Monday, April 8, 1889.

(Before Lord Chancellor (Halsbury), and Lords Watson and Macnaghten.)

MURRAY AND OTHERS (GREGORY'S TRUSTEES) *v.* MRS GREGORY'S TRUSTEES AND OTHERS.

(*Ante*, vol. xxiv., p. 266; and 14 R. 368.)

Succession—Vesting—Nearest of Kin—Destination-over—Period of Distribution.

By postnuptial contract spouses conveyed to each other in liferent, and to the children of the marriage, if any, in fee, the whole estate of each, the fee of both estates to be divisible by the husband of the marriage, such division to take effect after the death of the surviving spouse, and at majority or marriage of the children. Powers of advancing funds for their maintenance and education, or settlement in business, were given to certain named trustees. Should all the children die during the life of the surviving spouse the funds were (failing a disposition by the spouses severally) to suffer division after the decease of the survivor, by the husband's funds falling to his own nearest of kin, and the wife's falling to her own nearest of kin. The husband died without executing any further deed, survived by his widow and one child. The latter died, survived by an only son. The widow sold certain heritable property, which had been bought by her husband, and conveyed the same with consent of her grandson. The price of the subject was delivered to trustees to be held for those entitled thereto under the above named contract. The grandson died under age disposing of any right he might have in the said price in favour of his grandmother, who dealt therewith in her will.

Held (*rev.* the judgment of the Court of Session) (1) that the persons favoured as to the husband's estate were his nearest of kin as a class to be ascertained as at his own death; (2) that the grandson's will carried the price of the heritable subjects, as it had not been challenged within the prescribed period.

Opinion (*per* Lord Watson) that as a result of the Moveable Succession Act 1855 (18 and 19 Vict. cap. 23) "nearest of kin" is not equivalent to heirs *in mobilibus*.

Haldane's Trustees v. *Murphy*, December 15, 1881, 9 R. 269, doubted.

This case is reported *ante*, vol. xxiv., p. 266, and 14 R. 368.

The second parties, the trustees, and executors of Mrs Lisette Gregory appealed.

At delivering judgment—

LORD WATSON—My Lords, this appeal depends upon the construction of a destination by the late Dr William Gregory, which occurs in a postnuptial contract between him and the deceased Mrs Lisette Scott or Gregory, executed in March 1840. The spouses thereby conveyed, each to the other, in the event of his or her surviving in liferent, and to the children of the marriage in fee, certain funds and estate specially described, and in general the whole estate, heritable and moveable, then belonging to them, or which might be acquired by them during the subsistence of the marriage. Power was given to Dr Gregory to apportion the fee amongst the children, and failing appointment by him it was declared that they should take share and share alike. Two declarations are added, the first of which reserves power to the spouses severally to dispose of their own estate by testament, to take effect at the death of the longest liver, in the events either of there being no children of the marriage alive at the death of the predecessor, or of children then existing but dying in the lifetime of the survivor. The second provides that in the same events, and failing such disposition by will, the whole estates settled shall, on the expiry of the survivor's liferent, "suffer division in manner after mentioned—that is to say, the whole funds and estate above mentioned belonging or which may belong to the said Dr William Gregory shall fall to and become the property of his own nearest of kin, and the whole funds and estate above mentioned belonging to or which may belong to the said Mrs Lisette Scott or Gregory, shall fall to and become the property of her nearest of kin."

Dr Gregory died in 1858 survived by his widow and one child of their marriage, James Liebig Gregory, who died in 1863 leaving an infant son Henry, born in November 1862. The estate specifically conveyed by Dr Gregory consisted of moveables, but in the year 1848 he purchased with his own funds (whether acquired before or after the date of the postnuptial contract does not appear) certain heritable subjects in Princes Street, Edinburgh, at the price of £2275. The liferentrix, who had made up a title to these subjects upon the assumption that the deed of 1840 gave her a right of fee, sold them in 1877 for £7500. In consequence of objections taken by the purchasers to the validity of her title an arrangement was come to by which she executed a disposition in their favour, with the consent and concurrence of her grandson Henry, then a minor (who subsequently expede a title through his father James Liebig Gregory), and the price was invested in the names of three gentlemen, who granted a declaration of trust acknowledging that they held the money as a *surrogatum* for the subjects sold, to be applied in terms of the destination and conditions in the postnuptial contract. Henry Gregory died in 1881 unmarried and in minority, leaving a settlement by which he bequeathed to his grandmother his whole right and interest in and to the trust fund of £7500.

Mrs Gregory died in May 1885, when the fund in question was claimed by various parties. In order to ascertain judicially which of them had the best right to it a special case was presented to the Court of Session by (1) the trustees of the fund, who are mere stakeholders; (2) testamentary trustees of Mrs Gregory; (3) the heirs in heritage of Dr Gregory and also of Henry Gregory as at the death of the liferentrix; (4) the representatives of the late Lieutenant-Colonel Gregory, who was the heir-at-law *ab intestato* of Henry Gregory; and (5) the next-of-kin of Dr Gregory as at the time of his widow's death. A majority of the First Division, consisting of the Lord President (Inglis), with Lords Mure and Adams, *diss.* Lord Shand, by interlocutor dated the 21st

of January 1887, preferred the parties of the fifth part, who are the only respondents appearing in this appeal, the appellants being the trustees of Mrs Gregory, the parties of the second part who claim the fund as personal estate of Henry Gregory, which was carried to their author by his *mortis causa* settlement.

The conveyance of Dr Gregory's estate was according to its terms to take effect at his death, and there being a direct destination of the fee to children necessarily *natis* and not *nascituris*, I think it vested in James Liebig Gregory upon his father's decease. In considering the quality of the interest which then vested in him the power reserved to Dr Gregory to make another disposition of his estate, in the events which have since occurred, need not be taken into account. In *Balderston* v. *Fulton* (19 Court Sess. Cas. (2nd series) 293) it was held that the existence of such a power does not impede vesting, and in the present case it was never exercised by Dr Gregory and expired with him. Whether James Liebig Gregory took a right of property absolute or subject to defeasance must depend upon the terms of the second declaration. He was the nearest of blood to his father in both lines of succession at the death of the latter in 1858, and if he was also "nearest of kin" within the meaning of the deed he became the absolute owner of the estate conveyed by Dr Gregory. If, on the other hand, the words "nearest of kin" be taken to represent a class ascertainable at the death of the liferentrix, and therefore exclusive of the settlor's descendants, the fee which vested in him and his issue was subject to divestiture and became divested by their failure in the lifetime of Mrs Gregory.

So long as the old law governing the descent of personal estate remained unaltered the term "nearest of kin" and equivalent expressions were used to designate the class of blood-relations entitled to the moveable succession of an intestate. That succession belonged, as stated by Lord Stair (iii. 8, 31), "to the nearest of kin who are the defunct's whole agnates, male or female, being the kinsmen of the father's side of the nearest degree, without primogeniture or right of representation; wherein those joined to the defunct by both bloods do exclude the agnates by one blood." In the common law of Scotland next-of-kin and heirs *in mobilibus* meant one and the same thing, but another meaning might of course be impressed upon the term "next-of-kin" occurring in a written instrument if the context showed, either expressly or by reasonable implication, that the testator or settlor used it in a different sense. Thus, in *Connell* v. *Grierson* (5 Court Sess. Cas. (3rd series) 379), where the succession to a landed estate, held under a deed of entail feudalised in 1782, devolved in the year 1863 in terms of the ultimate substitution upon the entailer's "own nearest of kin and their heirs and assignees and disponees whomsoever," the Court, having regard to the whole tenor and objects of the deed, were of opinion that the entailer meant by these words to describe his nearest blood relation in the line of heritable succession, and they accordingly gave the estate to his heir of line in preference to an agnate who was one degree nearer in blood. Again, in *Scott* v. *Scott* (14 Court Sess. Cas. (2nd series) 1057), a testator directed the residue of his trust-estate to be paid over to his "nearest relations," and the Second Division held that the settlement contained sufficient indications of his intention to include in that term nephews and nieces of the half as well as of the full blood. In affirming the judgment the Lord Chancellor (Cranworth), 2 Macq. 281, said—"If, indeed, the words of his will had been merely that the testator gave the residue to his "nearest relations," without more, no doubt they would, according to the law of Scotland, mean those persons who would have taken in the event of his intestacy. But here the question is not who would take in the event of intestacy, because the testator has been his own interpreter of what he intended."

The Act 18 and 19 Vict. c. 23, altered the rule of moveable succession by admitting representation among descendants, and in the collateral line among brothers and sisters and their descendants, and also by giving a share to the father, and, in the case of his predecease, to the mother of an intestate dying without issue. But the term "next-of-kin" is still used in that statute to denote those persons who would have been the legal heirs of the intestate under the old law, and it expressly reserves to them exclusive right to the office of executor in competition with children or remoter descendants of persons who would have been next-of-kin if they had survived the intestate. The effect which these enactments may have upon the significance of the words "nearest of kin" was recently discussed by the learned Judges of the First Division in *Young's Trustees* v. *Janes* (8 Court of Sess. Cas. (4th Series) 242), but the circumstances of the case made it unnecessary to give any decision on the point. One thing is clear, that the expression is no longer equivalent to legal heirs *in mobilibus*, inasmuch as it does not include all the members of that class. It appears to me, however, that in its legal sense the expression is still applicable to those members of the class who would have been the sole heirs before the passing of the Act, and are now preferably entitled to administer the succession of the intestate. There may be a question whether, and how far, the surviving parent of a defunct ought to be regarded as one of his next-of-kin. Upon that point, which does not arise in this case, I express no opinion.

Of the three learned Judges constituting the majority in the Court below, one only relies upon the case of *Wannop* v. *Murphy* (9 Court Sess. Cas. (4th series) 269), which was decided in 1881 by a bench of seven Judges. Lord Adam no doubt considered himself bound by that decision, which, if well founded, appears to me to be a direct authority for the judgment now appealed from. In that case a testatrix, who died in 1877, directed her trustees to pay the whole income of the residue of her estate equally to and between her nieces A and B during their lifetime, and on their deaths to convey one-half of the capital to the children of A, and the other half to the children of B, declaring that it should be in the power of the trustees to delay the division until the children attained the age of twenty-two, they receiving the free income in the meantime. In the event of A and B dying without issue, or of such issue predeceasing the last mentioned period of division, the trustees were directed to pay and convey the residue to and among the truster's "own nearest heirs in moveables whomsoever,

the division always being *per stirpes* and not *per capita.*" A and B both died without having had issue. The Lord Justice-Clerk (Moncreiff), with Lords Deas, Young, and Craighill, held, in these circumstances, (1) that no interest vested in the heirs whatsoever of the testatrix before the period of distribution; and (2) that these heirs were a class to be ascertained as at that period, and not as at her death, and decree was pronounced in accordance with their opinions. The Lord President (Inglis), and also Lords Mure and Shand, dissented from the judgment, being of opinion (1) that the residue vested *a morte testatoris* in the heirs called by the ultimate destination, subject to defeasance to the extent of one-half in the event of A having issue, and to the extent of the other half in the event of B having issue; and (2) that A and B, the liferentrices, being among the heirs *in mobilibus* of the testatrix at the time of her death, each took a share of the capital, which passed to their representatives. Upon both these points I concur in the opinion of the minority. I cannot reconcile the judgment of the majority upon the first point with the decision of this House in *Taylor*, 3 App. Cas. 1287, and upon the second with its decisions in *Bullock* v. *Downes*, 9 H. of L. Cas. 1, and *Mortimore* v. *Mortimore*, 4 App. Cas. 488. These last were not Scotch cases, but in neither did the judgment of the House proceed upon any specialty of English law, and the canon of construction which they recognise appears to me to be applicable to the language of a Scotch deed which has not acquired technical significance, and falls to be construed according to the intention of the maker. The rule, as I understand it, is simply this, that in cases where a testator or settlor, in order to define the persons to whom he is making a gift, employs language commonly descriptive of a class ascertainable at the time of his own death, he must *prima facie*, and in the absence of expressions indicating a different intention, be understood to refer to that period for the selection of the persons whom he means to favour. In my opinion the rule has no other effect than to attribute to the words used their natural and primary meaning unless that meaning is displaced by the context.

In the present case I do not think it necessary to consider what would have been the result of attributing to the expression "nearest of kin" the meaning which it may be taken to have borne since the Act of 1855 became law. The deed which we have to construe is not a will which might be held to speak as at the decease of Dr Gregory. So far as the interests of children of the marriage are concerned it is, in substance as well as form, a mutual contract, and its pactional provisions must be construed now in the same sense in which they were understood by the contracting parties at the time of its execution in 1840. I cannot conceive that they meant the class whom they then preferred to vary with subsequent alterations in the law of intestacy. Their deed of contract contains no invocation of intestacy in the proper sense of the word. Dr Gregory's estate is not left to descend *ab intestato*, but the then existing law is referred to for the purpose of describing the persons who are to take *provisione hominis*. In these circumstances I am of opinion that his "nearest of kin" within the meaning of the deed are the same person or persons to whom the law prevailing in 1840 would have assigned his intestate moveable succession at the time of his death in 1858. I can find nothing adverse to that interpretation of the deed, unless it be the suggestion that it is improbable the spouses should have intended to make a direct conveyance to their children and also to include them in the destination to their "nearest of kin." That is a kind of probability which has frequently been put forward without success in cases of this description, and whenever it is, as here, unsupported by the context it can only afford material for conjecture.

In the course of the argument it was pointed out that in the event of your Lordships holding that the subject of this litigation vested absolutely in James Liebig Gregory at the time of his father's death that would re-open a question between the present appellants and the parties of the fourth part, who represent the heir of line of his son Henry. They claim upon the footing that the trust fund was heritable in the person of Henry, who died in minority, and did not pass by his will. They were called as respondents, but did not appear by counsel, and it was not against their interest that the interlocutor under appeal should be reversed. Had I not, on consideration, been of opinion that their claim is untenable I should have thought it advisable either to give them an opportunity of being heard for their interest before disposing of the appeal or to remit the cause. But it has long been settled that a minor *pubes* can dispose of his heritable estate with the effect of altering his succession by an onerous contract of sale. It remains open to him, or to his heir-at-law, to set aside the transaction *intra quadriennium utile* on proving that it was to the enorm lesion of the minor. But the period limited for such challenge has run out, and the sale of 1877 is now as valid as if Henry Gregory had been of full age at the time. The terms of the trust, under which the price is still held, were intended for the protection of contingent interests which might be set up under the deed of 1840, and cannot affect the rights *inter se* of Henry Gregory's representatives.

For these reasons, I am of opinion that your Lordships ought to reverse the interlocutor appealed from, and to declare that the appellants, the parties of the second part, are entitled to the whole funds held in trust by the parties of the first part, and I move accordingly.

The Lord Chancellor (Halsbury) and Lord Macnaghten entirely concurred.

Interlocutor so far as appealed from reversed, with a declaration that the parties of the second part are entitled to the whole funds held in trust by the parties of the first part.

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