

giddiness. Her general digestive system is upset, and she has recurring attacks of vomiting. The action of her heart is irregular, and she constantly suffers faintness and breathlessness. Her nervous system has been so injured by said accident that she lives in a state of nervous apprehension and misery. The explanation in answer is denied. (Cond. 8) The pursuer was earning as a bank clerk immediately prior to the accident the sum of £10 a-month. Her employers have not so far withheld any part of her salary since the said accident, but her earning capacity has been reduced meantime, and she is certain to be totally incapacitated for work at intervals during at least the next six months. She was totally unfit for work from 1st July 1921 to 9th July 1921, and she is advised that she must shortly stop work again for fourteen days. She has sustained the expense of convalescence in the country. The pursuer moderately estimates the loss and damage sustained and which will be sustained by her in the future, at the sum sued for. Denied that her estimate is excessive. (Cond. 9) The second-named defenders have a report from a specialist named Dr M'Kendrick on the pursuer's condition, and they are therefore well aware that they have injured her severely. They are called on to produce that report. The said defenders have been called upon to make reparation to the pursuer for her injuries, and they have offered her sundry small sums, starting with an offer of £5 and gradually raising their offer to £25, but even the last-named sum is quite inadequate. Although they admit liability they refuse to pay her reasonable compensation, and the present action is therefore necessary."

In their answers the second named defenders stated—" (Ans. 7 and 8) Admitted that the pursuer, as the result of the said collision, sustained certain injuries. Denied that the said injuries were of the nature and extent and had and will have the results condescended on by the pursuer. The pursuer's salary as a bank clerk was continued to her during her absence from business. (Ans. 9) Admitted that these defenders have a report from Dr M'Kendrick, and that they admit liability. They have tendered and hereby tender to the pursuer the sum of £25 in full of her claim for loss and damage, together with expenses of process. *Quoad ultra* denied."

The Sheriff-Substitute (NEISH) having allowed a proof the pursuer required the cause to be remitted to the Court of Session for jury trial in terms of section 30 of the Sheriff Courts (Scotland) Act 1907.

On 15th October 1921 counsel for the defenders second named opposed a motion for issues and moved the Court to remit the case back to the Sheriff on the ground that where, as here, it was clear from the averments that no reasonable jury could award the pursuer £50 of damages; the case was unsuitable for jury trial—*Greer v. Corporation of Glasgow*, 1915 S.C. 171, 52 S.L.R. 109; *Monaghan v. United Co-operative Baking Society*, 1917 S.C. 12, 54 S.L.R. 211.

LORD PRESIDENT—I think there are averments on this record sufficient to entitle the pursuer to an order for issues with a view to trial by jury in this Court. It may be that the case will turn out to be so trivial as to be unworthy of that procedure; but it would be impossible to treat it as such either in the Single Bills or in the Summar Roll unless the pursuer's averments were obviously irrelevant to make a substantial as opposed to a trivial case. I do not think that can be said of the averments on this record, and the case should therefore proceed in the ordinary way.

LORD MACKENZIE, LORD SKERRINGTON, and LORD CULLEN concurred.

The Court ordered issues.

Counsel for Pursuer—Maclaren. Agent—R. D. C. M'Kechnie, Solicitor.

Counsel for Defenders—J. S. C. Reid. Agents—Cumming & Duff, W.S.

Saturday, October 15.

SECOND DIVISION.

TODD'S TRUSTEES v. TODD'S EXECUTORS AND OTHERS.

Succession—Vesting—Direction to Pay on Death of Liferenter to Sons and Survivors or Survivor of them Equally, Share and Share alike, and to Children of Predeceasing—Period of Vesting in such Children.

A testatrix directed her trustees on the death of the liferenter to pay and divide a sum of money to and among her four sons and the survivors or survivor of them equally, "declaring always that the children of a predeceasing parent shall in every such case take equally amongst them the share which would have fallen to his father had he been in life at the time." *Held* that vesting in the sons was postponed to the death of the liferenter; that the gift to children of predeceasing sons was substitutional and not a separate and independent bequest; and that, accordingly, no right vested in the children of predeceasing sons who predeceased the liferenter.

Martin v. Holgate ((1866) L.R., 1 H.L. 175) distinguished.

Addie's Trustees v. Jackson (1913 S.C. 681, 50 S.L.R. 586) followed.

To determine their respective interests under the will of the deceased Mrs Margaret Hadden or Todd, who died on 8th October 1888, in a sum of £3500 on the expiry of a liferent thereof conferred by her will, a Special Case was presented for the opinion and judgment of the Court by Mrs Todd's trustees, *first parties*; the executors respectively of four sons of Mrs Todd and the children of one of these sons, Hadden

William Todd, *second parties*; the representatives of two children of another of these sons, James Joseph Todd, who survived their parent but predeceased the life-renter, *third parties*; the children of another of these sons, Gavin Thomas Todd, and the surviving seven children of James Joseph Todd, all of whom survived the life-renter, *fourth parties*.

The Case stated, *inter alia* — “By the second trust purpose [of her trust-disposition and settlement the testatrix] provided with regard to a certain sum of £3500 resting-owing to her and her executors as follows, viz.—‘I direct and appoint that my said trustees and executors shall as soon as they receive payment of the said principal sum of three thousand, five hundred pounds sterling, invest the same in their own names as trustees foresaid. . . . And they shall pay or apply for the use of my son Edward Farquhar Todd the whole interest and revenue to be received by them on the said principal sum of three thousand, five hundred pounds sterling, and that from and after the day of my death and during all the days of his life thereafter. And on the death of my said son Edward Farquhar Todd my said trustees and executors shall uplift the said principal sum of three thousand, five hundred pounds sterling, and shall pay and divide the same to and among my four sons Gavin Thomas Todd, James Joseph Todd, Hadden William Todd, and Charles Todd, and the survivors or survivor of them equally, share and share alike: Declaring always that the children of a predeceasing parent shall in every such case take equally amongst them the share which would have fallen to his father had he been in life at the time: But declaring always that in case of my son, the said Edward Farquhar Todd, marrying and leaving a widow or children, neither such widow nor any such children whom he may leave shall have any claim to the said principal sum of three thousand, five hundred pounds sterling, or interest thereon, or to any part of said principal sum or interest’: And further, declaring that if at my death or afterwards during the life of the said Edward Farquhar Todd any plan can be devised for securing to the satisfaction of my said trustees the interest of the said principal sum of three thousand, five hundred pounds sterling, to the said Edward Farquhar Todd during the remainder of his life, then the said principal sum may, upon such arrangement being made, be at once uplifted and divided among my other four sons in manner and in the terms before directed.’ By the third purpose of the said trust-disposition and settlement the testator directed as follows:—‘*Thirdly*, the whole remainder and residue of my said estate and effects, real and personal, I appoint to be paid and made over to the said Gavin Thomas Todd, James Joseph Todd, Hadden William Todd, and Charles Todd, and the survivors or survivor of them equally, share and share alike: Declaring always that the children of a predeceasing parent shall in every case take equally among them the share which would

have fallen to his father had he been in life at the time.’ . . . The said Edward Farquhar Todd died unmarried on 18th June 1920, until which date the testatrix’s trustees paid over to or on behalf of him the whole free revenue arising from the invested capital. The said capital still remains in the hands of the testatrix’s trustees. 4. . . . The four sons mentioned in the above-quoted trust purpose [were]—(1) Gavin Thomas Todd, who died on 15th May 1909 leaving a last will and testament. He was twice married and had five children, two of whom predeceased him, leaving three who survived him. (2) James Joseph Todd, who died on 5th September 1904 leaving a trust-disposition and settlement. He was survived by nine children, whereof seven survived their uncle Edward Farquhar Todd. His remaining two children died before the said Edward Farquhar Todd [leaving wills]. (3) Hadden William Todd, who died on 26th March 1906 leaving a will. He had eight children, all of whom survived both him and the said Edward Farquhar Todd. (4) Charles Todd, who died unmarried on 8th October 1910 leaving a will and codicil, under which the residue of his estate falls to be divided equally among the said children of Hadden William Todd. . . . (6) The second parties contend that upon a sound construction of the testatrix’s said second trust purpose her four sons—Gavin Thomas Todd, James Joseph Todd, Hadden William Todd, and Charles Todd respectively—obtained at the date of her death rights absolutely vested to equal one-fourth shares of the capital thereby disposed of. In the event of this contention not being sustained the executors of the said Charles Todd and the children of Hadden William Todd contend that a right to one-fourth share of the capital vested in Charles Todd at the date of death of the testatrix not subject to defeasance otherwise than by the birth and survival of issue to him, which did not take place. 7. The third parties contend that the condition of survival of Edward Farquhar Todd which attached to the gift in favour of the four sons of the testatrix did not attach to the gift in favour of their respective children, and that accordingly on the death of the said James Joseph Todd one-third share of the capital sum affected by the second trust purpose vested in his children then alive. The third parties therefore maintain that they are entitled to participate in one-third of the said capital sum. 8. The fourth parties contend that upon a sound construction of the testatrix’s said trust purpose, and in the event which occurred of all her four sons—Gavin Thomas Todd, James Joseph Todd, Hadden William Todd, and Charles Todd—predeceasing the said Edward Farquhar Todd, no right or interest in the said capital sum vested in any of the said four sons. They contend further that in the events which occurred a right to three equal shares of the said capital sum vested in each of the families of the three sons who were survived by issue, and that the individual members of the three *stirpes* fall to be ascertained as at the date of

the death of the liferenter, the said Edward Farquhar Todd." [The word "third" in italics was substituted by amendment for the word "fourth" at the discussion in the Second Division.]

The questions of law included the following—
 1. Did the said four sons of the testatrix respectively obtain at the date of her death absolutely vested rights to the capital sum affected by her second trust purpose?
 2. Did the said four sons of the testatrix obtain at the date of her death rights to the capital sum affected by her second trust purpose vested in them respectively, subject only to defeasance in the event of their respectively dying, survived by children, in the lifetime of the said Edward Farquhar Todd?
 3. In the events which have occurred, did no right to the said capital sum vest in any of the said four sons of the testatrix, under the second trust purpose?
 4. In the event of the first question being answered in the negative—Did the children of the testatrix's sons acquire vested rights in the said capital sum on the deaths of their respective fathers? or
 5. Was vesting in the fee of the said capital sum postponed until the death of the said Edward Farquhar Todd?"

Argued for the fourth parties—Vesting was postponed till the death of the liferenter. At the date of distribution, therefore, no vesting had taken place in any of the four sons who had predeceased the liferenter—*Addie's Trustees v. Jackson*, 1913 S.C. 681, 50 S.L.R. 586. Neither did any share vest in those of their children who predeceased the liferenter, because the children were called as in place of their parents and not as original legatees, as was the case in *Martin v. Holgate*, 1866 L.R., 1 H.L. 175—*Banks' Trustees v. Banks' Trustees*, 1907 S.C. 125, 44 S.L.R. 121. In *Campbell's Trustees v. Dick*, 1915 S.C. 100, 52 S.L.R. 78, the children took as original legatees—*per* Lord Cullen at p. 110. Reference was also made to *Cumming's Trustees v. White*, 1893, 20 R. 454, 30 S.L.R. 459.

Argued for the second parties—Postponement of payment did not necessarily mean postponement of vesting. The survivorship clause here was not expressly referred to the death of the liferenter. Power to anticipate was a strong argument against postponement of vesting—*Carleton v. Thomson*, 1867, 5 Macph. (H.L.) 151, and *per* Lord Colonsay at p. 155; *Ross's Trustees*, 1884, 12 R. 378, 22 S.L.R. 232. The only object in postponing payment was to secure the liferenter and not to determine the beneficiaries. The whole deed should be looked at and not merely a particular clause—*Gillespie and Others v. Kennedy*, 1893, 4 S.L.T. 350.

Argued for the third parties—It might be a condition of the gift to the sons that they should survive the liferenter, but the same condition was not to be implied in the gift to issue of the sons. Unless such a condition was expressed it should not be inferred. The two bequests to sons and to the issue of sons in the present case were quite separable, and *Martin v. Holgate*, *cit. sup.*, applied—*Campbell's Trustees v. Dick*, *cit. sup.*

LORD JUSTICE-CLERK—This Special Case raises some questions which are much more important than the amounts involved, but after a full hearing and a citation of the authorities bearing on the case, it seems to me that its decision does not raise any point of great difficulty.

The main question turns entirely, it seems to me, upon the application to be given to the principles which were laid down in *Martin v. Holgate* ((1866) L.R., 1 H.L. 175) in the House of Lords, and in the three cases of *Addie* (1913 S.C. 681), *Campbell* (1915 S.C. 100), and *Banks* (1907 S.C. 125) in the Court of Session, to which we were referred. I think they make it plain that in cases where there is a question as to what is to happen to shares of beneficiaries who have died before the period of distribution has arrived leaving children, the rule now is fixed that if the bequest to the children is (to use the language which was employed particularly by Lord Kinnear in the case of *Addie*) a separate and independent bequest as distinguished from a substitutional bequest, then any condition of survival of the period of distribution attached to the gift to the parents will not necessarily be implied in the gift to the children. This difference is illustrated in the two cases of *Addie* and *Campbell*, where opposite results were arrived at. In the former case the Court were of opinion that as the bequest was a substitutional one *Martin v. Holgate's* case did not apply. In *Campbell's* case, on the other hand, the Court took the view that it was a bequest of the same character as in *Martin v. Holgate*, viz., separate and independent and not in substitution, and that *Martin v. Holgate* did apply.

I cannot read *Campbell* as throwing the slightest doubt upon the soundness of the case of *Addie*—indeed, it would not be likely that it should, having regard to the fact that Lord Mackenzie took part in both decisions. I am quite clear we should not depart from the principles expressed in the case of *Addie*, and applying these principles it seems to me that we are here dealing, not with a separate and independent bequest in favour of the grandchildren, but with a substitutional bequest. The result therefore should be the same as was arrived at in the case of *Addie*, and not the same as was arrived at in the case of *Campbell*. *Bank's* case in 1907 seems to me to support the same view (although it does not bring out the same result). [*His Lordship then dealt with a subsidiary point.*]

I am of opinion that we should answer the questions as Mr Burnet desires, viz., 1 and 2 in the negative, 3 in the affirmative, 4 in the negative, and 5 in the affirmative.

LORD DUNDAS—I agree with your Lordship on all the points. It seems reasonably clear that there was no vesting in the four sons of the testatrix, Gavin, James, Hadden, and Charles, of this capital sum of £3500 prior to the date of the death of the liferenter Edward. But it was seriously pressed upon us that there was vesting in the issue of these sons. The authority for that was said to be *Martin v. Holgate*, (1866) L.R., 1

H.L. 175. Now that case, I need hardly say, is one of very high authority, having been decided in the highest Court in the land by judges of eminence. But the scope of *Martin v. Holgate* has always appeared to me to be a narrow one; and I think that view is illustrated by the fact—I think it is a fact—that *Martin v. Holgate* has only once been applied in this Court, viz., in the case of *Campbell* (1915 S.C. 100), whereas it had been distinguished and not applied in a good many more. The reason I do not think it can here be held to apply is that on a sound construction of the language used I am quite unable to say that there is here any original and independent gift to the issue free from the condition as to survivorship which affected their parents. We must therefore, I think without much doubt, answer questions 3 and 5 in the affirmative.

LORD SALVESEN—I agree with the decision which your Lordships propose to pronounce. I think we cannot draw the inference here which was drawn in the case of *Ross's Trustees* (12 R. 378) that the testatrix intended that vesting should take place in the four sons as at the date of her own death, but that on the contrary she intended that vesting was not to take place until the death of the liferenter, and that notwithstanding the declaration (which never received effect) that if a plan could be devised for securing the liferent, then the principle sum might be uplifted and divided among the four other sons. That clause is different from the one which the Court was considering in the case of *Ross's Trustees* which enabled them to come to the result that they did, for it contemplated the possibility of a plan by which it was left to the discretion of the trustees as to whether they would divide the estate at an earlier period.

LORD ORMDALE—I agree with your Lordship entirely.

The Court answered questions 1 and 2 in the negative, 3 in the affirmative, 4 in the negative, and 5 in the affirmative.

Counsel for the First and Second Parties—Burn Murdoch. Agents—Mackenzie & Kernack, W.S.

Counsel for the Third Parties—A.R. Brown. Agents—W. & J. Cook, W.S.

Counsel for the Fourth Parties—Burnet. Agents—Dalgleish, Dobbie, & Company, S.S.C.

Friday, October 21.

SECOND DIVISION.

SIMSON'S TRUSTEES v. SIMSON.

Succession—Testament—Subject of Gift—Words Importing Gift of Heritage—“All my Monies and Belongings”—Titles to Land Consolidation (Scotland) Act 1888 (31 and 32 Vict. cap. 101), sec. 20.

A testator left several testamentary writings, of which the latest in date was a holograph document executed on the

day before his death, in the following terms:—“I leave and bequeath all my monies and belongings to my dear wife A B . . .” The deceased's estate consisted mainly of urban property. There were no children of the marriage surviving. Held that the holograph writing was habile to convey to the testator's wife his whole estate, both heritable and moveable.

Adam Simson and others, the trustees nominated under a trust-disposition and settlement and codicil of the late Alexander Simson, 9 South George Street, Dundee, *first parties*, and Mrs Janet Gibson Alexander or Simson, wife of the said deceased Alexander Simson, *second party*, brought a Special Case to determine the effect of a holograph testamentary writing executed by the deceased.

The Case stated—“1. The late Alexander Simson (hereinafter called ‘the truster’) died upon the 3rd day of May 1920 survived by his wife, the second party hereto. There were no children of the marriage surviving, the nearest relatives of the truster being his brother the said Adam Simson and the children of his deceased sister Mrs Catherine Simson or Wilson, viz., Mrs Maggie Simson Wilson or Alexander, wife of William Alexander, 88 Hyndland Road, Glasgow; Mrs Blanche Edward Simson or Anderson, wife of George Stoddart Anderson, 24 Hunter Street, Kirkcaldy; Ada Jessie Wilson, 14 West Albert Road, Kirkcaldy; and Kate Rennie Wilson, 14 West Albert Road, Kirkcaldy. The truster left a trust-disposition and settlement dated 23rd April 1900, and codicil dated 22nd March 1915, by which he conveyed to the trustees therein named and for the purposes therein mentioned, the whole estate and effects, heritable and moveable, real and personal, then belonging or which should pertain and belong to him at the time of his decease, and he nominated and appointed his trustees to be his sole executors. The parties of the first part are the trustees nominated by the said trust-disposition and settlement and codicil. The said trust-disposition and settlement was prepared by John D. Bruce, S.S.C., Dundee, and the said codicil was prepared by Johnstone, Simpson, & Thomson, solicitors, Dundee, in whose custody the trust-disposition and settlement and codicil were at the date of the truster's death. . . . 2. The settlement was granted by the truster in trust for the purposes therein mentioned, viz.—(First) For payment of debts, funeral charges, and the expenses of executing the trust; (second) for the use and possession by the second party of his whole household furniture that might be in or about his dwelling-house at the time of his death, and that during all the days of her life, and so long as she should remain unmarried; (third) for payment to the second party of a reasonable sum for mournings; (fourth) for payment to the second party as soon as convenient after his decease of the sum of £150; (fifth) for payment to the second party during all the days of her life so long as she remained unmarried of the net annual income or proceeds of the whole residue of