

Thursday, June 18.

FIRST DIVISION.

SCOTT AND OTHERS (ADAMS' TRUSTEES) v. CARRICK AND OTHERS.

*Succession—Vesting—No Gift except in Direction to Convey—Postponement of Period of Payment.*

A testator directed his trustees, after the death or second marriage of his widow, to "pay to or apply for behoof of my children, until the youngest attain the age of twenty-one years complete, the free income of my estates . . . with special power also to my trustees to make such payment from the capital of my estate to or for behoof of my said spouse or children as my trustees . . . may hold to be necessary." He further directed his trustees, "so soon as convenient after my youngest child attains the age of twenty-one years complete, and after the interest of my said spouse has ceased by her decease or having entered into another marriage," to "convey or pay over the whole of the free residue of my estates to my children equally, the issue of any child who may have predeceased leaving issue coming in place of and taking the share which would have been taken by the predeceasing parent if in life."

After the death of the testator's widow, held that vesting of the capital of the estate did not take place until the youngest child of the testator should have attained the age of twenty-one.

*Succession—Trust-Disposition—Construction—Direction to Trustees to Pay to Trustee's "Children" the Income of his Estates—Whether "Children" includes Grandchildren.*

In a question with regard to the income of the same estate, held that the truster's immediate children only were entitled to participate therein, and that grandchildren were excluded, on the grounds (1) that the inclusion of grandchildren would involve the retention of the estate in the hands of the trustees after the youngest child had attained the age of twenty-one, which was opposed to the testator's express direction; and (2) that the testator had not overlooked the case of grandchildren, he having substituted them to their parents in the clause relating to the disposal of the fee of the estate.

By trust-disposition and settlement the late William Adams, who died on 6th August 1890, conveyed his whole means and estate to trustees for certain purposes.

By the fourth purpose he directed his trustees to pay the income of his estate to his widow, declaring that in the event of her re-marriage she should cease to have any interest in his estate, and continued as follows:—"And my trustees after the death

or second marriage of my said spouse shall pay to or apply for behoof of my children, until the youngest attain the age of twenty-one years complete, the free income of my said estates, and that at such times, in such proportions, and in such way and manner as my trustees, to whom I commit the fullest discretionary power, may think proper, with special power also to my trustees to make such payment from the capital of my estate to or for behoof of my said spouse or children as my trustees, in the exercise of discretionary power hereby conferred on them, may hold to be necessary in any special circumstances which may emerge, they keeping in view, however, that it is my wish that as much of the capital as possible shall be preserved for division amongst my children."

The fifth purpose was in the following terms:—"So soon as convenient after my youngest child attains the age of twenty-one years complete, and after the interest of my said spouse has ceased by her decease or having entered into another marriage, my said trustees shall either convey or pay over the whole of the free residue of my estates to my children equally, the issue of any child who may have predeceased leaving issue coming in place of and taking the share which would have been taken by the predeceasing parent if in life."

Mr Adams was survived by his wife, who died on 16th August 1893, and by seven children, the youngest of whom at the date when this special case was presented was seventeen years of age. Of these children Mrs Jessie Carrick died intestate on 23rd June 1895, domiciled in Ireland, and survived by her husband and an only child, Margaret Finlay Carrick; and Eliza Adams died on 10th January 1896 leaving a trust-disposition and settlement by which she conveyed her whole estate to trustees.

To determine the respective rights of the parties interested in Mr Adams' estate, this special case was presented by (1) Mr Adams' trustees of the first part; (2) Margaret Carrick of the second part, who maintained (a) that there had been no vesting in her mother, and (b) that the share of income which would have belonged to her mother now fell to herself; (3) James Carrick, Mrs Carrick's husband, of the third part, who maintained (a) that one-seventh share of the capital vested in his late wife before her death, and now fell to him as having an absolute right to be her administrator according to Irish law, and (b) that the share of income belonging to his late wife now fell to him; (4) the five surviving children of Mr Adams of the fourth part, who maintained (a) that no vesting could take place as regards the capital until the youngest child attained the age of twenty-one, and (b) that as regards the income, they alone were entitled to share it; and (5) Eliza Adams' testamentary trustees of the fifth part, who contended that one-seventh of the capital had vested in her and been carried by her settlement.

The questions of law submitted for the opinion of the Court were as follows—  
"(1) Did one-seventh share of the free

residue of the trust-estate vest in each or either of the deceased Mrs Jessie Adams or Carrick and Eliza Mary Helen Adams? (2) In the event of the first question being answered in the affirmative, did the said share vest in Mrs Carrick, subject to defeasance in favour of the second party? (3) Are the trustees, the first parties, bound to pay to, or apply for behoof of, either (a) the second party, or (b) the third party, one-seventh, or one-sixth, or such share as they may think proper, of the income accruing to the trust-estate between the death of the said Mrs Adams or Carrick and the payment or conveyance of the free residue? (4) If not bound, are the trustees, the first parties, entitled, under the powers conferred on them by the fourth purpose of said settlement, to pay to, or apply for behoof of, either (a) the second party, (b) the third party, or (c) the fifth parties, such share as they may think proper of the said income? (5) In the event of the third and fourth questions being answered in the negative, are the trustees entitled or bound to accumulate the share of income which they would have been entitled to pay to Mrs Carrick if alive, and to pay the accumulation to the second party if alive at the period of division of the estate, or does such income fall into residue?

Argued for the second party—Vesting here was postponed till the youngest child attained twenty-one. There was no direct gift, only a direction to pay at that date—*Sloan v. Finlayson*, May 20, 1876, 3 R. 678; *Bryson's Trustees v. Clark*, November 26, 1880, 8 R. 142; *Muirhead v. Muirhead*, May 12, 1890, 17 R. (H.L.) 45; *Groat v. Stewart's Trustees*, July 7, 1894, 21 R. 961. The power to make advances did not of itself infer vesting—*cf. Duncan's Trustees and Others*, July 17, 1877, 4 R. 1093. Even if vesting in the mother had taken place, there was a substitution of the child to her—*Reeve's Executor v. Reeve's Judicial Factor*, July 14, 1892, 19 R. 1013, *per* Lord Rutherford-Clark, p. 1020; *M'Clymont's Executors v. Osborne*, February 26, 1895, 21 R. 411. As regards the income, the second party was entitled to her mother's share under the *conditio si sine liberis*—*Willkie v. Jackson*, July 9, 1836, 14 S. 1121; *Bryce's Trustees*, March 2, 1878, 5 R. 722. Alternatively, in the fourth purpose, the word "children" must be taken to include grandchildren.

Argued for the third and fifth parties—There was vesting here a *morte testatoris*—*Jackson v. M'Mullan*, March 18, 1876, 3 R. 627. The children took an interest from their father's death, and even during the widow's lifetime the trustees had power to make advances to them out of capital—see *Wilson's Trustees v. Quick*, February 28, 1878, 5 R. 697; *Peacock's Trustees v. Peacock*, March 20, 1885, 12 R. 878. The word "predeceased" in the fifth purpose must be taken as referring to the death of the testator. As regards income, the trustees were entitled to apply income for behoof of children only, not of grandchildren.

Argued for the fourth parties—There

could be no vesting of the capital until the youngest child attained twenty-one. As regards income, it was only divisible among surviving children. The *conditio si sine liberis* never applied to income, and was not to be extended to new cases—*Hall v. Hall*, March 17, 1891, 18 R. 690. Nor would it be applied where the testator, as here, had obviously considered the case of children predeceasing the term of payment—*Carter's Trustees v. Carter*, January 29, 1892, 19 R. 408. The term "children" could not be interpreted so as to include grandchildren—*Rhind's Trustees v. Leith*, December 5, 1886, 5 Macph. 104.

At advising—

LORD ADAM—The questions in this case arise upon the construction of the trust-disposition and settlement of the late William Adams, who died on the 6th August 1890.

[After recapitulating the purposes of the trust-deed and the facts, his Lordship proceeded]—The first question we are asked is whether one-seventh share of the residue of the trust estate vested in each or either of the deceased Mrs Carrick and Eliza Adams.

It appears to me that there are only two possible periods of vesting under this deed, either a *morte testatoris* or at the period of division.

Now, it will be observed that this is not the case of a gift of the estate to the children with a subsequent direction to pay or divide it among them. The gift is implied from the direction to pay. But the time at which payment is to be made is as soon as convenient after the youngest child shall have attained twenty-one and the wife's interest shall have ceased, and the persons to whom payment is to be made are the children and the issue of any child who may have predeceased leaving issue, that is, predeceased the term of payment. The trustees can only pay when the time for payment directed by the deed arrives, and then only to children or to the issue of a predeceasing child. But the time for payment has not yet arrived, and it appears to me that there can be no vesting till it does, when only the parties who are to take can be ascertained. I think therefore that the first question must be answered in the negative.

The next two questions relate to the disposal of the income of the trust estate after the widow shall have ceased to have any interest in it, by death or re-marriage, till the period of division. The direction to the trustees, on that event occurring, is to pay it to or apply it for behoof of the truster's children until the youngest shall attain the age of twenty-one. It appears to me that by "children" here the truster means his own immediate children, and that grandchildren are not intended to be included. If grandchildren were held to be included, the direction would be a direction to the trustees to continue paying the income of the estate until the youngest grandchild had attained the age of twenty-one. For that purpose they would have to

retain the estate in their own hands, but that is certainly not the trustor's intention, because, as we have seen, he has directed the fee of his estate to be distributed as soon as the youngest of his immediate children had attained twenty-one, so that it would be impossible for the trustees to fulfil such a direction. It is clear that the trustor did not overlook the case of grandchildren in making his settlement, and that they are specially named when they are intended to take any benefit as appears from the next clause, which relates to the disposal of the fee of his estate, by which in that case the issue of children are specially substituted in place of their pre-deceasing parents.

I am of opinion, therefore, that the trustees are directed to pay the income in question to the trustor's immediate children only, and that they are neither bound nor entitled to pay any of it to grandchildren or anyone claiming in their right, and therefore that the third and fourth questions must be answered in the negative.

In my opinion the fifth question must also be answered in the negative. There is no direction to accumulate, and, as I have said, the trustees are bound to pay the income of the estate to the immediate children of the trustor alive at the time.

LORD KINNEAR and the LORD PRESIDENT concurred.

LORD M'LAREN was absent.

The Court answered the first, third, fourth, and fifth questions in the negative.

Counsel for the First Parties—Sym. Agents—Macgregor & Stewart, S.S.C.

Counsel for the Second Party—Dundas—W. Thomson. Agent—A. G. G. Asher, W.S.

Counsel for the Third Party—Craigie. Agents—Macandrew, Wright, & Murray, W.S.

Counsel for the Fourth Parties—Kennedy—Constable. Agents—Macgregor & Stewart, S.S.C.

Thursday, June 18.

## FIRST DIVISION.

[Lord Kincairney, Ordinary.]

### COUNTY COUNCIL OF SELKIRK v. BURGH OF GALASHIELS.

*Local Government—General County Assessment—Local Government (Scotland) Act 1889 (52 and 53 Vict. cap. 50), secs. 26 (sub-sec. 4) 27, and 105.*

*Held* that a county council has no power to levy the County General Assessment upon lands and heritages in royal or parliamentary burghs within the county.

*Police Commissioners of Oban v.*

*County Council of Argyllshire*, March 9, 1894, 21 R. 644, 510, *commented on*.

By the Local Government (Scotland) Act 1889, it is, *inter alia*, enacted as follows, sec. 26, sub-sec. 4—"If the county fund is insufficient to meet the expenditure, rates (in this Act referred to as the owner's consolidated rate, and the occupier's consolidated rate, and together as the consolidated rates) may be levied to meet such deficiency for general county purposes upon all rateable property in the county, or, in the case of expenditure for the management and maintenance of highways, the administration of the laws relating to public health, or other special purpose as hereinbefore mentioned, upon all rateable property within the several districts or parishes of the county as the case may be, in the manner and subject to the conditions in this Act provided."

Sec. 27, sub-sec. 1—"The county council shall annually fix the rate in the pound of the rateable property which will be necessary to meet the deficiency in the county fund in respect of each branch of expenditure subject to its control, or for which it is responsible in whole or in part, and such rate shall be imposed upon all lands and heritages within the county, except that the rate for the management and maintenance of highways, the administration of the laws relating to public health, and any other special purpose as hereinbefore mentioned, shall be imposed upon all lands and heritages within each division, or district, or parish, as the case may be. The rate in respect of each branch of expenditure, for which provision is made under an Act of Parliament in force at the passing of this Act, shall be deemed to be imposed under the powers, and subject to the provisions of that Act, except in so far as these are inconsistent with the provisions of this Act. The rate necessary in respect of any branch or branches of expenditure for which no provision is made, as last mentioned, shall be imposed as a general purposes rate under this Act."

Sec. 105—"In this Act, if not inconsistent with the context, the following terms have the meanings hereinafter respectively assigned to them—that is to say, the expression 'county' means a county exclusive of any burgh wholly or partly situate therein, and does not include a county of a city. The expression 'burgh' means any royal or parliamentary burgh."

On 13th November 1895 the Corporation of the burgh of Galashiels raised an action against the County Council of Selkirk for declarator that "the defenders are not entitled to levy County General Assessment on lands and heritages belonging to the pursuers lying within the boundaries of the said burgh of Galashiels."

The burgh of Galashiels adopted the Police Act of 1850, and maintains a police establishment. It is also a parliamentary burgh, and has a population of about 18,000.

The pursuers pleaded—"(1) In respect the lands and heritages belonging to the pursuers within the burgh of Galashiels do not