YOUNG, ET. AL., ... APPELLANTS.
ROBERTSON, ET. AL., ... RESPONDENTS.

1862.
Feb. 11*th*, 13*th*, 14*th*.

FIRST APPEAL.

Vesting of Shares — Whether at Testator's Death or at Distribution. — The point for decision was, whether under a testamentary trust disposition, certain shares vested *a morte testatoris*, or at the time of distribution?

The Court of Session had held, (altering the judgment of the Lord Ordinary, but in accordance with the opinions of the majority of all the Scotch Judges,) that the shares in question had vested *a morte testatoris*. The House, however, (reversing this decision,) held that the vesting did not take place till the death of the testator's widow,—the life-rentrix,—in other words, not till the period of distribution.

Duty of a Court of Construction.—Per the Lord Chancellor: The primary duty of a Court of Construction, in the interpretation of wills, is to give to each word employed, if it can with propriety receive it, the natural ordinary meaning which it has in the vocabulary of ordinary life, and not to give to words employed in that vocabulary an artificial, secondary, and technical meaning; p. 325.

BY trust disposition and codicil, dated respectively 30th March 1841, and 22nd March 1843, James Donaldson, merchant in Glasgow, gave to his wife, in case she should survive him, the life-rent of his estate, and he gave the fee of the residue thereof to his six grand nephews and grand nieces, namely, John Macdougall, William Macdougall, Mrs. Thomson, Mrs. Richardson, Mrs. Cuthbertson, and Thomas Young, equally, and to their respective heirs or assignees, declaring, that if any of them should die without

leaving lawful issue before his or her share vested, the same should be divided equally among the survivors (*a*).

The testator died on the 15th March 1844, survived by his widow, and by the six residuary legatees aforesaid.

The widow enjoyed the life-interest provided for her till her death, which event took place on the 3rd December 1857. She was survived by three of the residuary legatees, namely, John Macdougall, Mrs. Thomson, and Mrs. Richardson, the other three,

(*a*) The exact words of the settlement were these:—"I will and direct the said trustees or trustee to account for, pay, and divide, or convey the whole residue and remainder of my property, subjects, means, and estate, heritable and moveable, real and personal, or proceeds thereof, after the death of the last liver of me and my said wife, equally to and among John Macdougall, lieutenant in the Honourable East India Company's service at Madras, William Macdougall, indigo planter at or near Calcutta, sons of my late niece Mrs. Katharine Donaldson or Macdougall, Young or Thomson, wife of Dr. Thomson, physician in Perth, Young or Richardson, wife of Dr. Richardson, physician or surgeon in the Honourable East India Company's service in Bengal, and Eliza Young, lately residing in Perth, now wife of Allan Cuthbertson, accountant in Glasgow, all children of the late Mrs. Elizabeth Donaldson or Young, equally, or share and share alike, and to their respective heirs or assignees; declaring that if any of said residuary legatees shall die without leaving lawful issue before his or her share vest in the party or parties so deceasing, the same shall belong to, and be divided equally, or share and share alike, among the survivors of my said grand nephews and grand nieces equally."

The exact words of the codicil were these:—"I do hereby name and appoint my grand-nephew, Thomas Young, officer in the Bengal Native Infantry, to be one of my residuary legatees, and as such entitled to an equal and eventual share, with any other of the residuary legatees within named, of the whole free residue or remainder of my property, means, and estate, or proceeds thereof, which share I hereby leave and bequeath to him and his heirs and assignees, as within provided, and authorize, instruct, and appoint my said trustees and executors to account to him and his foresaids accordingly."

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namely, William Macdougall, Mrs. Cuthbertson, and Thomas Young, having predeceased the widow, the life-rentrix.

William Macdougall died on the 2nd September 1847, and Mrs. Cuthbertson on the 24th November 1845, both without issue.

Thomas Young died on the 22nd March 1852, leaving a child, namely, John Lawford Young, one of the above Appellants.

In an action of multiplepoinding (*a*), brought before the Court of Session, John Lawford Young claimed one-sixth of the residue, namely, the sum which would have been payable to his father, had his father survived the life-rentrix. John Lawford Young also claimed one-fifth of William Macdougall's share of the residue (*b*).

The *Lord Ordinary* (*c*), on the 15th February 1859, found that the residue of the testator's estate, given to his six grand nephews and grand nieces aforesaid, did not vest in them till the death of the life-rentrix, the widow of the testator. His Lordship further found that the shares of Thomas Young and William Macdougall respectively did not vest in them at all, they having predeceased the life-rentrix. He found that the share of Thomas Young belonged to John Lawford Young as conditional institute. He found that the share of William Macdougall devolved on such of the grand nephews and grand nieces as had survived the life-rentrix, "equally amongst them;" but that no right therein passed to the children of any of them who had predeceased the life-rentrix.

(*a*) Interpleader.

(*b*) Mrs. Cuthbertson's share formed no part of the fund *in medio*. See 22 Sec. Ser. 1535.

(*c*) Lord Kinloch.

To this Interlocutor the *Lord Ordinary* appended a note, which was mainly as follows :—

The leading question is, Whether the right to the residue vested *a morte testatoris* or not till the death of the life-rentrix. The opinion of the Lord Ordinary is in favour of the latter alternative. The right of the residuary legatees is constituted by a direction to pay or convey at the death of the life-rentrix, and not otherwise. The Lord Ordinary thinks the words point to something happening after the death of the testator, and before the death of the widow. If this view be sound, the shares of Thomas Young and William Macdougall did not vest in them. Thomas Young left an only child. The Lord Ordinary is clear that he succeeds in his father's place. William Macdougall left no issue. The result is to give his share to the grand nephews and grand nieces who survived the time of vesting.

Upon reclaiming notes, the Second Division determined to take the opinion of the other Judges upon the question whether the Interlocutor of the *Lord Ordinary* should be adhered to or not.

The consulted Judges, namely, the *Lord President*, Lord *Curriehill*, Lord *Neaves*, Lord *Ardmillan*, Lord *Mackenzie*, Lord *Jerviswoode*, Lord *Ivory*, and Lord *Deas*, were all of opinion that the right of the residuary legatees had vested *a morte testatoris*; they therefore advised that the *Lord Ordinary's* Interlocutor, "to that extent at least," should be altered.

The *Lord Ordinary* himself (a consulted Judge) adhered to his own Interlocutor.

In the Second Division, on pronouncing the judgment appealed from (20 July 1860), the *Lord Justice-Clerk* and Lord *Cowan* agreed with the *Lord Ordinary*, while Lord *Wood* and Lord *Benholme* concurred with the majority of the consulted Judges. In these circumstances the ultimate decision was a reversal of the *Lord Ordinary's* Interlocutor to the extent of holding that the vesting in question was *a morte testatoris*.

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In support of the present Appeal, Mr. *Rolt*, Mr. *Anderson*, Mr. *Mure*, and Mr. *Cotton* contended that where a fund is given to a class and to the survivors, the vesting takes place at the period of distribution. This is the rule in England, as appears by many decisions. *Cripps* v. *Woolcott* (*a*), *Wordsworth* v. *Wood* (*b*). The authorities are collected by Mr. Jarman (*c*). The like principle is recognized in Scotland, and was so even before it was settled in England. Bell's Principles, Sect. 1878. *Casamajor* v. *Pearson* (*d*), *Clelland* v. *Gray* (*e*), *Newton* v. *Thomson* (*f*). This being the rule, there is nothing in the present settlement to exclude it.

The *Solicitor-General* (*g*) and Sir *Hugh Cairns* for the Respondents.

The following are the opinions which were delivered by the Law Peers:—

Lord Chancellor's opinion.

The LORD CHANCELLOR (*h*):

My Lords, this case has been argued at your Lordships' bar in a very elaborate and able manner, and the great attention and time which have been given to it, although they appear somewhat large when compared with the difficulty of the question, are no more than what is due to the care with which the case was discussed in the Court below, and the difference of opinion that was there entertained.

My Lords, it is desirable to consider in the first place what are the reasonable and established rules of construction. In speaking of the established rules of construction, I refer to the jurisprudence of both

(*a*) 4 Maddox, 11. (*b*) 1 H. of L. Ca. 129.
(*c*) 3rd Edition of the Treat. on Wills, ii. 684.
(*d*) 1 Macl. & Rob. 685. (*e*) 1 Sec. Ser. 1031.
(*f*) 11 Sec. Ser. 452. (*g*) Sir Roundell Palmer.
(*h*) Lord Westbury.

England and Scotland, for although we are here to construe this settlement entirely with reference to Scotch rules, yet it is satisfactory when in the legal construction of ordinary words in the English language there is no difference in the view which is taken in the one country and in the other.

I apprehend it to be a settled rule of construction, that words of survivorship occurring in a settlement (that is, in a will,) should be referred to the period appointed by that settlement for the payment or distribution of the subject-matter of the gift. That undoubtedly is the rule now finally established in this country, and it has been ascertained from the authorities which have been cited at the bar that the rule was established in Scotland even before it was finally recognized in this country.

The application of that rule would lead to this determination in two cases. If a testator gives a sum of money or the residue of his estate to be paid or distributed among a number of persons, and refers to the contingency of any one or more of them dying, and then gives the estate or the money to the survivor, in that simple form of gift which is to take effect immediately on the death of the testator, the period of distribution is the period of death, and accordingly the contingency of death is to be referred to the interval of time between the date of the will and the death of the testator. In such a case, the words are construed to provide for the event of the death of any one of the legatees during the lifetime of the testator.

By parity of reasoning, if a testator gives a life estate in a sum of money or in the residue of his estate, and at the expiration of that life estate directs the money to be paid, or the residue to be divided among a number of objects, and then refers to

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the possibility of some one or more of those persons dying, without specifying the time, and directs in that event the payment or distribution to be made among the survivors, it is understood by the law that he means the contingency to extend over the whole period of time that must elapse before the payment or distribution takes place. The result therefore is, that in such a gift the survivors are to be ascertained in like manner by a reference to the period of distribution, namely, the expiration of the life estate.

These are, as I have already observed, in my judgment natural and reasonable rules of interpretation. Let us now consider whether there are any particular words to be found in the settlement before us which compel us to adopt a different mode of construction.

The testator or truster in this settlement has directed the residue of his estate to be applied, in the first place, for the benefit of his widow during her lifetime, provided that she survived himself, but if the wife predeceased him or survived him and afterwards died, he directs, in the first place, certain legacies to be paid, and then he directs his trustees "to account for, pay, and divide, or convey" "the whole residue and remainder of my property," "after the death of the last liver of me and my said wife, equally" among certain persons who are named, "equally, or share and share alike, and to their respective heirs or assignees." Then follow the words of the clause of survivorship, "declaring that if any of said residuary legatees shall die without leaving lawful issue before his or her share vest in the party or parties so deceasing, the same shall belong to and be divided equally, or share and share alike, among the survivors of my said grand nephews and grand nieces equally."

My Lords, I apprehend that on the first consideration of the words that I have read no one could arrive at any other conclusion than this, that the words "before his or her share vest in the party or parties so deceasing" are no more than an expression *in extenso* of that which is involved in the word "survivors."

But here legal ingenuity comes in, and detects in some of the words employed a more recondite sense and a different meaning from that which would at first strike the mind, particularly when imbued with a knowledge of the general rule of interpretation. Legal ingenuity suggests that the word "vest" admits of a double meaning, or rather that the word "vest" is a word of art, and therefore ought here to receive a technical, artificial, and legal meaning. And the interpretation accordingly which is contended for is this, that these words "before his or her share vest" must be taken to mean the conclusion of law with regard to the right of the individuals named, and that if that conclusion of law takes place immediately on the death of the trustor, and by virtue thereof the right to the shares is then determined, it must follow that no subsequent decease without issue after that legal conclusion has taken effect can have the effect of carrying over the share of any one of the parties named to the survivors living at a subsequent time. In reality, therefore, the discussion is reduced to a very short and narrow point or question, namely, the meaning of the word "vest."

Say the Respondents, the word "vest" must be taken to mean "become absolute." Well, let us adopt that construction, and substituting those words for the word "vest," the words then will be "before his or her share becomes absolute." That is a form of expression which grammatically and strictly conveys

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no meaning, unless you take the word "share" in a different sense from that which obviously and naturally belongs to it. If you take the word "share" in that sense which logicians call the abstract, in opposition to the concrete, the word "share" is made to signify not the thing taken but the right to the thing to be taken, and the words will run thus: "before the right to his or her share becomes absolute." And the whole of the argument that we have heard from the Respondents resolves itself in reality into this, that you are to depart from the meaning that you would give to the rest of the sentence, by adopting the legal, technical, and artificial sense of these words, instead of giving them their natural and ordinary meaning. The Respondents, in fact, require us to substitute other words for those which really occur, and make the language speak as if it had originally been "before the right to his or her share becomes absolute in the party or parties so deceasing." The whole of this contention is the result of legal refinement applied to the interpretation of plain and simple language.

The Appellants, on the other hand, say that these words "before his or her share vests" are referential words,—that they describe something that he who used them considered to have been previously directed, and to be ascertainable from the antecedent part of his bequest or directions. They accordingly contend that the words "before his or her share comes into possession" are to be read thus: "before his or her share is received or comes to the hands of the party or parties so deceasing."

The first inquiry as to these two interpretations is which of them consists best with the antecedent part of this settlement, to which of necessity there is a reference here? The antecedent part of this settlement

is that which constitutes the gift, and the gift consists in a direction on the death of the life-rentrix to pay and divide or convey the property to those residuary legatees, and I cannot but think that any man of plain understanding would have no difficulty whatever in arriving at the conclusion that the words "before his or her share vests" mean before that which has been previously directed happens. That which has been previously directed has been payment on the death of the widow. The natural meaning of the words therefore is, before that period of payment arrives, or before that payment has actually been made. This, my Lords, I apprehend to be the natural, plain, and ordinary meaning of the words. And your Lordships will observe that the word "share" is there taken according to its natural sense, namely, a portion of the residue. The word "vested" is taken in accordance also with its natural meaning in the vocabulary of ordinary life, namely, when a thing is received or comes into possession (*a*).

I consider that these particular words introduced into the clause do not give to it any different meaning from that which it would have had in legal interpretation without those words, for if the clause had run —"If any of the residuary legatees shall die without leaving lawful issue, the same shall belong to the 'survivors,' the word "survivors" would have been referred to the period of distribution or payment—that is, the expiration of the previous life-rent.

(*a*) During the argument the Lord Chancellor asked, "What is *share?* Must it not be in possession? Is it not from *shear*, to cut off, or divide? So *vest*,—does it not import, metaphorically, the putting on of a garment? Can this well be before the *cutting off* or *shearing* has taken place?" Spelman says, under the word vestitio:—Est autem vestire, plenam possessionem terræ, vel prædii, tradere; saisinam dare, infeodare. Unde *devestire* est possessione aliquem exuere; de feodo ejicere. Revestire est ejectum restituere. *Vestitura*, ipsa possessio, et possessionis traditio, &c.

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These particular words ought also to be construed in a manner consistent with the rest of the sentence. Whereas if you give them the interpretation for which the Respondents contend, you strip the word "survivor" of that meaning which it would have had without those words, and the expression "if any of the said residuary legatees shall die," (which is general and has no time annexed to it,) is limited to the event of their dying during the lifetime of the testator.

I think this conclusion is still further confirmed by the general intention which is to be collected from the whole collocation and arrangement of the sentence.

The natural order of things indicated is this:—At the death of the life-rentrix the duty of the trustees in the matter of division arises. They are then to convene and call together the persons who are to be entitled to share. But the words in question, namely, the clause beginning with the word "declaring," are part of the words descriptive of the objects to take; and the trustees therefore are called upon, at the time of distribution, to ascertain what those words mean and to give effect to them. But as they are words of futurity, the contingency that is contained in those words is, a contingency that must be held to cover the whole period of time that will elapse before the time when the trustees are called upon to determine who are entitled under these words. They are to ascertain the objects at the death of the life-rentrix, and they are then to give a meaning to these particular words.

My Lords, that being the conclusion which is suggested by the ordinary meaning of the words, and which you arrive at without substituting the secondary and artificial meaning for their primary and

natural meaning, which I hold in all cases it is the duty of a court of construction not to do,—for the primary duty of a court of construction, in the interpretation of wills, is to give to each word employed, if it can with propriety receive it, the natural ordinary meaning which it has in the vocabulary of ordinary life, and not to give to words employed in the vocabulary of ordinary life an artificial, secondary, and technical meaning,—if, I say, that is the conclusion which is arrived at upon these two modes of viewing the settlement, I will detain your Lordships for a few minutes by an examination of the reasons or grounds of decision which are to be found in the opinions of the majority of the Judges in the Court below.

My Lords, calling your attention first to the opinion which is given in the Appendix, and signed by six of the Judges in the Court below (*a*), your Lordships will find that the principal argument put forward by the learned Judges for the opposite conclusion to that which I have suggested is founded upon the use of the words "their respective heirs or assignees."

I have very great difficulty in dealing with this particular reason, and I am happy to find that the difficulty which I had myself experienced has been candidly confessed by the *Lord Justice-Clerk* (*b*), who, in commenting upon this portion of the reported judgment, says, that he was perfectly puzzled how to understand it or what meaning it was intended to convey.

My Lords, I apprehend, however, that no conclusion to the contrary can be derived from the use of these words "their respective heirs or assignees," which are found in connexion with the first part of the gift to

(*a*) See 22 Sec. Ser. Court of Session Cases, 1535.
(*b*) 22 Sec. Ser. 1543.

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the residuary legatees. I do not quite arrive at the conclusion of one of the Judges in the Court below that those words are mere surplusage (*a*). I think it has been shown in the argument that events might have occurred in which each of these words would have received an appropriate signification. If, for example, all the residuary legatees had died without leaving issue in the lifetime of the testator himself, the practical result then of those words would have been to prevent the lapse of the legacies. That might have been the effect of the word "heirs." If, on the contrary, the other interpretation, namely, the interpretation which I have suggested to your Lordships, be adopted, then under the words "heirs or assignees" the assignees would take in the event of any one of the residuary legatees having made an assignment during the life of the life-rentrix. If the residuary legatee became entitled, the assignee would have become entitled to share at the expiration of the life estate, that is, at the period of distribution. These words, therefore, do not in the smallest degree interfere with the construction which I have recommended your Lordships to put upon the words of the conditional institution "before his or her share vests." And on the other hand it cannot be objected to that construction that it reduces those particular words to a mere surplusage, for it leaves the words as words which might have operation in certain events which might have occurred.

Passing from that reason of decision, I come in the next place to that which is given by the two next consulted judges, namely, Lord *Ivory* and Lord *Deas* (*b*), whose interpretation, which certainly leads to a result different from that which I have recom-

(*a*) Lord Kinloch. 22 Sec. Ser. 1538.
(*b*) 22 Sec. Ser. 1536.

mended your Lordships to adopt, is founded altogether upon the language of the codicil by which a grand nephew, Thomas Young, was added to the number of the residuary legatees. I am unable to appreciate the force of the argument derived from that codicil; for it seems that it was the meaning and intent of that codicil to put Thomas Young in precisely the same condition in which the other residuary legatees were originally put by the settlement. Thomas Young is, as it were, grafted into the original settlement, as if he had been one of the original residuary legatees. What possible effect it could have had upon the construction of the settlement, if there had been six residuary legatees originally named therein (that is including Thomas Young), instead of there being a smaller number named therein, it is very difficult to understand.

The last of the opinions of the learned Judges who entertained a different opinion from that at which I have arrived, and which opinion I have felt it my duty out of respect to them carefully to consider, is that of Lord *Benholme* (*a*). But Lord *Benholme's* opinion is founded upon grounds which utterly reject out of the settlement the whole clause which gives the conditional institution, for Lord *Benholme's* opinion is founded altogether upon this description of reasoning. He first applies himself to the consideration of the gift of pecuniary legacies. He holds that the pecuniary legacies vested immediately on the death of the testator, and that their payment only is postponed. And then his Lordship's judgment is founded upon this question, which he asks, namely, "If this be so, shall the vesting of the residue be held to be delayed merely because the period of payment in regard to it also is postponed till the lapse of the life-

(*a*) 22 Sec. Ser. 1546.

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rent?" My Lords, there is no clause of survivorship given with regard to these legacies, but there is a clause of survivorship with regard to the residue. Therefore to treat the settlement in the manner in which Lord *Benholme* deals with it is in point of fact to exclude altogether the consideration of the clause upon which the whole argument depends.

My Lords, I will direct your attention in conclusion to the very just and appropriate expressions which are found in the judgment of the *Lord Justice-Clerk*, in whose opinion upon the effect of this settlement I must express my general concurrence. The *Lord Justice-Clerk* (*a*) very convincingly makes this remark with regard to the construction of the clause of survivorship. He says, "The testator did not mean the time which by a process of legal argument and ingenious construction might be discovered to be the term of vesting, he meant some specific time fixed in his own mind and known to himself; and when he thus speaks of the time of vesting as a specific time fixed by the operation of the deed, and when we can find mention in the deed of no term but one, it seems reasonable to conclude that that was the term to which the testator referred when he spoke of the time of vesting." He referred to a fact, and not to a conclusion of law; he referred to an operation which he had directed, not to a period of time that might be arrived at by legal argument on the effect in law with regard to the absoluteness or the contingency of the interest which he had given.

Upon the whole, therefore, I shall advise your Lordships to declare that, according to the true construction of the trust deed of Mr. Donaldson, no one of the residuary legatees, dying in the lifetime of the

(*a*) 22 Sec. Ser. 1541.

life-rentrix without leaving lawful issue, takes any part or share in the residuary estate. I think it would be impossible upon this occasion to define the whole of the order that ought to be made by your Lordships, for the two Appeals are so mingled together that it would be desirable that there should be one order in both Appeals. But so far as this particular Appeal is concerned, I should humbly advise your Lordships, to adopt that declaration, and to make an order to reverse so much of the Interlocutor complained of upon this Appeal as shall be found to be inconsistent with that declaration.

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Lord CRANWORTH :

Lord Cranworth's opinion.

My Lords, in the argument of this case below in the Court of Session so very much of learned acumen was displayed, and that argument took so long a time, that probably in ordinary cases your Lordships would have thought it more respectful, at least in appearance, to the Judges below that we should have taken a longer time to consider our judgment, concurring as we do with the minority and not with the majority of those learned Judges. That would have been the ordinary course that we should have pursued, but my noble and learned friend on the woolsack, and my noble and learned friend on my left (*a*), and myself having found on conferring together that we all concurred in the same view of this case, we thought that, considering the length of time which had been occupied in the argument, and the opportunity which the intermediate day occurring in the midst of the argument had given us of considering its bearings, as it would be much more convenient to the parties that we should proceed now, we thought that the learned

(*a*) Lord Chelmsford.

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Judges of the Court of Session would not feel that we were guilty of any disrespect towards them in immediately delivering our judgment.

My Lords, after the very elaborate manner in which my noble and learned friend the *Lord Chancellor* has gone through this case, I do not think it necessary for me to detain your Lordships with many observations. I take it that the rule is well established upon the authorities as well as upon principle, both in Scotland and in England, that where there is a clause of survivorship *primâ facie*, survivorship means the time at which the property to be divided comes into enjoyment, that is to say, if there be no previous life estate, at the death of the testator; if there be a previous life estate, then at the termination of that life estate. If, therefore, the language of this settlement had been simply "declaring that if any of the said residuary legatees shall die without leaving lawful issue, the same shall belong to and be divided equally, or share and share alike, among the survivors of my said grand nephews and grand nieces," if, I say, the clause had stood so, there would have been no doubt that "the survivors" meant the survivors at the death of the tenant for life, and the single question, although this case has occupied (and I will not say improperly occupied) a very long time in discussion, is whether that *primâ facie* construction is varied by the insertion of the words "before his or her share vest in the party or parties so deceasing."

Now that being the question, it is contended on the part of the Respondents that these words do materially alter the general rule by pointing out another period to which "survivorship" shall refer, namely, the vesting of the legacy.

My Lords, the first observation that occurs is this, that the word "vest" is a word at least of ambiguous

import. *Primâ facie*, vesting in possession is the more natural meaning. The expressions "investiture," "clothing," and whatever else be the explanation as to the origin of the word, points *primâ facie* rather to the enjoyment than to the obtaining of a right. But I am willing to accede to the argument that was pressed at the bar, that by long usage "vesting" is ordinarily put in competition to the not having obtained anything like an absolute and indefeasible right, the having obtained an absolute indefeasible right as contradistinguished from the not having so obtained it. But it cannot be disputed that the word "vesting" may mean, and often does mean, that which is its primary etymological signification, namely, vesting in possession. In my opinion that is its meaning here, "before his or her share vest in the party or parties so deceasing." In the first place, my Lords, if you do not so construe it, you must understand the testator (I call him the testator, he is rather the trustor) to have made a most extraordinary circumlocution to express such a very simple idea as before the time of my own death, by saying "before the time when his or her share vest in the party or parties so deceasing." It is scarcely possible to suppose that a person making a will or a trust deed in the nature of a will, and meaning to refer to events that might or might not have occurred before his own death, should have expressed it by such an extraordinary circumlocution as that.

Then, my Lords, is there anything on the face of the instrument to show that "vest" does not in this case mean that which I admit in the view which I take of the case would be its ordinary meaning? I think there is. What is it that the trustor is here speaking of as vesting? Why the share of the residuary legatee; that is in point of fact the legacy. Now,

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although it is quite true, as was urged at the bar, that in making a will in this country or a trust deed in Scotland, you may speak of a share or a legacy, although it is something which does not become, strictly speaking, a share or a legacy till the death of the testator, that is, you may say I give a legacy of a thousand pounds to A, but if a certain event happens, B shall take A's legacy, which only means that B shall take that which, if there had not been a subsequent disposition, A would have taken; yet, when I am speaking in a will or a trust deed of a share that might or might not vest, I cannot be speaking of something which can only come into existence at my own death. There can be no possibility of its vesting in the lifetime of the testator; therefore it is clear to me that the testator, in speaking here of the share "vesting," must have alluded to something which had existence at the time to which this reference was to apply, and that it must therefore be something that was to happen after his decease. Therefore "his or her share" would be an inaccurate expression. What ought to have been said would have been "his or her right to the share."

That, however, my Lords, would have been a refinement which I should not have felt it safe to rely upon if the rest of the context had not led me exactly to the same conclusion. Now, here there is no doubt from these words that the survivorship would have been survivorship at the death of the tenant for life. But why? Because the law presumes that that is the intention of the testator. Now would it not be an extraordinary construction to put upon these words, if the word "vest" may be consistent with that which the law assumes to be the ordinary intention of the testator, that you are to put upon it a refined and technical meaning, when, if you give to it its more

ordinary and national and more etymological meaning, you give it a meaning which, according to your own rule of construction, is the probable intention of the testator.

Lord Cranworth's opinion.

My Lords, upon these short grounds I entirely concur in the judgment which has been given by my noble and learned friend, and in the view which he has taken as to the form of order which it will be proper to make.

Lord Chelmsford's opinion.

Lord CHELMSFORD:

My Lords, my mind has fluctuated a good deal under the influence of the very able arguments which have been addressed to your Lordships, but it has at last settled in the conclusion at which my noble and learned friends have arrived. They have gone so very fully (particularly my noble and learned friend on the woolsack) into the whole question, that it will be unnecessary for me to trespass for any length of time upon your Lordships' attention in explaining the view at which I have ultimately arrived.

My Lords, the question depends upon a single clause in the deed of settlement, or, it may be said, upon a few words in that clause. It is a question purely of intention, and we have to gather from the language used whether the meaning of the testator (I shall call him the testator, though he is more strictly speaking a trustor) was that the share or interest in his residuary property should vest at the time of his death, or that it should not vest until the death of the life-rentrix, him surviving.

Now the clause directs the trustees to account for, pay, and divide the residue and remainder of his property, after the death of the last liver of him and his wife, amongst five persons named (a sixth being subsequently added by a codicil), all children of Mrs.

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Elizabeth Donaldson or Young, equally, or share and share alike, and to their respective heirs or assignees, with a survivorship clause, upon which the whole difficulty arises.

The Respondents contend that this clause is to be broken into parts, and to be read as containing, first, an absolute gift of the residue, and then a qualification of that gift under certain circumstances, and they say that effect is to be given, if possible, to every word in a will or testamentary deed, and that the construction which the Appellants contend for renders wholly nugatory the words "heirs and assignees."

Now, my Lords, I confess I am not disposed to lay very great stress upon the use of words of this common description, which are so likely to fall from the pen of the framer of a deed without any precise or definite object, where they cannot stand together with other words in the same deed indicating a different intention; nor am I disposed to lay great stress upon the supposition which has been made at the bar of the event occurring of all the residuary legatees dying without issue in the lifetime of the life-rentrix, out of which supposition it is endeavoured to extract the meaning of the testator. A testator must be taken to have in his mind circumstances which are likely to occur, and not improbable possibilities of that description. And whether, therefore, in that event the word "heirs" would have no effect whatever, and therefore there would be an intestacy, or whether, as has been suggested, it would amount to a conditional institution, it is quite immaterial for us to consider. I think that it is absolutely necessary to read this clause as an entirety. The trustees are directed to pay and divide, and the mind cannot rest until it arrives at the conclusion of the clause, by which it is ascertained what is the duty of the trustees, and amongst whom

the division is to take place, and it appears that that division is to be made amongst the survivors of the grand nephews and grand nieces who have survived such of them as shall have died without issue.

Now, supposing that the words rested there, there would be no difficulty at all in coming to the conclusion that the time of vesting of the interests would be the death of the life-rentrix, because until that period arrived it would not be known who were the persons who were the survivors, and who were therefore entitled to share the residue.

But it is said that a different meaning must be given to this clause, in consequence of the words, "if any of the said residuary legatees shall die without leaving lawful issue before his or her share vest in the party or parties so deceasing," and it is contended that the testator, by the use of these words, is pointing to a different period from the time of division, and that if he is pointing to a different period, no other period can be assigned than the time of the death of the testator.

Now I confess that those words lead my mind in a totally opposite direction. When a person is making a disposition of his property to take effect after his death, it must be taken that he assumes that the persons, the objects of his bounty, will survive him. If he contemplates the possibility of their dying in his lifetime, there will be no difficulty in his using apt words to describe his intention; but I cannot conceive any words less applicable to an intention of that kind than these words, "the residuary legatees dying before his or her share vest in the party or parties so deceasing."

With respect to the word "share," perhaps it may be said that it may be used popularly to describe the interest which would ultimately vest in the different

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parties, but how the words "the share vesting in the party or parties so deceasing" can apply to such an event happening in the lifetime of the testator, when nothing whatever can vest in his lifetime, I think it is very difficult indeed to understand. Then if these words cannot be applicable to a time during the life of the testator, we must look to another period, and the only other period to which they can be applicable is the period when the residue is to be divided, namely, at the time of the death of the life-rentrix.

My Lords, for these short reasons I have arrived at the same conclusion as my noble and learned friends and the minority of the Judges in the Court below, and I agree with my two noble and learned friends that the Interlocutors must be reversed (*a*).

(*a*) See Judgment at the end of the next case.

GRAHAME, WEEMS, GRAHAME, & WARDLAW—
LOCH & MACLAURIN.