils, dated respectively 21st April and 6th May 1911. I understand that the will is a document partly written and partly printed, and it was executed before witnesses. The residuary clause is in the following terms:—“... quotes, v. sup. . . .” The testator was survived by his two brothers and by all their children. Peter Cobban has two children besides his sons John and Alexander who are excluded from participation in the residue; George Cobban has six children.

The first question put to us is whether the residue is divisible between the testator's two brothers, or among the whole members of the two brothers' families, including the two brothers themselves, with the exception of the two excluded nephews. In my opinion the latter of these alternative views is correct and the former erroneous. I am unable to read the direction to divide between “Peter and his children” and “George and his children” respectively as importing a bequest to each of the brothers in case they should survive the testator, and a destination-over to their respective children, operative only in the event of the parent's decease. The word “and” is not, in my view, an apt one to indicate a destination-over or a conditional institution in the event of the failure of the first person named; though it has been construed in that sense where the context leads necessarily or by reasonable implication to that result, e.g., a bequest to “A and his heirs.” In the ordinary case I think the word “and” points to a joint right and not to successive rights in the parties named. In the present case this conclusion seems to me to be strengthened by the express exclusion of two of the testator's nephews from participation “in this last bequest,” which appears to favour the view of a present rather than a conditional bequest. I am therefore for answering the first alternative branch of the first question in the negative and the second in the affirmative.

I have felt more doubt about the answer to be given to the second question, which asks whether the residue should be divided into two equal parts *per stirpes*, one to be shared by Peter and his children (other than the two children expressly excluded) equally among them, and the other by George and his children equally among them; or whether it is to be divided among and shared by Peter and his children (other than the two expressly excluded) and George and his children equally *per capita*. The conclusion I have reached is that the latter of these alternative views is the true

one. The argument in favour of a bipartite division of the residue *per stirpes* certainly derives force from the use of the word “between.” I may, however, quote the language of Lord President Inglis in *Bogie's Trustees*, (1882) 9 R., at p. 455, where he pointed out that “‘between’ is undoubtedly a dual preposition etymologically, and in classical English signifies a separation or division into two. But it is equally clear that there is an improper use of the word ‘between’ which makes it equivalent to ‘among.’” I observe that Dr Johnson in his dictionary (*sub voce* “between”) says “between is properly used of two, and ‘among’ of more; but perhaps this accuracy is not always preserved.” In *Bogie's Trustees* and in other cases (e.g., *Laing's Trustees*, (1879) 7 R. 244) the Court has read “between” as meaning “among” where the context seemed reasonably to demand that reading. Conversely, the word “among” occurring in a formal trust-settlement was construed in a recent case—*Searcey's Trustees*, 1907, S.C. 823—as meaning “between.” In the case before us I do not find it difficult to suppose, looking to the testator's position in life, that he used the word “between” in its colloquial rather than in its classical signification. When the context of the residuary clause is regarded, it seems to me that this use of the word must have been intended by Mr Cobban. I think the fair and right construction of the clause is that it directs an equal division of the residue among Peter and his children (excepting the two excluded) and George and his children *per capita*. The bequest is to the trustor's brothers and their respective children as joint beneficiaries forming one class. The repeated use of the word “and” seems to me to lead almost necessarily to this result. I do not see why, as matter of construction, that word, where it occurs for the second time, should be held as indicating a separation of Peter and his children from George and his children, so as to infer the intention of a bipartite division; or why we should disregard the fact that each of the brothers is also separated from his own children by the interposition of the same word “and.” I am therefore for answering the first alternative branch of the second question in the negative, and the second in the affirmative.

The third question put to us relates to a bequest contained in the will in favour of the testator's nephew Alexander Cobban, who was appointed one of the executors but declined to act, and who was one of the two nephews expressly excluded by the will from participation in the residue. The bequest runs thus:—“... quotes sup. . . .” &c. In order to understand the words quoted, one must turn to the statement of admitted facts. It appears that the debt of £100 referred to was repaid to the deceased on 29th March 1911, i.e., seven weeks before his death; that the two endowment policies (both of which were on Mr Veal's life) were never assigned to the testator absolutely, but merely in security of the debt, and consequently formed no part of his estate. One

of the policies became a claim in 1910, and by arrangement with the testator the proceeds were paid to Mr Veal, the debt due by him still subsisting, and being thereafter secured only by the remaining policy which matured in or about March 1911, when the testator received payment of its proceeds, £125, 10s. This sum was duly credited to his bank account, and he handed Mr Veal a cheque for £24, 10s., retaining the balance in repayment of the debt and accrued interest. The original debt was thus repaid to and discharged by the testator during his lifetime, and the policies, which had never belonged to him, were not at his death in existence as claims. The question put to us is, "Does the bequest of £100 and endowment policies to the fifth party" (Alexander Cobban) "subsist as a legacy of £100 to be implemented out of the deceased's estate?" My opinion is in the negative. Mr Burn Murdoch put forward, I believe, all that could be said in favour of Alexander Cobban's claim to receive a legacy of £100. He argued that the bequest was not truly one of a claim to the debt due to the testator at the date of his will, but a sum of £100—the debt and relative security being merely indicated as the source from which that sum might primarily and appropriately be paid, and that the legacy was therefore a general one, to be made good out of the testator's general estate although the debt had been repaid during his lifetime. I cannot agree with this contention. I think the legacy was special—"the one hundred pounds" due to the testator by Mr Veal—and that the debt being repaid the legacy must be held to have been adeemed. That the legacy was special seems to me to be indicated by the testator's allusion to "his" (Alexander Cobban's) "claim" as well as by the whole tenor of the bequest. If the debt had subsisted at the testator's death and the general residue had proved insufficient to pay all the legacies in full, I think Alexander would have had a good claim to payment in full of his £100, as being a special legacy. But if the legacy would have been held in that event to be special it must surely be reckoned as special for all purposes. The cases of *Pagan*, (1838) 16 S. 383, and *M'Lean*, 1908 S.C. 833, seem to be adverse to Alexander Cobban's contention. It is well settled that ademption is a question of fact and not of intention, and Mr Burn Murdoch admitted this. But he endeavoured to fortify his argument already indicated upon the testator's intention, and as matter of construction of the clause in the will, by two supplementary contentions. I confess I did not see any force in that which was based upon the view that we have here a case of *res aliena scienter legata*; for it seems to me that assuming the policies to be *res aliena*, there was no legacy of them in any true sense; the security for the claim was I think referred to by the testator merely as ancillary to the bequest of that claim. The other argument was founded on the terms of the codicil of 21st April 1911 in which the testator, *inter alia*, directed his executors "to give effect generally to the bequests of the said will," and after making certain unimpor-

tant additions to and alterations upon it, added "and I confirm the whole bequests of my said will so far as not modified by these presents." The date of this codicil is less than a month later than that of the repayment and discharge of the debt. Mr Burn Murdoch urged that it was impossible to conceive that the testator would have so expressed his codicil if he had not intended that the bequest of £100 to Alexander Cobban should be and continue good and valid. I am afraid the answer is that the words in the codicil, which are quite usual and ordinary ones in a codicil prepared (as this one was) by a law agent, cannot be read as giving force or effect to a legacy contained in the will if that legacy was already ineffectual and inoperative, as I think this one clearly was. I confess that I feel a good deal of sympathy with the fifth party, because it is to my mind not at all improbable that the testator did intend him to have £100, and upon that very account excluded him from any share in the residue. But as matter of law I am constrained to hold that the special legacy contained in the will was adeemed, and that the third question must be answered in the negative.

LORD MACKENZIE—I concur.

LORD CULLEN—I concur. As regards the first question raised in the case, the words used by the testator to describe his residuary legatees seem to me plainly to import according to their natural meaning that the children of his brothers Peter and George are conjoined on an equal footing with their parents in the sharing of the gift. And there is nothing in the context of the will to impress them with any different meaning.

As regards the second question, the common use of the word "between" as meaning "among" makes it legitimate to resort to the context in any particular case for guidance as to the sense in which it has been used by the testator. In this case the grammatical structure of the description of the totality of beneficiaries does not lend itself to the notion of a bipartite division. It seems to me to be a mere assumption to say that the testator intended the description to be broken into two parts at the second "and" as if he had said "Peter and his children on the one hand" and "George and his children on the other hand." Moreover, the idea of a stirpital division involved in the argument for the third parties is not favoured by the fact that the head of each *stirps* is to rank in the division only *pari passu* with his children. I am of opinion that the division was intended to be *per capita*.

The last question relates to the bequest in favour of the fifth party. I am unable to read the terms in which it is expressed in the will as meaning anything else than this, that the then existing claim of debt against Mr Veal was the thing specifically bequeathed to the fifth party along with the benefit of the securities held for it. On this footing there is no escape from the conclusion that the bequest was adeemed by the payment of the debt during the testator's life; the clause of confirmation could not

alter the fact. Nor is it legitimate in my opinion to read it as making a new and substantial gift to the fifth party in the shape of a general pecuniary legacy of £100.

The Court answered the first alternative of the first question of law in the negative, and the second alternative in the affirmative; the first alternative of the second question in the negative and the second alternative in the affirmative; and the third question in the negative.

Counsel for the First and Second Parties—C. H. Brown. Agents—Mackintosh & Boyd, W.S.

Counsel for the Third Parties—J. R. Dickson. Agent—H. H. Macbean, W.S.

Counsel for the Fourth Parties—D. Jamieson. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for the Fifth Party—Burn Murdoch. Agent—W. B. Wilson, W.S.

Wednesday, November 18.

FIRST DIVISION.

BETT AND OTHERS v. HUGHES.

*Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 1 (1)—Accident Arising "Out of" the Employment—Coachman Cycling to Get Employer's Letters.*

It was part of a coachman's duty to call, when required by his mistress, at the post office some miles distant for letters. This he might have to do every day if his mistress were at home, and perhaps not at all for a fortnight if she happened to be from home. The road was little frequented and he was accustomed with the knowledge of his employer to use his bicycle for the purpose. He was injured through a man lurching against and upsetting his bicycle. *Held (dub. Lord Johnston)* that the accident arose "out of" his employment in the sense of sec. 1 (1) of the Workmen's Compensation Act 1906.

*Opinion per the Lord President* that the frequency or infrequency with which a risk arising "out of" an employment occurs is immaterial.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 1 (1) enacts—"If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule to this Act."

In an arbitration under the Workmen's Compensation Act 1906 in the Sheriff Court at Kinross, between Charles Hughes, coachman, Milnathort, respondent, and Alexander Easson Bett (now deceased) and others, appellants, the Sheriff-Substitute (DEAN LESLIE) awarded the respondent compen-

saation, and at the request of the appellants stated a Case for appeal.

The Case gave the following facts:—"The respondent about five years ago entered the service of the deceased Alexander Easson Bett, who was a carriage hirer, as coachman. For four years he acted as a driver of a carriage and pair of horses hired from the said deceased Alexander Easson Bett by Mrs Purvis Russell at Warroch, Milnathort. He was instructed by Alexander Easson Bett to do anything he was asked and to be obliging. His duties were those of a private coachman and included calling at Milnathort Post Office for letters when so required by Mrs Purvis Russell. When Mrs Russell was from home he might not for a fortnight at a time be sent to the post office. At other times he might have to go every evening. He had also to deliver letters elsewhere. He received orders at the house through one of the maids when it was necessary for him to go. When he did go for letters he generally used his own bicycle. Both the deceased Alexander Easson Bett and Mrs Purvis Russell knew that he used his bicycle for the purpose. On the evening of 11th October 1913, when returning to Warroch from the post office with letters, he passed three people on the road in Milnathort. Of these three one man lurching against him and knocked him over. The fall resulted in fracture of his right knee-cap. He has been since and is now totally incapacitated for work. His average weekly wage amounted to 32s. It was admitted for the appellants that the accident arose in the course of the respondent's employment."

The Case further stated—"I found in law that the respondent was injured by accident arising 'out of and in the course of his employment' with the said deceased Alexander Easson Bett within the meaning of the Act, and found the appellants as assisted liable to the respondent in compensation at the rate of 16s. per week as from the 18th day of October 1913."

The *question of law* for the opinion of the Court is—"Whether there was evidence upon which it could competently be found that the personal injuries sustained by the respondent were the result of an accident arising 'out of' his employment within the meaning of the Workmen's Compensation Act 1906?"

Argued for the appellants—The respondent's employment was not such as to expose him exceptionally to the danger which caused the accident. The accident might have befallen any member of the public. In this respect the case was distinguishable from *M'Neice v. Singer Sewing Machine Company, Limited*, 1911 S.C. 12, 48 S.L.R. 15, and *Pierce v. Provident Clothing and Supply Company, Limited*, [1911] 1 K.B. 997, where the employment involved a continual passing to and fro in a crowded street. The case of *Greene v. Shaw*, [1912] 2 Ir. Rep. 430 (Lord Chancellor at 437, Cherry, L.J., at 438) formed an exact parallel. Similar decisions were given in *Blakey v. Robson, Eckford, & Company, Limited*, 1912 S.C. 334, 49 S.L.R. 254; *Rodger and*