

his Principles, sec. 487, in which he deals with the effect of notice of abandonment, he says:—"But before acceptance, if what appeared a total loss has become not so, as by recapture, recovery, or partial preservation, the policy then is for indemnity only of a partial loss." But in support of this he only cites the English decisions beginning with the case of *Bainbridge v. Neilson*. It may be inferred that Mr Bell regarded the matter as settled by the current of the English decisions, but there is no later Scottish decision to support this view.

The matter was very fully discussed in the recent case of *Shepherd v. Henderson*, 8 R. 518, and 9 R. (H. of L.) 1. But the decision of that question was not essential to the judgment, because the Court of Session held that it was not proved that there was a constructive total loss at the date of the notice.

Lastly, there is no averment or evidence of practice in Scotland.

The point therefore being open we have to decide whether we should follow the law of England or the law of France and America; we are free to take either course. There are weighty considerations on both sides. For those in favour of the date of notice I need only refer to the note of the opinions of the Judges in the case of *Robertson, Forsyth, & Company*, and the opinion of Lord Craighill in *Shepherd v. Henderson*, 8 R. 526-7.

But on the other hand there are counter considerations which, on the whole, I am inclined to think should prevail. We are not bound by the English decisions, but looking to our close commercial relations with England, and the fact that our merchant shipping law is regulated by a code applicable to both countries, it would be unfortunate if a different rule on this point obtained in Scotland from that established in England. There are other considerations pointing in the same direction which I need not mention in detail. On the whole matter I think that in the absence of any authority in our own law to the contrary, there are sufficiently strong reasons of expediency to lead us to adopt that of England.

So much on the general question, but I am further inclined to think that on the terms of the policy the same practical result would be reached.

The policy contains this declaration:—"And it is expressly declared and agreed that the acts of the insurer or insured in recovering, saving, or protecting the property insured shall not be considered a waiver or acceptance of abandonment."

Now, the acts here specified are necessarily acts to be done after notice of abandonment has been given, and this seems to imply that notwithstanding that notice of abandonment has been given the insurers may do what they can before action raised to diminish their liability and reduce the loss without being held to have accepted the abandonment.

Therefore I think we should hold that the third and fourth pleas for the defenders are well founded, and that as this action

is laid upon the footing of the ship having become a constructive total loss, the action has been rightly dismissed by the Lord Ordinary.

The LORD JUSTICE-CLERK concurred.

The Court adhered.

Counsel for the Pursuers and Reclaimers
— Salvesen — Craigie. Agent — James
Russell, S.S.C.

Counsel for the Defender and Respondent
— Sol.-Gen. Dickson, Q.C.—Aitken. Agents
— Webster, Will, & Ritchie, S.S.C.

Tuesday, June 8.

FIRST DIVISION.

MACKAY'S TRUSTEES v. MACKAY'S TRUSTEES.

Succession—Vesting—Fee and Liferent—Gift Qualified by Restrictions—Repugnancy.

A trustor directed his trustees at the close of a general liferent given to his widow, to "divide or convey or pay and make over the whole estate and effects then belonging to me . . . to and among my children . . . equally share and share alike . . . it being provided in regard to the shares of my daughters that my trustees are hereby directed to hold the share of each daughter while unmarried in trust for her behoof in liferent for her liferent use allenary . . . and on the marriage of such daughter it shall be the duty and right of my said trustees" to settle her share in accordance with the directions in the deed.

M, one of the daughters who survived her father and mother, died unmarried. Held that M had a vested interest in the fee of her share of her father's estate.

Per Lord M'Laren—An original gift of a fee on partition of a residue amongst the members of a family will not be cut down to a liferent by the effect of a subsequent direction to pay the income to one or more of the objects of the gift for life, unless the primary gift is so qualified in expression as to show that no higher right is meant to be given than is more fully explained in the sequel.

Mr John Mackay, Edinburgh, died on 19th April 1881, leaving a trust-disposition and codicil dated respectively 16th January 1878 and 18th July 1879. By his trust-disposition Mr Mackay conveyed his whole estate to trustees. By the third purpose of it, he directed his trustees to pay the whole income of his estate (except so far as required to meet a provision in favour of his eldest son, and certain annuities) to his wife Mrs Agnes Christie or Mackay in liferent, for her liferent use only.

By the 9th purpose it was provided as follows:—"Immediately after the death of the longest liver of us, the said John Mackay and Agnes Christie or Mackay (until which event happens no right to any portion of the estate and effects hereby conveyed shall vest in any of my daughters), my said trustees shall proceed to realise, so far as they shall deem necessary, the estates and effects hereby conveyed, and at the first term of Whitsunday or Martinmas, which shall occur three months after the death of the survivor of us, they shall divide or convey or pay and make over the whole estate and effects then belonging to me to and among my children, except the said John Christie Mackay, equally share and share alike, the lawful issue of any of them who may have predeceased taking the parent's share, it being provided, in regard to the shares of my daughters, that my trustees are hereby directed to hold the share of each daughter, while unmarried, in trust for her behoof in liferent, for her liferent use allenerly, the interest or annual produce thereof being payable to them respectively in equal portions at Whitsunday and Martinmas, and on the marriage of such daughter it shall be the duty and right of my said trustees to take care that the share of the daughter so marrying shall be dealt with and provided for so that the same shall belong to and be held for behoof of the daughter so marrying, exclusive of the *jus mariti* and right of administration of her husband, and as an alimentary fund for behoof of herself during her marriage; and also that, in case no child or children be born of her marriage, she shall have power to dispose after her own death of the capital sum invested for her behoof, and also of the interest or annual produce thereof, as she shall see fit, but that only, both as regards the capital and interest, to the extent of the one-half of the share of my estate accruing to her, it being hereby expressly provided and declared that the remaining one-half of such share shall not vest in such daughter or daughters, but shall on her or their death without children fall to and be divided among my other children or their issue, in such proportions as such daughter or daughters may direct by any writing under her or their hands, which failing, such share shall fall into and form part of the residue of my estate, and be divided among my other children (the issue of any of them who may have predeceased taking the parents' share), in the same way as is above provided for in regard to the division of the residue of my estate."

The truster was survived by his widow and by four sons and three daughters. His widow died on 18th December 1885. Of the truster's children, one, Miss Mary Mackay, died unmarried on 14th August 1896, leaving a trust-disposition and deed of settlement by which her whole means and estate, including all estate which at the time of her death she was entitled to test upon, were conveyed to trustees. On the

death of Mrs Mackay, Mr John Mackay's trustees, at the request of the parties interested, continued to hold the trust-estate, and divided the free income thereof among the beneficiaries. Thereafter they from time to time realised portions of the estate, and divided the proceeds among the beneficiaries, but continued to hold the portions in which the daughters were interested, and to pay them the interest.

A Special Case was presented by (1st) Mr Mackay's trustees, and (2nd) Miss Mackay's trustees and executors.

The first parties maintained that no fee of a share in her father's estate had vested in Miss Mackay at the date of her death, and that it was not carried by her will.

The second parties maintained the contrary, and alternatively that on her death the fee of her share lapsed and fell into intestacy.

The questions submitted to the Court were—(1) Had the said Miss Mary Mackay a vested interest in the fee of a share of the said John Mackay's estate, under the ninth purpose of his trust-disposition and settlement? (2) Had the said Miss Mary Mackay a power of disposal by *mortis causa* deed of the said share, or any part thereof?; or (3) Does the fee of the said share, to any, and if so to what extent, fall into and form part of the residue of the truster's estate?; or (4) Does the fee of the said share lapse and fall into intestacy?"

Argued for first parties—The deed contained no words of absolute gift but merely a direction to the trustees to divide. Moreover, the gift such as it was, was displaced by the restriction to a liferent. Accordingly the direction to pay must be read as qualified by the succeeding direction, and as not conferring a vested right on the unmarried daughters—*Muir's Trustees v. Muir's Trustees*, March 19, 1895, 22 R. 553; *Greenlees' Trustees v. Greenlees*, December 4, 1894, 22 R. 136; *Spink's Executors v. Simpson*, February 16, 1894, 21 R. 553; *Campbell v. Campbell*, December 3, 1852, 15 D. 173.

Argued for second parties—The clause began by a clear gift of fee; and that being so, it was clear from the authorities that a child could not be divested of this right by subsequently restricting the gift to a liferent, unless there was another *fiar* inserted. This rule was laid down in *Lindsay's Trustees v. Lindsay*, December 14, 1880, 8 R. 281, and had been constantly followed, the latest example being *Stewart's Trustees v. Stewart*, January 23, 1896, 23 R. 416; *Dalglisch's Trustees v. Bannerman's Executors*, March 6, 1889, 16 R. 559.

At advising—

LORD M'LAREN—This case raises a question which has come to be of considerable importance in the construction of wills, the effect of a gift of a share of residue to a son or daughter followed by an instruction to trustees to hold or retain the share and to pay the income to the beneficiary for life.

The testator John Mackay left his estate for distribution to trustees. Under this

trust-settlement his widow had a general liferent, and after making provision for payment of legacies and the disposal of the business in which he was engaged, in terms which it is unnecessary to consider, the testator provided in the ninth purpose of his trust for the division of the residue amongst his children. The ninth purpose begins by directing that immediately after the death of the testator and his wife ("until which event happens," he says, "no right to any portion of the estate and effects hereby conveyed shall vest in any of my daughters") the trustees should proceed to realise the estate, and at the first term thereafter it is said "they shall divide or convey or pay and make over the whole estate and effects then belonging to me" (with certain exceptions) "to and among my children, except the said John Christie Mackay, equally, share and share alike, the lawful issue of any of them who may have predeceased taking the parent's share." Miss Mary Mackay, whose executors are the second parties to the case, was one of the truster's daughters, and if the trust purpose had stopped here, beyond doubt a share of the residue would have vested in her. But the deed goes on to provide in regard to the shares of daughters that the trustees are to hold the share of each daughter while unmarried, in trust for her liferent use alienably and to pay the interest half-yearly, and that on the marriage of such daughter her share is to be settled. As we are here concerned with the share of a daughter who died unmarried the subsequent provisions have only an indirect bearing on the question, which is, stated shortly, whether the direction to the trustees to hold the share of Miss Mackay while unmarried in trust for her liferent use, and with a power to settle her share on marriage, amounts to a revocation of the gift of the fee contained in the immediately preceding words. Now, a construction which should treat one member of a sentence as annulling the immediately preceding and related member does not recommend itself as probably expressing what was in the testator's mind, and least of all where the subsequent gift is put as a proviso or condition of the first. But the two provisions may quite well stand together if we suppose that the testator, while giving his daughter a share of the capital, was desirous that her share should be held in trust, first, in order the better to secure to her an income for life, and secondly, to enable the trustees to carry out his purpose of settling the money in the event of the daughter's marriage. If this was the testator's intention, then it was not necessary that he should say anything on the subject of the disposal of the fee after the daughter's death, because he had already given her the fee, and by so doing had empowered her to transfer it by will or deed subject to her liferent. And again, it is an argument in favour of vesting under the direction to divide which I have quoted, that unless this direction is held to apply to Miss Mackay's share there is no express disposal of the fee of her share in the event of her dying without issue.

It was suggested in argument that when a fee is given, a direction to trustees to hold the capital in trust and to pay the income only to the legatee is ineffectual. If there had been no direction to settle the shares of daughters in the event of marriage, the observation would be well founded, because then Miss Mackay by bringing an action, or perhaps without an action, might have taken the management of her share into her own hands.

It was also suggested that the original gift or direction to divide the residue was not a substantive gift, but only an announcement of the principle of equal division as between the children. But this construction seems inadmissible when it is considered that the gift of residue was a gift to sons and daughters, and that so far as the sons are concerned it is the only gift in their favour.

In the present case it may be presumed that one reason—perhaps the chief reason—for putting the daughters' shares under trust, was to enable the trustees to fulfil the truster's direction to settle the daughters' shares on marriage. A direction to settle on marriage would of course be effectual as a condition of the gift so long as the daughter's share remained intact in the hands of trustees.

Such a direction is not necessarily inconsistent with the vesting of the fee. Miss Mackay's right was affected by this qualification during her lifetime, because she never married, but the existence of the power to settle on marriage would not, in my judgment, affect Miss Mackay's right of disposing of the fee of her share by a deed or will taking effect after her death.

I may add that there is a considerable body of authority regarding the effect of an original gift with a direction to hold in trust superadded. In the very well-considered cases of *Lindsay* and *Dalglish* the two things were held to be reconcilable. And again, in two recent cases, *Greenlees*, 22 R. 136, and *Stewart*, 23 R. 416, this principle of construction was generalised; and I think it must now be held that an original gift on partition of a residue amongst the members of a family will not be cut down to a liferent by the effect of a subsequent direction to pay the income to one or more of the objects of the gift for life. Of course there may be cases where the primary gift is so qualified in expression as to show that no higher right is meant to be given than is more fully explained in the sequel, and no rule can be laid down which will dispense with the necessity of carefully considering the effect of all the clauses, and provisions bearing on the right conferred. In the present case my opinion is that Miss Mackay had a vested interest in the fee of her share of her father's estate subject only to the effect of the directions to settle her share in the event of her marriage, and that the first question ought to be answered in the affirmative. The second question does not arise, and the third and fourth questions may be answered in the negative.

The LORD PRESIDENT, LORD ADAM, and LORD KINNEAR concurred.

The Court answered the first question in the affirmative and the third and the fourth in the negative, and found that the second did not arise.

Counsel for First Parties—Sol.-Gen. Dickson, Q.C.—Burnet. Agent—James Mackay, W.S.

Counsel for Second Parties—Dean of Faculty Asher, Q.C.—Dundas. Agent—Alexander Morison, S.S.C.

Wednesday, June 9.

FIRST DIVISION.

[Lord Stormonth Darling,
Ordinary.]

BENTON *v.* LIQUIDATORS OF EMPLOYERS' INSURANCE COMPANY OF GREAT BRITAIN, LIMITED.

Insurance—Guarantee Insurance—Insurance of Debenture—Premium—Payment of Premium after Termination of Risk—Insolvency of Debtor before Term of Maturity.

In 1892, by policy of insurance, an Insurance Company guaranteed to the assured payment of the principal sum invested by him with a company on debenture maturing at 1st June 1897, and of interest thereon, "in the event of failure to pay on the part of the debtors." The contract proceeded on the narrative that the assured had paid to the Insurance Company a certain sum as premium for such assurance for one year, and that it had been agreed that that sum should be the future annual premium, and be payable on 1st June in each year. It was a condition of the contract that the policy should be void if the premium were not paid within fourteen days after it became due.

The debtor company went into liquidation in 1893, and in 1894 the assured, with consent of the Insurance Company, accepted, in lieu of his debenture, a debenture maturing in 1904 of a new company, which took over the rights and liabilities of the old one.

The assured paid the stipulated premium down to 1st June 1894, but did not pay the premium due on 1st June 1895. In July 1895 the Insurance Company went into liquidation.

In a question with the liquidator of the Insurance Company, held (*rev. judgment of Lord Stormonth Darling*) that the policy of insurance was void in respect of failure to pay the premium.

In 1892 John Benton, farmer, and Alexander Murray, advocate, Aberdeen, lent the sum of £600 to the Equitable Mortgage Company, Limited, on debenture bearing

interest at 5 per cent. per annum, and repayable on 1st June 1897.

On 16th June 1892 Benton and Murray insured that investment with the Employers' Insurance Company of Great Britain.

The following are the main provisions of the policy of insurance:—After the narrative that there had been paid to the company the sum of £2, 5s., being the agreed premium for such assurance until 1st June 1893, and that it had been agreed that the sum of £2, 5s. should be the future annual premium of such assurance thereafter, and that the same should be payable on the 1st June each year, the policy proceeded—"Now these presents witness that the company, in the event of failure to pay on the part of the debtors, hereby guarantee to the assured payment of the said principal sum of £600 sterling within four months of the date when the same is repayable as above stated, and of said interest thereon, . . . provided notice is given to the company of such failure to pay . . . Provided always that this policy is subject to the conditions indorsed hereon, which are to be taken as part hereof."

These conditions included the following: "1. This policy will be void . . . (b) if the premium is not paid within fourteen days after it becomes due;" (c) if the assured does not give the company notice of default on the debtors' part within a specified time; "(d) If the assured without the consent in writing of the company, consents to any arrangement modifying the rights or remedies of the assured against the debtors or takes proceedings for recovering the principal sum assured or interest thereon. 2. If the debtors delay payment of any principal or interest for thirty days after the same ought to be paid, or if the debtors stop payment, have a receiving-order made against them, become bankrupt, or are by the company known or believed to be in an unsound position, or if the company is called upon to pay any money under this policy, the assured shall, at the request and cost of the company, give to the company all such information as the assured may possess and the company may require as to the issue of the debentures hereby assured and the circumstances under which the assured took the same and the securities and rights available to the assured, and shall also at the like request and cost and upon payment by the company of the principal remaining due upon the debentures and interest at the rate within specified to date of payment, execute all such deeds and writings in favour of the company or its nominees, and do all such things as may be required by the company for vesting in them or their nominees all rights of the assured against the debtors and any property or person whatsoever, and the company may enforce any such rights or remedies in the name of the assured, but at the cost of the company. . . . 3. This policy shall continue from year to year so long as the assured shall pay the premiums hereunder on the days appointed for payment thereof, or before the expiration of