

footing primarily of a comparison of rentals. Now unfortunately, although the print in the case is a large one, the data for instituting a comparison of rentals are most insufficient, and, such as they are, misleading and confused, no proper distinction, to mention one point, being drawn between the front areas and the back areas of the different buildings attempted to be compared. Accordingly if we were to proceed with this case I am satisfied that our decision would be very much a matter of guesswork. What, therefore, we propose to do is to recall the valuation made for this year, restore the former rate, and leave it to the parties, if they so desire, to bring the matter before us again next year on a case which is better prepared. I venture further to suggest that parties in preparing their case should take their counsel along with them. I may say that what the Court most desire in a case of this nature is a well-prepared tabulated statement which can be readily followed with the help of a map and of any necessary explanations from counsel.

LORD SALVESEN—I think the only matter which we can finally decide in this appeal is that the mere fact that a building such as the one in question is occupied by a statutory body is not *per se* a sufficient ground for applying the contractor's principle, and that even where subjects are owned and occupied by statutory bodies the proper method to adopt, at any rate in the first instance, is the ordinary method of comparison. It may, of course, be possible for the assessor here to show that the building is of so peculiar construction that the only hypothetical tenant is the existing occupier and owner. In that event we might be driven to apply the contractor's principle, but so far as the evidence goes at present I should draw the opposite conclusion, viz., that there is nothing unique about this building, that there would be no difficulty in finding other tenants for it, and that accordingly the contractor's principle should not be applied to this any more than to a hundred other cases in which the building is one erected by a person for his own accommodation and with special regard to his own requirements. The mere fact that it may not be easy to get a tenant to take the present occupiers' place is not a sufficient reason for having recourse to a principle which is only legitimate where a comparison with neighbouring premises is impossible.

While, therefore, we can without difficulty decide the principle and method of valuation, I do not consider that we have adequate materials before us for fixing the amount. The assessor's contention is that the figure which appears in the roll at present is too low. That may be so, and he may be able at some future time to demonstrate this by the method of comparison adopted in other cases, of which the following are merely examples:—*North British and Mercantile Insurance Company v. Assessor for Edinburgh*, 1908 S.C. 601, 1910 S.C. 814, and *North British Railway Company v. Assessor for Edinburgh*, 1911 S.C. 939, where the subject in question was the

Station Hotel. We have, however, no sufficient materials for affirming his contention in the case as presented, and the old valuation must accordingly stand for the present year.

LORD CULLEN—I concur.

The Court were of opinion that the subjects should be entered in the roll at the figure at which they were entered in the previous year.

Counsel for the Appellants—C. D. Murray, K.C.—J. Forbes. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for the Assessor—Wilson, K.C.—Russell. Agents—Campbell & Smith, S.S.C.

## COURT OF SESSION.

Friday, December 12.

### FIRST DIVISION.

#### VEITCH'S TRUSTEES *v.* RUTHERFORD AND OTHERS.

*Succession—Vesting—Liferent or Fee—Direction to Trustees “to Put not a Shilling at Risk” during the Beneficiaries’ Lives—Repugnancy.*

A testator left the residue of his estate to trustees “for behoof of” two ladies, and enjoined them, the trustees, “to put not a shilling at risk during the life” of the two beneficiaries.

Held that the bequest conferred an absolute right of fee vesting *a morte*, that the trust purposes were repugnant, and that, accordingly, the beneficiaries were entitled to immediate payment of the residue equally between them.

On 26th September 1912 W. G. Turnbull, farmer, Spittal-on-Rule, Roxburghshire, and another, the testamentary trustees of the Reverend William Veitch, LL.D., Circus Place, Edinburgh, *first parties*; Mrs A. R. Turnbull or Rutherford, widow of John Rutherford, farmer, Jedburgh, and Mrs A. E. Rutherford or Bywater, wife of J. T. A. Bywater, Nisbethill, Ancrum, with the consent of her husband as her curator and administrator-in-law, the beneficiaries named in the residue clause after mentioned, *second parties*; Mrs J. E. Turnbull or Brown, wife of D. G. Brown, Ballarat, Victoria, with the advice and consent of her husband, and another, the representatives of the testator's next-of-kin and heirs *in mobilibus* as at the date of his death, *third parties*; and the said W. G. Turnbull and others, the surviving original trustee and the representatives of the deceased trustee under the said residuary clause, *fourth parties*, brought a Special Case for the determination of the rights of the second parties in the residue of Dr Veitch's estate.

The Case stated—“1. The late Reverend William Veitch, LL.D., . . . died on 8th July 1885, leaving a holograph will dated 4th July 1878, . . . and registered in the

Books of Council and Session 20th January 1886. . . .

"2. As regards the residue of the testator's estate the said *will* provides as follows—'The residue I leave to my relation and friend Professor William Rutherford and Mr William Turnbull, Spittal, for behoof of Mrs John Rutherford, Thickside, and Mrs Bywater (Annie Rutherford), and enjoin on them to put not a shilling at risk during the life of the two ladies.'

"3. At or about the end of the year 1885 the executor appointed by the said *will* paid over the residue of the testator's estate to the said Professor Rutherford and William Turnbull, . . . as trustees under the said residuary clause. The said Professor Rutherford has since died. . . . The trustees, since the said residue was paid over to them in 1885, have held and invested the capital thereof, which at the present value of the investments amounts to about £6400, and have paid the annual income to the said Mrs Rutherford and Mrs Bywater equally. . . .

"4. The second parties . . . maintain that under the said *will* the residue of the testator's estate has vested in them in fee, and that they are now entitled to have the same paid to them equally. Alternatively they maintain that the said residue has vested in them in fee, subject only to the limitation that during their lifetime it falls to be administered by the first parties for their respective use and behoof. If it be held that their interest is one of *lifereit*, they maintain that in addition to said interest each of them has a power of disposal *mortis causa* of one half of the residue. If it be held that their interest in the residue is limited to one of *lifereit* only, they maintain that on the death of the first decessor of Mrs John Rutherford and Mrs Bywater, the fee of the half of the residue which had been *lifereited* by her *will* thereafter be *lifereited* by the survivor. . . .

"7. The first, third, and fourth parties maintain that under the said *will* the second parties are not now entitled to have the said residue paid to them, but are entitled only to the *lifereit* of said residue. . . ."

The questions of law were—"1. Is the residue vested in fee in the second parties equally? 2. If the first question be answered in the affirmative, (a) are the second parties now entitled to payment of the said residue equally between them, or (b) does it fall to be administered by the first parties during their lifetime for their respective use and behoof? 3. If the first question be answered in the negative, has each of the second parties a power of disposal *mortis causa* of one-half of the said residue in addition to her *lifereit* interest? 4. If the right of the second parties be limited to one of *lifereit* only, on the death of the first decessor of Mrs John Rutherford and Mrs Bywater will the fee of the half of the residue which had been *lifereited* by her be thereafter *lifereited* by the survivor?"

A note was subsequently lodged in process by the parties setting forth, *inter alia*, that both Mrs Rutherford and Mrs Bywater (the second parties) were married prior to the

passing of the Married Women's Property (Scotland) Act 1881; that no provision by irrevocable deed was ever made by Mr Rutherford for his wife in the event (which happened) of her surviving him; that Mr Bywater died on 10th September 1913 leaving a trust-disposition and settlement, by which he, *inter alia*, renounced his *jus mariti* with regard to any funds that might be acquired by his wife, and that accordingly both of the second parties took the residuary bequest referred to as their separate estate.

Argued for the second parties—The right of the second parties in the residue was one of fee, not of *lifereit*. Each therefore was entitled to immediate payment of her share—*Miller's Trustees v. Miller*, December 19, 1890, 18 R. 301, 28 S.L.R. 236; *Greenlees' Trustees v. Greenlees*, December 4, 1894; 22 R. 136, 32 S.L.R. 106; *Ballantyne's Trustees v. Kidd*, February 18, 1898, 25 R. 621, 35 S.L.R. 488; *Gillies' Trustees v. Hodge*, December 7, 1900, 3 F. 238, 38 S.L.R. 150; *Yuill's Trustees v. Thomson*, May 29, 1902, 4 F. 815, 39 S.L.R. 668; *Tweeddale's Trustees v. Tweeddale*, December 16, 1905, 8 F. 264, 43 S.L.R. 193. The cases of *Christie's Trustees v. Murray's Trustees*, July 3, 1889, 16 R. 913, 26 S.L.R. 611, and *Chambers' Trustees v. Smiths*, April 15, 1878, 5 R. (H.L.) 151, 15 S.L.R. 541, were distinguishable, for in both the fee was defeasible, and in *Forrest's Trustees v. Reid*, November 25, 1904, 8 F. 142, 42 S.L.R. 133, there was a destination-over to heirs. In the present case the fee given was an absolute one, for there was no further destination and no resolute conditions, nor were there other interests involved which might require the retention of the money in the trustees' hands. [As to the possibility of a protected fee, LORD JOHNSTON referred to *Gibson's Trustees v. Ross*, July 12, 1877, 4 R. 1038, 14 S.L.R. 694, and to *Massy v. Scott's Trustees*, December 5, 1872, 11 Macph. 173, 10 S.L.R. 111.] *Esto*, however, that the right of the second parties was merely one of *lifereit*, the survivor was entitled to a *lifereit* of the whole—*Barber v. Findlater*, February 6, 1835, 13 S. 422; *Paxton's Trustees v. Cowie*, July 16, 1886, 13 R. 1191, *per* the Lord President at p. 1197, 23 S.L.R. 830. [Counsel for the parties admitted that the third question—viz., that as to the power of disposal—did not arise at present. It was also conceded by the third and fourth parties that in the event of the Court holding the right of the second parties to be one of *lifereit*, the survivor would be entitled to a *lifereit* of the whole.]

Argued for the first, third, and fourth parties—The bequest was one of *lifereit*. The words "for behoof of" did not necessarily imply a gift of fee. They were equivalent to "for the use of." There was no direction to pay, and no absolute gift *in initio* as in *Greenlees (cit.)*

At advising—

LORD PRESIDENT—I regard the questions raised in this Special Case as completely covered by authority, and I should regret if any further doubt were thrown upon the principle of law laid down and applied by

the judgment of the whole Court in the case of *Yuill's Trustees*, (1902) 4 F. 815. That principle I take to be this, that "when a vested, unqualified, and indefeasible right of fee is given to a beneficiary of full age he is entitled to the payment of the provision notwithstanding any direction to the trustees to retain capital provision and to pay over the income periodically, or to apply the capital or income in some way for his benefit." And I think that in that case Lord Moncreiff was quite right when he said that "it is simply a short statement of the grounds of judgment of Lord Rutherford Clark and Lord M'Laren in the case of *Miller's Trustees v. Miller*," (1890) 18 R. 301, for when I turn to *Miller's Trustees* I find that Lord Rutherford Clark thus laid down the principle—"I do not think that the law allows of any restriction on the owner of an absolute fee, and in my opinion the direction that the trustees shall manage the estate till Mr Miller reaches twenty-five is just as repugnant to the right of fee which is vested in him as a direction to manage the estate till he reaches any other age, or it might be till his death." And Lord M'Laren in the same case says—"It seems to me that a beneficiary who has an estate in fee has by the very terms of the gift the same right of divesting the trustees and so putting an end to the trust which the trustor himself possessed."

Now we have here before us, as I think, a clear case for the application of the principle so laid down, for the residue clause of Dr Veitch's holograph settlement runs thus—"The residue I leave to my relation and friend Professor William Rutherford and Mr William Turnbull, Spittal, for behoof of Mrs John Rutherford, Thickside, and Mrs Bywater (Annie Rutherford), and enjoin them to put not a shilling at risk during the life of the two ladies." I cannot construe these words otherwise than as conferring a clear, unqualified, and indefeasible right of fee on these two ladies. And it is nothing to the purpose to say that these words are followed by an injunction to the trustees to put not a shilling at risk during the life of the two ladies, because that is no more than a direction to place the money in a safe investment where no loss can take place. It is, I think, impossible to contend that the import of these words is to reduce the right of fee to a right of mere life interest, and if they have not that effect, then it was not maintained to us that they had any other effect. The first and third parties to this case were, I think, well advised in not maintaining in face of the judgment in *Yuill's Trustees* and *Miller's Trustees* that the effect of these words was to enable the trustees to retain and to manage this vested provision.

It appears to me, as the result of the authorities to which I have referred, and as the result of the principle which I take to be firmly embedded in our law, that a beneficiary cannot be denied an immediate payment of his provision unless there are trust purposes in the settlement, to secure which it is essential that the trustees retain in

their own hands the right which is vested in the beneficiary. Now in the case before us there are no such trust purposes, and therefore I think that these ladies are entitled to the immediate payment of the provision made for them in the residue clause of this will.

I propose to your Lordships, therefore, turning to the questions, that we should answer the first question in the affirmative, the first part of the second question in the affirmative, and the second part of the second question in the negative. The third question is superseded, and the fourth question is abandoned.

LORD JOHNSTON—The testator left the residue of his estate to two trustees for behoof of two ladies, Mrs John Rutherford and Mrs Bywater, and enjoined them, the trustees, "to put not a shilling at risk during the life of the two ladies." The testator's will was holograph and evidently prepared by himself. I cannot have any doubt that the testator intended a joint fee vesting *a morte*, and not a life interest, and that he desired merely that the trustees should keep the money safely invested for the ladies during their lives. Such a trust superimposed on a fee is repugnant and can receive no effect, however valuable the constitution of such a trust may be to many a liar.

As the two ladies both survived the testator, though the bequest was joint they each took a vested interest in one-half, and no question of accretion arose.

Mrs Rutherford was married in 1875, and the testator died in 1885. Her husband had made no provision for her before the passing of the Married Women's Property Act 1881. Hence by section 3 thereof Mrs Rutherford took her share of the residuary bequest in question as her separate estate.

Mrs Bywater was also married, in 1878, before the passing of the Act. Mr Bywater made a reasonable provision for her by ante-nuptial marriage contract, and therefore Mrs Bywater's interest in the bequest in question fell under his *jus mariti*. See also section three of the Act. But by his testamentary settlement he waived his right in favour of his widow. Hence Mrs Bywater's rights are not practically affected by her marriage.

The first, and the first branch of the second, question therefore fall to be answered in the affirmative. The other questions do not require answer.

LORD MACKENZIE—I think it follows from the authorities which were cited that the questions in this case should be answered in the way your Lordship proposes.

LORD SKERRINGTON was absent.

The Court answered the first question of law in the case, and the first branch of the second question, in the affirmative, and found it unnecessary to answer the remaining questions.

Counsel for the First Parties—A. M. Hamilton. Agents—Mackenzie & Wyllie, W.S.

Counsel for the Second Parties—Moncrieff, K.C.—J. H. Henderson. Agents—Bell, Bannerman, & Finlay, W.S.

Counsel for the Third Parties—Chree, K.C.—Shiell. Agents—Sharpe & Young, W.S.

Counsel for the Fourth Parties—Macquisten. Agent—J. D. Rutherford, W.S.

Friday, December 12.

FIRST DIVISION.

[Scottish Land Court.

HOWATSON v. M'CLYMONT.

*Landlord and Tenant—Small Holding—Business Primarily Pastoral—Permanent Grass Park Tenanted by Dairykeeper—Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49), sec. 26 (3) (g).*

Two enclosures of "permanent grass park," 10 and 3½ acres in extent, on which there were no buildings, were used by the tenant, a dairykeeper, for the grazing and feeding of five cows and one horse. In his dairy business, which had existed before he got the enclosures, he sold the milk produced by his own five cows, and the milk, which he bought, of other ten cows belonging to neighbouring farmers. The horse was used for the purpose of the holding and for conveying the milk to market.

*Held (diss. Lord Ormidale)* that the subjects were not "held for the purpose of a business or calling not primarily agricultural or pastoral" within the meaning of section 26 (3) (g) of the Small Landholders (Scotland) Act 1911, and consequently were not excluded from the operation of the Act.

The Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49) enacts—Section 26—“(3) A person shall not be held an existing yearly tenant or a qualified leaseholder under this Act in respect of—(g) any land . . . being permanent grass park held for the purposes of a business or calling not primarily agricultural or pastoral, including that of butcher, cattledealer, and the like. . . . (10) A person shall not be subject to the provisions of this Act regarding statutory small tenants who in terms of this section would be disqualified from being an existing yearly tenant or a qualified leaseholder.”

Charles Howatson of Glenbuck, Ayrshire, being dissatisfied with a decision of the Scottish Land Court in the matter of an application by John M'Clymont, tenant of a holding known as Tollparks, Kirkburnhead, on the estate of Turdoes, in the county of Ayr, requested the Court to state a Case for appeal.

The Case stated—“1. On 24th January 1913 John M'Clymont, dairykeeper, Kirkburnhead, Muirkirk, in the county of Ayr, applied to the Scottish Land Court to be declared a landholder, and to have a first fair rent fixed for a holding known as Tollparks, Kirkburnhead, in the parish of Muir-

kirk and county of Ayr, belonging to Charles Howatson of Glenbuck, Ayrshire.

“2. At the hearing in Kilmarnock, on 3rd March 1913, the application was of consent of parties converted into one by the applicant to be declared a statutory small tenant, and to have the period of renewal of his tenancy and a first equitable rent fixed in terms of section 32 of the Small Landholders (Scotland) Act 1911.

“3. The landlord objected to the competency of the application on the ground that the holding being permanent grass parks used for the purposes of a dairy business not primarily agricultural or pastoral, is excluded from said Act by section 26 (3) (g) thereof. . . .

“4. After hearing evidence and inspecting the holding the Land Court issued an interlocutor in the following terms:—*Edinburgh, 25th April 1913.*—The Land Court having resumed consideration of this application, repel the objection to competency stated for the respondent at the hearing, that the holding consists of permanent grass park held for the purposes of a business not primarily agricultural or pastoral (section 26 (3) (g) of the Act of 1911): Find that it is not proved to the satisfaction of the Court that the applicant or his predecessor in the same family has provided or paid for the whole or the greater part of the buildings or permanent improvements on the holding without receiving from the landlord payment or fair consideration therefor (section 2 (1) (iii) (a) of the Act: Find that the respondent has not stated any objection to the applicant under section 32 (4) of said Act: Therefore find that the applicant is a statutory small tenant in and of the holding described in the application, and that he is entitled, in virtue of the 32nd section of said Act, to a renewal of his tenancy of the said holding and to have an equitable rent fixed: And having considered all the circumstances of the case, holding, and district, fix and determine the period of renewal at seven years, and the equitable rent payable by the applicant at thirteen pounds, ten shillings sterling, each to run by consent of parties from the term of Whitsunday 1913: Find no expenses due to or by either party.

‘ROB. F. DUDGEON.

‘NORMAN REID.’

“5. The said Charles Howatson, the landlord, respectfully submits that the Scottish Land Court has misinterpreted the statute, and that the foregoing decision is wrong in law in repelling the objection to competency, and in finding that the tenant is a statutory small tenant in and of the said holding, the landlord's contention being that a dairyman using permanent grass parks for the purposes of his dairy business is, within the meaning of the statute, in the same position as a butcher or cattledealer using such parks for the purposes of his business.

“6. The following are the facts proved so far as bearing on the said objection to competency:—The holding in respect of which the application was made consists of two fields, one extending to 10 acres and the other to 3½ acres, held by the applicant on yearly tenancy at a rent of £20. He became