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GRAHAM, &c. *v.* RUSSELL.

MRS. JEAN GRAHAM, otherwise HAY, Captain SAMUEL GRAHAM, and Captain JAMES GRAHAM, three of the five Grandchildren of the deceased SAMUEL STEVENSON, } *Appellants;*

JOHN RUSSELL, Trustee for SAMUEL STEVENSON, ... } *Respondent.*

House of Lords, 1st April 1791.

SUCCESSION — SUBSTITUTION OR CONDITIONAL INSTITUTION. — A party, by his trust deed, left the residue of his estate to his five grandchildren, equally among them, declaring that the share of any one deceasing should accresce to the survivors. Also that these shares should become payable to them, on their attaining the age of 25 years, when the trustees should be bound to pay the same, with interest. Cecilia, one of those grandchildren, survived her grandfather, and also the age of 25, but, in consequence of mental weakness, her share had been allowed to remain in the trustee's hands unpaid. She died, leaving a brother, Samuel Stevenson. Held that the substitution in favour of the surviving grandchildren did not take effect, and her brother preferred to her share.

Samuel Stevenson executed a deed, conveying to trustees his whole estate and effects then belonging, or which might belong to him at his death, for the purpose, (after paying his funeral expenses and debts.) 1. To pay £50 a-year to his wife, and £20 a-year to his son, during their lives; 2. To pay his grandson Samuel Stevenson, and granddaughter Cecilia Stevenson, children of his said son, £30 per annum, for maintenance and education, till they attained the age of 25 years: and to his grandson Samuel Stevenson Graham, and James Graham, and his granddaughter Jean Graham, the sums of £20 per annum, for the like purpose; 3. That when the eldest of his grandchildren attained the age of 25, the trustees should set apart such sums, as that the interest thereof might adequately meet these annuities; 4. That of the residue, after setting apart money to answer the annuities, there should belong £200 to his grandson Samuel Stevenson, and the like sum to his granddaughter Cecilia; 5. That after all these purposes were satisfied, the residue should be divided between all his five grandchildren equally; and, 6. That the capitals set apart to answer the said an-

nuities should also belong to the five grandchildren, and be divided among them, after these annuities were determined.

There was then the following clause:—" That failing any " one of my five said children by death, the share or shares " of the deceased, *so far as remains unpaid*, shall accresce " and appertain to the survivors of my said children equally, " or to the survivor, and shall become due and payable at " the first term of Whitsunday or Martinmas after their re- " spective ages of 25 years; and the trustees shall be bound " and obliged to pay the same accordingly, with interest " from the respective terms of payment, aye and until pay- " ment."

The granddaughter Cecilia survived her grandfather, and attained to the age of 25 years, when she was entitled to payment of her share of the residue; but, in consequence of mental imbecility, her guardians never received her share, but allowed it to remain in the trustee's hands, only receiving from time to time sums necessary for maintenance. Some years thereafter she died. And the question raised in this suit was:—Whether her share belonged to her brother Samuel Stevenson, as her personal representative? or whether it accresced to the surviving grandchildren, so as to entitle her cousins, as well as her brother, to a share? For the appellants, three of the surviving grandchildren, it was contended that, by the law of Scotland, it was competent and common, in money obligations, to substitute one person to another: for example, to A.B, whom failing by decease to C.D, and the effect of such substitution is, that though A.B, the institute, may defeat the substitution, by levying the money, yet if he does not do so while the same remains due upon the original obligation, the substitute will take, to the exclusion of his representatives. The same rule followed in legacies, in regard to which a substitution is quite competent. It was answered for Cecilia's brother, Samuel Stevenson, that the intention to be gathered from the will was, that the substitution was only to take effect in the event of any of them dying before his or her share became payable at the age of 25.

The Court, of this date, altering an interlocutor of the Lord Ordinary, 15 July 1789, found " that the share of the " trust funds destined to the deceased Cecilia Stevenson de- " volves upon her brother Samuel, as her executor; and Feb. 9, 1790.

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"therefore prefer the petitioner thereto, as trustee for him, "and his creditors."*

Against this interlocutor the present appeal was brought.

Pleaded for the Appellant.—By the words, as well as by the meaning of the will, it was declared that the share of any of his grandchildren deceasing should accresce to the survivors. This is plainly and distinctly expressed, and can admit of no other construction than this—that if any of them died at any time, whether before or after the terms of payment, this substitution was to take effect. But, according to the respondent's construction of the clause, the substitution or accrescing clause was only to take effect, if any of the grandchildren died before attaining the age of 25 years respectively, a construction which is totally at variance with the express words used; and the expressions "in so far as not yet paid."—Which undoubtedly apply to a period anterior to the 25 years of age.

Pleaded for the Respondent.—The whole tenor of this deed shows, that it was not the intention of the truster to make the share of a deceasing grandchild, who survived the age of 25, go to the surviving grandchildren. But, on the contrary, the moment they attained the age of 25 years, it was to be presumed as if already paid and vested in her person, so as to operate an extinction of the substitution. Cecilia lived more than six years after attaining this age, and having died intestate and lunatic, her share must now belong to her brother the respondent. At all events, the right claimed cannot extend to the £200 given her as precipuum, nor to the interest of her share fallen due since her age of 25.

After hearing counsel, it was

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* NOTE.—From LORD PRESIDENT CAMPBELL's Session Papers:—

PRESIDENT.—"The interlocutor of the Lord Ordinary wrong. It is absurd to make it depend upon the accident of the money being called up or not, whether one rule of succession or another shall take place. It is plainly a *conditional institution;* if any of the legatees shall die before the period when the money should be paid, are the words used. *Paid* and *payable* are synonymous in the language of this deed. Cases of Tennant, &c., which went upon technical words, very different. The case of Couts was a bad decision. Tortuous conduct of the guardians in this case, in not uplifting Cecilia's share when it became payable to her, ought not to avail the other grandchildren."

Ordered and adjudged that the interlocutor be affirmed, with the following addition, viz. without prejudice to any question that may arise upon the death of Janet Irvine, the testator's widow.

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BAILLIE v. CHALMERS.

For Appellants, *Sir J. Scott, W. Tait.*

For Respondent, *Alex. Wight, W. Grant.*

[Mor. p. 6083.]

JAMES BAILLIE of Olivebank, Esq., . *Appellant;*
MRS. ELIZABETH CHALMERS, . . *Respondent.*

House of Lords, 6th April 1791.

HUSBAND AND WIFE—DELICTS—EXPENSES.—An action of damages for scandal was brought against a married woman, calling her husband for his interest; and judgment with expenses pronounced against her. The Court of Session held the husband liable for the expenses of process (£688). Reversed in House of Lords, and held him liable in expenses, only in so far as he was responsible for the conduct of his defence, as this might be found to be malicious, vexatious, or calumnious; and remit made to inquire into this.

An action of damages for slander was raised by the respondent, with concurrence of her husband, against Mrs. Helen Douglas or Baillie, the appellant's wife, and also against the appellant, for his interest. Defences were lodged to this action for Mrs. Baillie, and the appellant, *for himself*, and *as curator for his wife*, setting forth "That however painful it must be to a person of an ingenuous mind to be accused in a court of justice of maliciously defaming and slandering a neighbour from motives of malice or ill will; yet the defenders feel less concern at being involved in such an accusation, than at being obliged, in their own defence, to set forth facts, which if the pursuers have any sense of honour and delicacy, must tend to hurt them more than all the expressions the defenders are charged with." Then followed a detail of certain slanders. The defences offered were found to be irrelevant by the Court of Session, after much litigation; and this judgment being taken by appeal to the House of Lords, was affirmed, and remit made to proceed *quoad ultra*.