

the evidence led in the second trial differs in no material respect from that led in the first, or at all events differs in no respect favourable to the pursuer. In my opinion this verdict cannot stand.

LORD GUTHRIE—The pursuer had two courses open to him, the one he took, which involved a difficult calculation, the risk of the accuracy of which he accepted, and the other, simple, obvious, and necessarily effective. But further, the course he took not only involved a difficult calculation, it involved a calculation in which the necessary elements were unknown to him, namely, first, when the stationary car was going to start; second, the distance between him and the uncertain place where he was going to cross the north and south tramway line; and third, the speed at which the car would come, a speed dependent on many circumstances, such, for instance, as whether the car was up to time or behind time. It seems to me that his choice involved the same element of fault directly causing the accident as arose in *M'Allester's* case, 54 S.L.R. 401, and I would refer to my opinion in that case. Indeed, this case in its circumstances involves graver fault on the part of the pursuer than in *M'Allester's* case. In that case the motor car-driver, just before the accident, was not talking, as the pursuer was doing here; and the driver looked, but could not see what was coming along the street, owing to the construction of his car, whereas the pursuer here could easily have seen the approaching car if he had looked about him before stepping on the car lines.

The Court set aside the verdict and entered judgment for the defenders.

Counsel for the Pursuer—Macquisten. Agent—Allan M'Neil, S.S.C.

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Friday, July 20.

FIRST DIVISION.

[Lord Hunter, Ordinary.]

CRUMPTON'S EXECUTOR *v.* CRUMPTON'S JUDICIAL FACTOR AND OTHERS.

Succession—Conditional Institution and Substitution—Liferent and Fee—Absolute Gift Followed by Words of Limitation.

A testatrix who had absolute powers of appointment over a sum of £10,000 appointed and bequeathed £8000 and the whole of the residue of her means and estate to her nephew, "his heirs, executors, and administrators absolutely, provided always . . . that in case my nephew shall die without issue" the estate left to him should go one-half to establishing a charity in London and the other half to Dr Barnardo's Homes. The testatrix then gave the interest of £1000

to a Mrs Edgehill, provided that "if my nephew . . . survives Mrs Edgehill he is to receive it, or rather it is to be put in trust for him, the principal, and paying him the interest only," and if he did not survive Mrs Edgehill it was to go to her issue. The testatrix then gave Alice Thompson, a former servant, "the interest of Five hundred pounds for her life, and if my nephew survives me the principal sum of Five hundred (is to be placed in trust for him) he receiving the interest only, and this also applies to the Eight thousand pounds left to him as above." At the date of the will the nephew was confined in a lunatic asylum and his affairs were being managed by a *curator bonis*. The testatrix was survived by her nephew and Mrs Edgehill; Alice Thompson predeceased her. After her nephew's death his curator was appointed judicial factor on his estate. *Held* (rev. Lord Hunter), in a competition between the nephew's judicial factor and Dr Barnardo's Homes with reference to the estate left by the testatrix other than the legacy to Mrs Edgehill and her issue, (1) that the testatrix did not intend the interest taken by her nephew under her will to be restricted to a liferent, and (2) that the charities were not substituted in the fee of the estate left to the nephew but were called as conditional institutes only.

Thomas Bennet Clark, as executor-dative of Sarah Elizabeth Crumpton, *pursuer*, raised an action of multiplepoinding against himself as judicial factor on the estate of William Thomas Crumpton, nephew of Sarah Elizabeth Crumpton, and Dr Barnardo's Homes, London, *defenders*. Claims were lodged by Charlotte Augusta Crone and others, cousins once removed and next-of-kin of William Thomas Crumpton, by the pursuer as judicial factor on William Thomas Crumpton's estate and also as executor of Sarah Elizabeth Crumpton, and by Dr Barnardo's Homes, London.

The *holograph will* of Miss Sarah Elizabeth Crumpton was in the following terms:—"The last will and testament of Sarah Elizabeth Crumpton. Now in exercise of the said power and of every other power now or at the time of my decease thereto enabling me, I appoint the said sum of Ten thousand pounds and the residue of my father's estate in manner following, to my nephew William Thomas Crumpton *all* the principal and sum of Eight thousand pounds, and the residue of my father's estate and all interest due in respect thereof at the time of my death, and also all the rest, residue, and remainder of my estate, real and personal. I appoint, devise, and bequeath the same unto my nephew William Thomas Crumpton, his heirs, executors, and administrators absolutely, provided always nevertheless that in case my nephew shall die without issue I appoint the said sum of Eight thousand pounds and the residue of my said father's estate, and I give, devise and bequeath all my estate which I shall die possessed of to be equally divided

between establishing in London a home for penniless and unfortunate women and girls who desire to lead a better life (and as long as they continue to do so to reside in it) and Dr Barnardo's Home in London for stray children; I bequeath to Mrs Mary Laurie, widow of Mr William Laurie, formerly merchant of Barbadoes (once of the firm of Barron & Laurie of Barbadoes), the interest of One thousand pounds for her life, and if her daughter Mrs Edgehill survives her, to be paid to Mrs Edgehill; if my nephew William Thomas Crumpton survives Mrs Edgehill, he is to receive it, or rather it is to be put in trust for him, the principal, and paying him the interest only; if he does not survive Mrs Edgehill her children are to have the principal sum of One thousand pounds divided equally among them; to my former servant Alice Thompson of Barbadoes I give the interest of Five hundred pounds for her life, and if my nephew survives me the principal sum of Five hundred *and the interest* (is to be placed in trust for him), he receiving the interest only, and this also applies to the Eight thousand pounds left him as above. I empower my executors hereinafter named to see that the above directions are carried out as my wish now expressed, and I revoke all testamentary instruments heretofore made by me—In witness whereof I have hereunder set my hand this tenth day of August one thousand eight hundred and ninety-one. (Signed) SARAH E. CRUMPTON, attesting witnesses." [*The words in italics were deleted in the will.*]

The facts of the case were—Miss Sarah Elizabeth Crumpton died at Dumfries on February 5, 1899. As her will contained no nomination of executors the pursuer was appointed executor-dative by the Sheriff of Dumfries on 17th March 1899. Miss Crumpton was the only daughter of Thomas Crumpton, Barbadoes, and was born in Barbadoes. She came to London in 1884. In June 1899 she went to Dumfries, where she resided till her death. At the date of her death she possessed £150 in cash and some personal belongings; in addition, in the circumstances which arose at her death, she had power to appoint by testamentary writing for such interest or interests and in such manner and form as she might choose, to such person or persons as she might choose, the capital of a legacy of £10,000 left to her by her father in his will. Her father's will also made a provision of £10,000 for his son Thomas (Miss Crumpton's brother), who died shortly after his father leaving an only son William Thomas Crumpton. Thomas Crumpton senior's estate was not sufficient to provide for those provisions of £10,000 each and other legacies in full, and the sum, of which Miss Crumpton ultimately enjoyed the *liferent*, amounted at her death to about £6000. The pecuniary legacies bequeathed by Miss Crumpton exceeded the amount of her estate and the legacies were proportionately reduced. The legatee, Alice Thompson, died in December 1891. Mrs Laurie died in 1900, survived by her daughter Mrs Edgehill, who also survived William Thomas Crumpton. The pursuer

held the legacy of £1000 (as diminished), or two nineteenthths of the executory estate, for Mrs Edgehill in *liferent* and her children in fee. The remaining seventeen nineteenthths of the estate formed the fund *in medio* in the action. William Thomas Crumpton was married but was predeceased by his wife. He had no issue. He became insane in 1882 and was confined in an asylum from 2nd April 1882 till his death on 22nd February 1916. He died intestate. The pursuer was appointed his *curator bonis* on 5th June 1884, and on 3rd April 1916 he was appointed judicial factor on his estate.

The pursuer as judicial factor of William Thomas Crumpton *claimed, inter alia*, the whole fund *in medio*, and *pleaded, inter alia*—"1. On a sound construction of the will of the said Miss Sarah Elizabeth Crumpton, the said William Thomas Crumpton was entitled to the fee of the bequest of £8000 and the residue of her estate and to the fee of the £500 *liferented* by the said Alice Thompson, and the claimant, as judicial factor foresaid, is accordingly entitled to be ranked and preferred to the whole fund *in medio*."

Dr Barnardo's Homes claimed the whole fund *in medio*, or alternatively one-half thereof, and *pleaded, inter alia*—"1. On a sound construction of the said Miss Sarah Elizabeth Crumpton's last will and settlement, the claimants are entitled to be ranked and preferred in terms of one or other alternative of their claim. 2. The said William Thomas Crumpton having died intestate and without issue, the claimants are entitled in terms of the said Miss Crumpton's last will and testament to payment of the whole, or otherwise one-half, of the fund *in medio*."

On 6th March 1917 the Lord Ordinary (HUNTER) found that the interest which William Thomas Crumpton took under the will of Sarah Elizabeth Crumpton was restricted to a *liferent* and that the fee of the securities representing the sum of £8000 and the residue of the estate bequeathed by said will, including in said residue the securities representing the sum of £500 *liferented* by Alice Thompson, was destined to the extent of one-half for establishing in London a home for penniless and unfortunate women and girls who desired to lead a better life, and to the extent of the other half to Dr Barnardo's Homes in London for stray children, and ranked and preferred Dr Barnardo's Homes to one-half of the fund *in medio*, and allowed the pursuer to submit a scheme showing how he proposed to administer or dispose of the other half of the fund *in medio*, and granted leave to reclaim.

The pursuer reclaimed, and argued—William Thomas Crumpton's interest in his aunt's will was not restricted to a *liferent*. It was given to him "absolutely"—that word was meaningless if he only got a *liferent*. Further, his heirs, executors, and administrators were called. The clause at the end of the will was merely intended to provide for the mode in which the bequest was to be enjoyed (the testatrix being aware that William Thomas Crumpton was insane

and would require guardians), and did not create a restriction to a liferent—*Tweeddale's Trustees v. Tweeddale*, 1905, 8 F. 264, per Lord President Dunedin at p. 274, 43 S.L.R. 193. If a liferent had been intended to be given, the testatrix knew how to express a gift of fee and liferent and would have expressed her intention. In any event it was for the respondents to show that the initial absolute gift had been restricted. Further, the will nominated no executor and appointed no trustees. The only executor was the pursuer as executor-dative, and as such he was not a trustee—*Jamieson v. Clark*, 1872, 10 Macph. 399, per Lord President Inglis at p. 405, 9 S.L.R. 233. An executor-nominate only was given the powers of a trustee—Executors (Scotland) Act 1900 (63 and 64 Vict. cap. 55), section 2. The Court would not correct that omission—*Mitchell v. Mitchell*, 1877, 5 R. 154, per Lord Justice-Clerk Moncreiff at p. 159, and Lord Ormidale p. 160, 15 S.L.R. 102. If the fee once vested in William Thomas Crumpton there was therefore no means of protecting other beneficiaries. And it followed that there was no substitution to William Thomas Crumpton but merely a conditional institution. The presumption was against substitution and in favour of conditional institution in moveable succession—*Brown v. Coventry*, 1792, M. 14,863. The intention of the testator always determined whether there was conditional institution or substitution. Here vesting was absolute as was shown by the use of the words heirs, executors, and administrators. The proviso relating to William Thomas Crumpton's death without issue referred to his death before the testatrix. Substitution in moveable succession was permissible—*Christie v. Christie*, 1681, M. 8197; *Campbell v. Campbell*, 1740, M. 14,855; *M'Dowall v. M'Gill*, 1847, 9 D. 1284. But if here there was any substitution at all it was conditional upon William Thomas Crumpton dying without issue, a conditional substitution requiring a very explicit expression of the testator's intention—*Johnston v. Greig*, 1831, 9 S. 806, per Lord Fullerton at p. 827, 1833, 6 W.S. 406. In reality the present was a bequest subject to a condition which could be only purified after the death of the testatrix, and that was not a substitution—*Lawson v. Imrie*, 1841, 3 D 1001, per Lord Fullerton at p. 1004. If, however, there was a substitution it was evacuated. Substitution was not recognised by the Roman law; later it was fully recognised with regard to heritage where the superior recognised a series of substituted heirs. Thereafter the doctrine was applied to moveables, but just as in the case of heritage the substitution remained operative only so long as the deed containing the substitution remained the title to the property. Thus in a bond where there was a substitution, the moment the money was paid the substitution was spent, for the title to the money was no longer the bond containing the substitution. The same result followed where a bequest with a substitution was immixed in the legatees' other estate—*Buchanan's Trustees v. Dalziel's*

Trustees, 1868, 6 Macph. 536, per Lord President Inglis at p. 539, 5 S.L.R. 325. Here while the estate remained in Miss Crumpton's executor the substitution, if there was one, operated, but the moment William Thomas Crumpton got the fund the substitution was evacuated.

Argued for the claimants—Dr Barnardo's Homes (respondents)—The clause at the end of the will clearly restricted the absolute gift to William Thomas Crumpton to a liferent—*Tweeddale's Trustees v. Tweeddale (cit.)*, per Lord President Dunedin p. 273. That clause was not to be taken as *pro non scripto* as being repugnant to the earlier absolute gift, but as a qualification on that gift—*Russell v. Bell's Trustees*, 1897, 24 R. 666, 34 S.L.R. 497; *Miller Richard's Trustees v. Miller Richard*, 1903, 5 F. 909, 40 S.L.R. 663. In the case of a charitable bequest the absence of a nomination of executors or trustees caused no difficulty—*Patullo*, 1908, 46 S.L.R. 712; *Magistrates of Dundee v. Morris*, 1858, 3 Macq. 134. If executors had been nominated they would have been trustees—*Ainslie v. Ainslie*, 1886, 14 R. 209, per Lord President Inglis at p. 211, 24 S.L.R. 164. If William Thomas Crumpton took a fee, those claimants were substituted to him. A substitution always included a conditional institution and never referred to any special time. A conditional institution always referred to a special *punctum temporis*—*M'Dowall v. M'Gill (cit.)*; *Dyer v. Carruthers*, 1874, 1 R. 943, 11 S.L.R. 539; *Buchanan v. Dalziel's Trustees (cit.)*. Here there was no reference to any special point of time. Further, a substitution did not require any machinery to carry it out. If there was a substitution it had not been evacuated, for the legatee was *incapax* and his curator could not alter his succession.

At advising—

LORD PRESIDENT—The Lord Ordinary has, I think, erred in the interpretation of this will. The error arises from his Lordship having overlooked or disregarded the unqualified terms in which the bequest to the nephew is expressed. The fund *in medio* is bequeathed, appointed, and devised to William Thomas Crumpton, his heirs, executors, and administrators absolutely. These words do not admit of two interpretations. They are altogether idle words if the right so conferred was, as the Lord Ordinary has held, reduced to a bare liferent; and equally so if there was a substitution in favour of the charities who are rival claimants on the fund. The charities were to take in one event, and in one event only—if William Thomas Crumpton died without issue. The natural meaning of these words is died without issue prior "to the death of the testatrix," not died at any time either before or after her death. Otherwise the words I have just used, "heirs, executors, and administrators absolutely," would be destitute of meaning. The fee, I think, vested in William Thomas Crumpton *a morte testatoris*, and inasmuch as he survived the testatrix for many years the fee was in him at the date of his death. There was, no doubt, a condi-

tional institution of the two charities, the condition being the death of William Thomas Crumpton without issue prior to the death of the testatrix. That condition was never purified.

I do not deny for my part the doctrine of substitution in moveables. I deem it, with Lord President Boyle in the case of *M'Dowall v. M'Gill*, 9 D. 1284, at p. 1288, "as much a part of the law of Scotland as the law of entail." But there is a very strong presumption against the application of that doctrine to moveable succession, and the ease with which the evacuation can be effected, as expounded by Lord Fullerton in the same case, confirms the view.

The subsequent hint or suggestion in a later part of this will (for it is no more) that the nephew should have the interest only is quite insufficient in my opinion to reduce the bequest to that of a bare life tenant. If so serious an abridgment of the right of fee were really intended, then there would be a clear repugnancy to which the law of Scotland gives no countenance.

I am therefore for recalling the interlocutor of the Lord Ordinary and ranking and preferring the judicial factor in terms of his claim.

LORD JOHNSTON—I agree with your Lordship. Although this deed is in form a testament, it is much more an exercise of a power of appointment. This lady had a very small fortune of her own—something under £200—but she had the power of appointment of a matter of £10,000. She does not proceed at once with a bequest but with an appointment, and I think that there is a difficulty in holding that a power to appoint imports also a power to substitute to the appointee. I may at least say that the presumption is against words of appointment comprising within them an appointment in substitution. Words of ulterior appointment or of appointment-over naturally lead to the conclusion that the appointment-over was only intended to take effect in the event of the first appointee predeceasing the donee of the power. This deed is therefore more easily interpreted than it would have been if it had been a pure testament and not an appointment embedded in the form of a testament.

A further point that has weighed with me is that the words "is to be placed in trust for him," found in the concluding part of the deed, were not clearly meant to reduce the appointment to a life tenant with a fee in reversion. We are entitled in interpreting this deed to know the circumstances which surrounded this lady at the time she was making her will. One thing we do know is that she made use of a form couched in legal phraseology and did not employ a solicitor, nor did she simply adopt it, but used it merely to enable her to make her own draft. She did use it with wonderful intelligence, but at the same time naturally not with the knowledge and skill of a trained lawyer. Another thing that we do know and are entitled to weigh in ascertaining the lady's intention is that her nephew had been for some time in confinement, and that his recovery was at least uncertain. Where, then, the lady uses the words "to be placed

in trust for him" I am satisfied that she was looking to the fact that her nephew might continue in the unfortunate condition in which he was at the date when she wrote, and that what she had in mind by these words was to provide that the fund appointed was to be managed for him if necessary, and that she did not intend in any way to affect his right to the fee.

LORD MACKENZIE—I come to the same conclusion. On the language of the will I do not think it possible to limit the gift to the nephew to a life tenant; and although I regard the doctrine of substitution in moveables as established in the law of Scotland, I am unable to hold that it applies in this case.

LORD SKERRINGTON—The will which we have to construe was made in the exercise of a testamentary power of appointment, but as the power was a general one I have no doubt that it was competent for the testatrix, if she so intended, either to make the appointment to one person in life tenant and to another person in fee, or to make an appointment to a person in fee with a substitution failing the appointee disposing of the fund. The first question which we have to consider is whether the testatrix has so expressed herself as to cut down the right of the appointee to a life tenant. That was the view of the Lord Ordinary, but I agree with your Lordship in the chair that his judgment upon that point cannot be sustained.

I confess that I felt some difficulty in regard to the question whether this was not a case in which the testatrix had created a substitution in moveables, but the argument of Mr Chree satisfied me that the appointment in favour of William Thomas Crumpton, his heirs, executors, and administrators excluded the possibility of a substitution. I am satisfied that the testatrix intended that if William Thomas Crumpton succeeded, then his right should pass to his legal representatives *ab intestato*, and that the only purpose of the proviso was to provide a conditional institution which should take effect in the event of his not surviving to take, but predeceasing the testatrix. As he did survive to take, the destination in favour of his heirs, executors, and administrators takes effect—in other words there is no substitution.

The Court recalled the interlocutor of the Lord Ordinary, and ranked and preferred the pursuer as judicial factor on the estate of William Thomas Crumpton to the whole fund *in medio*.

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