JOHN LAWFORD YOUNG, ... APPELLANT.
ROBERTSON, ET AL., ... RESPONDENTS.

SECOND APPEAL.

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

Survivorship—Qualification of the Condition si Institutus sine Liberis decesserit.—It having been decided by the House in the last case that the vesting of the shares did not take place till the death of the life-rentrix,—it was also held by the House, in this Second Appeal, that although the son of one of the six residuary legatees, who had predeceased the life-rentrix, was entitled to his father's share, he was not entitled to participate in the shares of other residuary legatees who had predeceased the life-rentrix without issue.

Deference due to settled Rules.—Per Lord Cranworth: The Court of ultimate appeal will not easily overturn a series of decisions which have long regulated the settlement and devolution of property; p. 345.

IN this case John Lawford Young, son of Thomas Young, one of the six residuary legatees, named in the will of James Donaldson (*a*), appealed against the judgment of the *Lord Ordinary* of the 15th February 1859, and against the Interlocutor by the Second Division, dated the 20th July 1860, in so far as by those Interlocutors it was "found with regard "to the one-sixth share given to William Macdougall, "that the same devolved on such of the said grand "nephews and grand nieces as survived the life-"rentrix, equally amongst them; but that no right "therein passed to the children of any of the said "grand nephews who predeceased the life-rentrix."

Mr. *Anderson* and Mr. *Mure* contended that John Lawford Young was not only entitled to claim one-

(*a*) See *suprà*, p. 315.

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sixth of the residuary estate (which was allowed him), but that he was also entitled to participate and receive his due proportion of William Macdougall's share which proportion would have come to his father, Thomas Young, if he had survived the life-rentrix. This last was the proposition which the Court below had negatived, and which gave rise to the present Appeal. The *Lord Ordinary* had thought himself bound by decisions; but it was evident that the testator in this case regarded the issue of the legatees in the same light as the legatees themselves. The child was therefore entitled not only to what was directly given to his father, but he was also entitled to the proportion of William Macdougall's share, which would have been his father's in the event of his survivance of the life-rentrix.

[The LORD CHANCELLOR (*a*): If Thomas Young did not survive the life-rentrix, how can the Appellant claim what was given to survivors only?]

According to the older cases, whatever would have gone to the father should go now to the child. *Roughead* v. *Rannie* (*b*). We admit that certain modern cases, particularly that of *Clelland* v. *Gray*, referred to by the *Lord Ordinary* in his Note, have restricted or qualified the true principle (*c*), a prin-

(*a*) Lord Westbury.

(*b*) Morr. 6403. "A father, having granted a provision to his son, declared that in case of his dying in minority, and without lawful children, he should be succeeded by his sisters, or such of them as should then be in life. The son having died in minority, and unmarried, his nephew by a sister, who predeceased, was found entitled to his mother's share by an unanimous judgment of the Court of Session on the 14th February 1794."

(*c*) The following is the language of the Lord Ordinary in his Note: There is no difficulty created by the destination being to the parties, "their heirs or assignees." These are heirs and assignees after vesting. The phrase is only used to indicate the completeness of the vesting, after the appointed time has arrived. If this view be correct, the shares of Thomas Young and

ciple, however, founded in the Civil Law, recommended by its equity, and which it is the province of this House, as the great ultimate appellate jurisdiction of the country, to restore.

The Respondents' counsel were not required to address the House.

The following opinions were delivered by the Law Peers:—

Lord Chancellor's opinion.

The LORD CHANCELLOR (*a*):

My Lords, your Lordships have listened with great attention to the very clear argument which we have heard from the Counsel for the Appellants, but I think your Lordships will agree with me that upon the only point which is now in controversy there is no necessity to call upon the Counsel for the Respondents.

William Macdougall did not vest in these gentlemen, and cannot be claimed by their executors or disponces. The disposal of the shares will, however, be different, according to the different circumstances in each case respectively.

Thomas Young left an only child. The Lord Ordinary is clear that he succeeds in his father's place. He does so by the plain implication of the clause above quoted (see *suprà*, p. 315), which obviously, as the Lord Ordinary thinks, puts the lawful issue of each grand nephew or grand niece in the parent's room. He would have done so at any rate, as the Lord Ordinary conceives, by force of the condition *si sine liberis;* to which the clause only gives expression. William Macdougall left no issue. The result, as the Lord Ordinary considers, is to give his share to the grand nephews and grand nieces who survived the term of vesting. As the phrase is "the survivors of my said grand nephews and grand nieces equally," without mentioning the issue of predeceasers, the Lord Ordinary conceives such issue to have no right in the division. It might appear, as if on principle, the condition *si sine liberis* should also apply to this case. But the Court has held that this condition (which must have some limitation) does not apply to extend to children the benefit of survivorship, when the testator does not mention issue, in cases which in principle cannot be distinguished from the present.—See *Cleland* against *Gray*, 20th June 1839, Session Cases, New Series, vol. i. p. 1031, and cases there referred to.

(*a*) Lord Westbury.

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Lord Chancellor's opinion.

My Lords, there is a very benignant rule in the law of Scotland originally derived from the civil law (*a*), although its application is somewhat different from the application which you make of that system, which has this effect, that if a legacy be given to an individual and he either predeceases the testator or dies before the period appointed for vesting, leaving children, the legacy does not lapse, but the children are substituted in the place of the legatee.

The extent to which that rule appears to have been carried and applied by decisions seems to be thus limited,—that the children are to take all that was in the parent at the time of the death of the parent. But the contention that we now have is, that the rule should be carried to the extent of substituting the children for the parent to all intents and purposes, so as to give the child something that the parent had not at his death, but might have become entitled to if he had lived till some later period, or if he had fulfilled some other condition named in the original gift.

It appears to be confessed at the bar that there is not only no decision warranting the extended application of the rule in the manner which is now contended for, but that there has been a long series of decisions, which we have had cited here, extending for a period of more than thirty years, in which Judges have refused to carry the rule to the extent to which it is now contended that in principle it ought to be carried.

The particular circumstances of this case may be

(*a*) A testator made a gift to his grandchild, to go to the testator's son in case the grandchild died under age. The grandchild died under age, but left issue; whereupon Papinian resolved (*conjectura pietatis*) that the condition failed; for that the son was only to take in the event of the grandchild dying, not only under age, but also without issue; in other words, *si sine liberis decessit*. See Digest, 35, i. 102.

very shortly stated. There is a gift, from and after the expiration of a life-rent, to certain individuals named as residuary legatees. Then by a codicil there is an addition made to the number of those individuals. The person added by the codicil to the individuals named as residuary legatees in the original settlement was a Mr. Thomas Young, the father of the present Appellant, so that Mr. Thomas Young is, by force of the codicil, to be regarded as if he had been named as a legatee in the original settlement.

The decision which your Lordships have just arrived at has been to put this construction upon the original settlement, that the period of vesting is the period of distribution, namely, the death of the life-rentrix. Thomas Young did not live until that period. But the operation of the rule to which I have referred substitutes John Lawford Young, the present Appellant, for Thomas Young at the period of his death. Now the testator, the truster, in this settlement, contemplating the possibility of the death of one of the residuary legatees before the period of distribution, has introduced a clause of conditional institution (what in England would be called an executory gift over) that in the event of any one or more of the legatees dying without leaving lawful issue during the life of the life-rentrix (for so we must now take it), the share of the individual or individuals so dying shall go to the survivor or survivors. And the contention now is, that although Thomas Young is not to be numbered among those survivors, yet that in point of fact the effect of the rule in question is to substitute the child of Thomas Young to such an extent as to make him come within the description and class of survivor, though actually and truly his father was not a survivor.

It is very difficult to understand upon what prin-

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ciple or by force of what species of argument such a construction could be put upon these words creating the conditional institution. Whoever claims under and by virtue of that conditional institution must claim in the character of being a person living at a particular time. The words "survivors or survivor" refer to individuals here named. We will take Thomas Young as being put by the codicil in the same position as the individuals named in the will. The word "survivor," therefore, will be a description of such of the six individuals so named as were living at a particular time. And the effect is precisely the same as if, instead of the word "survivor," you were to take the names of the individuals living at that particular time, and read those names in the settlement in lieu of the word "survivors." If that had been so done, Thomas Young, the father, would not have been entitled. And I think it is impossible to hold that any principle of surrogation or substitution would give to the child that which the father by no possibility could have taken. The very principle of surrogation is merely to place the child in the room of the father; but it would be contrary to all principle to make the surrogation extend to give to the child a right which the father by no possibility could have.

But, my Lords, it is needless to argue this matter further on principle, or to reason as to what ought to have been the true operation and extent of the rule, because, when your Lordships find a rule, the introduction of which is due entirely to decision, and the mode of interpreting which has been regulated and determined wholly by decisions, it is impossible to hold that there is any principle of law that would warrant the use of that particular rule beyond the extent to which it has hitherto been recognized. It

would be, I think, contrary to the rules which have most reasonably and wisely regulated the interposition of a Court of Appeal, if your Lordships, disregarding this long series of cases which have determined the manner and extent of the application of the principle, were now to declare that the principle had been hitherto misunderstood, and that it ought to have been applied and extended in a different manner, and that therefore the series of cases in which its application has been limited are so many instances in which injustice has been done. I cannot advise your Lordships to recognize this rule as capable of being properly applied in a manner so different from that in which hitherto it has been applied, and I should therefore humbly advise your Lordships to confirm the Interlocutor to the extent of declaring that it is impossible to carry the principle so far as to give to John Lawford Young, on the rule of substitution, an interest which never vested in the father, and which the father by no possibility could have taken unless the father had fulfilled the condition which he did not fulfil.

Lord Chancellor's opinion.

The effect of the whole argument which we have heard upon these two Appeals therefore may be thus expressed. The former declaration which your Lordships pronounced in the last case would have the effect of holding that one share only, namely, the share of Macdougall, became distributed under the clause of conditional institution. There is involved in that declaration the conclusion of one of the points of the present Appeal, namely, that the share which Thomas Young would have taken, if Thomas Young had survived the life-rentrix, belongs to his only child, the present Appellant, John Lawford Young. The result will be that in the present Appeal it will be

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right to declare that John Lawford Young, as substitute, is entitled to the share that was originally given to his father, Thomas Young, but to declare that the sixth share of Macdougall belongs, under and by force of the words contained in the original settlement, to those of the grand nephews and grand nieces who were living at the time of the death of the life-rentrix. Therefore John Lawford Young will be held entitled to the original sixth share, but he will not be held entitled to any portion of or participation in the share of Macdougall. The share of Macdougall, therefore, will be divisible into four parts instead of being divisible into five parts, as contended for by the Appellants. These declarations, with the consequent reversal of so much of the Interlocutors of the Court below as is at variance with these declarations, will constitute the final order which I humbly advise your Lordships to make in these two Appeals.

Lord Cranworth's opinion.

Lord CRANWORTH :

My Lords, in the course of Mr. *Anderson's* able address to your Lordships in this second Appeal, he observed that it was one of the important duties of a Court of Appeal to set right and correct errors that might have crept in in the lapse of ages in the administration of justice in the inferior Courts, to do that which those Courts probably *proprio vigore* would feel themselves incompetent to do. In that observation your Lordships I am sure most fully concur. Mr. *Anderson* referred to one or two instances in which a few years since this House acted upon that rule. He cited the case of *Miller* v. *Small* (*a*), and I think another case, in which your Lordships set right

(*a*) *Suprà*, vol. i. p. 345.

what you considered to be a vicious principle of interpretation of covenants and other matters into which the Courts of Scotland had in the lapse of ages fallen.

But, my Lords, coupled with that duty there is another duty incumbent on all Courts, and pre-eminently upon a Court of ultimate Appeal, and which has been invariably observed, namely, that as regards those rules which regulate the settlement and devolution of property, those Courts which have to interpret instruments and acts of parties must take care to be very guarded against letting any supposed notion as to the inaccuracy of any rule which has in fact been acted upon, induce them to alter it so as to endanger the security of property and of titles.

Now, my Lords, if that principle is ever to be acted upon, I think your Lordships would be acting most unwisely if you were not to adopt the course that my noble and learned friend has suggested in a case in which the question is as to a principle, as his Lordship has observed, of what we should here call Judge-made law, and which has been carried by decisions to a certain point (rightly I suppose), but which the Courts have refused to extend beyond that point. If your Lordships were to be the Court to interfere and to say you ought to have gone further than you have gone, that I consider would be a precedent of a most dangerous character.

My Lords, the only further observation that I would make is this, that it was pressed, I think by Mr. *Anderson*, and certainly by Mr. *Muir*, that in the cases upon this subject there has not been a perfect uniformity of opinion amongst the Judges, but that one of them at least, Lord *Mackenzie* (I think there was one other), expressed his extreme reluctance in

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adhering to the rule which your Lordships are now called upon to sanction, but that he did so because he felt bound by the current of precedents. My Lords, I think that that, so far from detracting from the weight of the decisions that we are now called upon to affirm, most materially adds to it; because that very learned Judge, looking at the question in the abstract, said I think it ought to have been decided otherwise, but the habit has been so long and inveterate of deciding according to a particular course that I shrink from doing otherwise than affirming. My Lords, I have only further to say that upon these grounds I entirely concur in the course that my noble and learned friend has proposed, both as to the substance and as to the form of the order.

Lord Chelmsford's opinion.

Lord CHELMSFORD:

My Lords, it is unnecessary for me to add anything to what has fallen from my noble and learned friends, but that I entirely agree with them.

The LORD CHANCELLOR: The declaration will be:—

"Declare that such of the residuary legatees named in the settlement and codicils as died during the life-time of the life-rentrix without leaving lawful issue took no share in the residuary estate of the truster. And declare that the share of William Macdougall, being part of the fund, is, in the events that have happened, according to the true construction of the settlement and codicils, divisible into three equal parts among the grand nephew and grand nieces named in the will who were living at the death of the life-rentrix, according to their respective rights and interests under the settlement and codicils. With the consent of both parties, the costs in the two Appeals to be paid out of the fund *in medio*."

JUDGMENT (*a*).

It is *Declared*, That such of the residuary legatees as died during the lifetime of the life-rentrix, without leaving lawful issue, take no share in the residuary estate of the truster.

And whereas Counsel for the Appellants in the last-mentioned Appeal of Young and another against Robertson and others were heard upon a further point involved in the said last-mentioned Appeal, to which the Respondents' Counsel were not called upon to reply; and the Counsel being withdrawn, and due consideration had of what was offered for the Appellants:

It is *Declared*, That the Appellant, John Lawford Young, being the only lawful child of the late Major Thomas Young, in the proceedings mentioned, takes one-sixth part of the said residuary estate of the said truster. And it is further *Declared*, That the share of the said William Macdougall, being part of the fund in the proceedings mentioned, is, in the events which have happened, divisible into three equal parts among the grand nephew and two grand nieces of the said truster, who were living at the death of the said life-rentrix.

And it is *Ordered* and *Adjudged*, That so much of the said Interlocutors complained of in the said Appeals as is inconsistent with the said declarations be, and the same is, hereby reversed. And it is further *Ordered*, That upon the application and with the consent of the said Appellants, and such of the Respondents as have answered these Appeals, the costs incurred by all such parties in these Appeals be paid out of the fund *in medio*. And it is also further *Ordered*, That the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with these declarations and this Judgment.

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

(*a*) Both in this and in the preceding Appeal.