

think, or very probably might, result in great injustice to them. On the other hand, to recal the Sheriff's order will do no injustice to the pursuers. The trustee of the third defender (the appellant's mother) has appeared to defend on her behalf. If the pursuers succeed in establishing their claim, they will get decree against all the defenders, and Mrs Crichton's trustee will be personally liable to the pursuers in the expenses of process. If the pursuers fail, they will not have to pay expenses to the defenders except as for one appearance. No doubt separate defences have been lodged for the appellants and Mrs Crichton, but the defences for all are practically the same. To save possible expenses, however, I would suggest to your Lordships that we should recal the interlocutors appealed against, and remit to the Sheriff to sist process, *hoc statu*, against the appellants, leaving the question to be determined to be taken as between the pursuers and Mrs Crichton's trustee, with power to the Sheriff to decide the question of the expenses of this appeal as expenses in the cause.

The LORD JUSTICE-CLERK, LORD YOUNG, and LORD MONCREIFF concurred.

The Court pronounced this interlocutor:—

“The Lords having heard Counsel for the parties on the appeal, Sustain the same, and recal the interlocutors of the Sheriff-Substitute and the Sheriff of Perth, dated respectively 6th and 30th May and 4th August 1902: Remit to the Sheriff to sist, *in hoc statu*, the action in so far as laid against the defenders John and James Crichton, and *quoad ultra* to proceed therein, and with power to him to dispose of the question of the expenses in this and the Inferior Court as expenses in the cause.”

Counsel for the Pursuers and Respondents—Campbell, K.C.—Dewar. Agents—Carmichael & Miller, W.S.

Counsel for the Defenders and Appellants—Clyde, K.C.—Chree. Agents—Gill & Pringle, S.S.C.

Friday, November 14.

SECOND DIVISION.

BROWN'S TRUSTEES v. GOW.

Succession—Legacy—Free of Government Duty—Provision in Codicil that Foregoing Bequests and those in Foregoing Settlement and Codicil to be Free of all Government Duty—Bequests in Subsequent Codicils—Codicils directed to be Taken “as Part and Parcel of” Settlement.

A testator by his trust-disposition and settlement left certain legacies, including one which his trustees were directed to pay “free from legacy-duty.” He left the residue of his estate

to certain nephews and nieces. By a codicil the testator bequeathed to each of his trustees a sum of £100 “free of legacy-duty,” and left certain other legacies. By a second codicil he bequeathed certain further legacies, and provided and declared “that the foregoing bequests, and also those contained in the foregoing trust-disposition and settlement, are to be satisfied and paid free of all Government duty.” By third and fourth codicils the testator made certain other bequests without reference to Government duties. In his settlement he had directed his trustees to pay all such legacies as should be contained in any codicil or memorandum or writing by him, “declaring that the same, whether formal or informal, shall be held and taken to be part and parcel of these presents.” Held that the declaration in the second codicil as to freedom from Government duties was to be strictly read as applying only to foregoing bequests, and did not apply to those contained in the later codicils.

Alexander Brown, merchant, residing at 8 Pitt Street, Edinburgh, died on 5th April 1900, leaving a trust-disposition and settlement dated 11th January 1865 and various codicils thereto. In the settlement the testator directed his trustees as follows:—“And I direct them to pay out of my said estate all such legacies gifts or provisions and implement all such instructions as shall be contained in any codicil or any memorandum or writing by me clearly expressive of my will, though not formally executed, declaring that the same, whether formal or informal, shall be held and taken to be part and parcel of these presents.”

Among the legacies, gifts, &c., contained in the testator's settlement was a legacy of £200, “free from legacy-duty.”

The trustees were directed to pay the residue of the testator's estate to and among certain nephews and nieces *nomi-natim*.

In 1894 the testator executed a codicil whereby he left to each of his trustees a sum of £100 “free of legacy-duty,” and made certain other bequests.

In 1897 the testator executed a second codicil making certain further bequests, and containing the following provision, viz.:—“I provide and declare that the foregoing bequests, and also those contained in the foregoing trust-disposition and settlement and codicil, are to be satisfied and paid free of all Government duty.”

Thereafter, in 1898, the testator executed a third and a fourth codicil, in each of which he made certain further bequests of heritage and moveables, without any direction as to freedom from Government duties.

In these circumstances this special case was presented for the opinion and judgment of the Court.

The parties to the special case were (1) the testator's trustees, and (2) the beneficiaries under the testator's third and fourth codicils.

The first parties maintained—that the clause as to freedom from all Government duty contained in the second codicil did not apply to the bequests contained in the said third and fourth codicils, and that in a question between the parties both the estate-duty, so far as applicable to heritage, and the succession and legacy duties should be borne by the second parties, so far as said bequests were concerned.

The second parties maintained—that on a just construction of the said testamentary writings, they were not liable ultimately for the estate-duty and the succession and legacy duties payable in respect of the bequests to them respectively, and that, in any event, they were only liable for succession and legacy duties. They contended that the clause of exemption in the second codicil was applicable to all the bequests made by the trustor.

The following was the question of law:—“On a sound construction of the trust-disposition and settlement and codicils of the said deceased Alexander Brown, are the bequests in favour of the second parties free in a question with the first parties (a) of both estate-duty, so far as applicable to heritage, and succession and legacy-duties; or (b) of any of these duties?”

Argued for the first parties—The provision in the second codicil as to freedom from Government duty was to be strictly interpreted, and it applied only to foregoing legacies. Bequests could not be freed from the burden of paying Government duties except by distinct provision—*Urquhart's Trustees v. Gordon*, December 7, 1900, 3 F. 242, 38 S.L.R. 148.

Argued for the second parties—All the codicils were to be taken as part and parcel of the settlement, and the provision as to freedom from Government duty in the second codicil referred to all the bequests contained in the settlement. The third and fourth codicils being part and parcel of the settlement, the bequests which they contained were declared by the testator to be free from Government duty, the burden of paying which was thrown on residue. A clause of relief from Government duties had been held to apply to subsequent codicils—*M'Alpine, &c.*, March 20, 1883, 10 R. 837, Lord President, p. 846, 20 S.L.R. 551; *Williams v. Hughes* (1857), 24 Beavan, 474; *Byne v. Currey* (1834), 2 Crompton & Meeson 603; *Tomkins v. Tucker* (1901), 85 L.T.R. 451. The case of *Urquhart's Trustees v. Gordon, cit. sup.* was special and did not affect the question. With regard to the bequests of heritage it could not be intended that the Government duty was to be a burden on the heritable subjects.

LORD JUSTICE-CLERK—The provision in the testator's second codicil as to freedom of bequests from legacy-duty is very distinct and clear; it is as follows:—“I provide and declare that the foregoing bequests, and also those contained in the foregoing trust-disposition and settlement and codicil, are to be satisfied and paid free of all Government duty.” That provision plainly refers back to the bequests

which the testator had already made in this settlement and in the first codicil thereto, and also in the codicil which he was then signing.

There is no mention of freedom from duties in the third and fourth codicils, with reference to which this question is raised, but it is said that because of a declaration by the testator in his settlement that any codicil, memorandum, or writing by him “shall be held and taken to be part and parcel of” his settlement, it is necessary to read the declaration I have quoted from the second codicil as a general declaration that all bequests shall be free of legacy-duty. No doubt there might be such a declaration in cases where it was intended that the entire burden of paying Government duties should be borne by residue, but I think here we have no such case.

Taking all this testator's writings together as one settlement in which this provision occurs as to freedom from Government duties, that provision refers only, as I think, to foregoing bequests. I cannot read it as applying to subsequent bequests. Therefore I think the bequests in the third and fourth codicils cannot be held to be free of legacy-duty, and the usual course must be followed, viz., that the legatees pay the Government duties.

LORD YOUNG—I am of the same opinion. The parties who take under the third and fourth codicils maintain that they are entitled to what is left to them free of legacy-duty—that is, that the duty should be paid out of the residue of the estate by those to whom the residue is left.

I am clearly of opinion with your Lordship that there is no direction by the testator that the duties on the legacies bequeathed by the third and fourth codicils are to be paid by the residuary legatees.

LORD TRAYNER—I am of the same opinion. The rule is that anyone who takes under testamentary writings is *prima facie* responsible for Government duties. Of course, if the testator directs that his benefaction is to be paid to the legatee free of duty, that puts the burden of paying the duty on the rest of his estate. The question is whether this case can form an exception to the general rule. I think Mr Thomson's argument for the second party was very ingenious, but I am unable to adopt it. It is noticeable that with regard to certain legacies the testator directs in express terms that they are to be paid free of legacy-duty. Where he does not do so (as in the third and fourth codicils), I take it he did not intend that his estate should bear the duty, but left such duty to be paid by the legatees. I agree therefore that this question should be answered in the negative.

LORD MONCREIFF—I am also of the same opinion. The question must be answered with reference to the writings before us. I fully understand and appreciate the argument for the second parties on those writings, but I think it fails and stops short of the point for which they contend. When

the testator came to frame these later codicils he may have thought that what was said in the second codicil as to freedom from duties would be held as covering the bequests in the later codicils, but I am afraid we cannot treat that provision as being so elastic. Therefore I cannot hold the bequests in the third and fourth codicils to be free from duty.

The Court answered the question in the negative.

Counsel for the First Parties—Guthrie, K.C.—W. Thomson. Agents—Macgregor & Stewart, S.S.C.

Counsel for the Second Parties—A. S. D. Thomson—Grainger Stewart. Agents—W. & J. L. Officer, W.S.

HOUSE OF LORDS.

Thursday, November 13.

(Before the Lord Chancellor (Halsbury) and Lords Shand, Davey, and Robertson.)

MAXWELL v. M'FARLANE.

(*Ante*, June 14, 1901, 38 S.L.R. 665, and 3 F. 933.)

Superior and Vassal—Feu-Contract—Construction—Additional Feu-Duty Stipulated for Ground “on which Buildings shall be Erected”—Approaches—Reservoir Banks.

A feu-contract provided that the vassal should pay, in addition to the feu-duty stipulated, “the sum of two shillings sterling of additional feu-duty for every square pole of the said piece of ground on which buildings shall be erected, excepting an addition to the mansion-house and a porter's lodge.” A singular successor of the original vassal erected a public laundry on part of the feu. *Held* (reversing the judgment of the First Division and restoring the judgment of Lord Stormonth Darling, Ordinary) that the additional feu-duty was exigible only for the ground used for the buildings which had been erected, and not also for ground utilised for approaches to the buildings, and certain grass slopes forming the bank of the laundry reservoir.

This case is reported *ante ut supra*.

The defender and respondent appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—In this case it appears to me that the ordinary and natural meaning of the words is the construction which I must place upon this contract. I do not understand how it is to be “enlarged.” I could imagine that if the parties had in their minds all that the learned counsel have from time to time suggested as being in their minds for the purpose of making this bar-

gain between them, they might have used language which was not open to any controversy at all and might have pointed out plainly what they intended. For instance, if they had intended that additional feu-duty should be paid not only in respect of actual buildings but in regard to everything that was convenient or necessary or proper or agreeable to be enjoyed with the buildings erected, then they would have said so. But they have used language which seems to me not to be open to any ambiguity; and to my mind the language is too plain to be enlarged or to be altered.

I think there is this fallacy in the arguments which have been addressed to your Lordships in support of this judgment—that there is a confusion between that which is a building and that which is agreeable to or convenient to a building erected. It is possible of course to conceive cases where the lines of thought become so narrow between what is a building and what is only something to be enjoyed together with a building that you can imagine very difficult questions to arise. But to my mind, looking at the language itself, no such question arises here.

It is broadly contended on the one side that everything that is appropriate to the condition of things that now exists—namely, a laundry—is a thing in respect of which the additional feu-duty may be claimed. I cannot see that. When Lord M'Laren points out that chimneys or the well of a house may be included by one view of this and excluded by the other, I think his Lordship seems, if I may say so with all respect to him, to confuse two totally different things. It may be sometimes a difficult question as a matter of construction (by the word “construction” I do not mean construction of language, but I mean the actual physical building of a house) to determine what is or is not part of a house. For my own part I should have thought there was no difficulty in saying that a paved yard, a chimney, or what we know as the well of a house—that is to say, the interior portion of a house uncovered by actual bricks, which in itself is a complete and perfect unity—is just as much part of the house as the most contained room in it is part of the house.

It appears to me that that gets rid of the whole difficulty which the learned Judge suggested. Once solve the question: Is this a house? and if it is, it is within the language. But if it is not inside a house—if it is not a house—you must show, to my mind, something in the language which the parties have used which contemplated that the additional feu-duty was to be paid for something which is outside and was not a house. I can find no such enlargement in any part of this contract. The result, to my mind, is that the only construction that ought to be placed upon this language is that which the learned Lord Ordinary has placed upon it, and I therefore move your Lordships that the interlocutor appealed from be reversed and that the interlocutor of the Lord Ordinary be restored.