

unable to hold that the mere designation of the pursuer or the statement of the purpose for which the defender was to travel modifies the absolutely general obligation of the defender not to sell or travel at all in the towns and districts indicated, and I am of opinion that under that obligation, if valid, he might have been prevented from selling or travelling in any trade whatever.

I may point out that in the case of *Baker v. Hedgecock*, 39 Ch. D. 520, where the obligation was not to carry on any business whatever, it was held to be of no moment that in the beginning of the agreement the employer was designated as "of 61 High Holborn, tailor," and the employee was designated "skilled foreman cutter and general superintendent," and the employer was not permitted, by limiting the agreement for the purposes of the action to an injunction against carrying on the business of a tailor, to render the agreement valid or the action good. It was accordingly there held that the agreement was void and the injunction was refused. Applying that case to the present, I am of opinion that the limited restriction in the prayer of the petition against selling, travelling, or trading in boots and shoes will not render the agreement valid so as to entitle the Court to grant the limited interdict asked; and similarly I am of opinion that the limitation of the districts against trading in which interdict is sought will not have the effect of rendering the agreement valid to that limited extent. I regard the obligation as one and indivisible and not separable or restrictable in part, as suggested by the pursuer.

On these grounds I am of opinion that the interlocutor of the Sheriff-Substitute of 8th May 1907 ought to be recalled, and that we should find that at the date of the action the defender had been canvassing the persons mentioned in the prayer of the petition, being customers of the pursuer, for orders for boots and shoes; that his doing so was in contravention of his agreement with the pursuer, and in respect that the period of twelve months fixed by the contract has now expired, should find it unnecessary to grant interdict against the defender from selling boots and shoes to or canvassing any parties who were customers of the pursuer prior to 27th October 1906, and in particular from selling to or canvassing the persons specially named in the prayer of the petition or their representatives for orders for boots and shoes, and *quoad ultra* should assoilzie the defender.

LORD STORMONTH DARLING was absent.

The Court pronounced this interlocutor—

"Recal the said interlocutor: Find that at the date of the action the defender had been canvassing the persons mentioned in the prayer of the petition, being customers of the pursuer, for orders for boots and shoes; that his doing so was in contravention of his agreement with pursuer; but as the

twelve months referred to in the said agreement have long since expired, find it unnecessary to interdict the defender from selling boots and shoes to or canvassing any parties who were customers of the pursuer prior to 27th October 1906, and in particular from selling to or canvassing the persons specially named in the prayer of the petition or their representatives for orders for boots and shoes; and *quoad ultra* assoilzie the defender from the conclusions of the petition, and decern."

Counsel for the Defender (Appellant)—
Wilton. Agent—Alex. Bowie, S.S.C.

Counsel for the Pursuer (Respondent)—
MacRobert. Agents—Young & Falconer,
W.S.

Friday, January 31.

SECOND DIVISION.

FYFE'S TRUSTEES v. DUTHIE AND OTHERS.

Succession—Fee and Liferent—Vesting—Vesting subject to Defeasance—Fee to Daughters Burdened with Trust to Secure Income to them during Lives and Capital to their Surviving Children—Circumstances in which Direction to Secure Daughters' Shares by "Antenuptial Settlement" Held Applicable to Daughters Married at Date of Will—Repugnancy.

A testator directed his trustees to realise and divide the residue of his estate among his children equally—"Declaring . . . that the term of the vesting of the foregoing provisions of residue shall as regards daughters be on their respectively attaining majority or being married, whichever of these events shall happen first: As regards said provisions to my daughters, I hereby appoint that the capital of the same shall not be paid to them (except as after mentioned), but that my trustees shall pay to my daughters the revenue of their respective provisions while they remain unmarried; and on their marriage my trustees shall see to it that the said provisions, both revenue and capital, be secured in trust in their own names, or in the names of other trustees by antenuptial settlement upon my daughters and their children to be born, in usual form, the husbands of my said daughters (if my said daughters shall so desire) to have a liferent only postponed to my said daughters' liferent: Further, notwithstanding what is before written, my trustees shall have power on the marriage of such daughter to pay to her, or to pay to any daughter already married, at my death, for her own absolute use, such portion (not exceeding one-tenth part) of the capital of her provision as my trustees shall think proper, which pay-

ment shall be imputed towards such daughter's provision." There was no destination - over of the share of a daughter in the event of her surviving the period of vesting but dying without children. The testator was survived by unmarried daughters who had attained majority, and by two married daughters, one of whom had children, and both of whom were married at the date of the settlement. No antenuptial settlements had been made on their marriage.

Held that a fee was given to the daughters, but that it was burdened with a trust for the purpose of securing to them the income of their shares during their lives, and the capital to their children who should survive them, and that this applied not only to the unmarried but also to the married daughters, because the indication of a method of carrying out this purpose (i.e. by "antenuptial settlement"), which was inapplicable to the married daughters, could not prevent the testator's intention receiving effect; and (2) that on the death of a daughter without leaving children her share would be carried by her will if she left one, and if not would pass to her heirs *ab intestato*.

John Fyfe, granite merchant in Aberdeen, died on 18th July 1906, survived by two sons and eight daughters and predeceased by his wife. He left a trust-disposition and settlement, dated 15th January 1902, and recorded in the Sheriff Court books of the county of Aberdeen 30th July 1906.

By his trust-disposition and settlement the testator conveyed his whole estate to trustees. The settlement provided as follows—"In the seventh place, I direct my trustees, as soon as they may find convenient, to realise and divide the residue of my estate, heritable or moveable, real or personal (including the proceeds of my said business and others, if not taken over by my said sons or son), among my children, in such proportions as I shall by any writing appoint, and failing such appointment, equally among them, share and share alike: But declaring that if my said sons or son shall elect to accept the legacy of my business and others, bequeathed by the sixth purpose hereof, along with the said legacies or legacy of £5000 each, provided to them or him in terms of the fourth and sixth purposes hereof, such sons or son shall take and receive such legacies in full of all claim on my estate, and shall have no share in the said residue, which shall in such case be divided, as above, among my children who do not benefit by the legacy of my said business and others: Declaring . . . that the term of the vesting of the foregoing provisions of residue shall, as regards daughters, be on their respectively attaining majority or being married, whichever of these events shall happen first: As regards said provisions to my daughters, I hereby appoint that the capital of the same shall not be paid to them (except as after mentioned), but that my trustees shall pay

to my daughters the revenue of their respective provisions while they remain unmarried, and on their marriage my trustees shall see to it that the said provisions, both revenue and capital, be secured in trust in their own names, or in the names of other trustees, by antenuptial settlement, upon my daughters and their children to be born, in usual form, the husbands of my said daughters (if my said daughters shall so desire) to have a liferent only postponed to my said daughters' liferent: Further, notwithstanding what is before written, my trustees shall have power on the marriage of such daughter to pay to her, or to pay to any daughter already married at my death, for her own absolute use, such portion (not exceeding one-tenth part) of the capital of her provision as my trustees shall think proper, which payment shall be imputed towards such daughter's provision: Subject to these general directions the terms of such antenuptial settlements shall, as regards my said daughters' provisions, be determined by my trustees: And I declare that if any of my children predecease the term of vesting of their provisions without leaving lawful issue, the share of such predeceasing child shall accrete to those of my children who shall survive the term of vesting of their provisions, or to their issue *per stirpes*, but if such predeceasing child shall leave lawful issue, such issue shall have right to their predeceasing parent's share, and to the proportion of any share that may have accreted in manner foresaid: And I declare that my trustees shall have power to advance and pay to or expend for the aliment, education, and advancement in life of any of my children or of their issue, such portion not exceeding one-fifth of the revenue or capital of the provisions hereby made for them, as to my trustees shall seem expedient, and that even though the term of vesting of such provisions may not have arrived, such advances being imputed towards the provision of the child on whose behalf such advances shall be made."

The residue of the testator's estate, which consisted both of heritage and moveables, amounted to about £150,000. The testator made no appointment of residue other or further than what was contained in the seventh purpose above quoted.

William Fyfe and John Malcolm Fyfe, the two sons, exercised the option conferred on them by the sixth purpose of the settlement, and took over the truster's business, and accepted the legacies of £5000 bequeathed to each of them by the fourth purpose. They therefore took no share of the residue of the trust estate.

Of the eight daughters, two, Mrs Lesley Fyfe or Duthie and Mrs Barbara Fyfe or Weber, were married, and had been married at the date of the testator's death. They had both attained majority. No antenuptial settlements were made on their marriages. The six unmarried daughters except one had at the date of this case attained majority.

Questions having arisen as to the disposal

of the residue of the trust estate, this Special Case was presented for the opinion and judgment of the Court.

The parties to the Special Case were (1) William Fyfe and others, the trustees appointed by the settlement, *first parties*; (2) Mrs Duthie and Mrs Weber, the testator's married daughters, *second parties*; (3) the unmarried daughters, *third parties*; (4) the whole grandchildren of the testator, who were all children of Mrs Duthie, *fourth parties*; (5) the whole heirs *ab intestato* of the testator, *fifth parties*.

The first parties maintained that on a sound construction of the said trust-disposition and settlement they were bound (subject to the power to advance) to procure the shares of residue of the second parties settled in trust in the names of themselves or of other trustees for behoof of the second parties respectively, in liferent and otherwise, in terms of the directions for the settlement of daughters' provisions contained in the seventh purpose of the trust-disposition and settlement; and that as regards the shares of the testator's unmarried daughters, being the third parties hereto, they were bound to retain the capital of the provisions to the said daughters while they respectively remained unmarried, and to pay the income to the said daughters respectively, subject to the power to make advances out of capital not exceeding one-fifth in each case, and that on the marriage of each daughter they were bound to secure the said provisions by antenuptial settlement upon the daughters and their children, as provided by the said seventh purpose of the trust-disposition and settlement, subject to the power to make advances not exceeding one-tenth part of the capital in each case.

The second parties maintained that they had an unqualified and indefeasible right of fee in their respective shares of residue, the subsequent directions of the testator falling to be regarded as inapplicable, or otherwise as repugnant or ineffectual; and further, that they were entitled to present payment of the capital of their shares. Alternatively, they maintained that they were entitled to the income of their respective shares during their lives, and that the fee of their respective shares had vested in them, subject to defeasance in the case of each daughter, in the event only of her entering into a subsequent marriage, and of an antenuptial settlement being executed in manner provided by said trust-disposition and settlement, and of children born of such marriage surviving her, and then only if and in so far as rights in the fee should have been conferred on such children by such antenuptial settlement.

The third parties maintained that they had also a vested right in their respective shares of the residue along with the second parties and that they were entitled to present payment of the capital of their shares. Alternatively, they maintained that they were entitled to the income of their respective shares during their lives, and that the fee of their respective shares

had vested in them, subject to defeasance in the case of each daughter, in the event only of her marrying, and of an antenuptial settlement being executed in manner provided by said trust-disposition and settlement, and of children born of such marriage surviving her, and then only if and in so far as rights in the fee should have been conferred on such children by such antenuptial settlement.

It was maintained on behalf of the fourth parties that they had taken a vested interest in the fee of the share of residue provided to their mother, Mrs Lesley Fyfe or Duthie, and that the capital of such share would on her death fall to be divided among the fourth parties along with any children that might thereafter be born to her, subject to such provision, if any, in favour of her husband John Duthie, as might competently be made by her.

It was maintained on behalf of the fifth parties that they were entitled as heirs *ab intestato* of the testator to the fee of the shares of any of the daughters who might die without leaving issue born after the testator's death.

The following questions of law were, *inter alia*, stated for the opinion and judgment of the Court:—“(1) Has an unqualified right of fee in their respective shares of residue vested in the second parties, and are they entitled to present payment of the capital of their shares? Or (2) Are the first parties bound (subject to the power to advance) to procure said shares settled in trust in the names of themselves or of other trustees for behoof of the second parties respectively, in liferent and otherwise, in terms of the trustor's directions for the settlement in trust of daughters' provisions contained in the seventh purpose of his trust-disposition and settlement? (3) Has an unqualified right of fee in their respective shares of residue vested in the third parties, and are they entitled to present payment of their shares? Or (4) Are the first parties bound (subject to the power to advance) to retain the shares of the third parties and to pay to them respectively only the income thereof, so long as they are respectively unmarried, and in the event of any of the third parties being hereafter married, to procure her share (subject to the power of advance), settled in trust for behoof of her in liferent, and otherwise in terms of the trustor's said directions for the settlement in trust of daughters' provisions? . . . (6) As regards the share of residue provided to Mrs Duthie, have the fourth parties (together with any children who may hereafter be born to her) a vested right of fee in said share? . . . (8) Does the fee of the share of any daughter who may die without leaving issue, born after the testator's death, fall to the fifth parties as heirs *ab intestato* of the trustor?”

The following cases were cited by the first and fourth parties in support of their contentions—*Tweeddale's Trustees v. Tweeddale*, December 16, 1905, 8 F. 264, 43 S.L.R. 193; *Chambers' Trustees v. Smiths*, April 15, 1878, 5 R. (H.L.) 151, 15 S.L.R. 541.

At advising—

LORD LOW—(read by the Lord Justice-Clerk)—The questions raised in this Special Case depend upon the construction of the residue clause in the trust-disposition and settlement left by the deceased John Fyfe.

The truster's sons having elected to take certain other provisions instead of sharing in the residue, the residuary legatees are the truster's daughters, of whom there are eight. Two of these daughters, Mrs Duthie and Mrs Weber, are married. They were both married prior to the execution of the trust-disposition and settlement. Mrs Duthie has five children, all of whom were born prior to the truster's death. Mrs Weber has no children.

By the seventh purpose of the trust-disposition and settlement the truster directed his trustees, as soon as they might find convenient, to realise and divide the residue of his estate among his children equally, share and share alike, declaring that "the term of the vesting of the foregoing provisions of residue shall as regards daughters be on their respectively attaining majority or being married, whichever of these events shall happen first."

That is a direction which amounts to an absolute gift of a share of the residue to each daughter who shall attain majority or be married. So far there is no ambiguity, but the testator proceeds to give certain further directions in regard to the way in which the trustees are to deal with the daughters' shares, which are so badly expressed as to render their construction a matter of difficulty.

All the daughters maintain that the directions are so ambiguous that it is impossible to give to them any effect whatever, while the married daughters further maintain that at all events the directions cannot be applied to the shares destined to them.

I think that the fact that two of the daughters were already married when the settlement was made does add to the difficulty of construction, but leaving that fact out of view in the meantime, and considering the clause as if the question had arisen with daughters who were all unmarried, I do not think that there is any reasonable doubt what the testator's intention was, and I further think that that intention is sufficiently expressed by the language used.

The testator directs that the capital of the residue shall not be paid to the daughters (except to a certain small extent), but shall be held by the testamentary trustees, or by other trustees whom they are authorised to nominate, during the lifetime of the daughters. So far I do not think that there is any doubt, because the directions to that effect are not really ambiguous. There is more difficulty, however, in regard to the purposes for which the capital is to be held in trust. As regards the daughters themselves, I think that it is sufficiently clear that they are only to be entitled to payment of the income. It is expressly said that so long as a daughter remains unmarried the trustees are to pay the "revenue"

of her share to her, and the right of a daughter after she is married is referred to as a "liferent."

That being so, the next question is, what becomes of the capital? I shall quote the very words of the clause upon which the answer to that question depends. After directing the trustees to pay the revenue of their shares to the daughters so long as they remain unmarried, the clause proceeds—"And on their marriage my trustees shall see to it that the said provisions, both revenue and capital, be secured in trust in their own names, or in the names of other trustees, by antenuptial settlement, upon my daughters and their children to be born, in usual form, the husbands of my said daughters (if my said daughters shall so desire) to have a liferent only postponed to my said daughters' liferent. . . ."

Now the trust which is to be set up on the marriage of a daughter is to be for the purpose of securing both revenue and capital. The revenue alone, as we have seen, is to be paid to the daughters during their lives, and therefore the securing of the capital must be primarily for the benefit of children. But it was argued that there was nothing to show what was the precise nature of the right to the capital which was given to the children. It might be an absolute and unqualified fee, the daughters being restricted to a liferent *alternarily*, or it might be a right which depended upon the children surviving their mothers. The language used, it was contended, was consistent with either of these alternatives. I do not think that that contention is well founded. It seems to me that there are very sufficient grounds for holding that the right given to the children of a daughter depended upon their survivance of their mother.

In the first place, to restrict the daughters to a liferent and to give an absolute fee to their children if and when they came into existence would be inconsistent with and repugnant to the initial gift to the daughters. In the second place, there is no destination-over of the share of a daughter who survives the period of vesting but has no children. If, however, a fee was conferred upon the daughter by the initial gift, and if the effect of the subsequent directions was merely to burden that fee with a resolute condition in the event of the daughter being survived by children, there was no room for a destination-over in the event of failure of children.

It therefore seems to me that this is a case of the kind of which *Tweeddale's Trustees*, 1905, 8 F. 264, is the most recent example, and that a fair construction of the language used is that a fee was given to the daughters, but that it was burdened with a trust for the purpose of securing to the daughters the income of their shares during their lives, and the capital to their children who should survive them. The result would be that in the event of a daughter dying without leaving children, her share would be carried by her will, if she left one, and if not would pass to her heirs *ab intestato*.

For these reasons I am of opinion that as regards unmarried daughters the directions in question sufficiently disclose the intention of the testator, and I shall now consider the case of the daughters who were already married.

In the first place, it seems to me to be certain that the directions were intended to apply to all the daughters. They are introduced by the words—"As regards said provisions to my daughters, I hereby appoint that the capital of the same shall not be paid to them"—words which plainly include all the daughters. Then in the clause immediately following the directions in question the testator authorises his trustees to pay a certain part of the capital to his daughters. The clause is in the following terms:—"Further, notwithstanding what is before written, my trustees shall have power on the marriage of such daughter to pay to her, or to pay to any daughter already married at my death," a portion of her share not exceeding one-tenth. Now, there the testator does contemplate that a daughter may be already married at his death, and obviously there would be no necessity for empowering the trustees to pay a portion of the capital to a daughter in that position unless the previous direction to the trustees to hold the capital applied to daughters already married.

But the difficulty which arises is this—that although the trustees are directed not to pay the capital of their shares to any of the daughters, the testator's instructions as to the purposes for which the shares are to be retained are, in terms, applicable only to the case of unmarried daughters. Thus the trustees are directed to pay the revenue of the shares "to my daughters while they remained unmarried," and "on their marriage" the trustees are to secure their shares in trust "by antenuptial settlement upon my daughters and their children to be born." Therefore upon a literal reading of the clause the trustees, although they would be bound to retain the share of a married daughter would have no power, or at all events no express power, to pay the revenue to her, and they could not secure the share by antenuptial settlement unless such daughter became a widow and married again, and they could in no case secure the capital to children born prior to the testator's death, because the settlement is only to be on children "to be born."

In these circumstances there is much force in the contention of the married daughters that as regards them the directions must be disregarded altogether, because assuming that the trustees are directed to hold their shares, there is no specification of the purposes for which they are to do so, and it cannot be assumed that the intention of the testator was the same as regards married and unmarried daughters.

The question is one of very considerable difficulty, but I have come to be of opinion that the directions are capable of being applied, as they were undoubtedly intended to be applicable, to the case of married as

well as of unmarried daughters. I think that the instructions to the trustees as to what they are to do with the shares of the daughters (which they are unequivocally directed in all cases to retain) may be regarded, first, as expressing the testator's intention as to the purpose for which the shares were to be retained, and secondly, as indicating what might be called the machinery for carrying that purpose into effect. Now, if I am right in holding that the purpose is sufficiently clear, I do not think that the testator's intention can be defeated simply because he has indicated a method of carrying out his wishes which is not precisely applicable to every case. There is no difficulty in settling the shares of the married daughters in trust to secure payment of the revenue to them, and of the capital to their children in the event of their survivance, and that is the kind of settlement which the testator had in view, although it is not and cannot be precisely the form of settlement which he specified.

I am therefore of opinion that the 1st and 3rd questions should be answered in the negative, and the 2nd and 4th in the affirmative, and that the 6th and 8th questions should be answered in the negative. In regard to the 5th and 7th questions, I think that we should find it unnecessary to answer them.

THE LORD JUSTICE-CLERK and LORD ARDWALL concurred.

LORD STORMONTH DARLING was absent at the hearing.

The Court answered the first, third, sixth, and eighth questions in the negative, and the second and fourth in the affirmative.

Counsel for the First and Fourth Parties—Cullen, K.C.—Spens. Agents—W. & J. Cook, W.S.

Counsel for the Second and Third Parties—Dean of Faculty (Campbell, K.C.)—Murray. Agents—Skene, Edwards, & Garson, W.S.

Counsel for the Fifth Parties—D. Anderson. Agents—W. & J. Cook, W.S.

Monday, April 8, 1907.

OUTER HOUSE.

[Lord Johnston.]

THE LORD ADVOCATE v. BALFOUR.

Fishings—Crown—Salmon Fishings in Orkney—Udal Tenure.

Held (per Lord Johnston, Ordinary) that in Orkney the right of salmon fishing is not *inter regalia*, the feudal law of Scotland as to salmon fishings not being applicable in Orkney, irrespective of whether the title to the lands in respect of which the fishing is claimed by the proprietor, has become feudalised.

Observations on the udal tenure of Orkney and the history of the feudal system in Scotland and in Orkney, so far as adopted therein.