Tuesday, November 29.

SECOND DIVISION.

MACINDOE AND OTHERS (BOGLE'S TRUSTEES) *v.* COCHRANE AND OTHERS.

Succession — Vesting — Destination-over — Postponement of Vesting.

A truster directed his trustees to set apart the sum of £5000, and "hold and apply, pay, and convey" that sum for behoof of a mother in liferent, and her children in fee, payable equally among them immediately on the decease of their mother in the event of their having then attained the age of twenty-five years, but if not, then as soon afterwards as they did; and provided further, that in the event of any of the children predeceasing the period at which, had they survived, they would have been entitled to the benefit of the said provisions, leaving lawful issue, then that issue should be entitled to the parent's share, and if a child died without issue, then the share should accresce to the survivors of the class to which the predeceaser belonged.

One of the children predeceased the liferentrix, having attained the age of twenty-five years. *Held* that no share of the provision of £5000 vested in him.

Peter Bogle, cotton spinner in Glasgow, who died upon 26th July 1853, left a trust-disposition and deed of settlement dated 13th September 1851, conveying to trustees, whom he also named his executors, his whole estate, and directed them, *inter alia*, as follows—"In the second place, my said trustees shall set apart the sum of £5000 sterling, and invest the same in heritable or other good security, and they shall hold and apply, pay, and convey the said sum to and for behoof of Mrs Elizabeth Bogle or Cochrane, wife of John Cochrane, seedsman in Glasgow, in liferent for her liferent alimentary use and enjoyment allenarly of the free annual income, interest, and profits thereof, and to and for behoof of the children of her present marriage equally among them in fee, which provision of £5000 sterling shall be payable to or divisible among the said children immediately on the decease of their mother in the event of their having then attained the age of twenty-five years. But if not then, as soon after such decease as they shall respectively attain the said age: Declaring that between the period of the said Mrs Elizabeth Cochrane Bogle or Cochrane's decease, and the arrival of the said term of payment, my said trustees may apply the whole or such portion of the income or interest effeiring to the provisions falling to any of the said children as they may deem proper towards the proper upbringing of said child. . . . And I hereby specially provide and declare that in the event of any of the children of the said Mrs Elizabeth Bogle or Cochrane, Elizabeth Bogle, or Janet Murray, or John Bogle, or of any of the other parties substituted to provisions, either special or residuary, by the foregoing settlement, predeceasing the period at which, had they survived, they would have been entitled to the benefit of the said provisions, leaving lawful issue, then and in such event the said issue, and the survivors and survivor of them, shall be entitled to the share which their respective father or mother would have received had he or she survived: But declaring that in the event of any of said children predeceasing the said period without leaving lawful issue, then the share to which on survivance he or she would have been entitled shall fall and accresce to the survivors or survivor of the class to which he or she belongs, and the lawful issue of any of the members of said class who may have predeceased leaving such issue, the said issue being always entitled to their respective parent's share."

The only children born of the marriage between John Cochrane and Mrs Elizabeth Bogle or Cochrane were James Cochrane, Glasgow, Peter Bogle Cochrane, sometime of Christchurch, New Zealand, and John Cochrane, commission agent, Edinburgh. Peter Bogle Cochrane died unmarried and intestate at Prebbleton, New Zealand, on 8th December 1888. He was more than twenty-five years of age at his death. Mrs Cochrane died on 1st March 1892.

Upon 7th June 1888 the late Peter Bogle Cochrane granted a mortgage in favour of Cyril Julian Mountfort and Henry Joseph Campbell Jekyll, of Christchurch, New Zealand, over his share of the sum of £5000 disposed of by Mr Bogle's settlement, and the bonds and dispositions upon which it was secured, for £300, with interest at £12 per cent. per annum. Further, the mortgagor assigned to the mortgagees "All that the one-third part or share, and all other the part or share of him, the said mortgagor, expectant on the decease of the said Elizabeth Bogle or Cochrane, of and in the said sum of £5000, so as aforesaid set apart in and by the said in part recited disposition in trust and deed of settlement of Peter Bogle deceased, and of and in the said several bonds and dispositions in security in or upon which the same sum or any part thereof is or shall or may be placed out or secured, together with all powers and remedies for recovering and obtaining payment and transfer of the said premises, and all the estate, right, title, and interest, claim, and demand whatsoever of him, the said mortgagor, of, in, to, from, or out of the said premises, and every part thereof, subject to the powers of redemption contained in the said mortgage." The mortgage was duly intimated to Mr Bogle's trustees.

Upon the death of Mrs Cochrane, the liferentrix, a competition arose between Peter Bogle Cochrane's assignees and the surviving children of Mrs Cochrane; and this special case was presented for the opinion and judgment of the Court by (1) the late Peter Bogle's trustees; (2) Mrs Cochrane's only surviving children; and (3) Peter Bogle Cochrane's assignees. The

second parties contended that the sum of £5000 did not vest in Mrs Cochrane's children until after her death, and that accordingly nothing had vested in P. B. Cochrane. The third parties maintained that one-third part of the sum of £5000 vested in Peter Cochrane *a morte testatoris*, or alternatively, when he attained the age of twenty-five, even although he predeceased his mother.

The questions of law for the Court were —"(1) Did a third part or share of the fee of the said provision of £5000 vest in Peter Bogle Cochrane, either *a morte testatoris*, or on his attaining twenty-five years of age, so as to transmit to the third parties as his assignees and representatives? Or (2) Did all the interest of the said Peter Bogle Cochrane in the fee of the said £5000 provision lapse through his predeceasing the liferentrix Mrs Cochrane, and is the whole of said £5000 now payable to the second parties equally between them to the entire exclusion of the third parties?"

Cases cited for the second parties — *Fyfe's Trustees* v. *Fyfe*, February 8, 1890, 17 R. 451; *Forbes* v. *M'Condach's Trustees*, December 12, 1890, 18 R. 231; *Marshall* v. *King*, October 30, 1888, 16 R. 40; *Bryson's Trustees* v. *Clark*, November 26, 1880, 8 R. 142; *Hay's Trustees* v. *Hay*, June 19, 1890, 17 R. 961; *M'Alpine, &c.*, March 20, 1883, 10 R. 837.

Authorities cited for the third parties— *Taylor, &c.* v. *Gilbert's Trustees*, July 12, 1878, 5 R. (H.L.) 217; *Muirhead* v. *Muirhead*, May 12, 1890, 17 R. (H.L.) 45; *Carleton* v. *Thomson*, July 30, 1867, 5 Macph. (H.L.) 151.

At advising—

LORD JUSTICE-CLERK—In this special case certain creditors of Peter Bogle Cochrane desire to have it found that a right to a share of a sum of £5000 vested in him through the trust-disposition and settlement of Peter Bogle, and that either *a morte testatoris* or upon Peter Bogle Cochrane attaining the age of twenty-five-years. The clauses of the deed under which this claim is made are as follows—[*His Lordship read the clauses above quoted*].

The facts as regards Peter Bogle Cochrane are, that he survived the testator, and also attained the age of twenty-five, but that he died before his mother, the liferentrix. It is therefore quite certain that any gift or bequest to him did not become payable to him during his lifetime. That is of course not necessarily inconsistent with its having vested in him before the mother's death. But in the deed the testator has specially provided that if any child should predecease the period at which, if the child survived their mother, he or she would have been entitled to "the benefit of the said provision," then the share of such predeceasing child should go to the issue of such child, if any, or failing such issue surviving the period, then to the survivors or survivor of the class," &c. Now, the point of time at which this clause was to take effect was expressed by the deed to be that at which Peter Bogle Cochrane would have been entitled "to the benefit of the said provision." That, it appears to me, means the time at which the actual enjoyment of the provision would commence, namely, the time of payment or division, which time is the date of the mother's decease. It was then—and then only—that according to the deed the members of the class were entitled to "the benefit of the said provisions." In this view it does not matter whether in each individual case the beneficiary took a vested interest on the mother's death, or only on attaining twenty-five years of age, if the latter event only occurred after the former. That question does not arise; for in this case Peter Bogle Cochrane did not survive his mother.

Further, the clause by which the benefit of the bequest to each legatee is conferred upon surviving children of the members of the class, or failing such to the survivors of the class itself, must be held to postpone vesting, unless there be in the deed words which make it plain that the intention of the testator was that there should be vesting on his death, or at some earlier point of time than the period of distribution. I can find nothing in the deed to indicate any such intention. It is true that the trustees are empowered between the period of the widow's death and the date at which any child may attain twenty-five years of age, to apply "the income or interest effeiring to the provisions falling to any of the said children as they may deem proper towards the upbringiug of such child." But such a clause does not in any way imply vesting. A testator may be anxious that part of the income of his estate be applied in the upbringing of a person whom it is his desire to favour as long as that person may be alive, and may yet not desire that if the person does not live past the period when his property is to be finally divided, that person's assignees should carry away a capital sum from the rest of the class he desires to favour. Accordingly, it was held in *Fyfe's Trustees* that a power to trustees not only to expend income, but also to make advances out of capital before the period of division for the advancement in life of members of the class favoured, did not imply that any vesting took place before that period had arrived.

On the whole matter, I am unable to read the complicated provisions of this deed in a sense which would make its elaborate character quite unnecessary. I think the intention of the testator to be quite clear, that the benefit of the provisions which he makes, opens only upon the decease of the liferentrix, and that nothing vested in Peter Bogle Cochrane in respect that he predeceased that event.

LORD YOUNG and LORD RUTHERFURD CLARK concurred.

LORD TRAYNER — The question to be here determined is, whether Peter Bogle Cochrane took a vested right in any part of the sum of £5000 mentioned in the case? and the answer to that question depends upon the construction to be put on certain

clauses in the settlement of the testator Mr Bogle.

Mr Bogle by his settlement directed his trustees to set aside and invest out of the trust-estate a sum of £5000, and to "hold and apply, pay and convey," the said sum for behoof of Mrs Cochrane in liferent, and her children equally in fee. The capital or fee of said sum was directed to be paid or divided among the said children immediately on the decease of their mother, in the event of their having then attained the age of twenty-five years, but if not, then as soon after such decease as they should respectively attain said age. It was further provided that if any of said children predeceased "the period at which, had they survived, they would have been entitled to the benefit of the said provision," leaving lawful issue, such issue and the survivors and survivor of them should take their parent's share, but if any of such children predeceased "the said period" without leaving issue, then the share of such predeceaser should "fall and accresce to the survivors or survivor of the class to which he or she" belonged.

Peter Bogle Cochrane, one of Mrs Cochrane's children, survived the testator, attained the age of twenty-five years, but predeceased his mother, the liferentrix, never having been married. In these circumstances it is maintained by the third parties to the case, who now represent Peter Bogle Cochrane as his assignees, that the right to a share of the said £5000 vested in him either *a morte testatoris* or upon his attaining the age of twenty-five years. It is maintained, on the other hand, by the second parties (the children of Mrs Cochrane who survived her), that nothing vested in Peter Bogle Cochrane, in respect he predeceased the period at which said sum was payable or divisible among the heirs, before which period no vesting took place. I think this latter contention is sound.

It was argued for the second parties that there was nothing more in the testator's settlement than a direction to pay to Peter Bogle Cochrane on the happening of a certain event, namely, the death of the liferentrix, and that having predeceased the occurrence of that event, he took no right under the settlement, according to the decision pronounced in the case of *Bryson's Trustees*, 8 R. 142. I think that a very arguable point, but I do not proceed upon it to any extent in the present case. I assume that the direction of the testator here was equivalent to a direct gift or bequest. But that bequest was certainly not payable until after (1) the death of the liferentrix, and (2) the attainment of twenty-five years of age by Peter. The postponement of the period of payment did not of itself preclude immediate vesting. There was something more, however, here than mere postponement of the period of payment. For the testator provides that if any of Mrs Cochrane's children should predecease the period "at which, had they survived, they would have been entitled to the benefit of the said provisions," then their share should go to their issue, if any, and the survivors or survivor of such issue, or failing such issue, then "to the survivors or survivor of the class" to which the predeceaser belonged. Accordingly there was here, in the event of Peter predeceasing a certain period, a destination-over to his issue, and a survivorship clause. What was that period? It was the period at which, under the directions of the settlement, he would have been entitled "to the benefit of the said provision." The third parties contended that the period so described was the date of the testator's death, because a right then vested, and consequently a benefit—if not the full benefit—of the provision was at once taken by Peter. I do not so read the deed. Apart from other considerations, I think the fair meaning of the words now under consideration is this, the period when the legatee should take the beneficial enjoyment of the provision—in other words, the period when payment or division of the £5000 among the fiars fell to be made. In that view, Peter did not survive the period at which he became entitled to the benefit of the provision made in favour of Mrs Cochrane's children. But that vesting was postponed appears further from the consideration of the clauses which follow in favour of issue and the survivor of such issue, and failing issue, to the survivors of the class. Such clauses of destination-over and survivorship as a rule postpone vesting until the period of distribution arrives, unless there be some clear indication in the terms of the settlement of a different intention on the part of the testator.

I think there is no such indication here. On the contrary, I observe that the interest or income of the £5000 is not payable to the fiars thereof during the interval (if such happened) between the death of the liferentrix and the time when the fiars attained the age of twenty-five, although the trustees were empowered to apply such interest in whole or in part during that interval for the benefit of the fiars. This is a minor point no doubt, but just as in cases of doubt the direction to pay interest or income to the fiar before the date of distribution is a circumstance which makes for immediate vesting, so the direction that such income shall not go to the fiar tends to support the opposite conclusion.

On the whole matter, I am of opinion that the first question should be answered in the negative, and that makes it unnecessary to answer the second question.

The Court answered the first question in the negative, and found it unnecessary to answer the other question.

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