

Stubbs Limited v. Russell and Stubbs Limited v. Mazure are to be reconciled.

Their Lordships dismissed the appeal, with expenses.

Counsel for the Appellants—Solicitor-General (Morison, K.C.)—Holden. Agents—Balfour & Manson, S.S.C., Edinburgh—M'Kenna & Company, London.

Counsel for the Respondent—E. O. Christie—Inglis. Agents—Manson & Turner Macfarlane, W.S., Edinburgh—Simmons & Simmons, London.

COURT OF SESSION.

Friday, June 27.

FIRST DIVISION.

YULE'S TRUSTEES v. DEANS AND OTHERS.

Succession—Vesting—Vesting subject to Defeasance—Bequests Conditional upon Testator's Son not Recovering his Sanity.

A testator, after narrating that his wife had become blind and his son insane, appointed trustees, and left an annuity to his wife and the remainder of the free income of his estate to his son to maintain him in an asylum, provided that if the son "should . . . recover [his sanity] I desire my whole estate . . . to be made over to him . . . but should my son not so recover, then after the death of both my wife and my son I wish my estate to be disposed of as follows"—Then followed bequests to various legatees, and a bequest of residue and a declaration that the deed was the testator's last will and testament for the disposal of his estate after the decease of himself and of his wife and son. The testator was survived by his wife and son. The widow predeceased the son. The son never recovered sanity, and survived some of the legatees who were to take in that event. *Held*, in a Special Case, that the legatees who had predeceased the son took a vested right to their legacies subject to defeasance in the event of the son's recovering his sanity, and that as that event had never occurred their representatives were entitled to the legacies in question.

Observations per Lord Skerrington and Lord Mackenzie on the application of the doctrine of vesting subject to defeasance.

John Dawson and others, the testamentary trustees of the deceased Robert Yule (the testator), *first parties*, Mrs Elizabeth Mechie or Deans, universal legatee of Margaret Yule, a niece of the testator, with consent, *second party*, James Will and another, as in right of legatees under the testator's trust-disposition and settlement, *third parties*, and the Royal Infirmary of Edinburgh as a

residuary legatee of the testator, *fourth parties*, brought a Special Case for the opinion and judgment of the Court upon questions relating to the vesting of legacies left by the testator.

Robert Yule died on 10th December 1902, leaving a trust-disposition and settlement and codicil. The *trust-disposition and settlement* provided—"I Robert Yule . . . do hereby declare this writing to be my last will and testament for the disposal of my estate after my decease. My wife having unfortunately become blind and my son an inmate and patient in Morningside Asylum since the month of January 1876, I am compelled to request my friends kindly to act as trustees on behalf of my wife and son for the winding-up of my estate. . . . [Then followed a nomination of trustees who were given powers to sell and dispose of the whole estate, both heritable and personal, or to retain and manage it until final winding-up, and to keep the testator's money securely invested, bearing interest for the objects of the trust.] . . . To my wife Mary Anne Low or Yule I bequeath an annuity of fifty pounds sterling (£50) per annum, payable in advance at periods to be agreed on. To my son Robert Low Yule I bequeath the remainder of the free income arising from my estate, to be applied in keeping him as comfortable as possible in the asylum, and if he should in the course of Divine Providence recover the full use of his mental faculties I desire my whole estate of every kind to be made over to him, and the trustees remunerated as aforesaid and discharged of their trust, but should my son not so recover, then after the death of both my wife and my son I wish my estate to be disposed of as follows—[Then followed various bequests, which included]—to my nephew James Muir, residing at 40 Arundel Square, London, N., I bequeath the sum of Two hundred pounds sterling (£200); to my niece Margaret Yule, who has now come to live with us, if she will continue to live with and care for my wife while they may be spared together, I give and bequeath the small dwelling-house belonging to me and situated at 36 Bedford Street, Edinburgh, together with the sum of Two hundred pounds sterling (£200); also to the same Margaret Yule I bequeath the sum of One hundred pounds sterling (£100), to be paid to her at the first term of Whitsunday or Martinmas that happens after my decease without waiting for the final winding-up of the estate, and also a similar sum of One hundred pounds sterling to be paid to her at first Whitsunday or Martinmas as that happens after the death of my wife without waiting for final winding-up of the estate; to Mr Peter Cairns, residing at 4 Livingstone Place, Portobello, I beg to bequeath the sum of One hundred pounds sterling (£100); to Mr James Will senior, residing at 23 Howe Street, Edinburgh, I bequeath the sum of One hundred pounds sterling (£100); to Mr Edwin Wessels Watkins, son of J. L. Watkins, residing at 11 Duncan Avenue, Jersey City, United States, I bequeath the sum of One hundred pounds sterling (£100); to the Edinburgh Royal Infirmary I bequeath two-thirds (§)

of the residue of my estate; to my trustees I bequeath the remaining one-third (b) of the residue after all legal claims and expenses shall have been paid, to be by them distributed among the charitable institutions of Edinburgh, in such manner and amounts to each as they shall judge for the best. This writing I again declare to be my last will and testament for the disposal of my estate after the decease of myself and of my wife and my son, hereby cancelling all previous writings, and reserving to myself power to make alterations or additions to it."

The Special Case set forth—"4. The testator was survived by his widow and his son and by all the said individual legatees. The widow died on 10th August 1904. His son Robert Low Yule died on 28th July 1918 without recovering sanity. Margaret Yule continued to live with and care for the testator's wife until the testator's wife died, and she was paid £100 on the testator's death and also £100 on the death of the widow. She, however, predeceased Robert Low Yule, and died on 19th January 1910, leaving a will conveying all her estate to Mrs Elizabeth Mechie or Deans, wife of the said William Deans [the second parties]. James Will also predeceased Robert Low Yule, having died on 5th March 1918. His executor is James Will, formerly private, F Company, 79th Recruit Distributive Battalion, Dudhope Castle, Dundee, and presently residing at No. 44 Howe Street, Edinburgh. James Muir is also believed to have predeceased Robert Low Yule. On 11th January 1912 he assigned his interest in his said legacy to Michael Zeffert, 177 Maida Vale, London. The said Private James Will and Michael Zeffert are the third parties hereto. . . . Of the other individual legatees Peter Cairns survived Robert Low Yule, but it is not yet known whether Edwin Wessels Watkins did so. 5. No question has been raised or now arises between the parties with regard to the two legacies of £100 each to Margaret Yule, of which payment has been made as aforesaid. The predecease of the said three legatees, however, has raised a question as to the date of vesting of their respective legacies bequeathed under the said holograph will and codicil other than the said two legacies of £100 each."

The second and third parties contended "that the true intention of the testator was to confer a vested right *a morte testatoris* in the said legacies. In any event they maintain that vesting took place in these legacies *a morte testatoris*, subject to divestiture only in the event of Robert Low Yule recovering the full use of his mental faculties. He died without doing so, and [they] are therefore entitled to the sums bequeathed to their respective authors."

The fourth and first parties, so far as interested in the residue, contended "that vesting in the said legacies was postponed until the death of Robert Low Yule, and that in the events which have happened these legacies fall into residue."

The questions of law were—"2. Did the said legacies or any of them vest *a morte testatoris* subject to defeasance in the event

of Robert Low Yule recovering his full mental faculties? or 3. Was the vesting of said legacies, or any of them, postponed to the death of Robert Low Yule?"

Argued for the second parties—All the legacies vested *a morte* subject to a contingency which was not personal to any of the legatees, viz., in the event of the testator's son recovering his sanity. That contingency was not suspensive but was resolute, for the testator's general intention was to give the beneficiaries the fullest possible benefit consistent with his desire for the disposal of his estate on his son's recovery, and there was nothing to indicate a desire to suspend vesting. Thus there was no destination-over such as there would have been in the case of a legacy to A whom failing to B, nor was there a survivorship clause. If there was nothing but the interposition of a life-tenant, a mere residuary clause did not suspend vesting—*Haldane's Trustees v. Murphy*, 1881, 9 R. 269, 19 S.L.R. 217. No doubt the condition was peculiar in that it was not the usual contingency of the birth of children. If the contingency had been the birth of children the legacies would admittedly have vested subject to defeasance. There was no difference in principle between that contingency and the present. Further, vesting subject to defeasance was not limited to the case where the contingency was the birth of children—*Corbel's Trustees v. Elliott's Trustees*, 1906, 8 F. 610, 43 S.L.R. 379; *Coulson's Trustees v. Coulson*, 1911 S.C. 881, 48 S.L.R. 814; *Gilbert's Trustees v. Crerar and Others*, 1877, 5 R. 49, per Lord Justice-Clerk Moncreiff at p. 56, 15 S.L.R. 32, 1878, 5 H. (H.L.) 217, per Lord Gordon at p. 220, 15 S.L.R. 776; *M'Lay v. Borland*, 1876, 3 R. 1124. The present case was covered by *Drou's Trustees v. Peddie*, 1850, 12 D. 825, per Lord Justice-Clerk Hope, and *Beddy v. Courtney*, 1887, 19 L.R. (Ir.) 245. The legacy did not vest in the testator's son subject to defeasance if he died insane, for there was no direct gift to him, and the condition on which he was to take was personal to him and could only be fulfilled in his life—*In re Chappell's Trust*, 1862, 6 L.T.N.S. 643. The nature of a condition as suspensive or resolute depended on the testator's intention—*Cumming's Trustees v. White*, 1893, 20 R. 454, per Lord Young at p. 457, 30 S.L.R. 459. Lord M'Laren's opinion in *Gardner v. Hamblin*, 1900, 2 F. 679, at p. 685, 37 S.L.R. 486, though its terms were guarded, would cover the present case. *Storie's Trustees v. Gray and Others*, 1874, 1 R. 953, per Lord Mure at p. 955, 11 S.L.R. 552, was referred to. The same condition applied to fourth parties' legacy as applied to that of those parties.

Argued for the third parties—Those parties adopted the argument of the second parties. The whole question was one of intention, and the construction maintained by those parties was the natural one. The whole testamentary provisions were subject to the son's recovery, but if he did not recover the distribution was to be as if he had died.

Argued for the fourth parties—Fairly construed the contingency suspended vesting until the death of the testator's wife

and son. The testator did not intend to benefit anyone until then. In the case of the legacy claimed by the second parties there was a further contingency also suspension of vesting. The trustees were to act for the wife and son; the emergence of other beneficiaries was only to take place after the death of the wife and son and there was no direct gift in favour of any legatee. If there was vesting subject to defeasance at all it was in the son. There was no difficulty caused by suspended vesting, for the residuary clause prevented the estate falling into intestacy. The doctrine of vesting subject to defeasance had never been applied in circumstances like the present and it was not to be extended beyond the decided cases—*Bannatyne's Trustees v. Watson's Trustees*, 1914 S.C. 693, per Lord President Strathclyde at p. 700 and Lord Mackenzie at p. 702, 51 S.L.R. 605; *Johnston's Trustees v. Dewar*, 1911 S.C. 722, per Lord Skerrington at p. 724, 48 S.L.R. 582; *Gardner's case (cit.)*. The authority of those cases had not been affected by *Allan's Trustees v. Allan*, 1918 S.C. 164, per Lord President Strathclyde at p. 167 and per Lord Johnstone at p. 168, 55 S.L.R. 212. *Hood's Trustees v. Jack*, 1919, 1 S.L.T. 208, was distinguished on the facts. A destination-over would prevent vesting subject to defeasance, and while a residuary clause was not so strictly adverse to vesting subject to defeasance it might exclude it—*Steel's Trustees v. Steel*, 1888, 16 R. 204, per Lord President Inglis at p. 208, 26 S.L.R. 146; *M'LAY's case* was very special—*Turner v. Gaw*, 1894, 21 R. 563, per Lord Low at p. 564, 31 S.L.R. 147.

LORD SKERRINGTON—The legacies with which we are concerned are given in a form which is favourable to early vesting, because the testator used language of substantive bequest although he postponed the “disposal,” that is, the distribution, of his trust estate until after the death both of his wife and of his son. The real question, however, is whether we ought to read into this will a condition which the testator did not express, viz. that the legatees must survive the term of payment. I suspect that any man of business would answer this question in the negative as soon as he had mastered the contents of a will which is simple and intelligible both in its ideas and also in its expression of them. To us, however, the matter is complicated by the citation of many decisions in regard to the construction of other wills and by the invocation of various canons which are supposed to assist us in reaching the true intention of a testator.

I do not think that I am putting the case unfairly against the residuary legatees, whose interest it is to maintain that the legacies in question have lapsed, when I say that anyone who asserts that a legacy is conditional must either put his finger upon the condition in the will or, if he cannot do so, he must satisfy the Court that there exists some good reason for believing that the testator intended to subject his legatees

to such a condition. If the testator really intended to make these legacies conditional on the legatees respectively surviving both his son and his widow, I should say that his niece Miss Yule had a good ground of complaint. Her legacy was given subject to two conditions, each of which was clearly expressed, viz. (a) that the testator's only son should die without recovering the use of his mental faculties, and (b) that Miss Yule should continue to live with and care for the testator's widow during their joint lives. Both these conditions were duly fulfilled, and yet it is attempted to be made out that there existed a third condition which the testator did not take the trouble to express.

What reasons have been adduced for introducing into this will a condition which is not in any way necessary in order to protect the primary and pre-eminent interests of the testator's widow and son, and which if so introduced would materially detract from the value of these other legacies? The first reason which was suggested was novel and curious. The testator imposed one condition in the case of the legacy to his son; therefore he must be deemed to have imposed an entirely different condition upon the persons whom he desired to favour if his son should fail to recover his mental health and so qualify himself to take his father's whole estate. That seems a *non sequitur*. One is of course familiar with the argument that a condition expressly imposed upon one legatee ought by implication to be imposed upon another legatee—a question discussed by the House of Lords in *Martin v. Holgate*, L.R., 1 E and I. App. 175.

It was further argued that the residuary legatees, i.e., the Royal Infirmary and also charities to be selected by the trustees, were in the same position as if the legacies now in question had been given over to the residuary legatees in the event of the primary legatees failing to survive the date fixed by the testator for payment of their legacies. Most of these legacies are general legacies, but one is a special legacy of a house. It is, I think, a fallacy to suppose that a testator desires to favour his residuary legatees at the expense of his special and general legatees. In other words, a residuary bequest is not equivalent to a gift-over of the general and special legacies, and it does not in the ordinary case suspend the vesting of the general and special legacies until the date of payment.

The condition that a legacy should be paid only if the testator's son should die without recovering his mental health was not in any way personal to the legatee and it could be purified either in his lifetime or after his death. *Prima facie* such a condition is resolute, and I think that it actually was so in this case.

It was argued, however, that vesting subject to defeasance is a principle of an exceptional character and that it ought not to be extended to any set of circumstances to which it has not already been applied. Even if the principle were really exceptional in its nature I fail to see why it should not be

invoked in any case where it could assist to give effect to what the Court holds to be the real wishes of a testator. Suspended vesting and conditional vesting are mere matters of legal machinery, and it is the duty of the Court to utilise either the one or the other as it may consider just. In truth, however, the latter principle is not in any way exceptional in the law of Scotland. It was of old heard of chiefly in its application to heritable destinations; but it was also found to be of general use in the working out of trusts and legacies, as appears from the cases of *Shaw v. Shaw* (1810, 6 S. 1149) and of *Scheniman v. Wilson* (1828, 6 S. 1019)—cases of vesting subject to partial defeasance, against the risk of which the Court required provision to be made by way of caution for repayment. Again, it will be found that where a power has been conferred upon a person to dispose of something which is not his own property, the exercise of that power generally involves the divestiture of a previously vested beneficial right. Many other examples could be cited as showing the deep-rooted and wide-spreading character of the principle.

Accordingly I reject the notion that conditional vesting must not be applied to any case merely because there is no precedent for it. It must not, however, be invoked, however great may be the temptation, in any case where by so doing we should subvert some firmly established rule of construction. For example, in the last paragraph of his opinion in the well-known case of *Snell's Trustees* (4 R. 709), Lord Shand suggests merely *obiter*, that where a direction to pay a legacy to a person at the expiry of a life is followed by a gift over the representatives of the primary legatee would take the legacy if both he and the conditional institute predeceased the term of payment. I doubt whether this suggestion, however excellent in itself, could receive effect without disturbing what is generally supposed to be the effect of a long train of decisions.

Counsel for the fourth party further argued that on the most unfavourable view for his client the testator must be held to have conferred a vested right to the fee of his whole estate upon his son Robert Low Yule, but subject to divestiture if the latter should not recover his health, and that consequently the ulterior legatees with whom we are concerned could not at the same time have a vested right to their respective legacies. This argument would have been a formidable one if the gift to Robert had been differently expressed. As it stands the bequest of his father's whole estate is subject to a condition personal to Robert, which could not be fulfilled except in Robert's life, and which was, I think, clearly suspensive.

I suggest to your Lordships that the second question ought to be answered in the affirmative, but with this explanation that the legacy to Miss Margaret Yule did not vest in her until the death of the testator's wife in the year 1904. That explanation, though necessary for the sake of accuracy, does not affect the result.

LORD MACKENZIE—I am of the same opinion. With reference to what your Lordship has said on the question of vesting subject to defeasance, I do not desire to add to what I have already said in the case of *Allan's Trustees*, 1918 S.C. 164, 55 S.L.R. 212. After referring to the cases, I there came to the conclusion that the doctrine of vesting subject to defeasance was established as a useful working principle in the law of Scotland, and I do not consider that that principle is limited by the cases which illustrate it. In the present case I regard the language used by the testator as indicating an intention to the effect explained, and the working principle of vesting subject to defeasance enables us to give effect to it. The legacy was given subject to an event which might happen as well after as before the legatee's death, and was, therefore, subject to the disposition of the legatee and his disponees on the occurrence of the contingency.

LORD CULLEN—I am of the same opinion. The legacies were given subject to the condition that the son should not recover his sanity. The condition was purified. I am unable to read into the will the further condition that the legatees should survive the son. It is not to be inferred from the payment of the legacies being necessarily postponed until the son died. Nor is it, in my opinion, to be inferred from the provision that, in the event of the condition actually expressed not being purified and of the legacies therefore failing, the amounts bequeathed were, with the rest of the estate, to go to the son.

The LORD PRESIDENT was not present.

The Court answered the second question of law in the affirmative, with the explanation that the legacy to Miss Margaret Yule did not vest in her until the death of Mrs Yule, which occurred on 10th August 1904; and the third question in the negative.

Counsel for the First Parties—Stuart. Agents—D. M. Gibb & Sons, S.S.C.

Counsel for the Second Party—Christie, K.C.—Wark. Agent—James Bee, Solicitor.

Counsel for the Third Parties—Solicitor-General (Morison, K.C.)—W. T. Watson. Agents—J. & D. Smith Clark, W.S.

Counsel for the Fourth Parties—T. G. Robertson. Agent—James A. Hope, W.S.