

the other would be that he is to get all the particular benefit provided for him, but if there be any case unprovided for, then this general intention would take effect in his favour. Now, when we look to the language of the fifth purpose to see which of these constructions of the general language at the beginning is the true one, I can have no doubt that the testator intended to qualify the bequest, because at the very beginning the testator's first direction is to pay Mr David Brown Anderson the income of the share. That would be a very strange way of carrying out a purpose to give the legatee the capital. In so far as the argument of the third parties is founded on the cases of *Miller's Trustees* and *Yuill's Trustees*, I think it proceeds on a misapprehension of the scope of the rule of construction there introduced, because these cases had only reference to administration, and all that was laid down was, that if from the language of the deed it is clear that a fee is given, any attempt to limit the enjoyment of the fee would be futile. But then that principle is qualified, in the opinion of Lord President Inglis, by saying that when there are trust purposes to be served, which cannot be secured except by continuing the trust administration, the rule cannot be applied, and the qualification stated in that eminent Judge's decision is confirmed by the decision of the House of Lords in *MacCulloch* [1904], A.C. 55, where, while the principle of *Miller's Trustees*, 18 R. 301, and *Yuill*, 4 F. 815, was affirmed, it was held that the principle could not be applied to the case of a son in whom the right of fee had vested, because the son was not entitled in face of the opposition of the daughters to insist upon an immediate division of the estate. I do not doubt that, if all parties were agreed, the estate might be divided, but even in the matter of administration any of the beneficiaries who desired that the estate should be administered by the trustee would, according to the case of *MacCulloch*, be entitled to have the trust kept up. But then the case of the third party is further put upon the ground that while a liferent is in the first place given to Mr Anderson there are superadded such extensive interests in the fee that, when combined with the liferent, they constitute the equivalent of an unqualified fee. Now, as I had occasion to point out in a case which was discussed last week, although the doctrine has been laid down by the highest authorities that a liferent with an unqualified power of disposal and no ulterior destination may amount to a fee, no case has actually occurred in which all these theoretical conditions have been fulfilled, and in which by the mere force of the words themselves a qualified right has been held to be an unqualified right. It is not surprising that there should be no such case, because if a testator means to give an unqualified right it is very easy for him to say so, and if he means substantial qualification, then such qualification would receive effect through the intervention of a trust. Now, it seems to me that under this trust Mr Anderson has an abso-

lute right to nothing more than the sum of £2000, which the trustees are empowered to advance to him, and with regard to all the rest of the capital the directions are perfectly plain that Mr Anderson is to receive the income for life, and that the fee is to go to his children if he marries, subject to a power of division among them to be exercised by will or deed.

What is to happen in case Mr Anderson should have no issue, or should die without leaving any children surviving him, is a question which I think we can hardly usefully consider at the present time. It may be that if in that case he disposed of the estate to third parties it might be held that under the general words at the commencement of the fifth purpose he would have an interest in the fee sufficient to enable him to dispose of it. That has been held in other cases—chiefly cases of provision in favour of ladies with a power to settle; but this is a question which we are unable to determine in the absence of those who may have an adverse interest.

I am clearly of opinion with your Lordship that the testamentary directions must be carried out according to the plain meaning of the language used, and that this is not a case where any artificial or arbitrary rule of construction ought to interfere with the testator's intention, and that the question must be answered in favour of the first parties.

LORD KINNEAR—I agree with your Lordships for the reasons you have stated.

The LORD PRESIDENT was absent.

The first alternative of the first question was accordingly answered in the affirmative.

Counsel for the First and Second Parties—Campbell, K.C.—Munro. Agents—MacKenzie, Innes, & Logan, W.S.

Counsel for the Third Party—The Solicitor-General (Dundas, K.C.)—Blackburn. Agents—Dundas & Wilson, C.S.

Thursday, December 8.

FIRST DIVISION.

[Sheriff Court of Ayrshire at Ayr.]

YOUNG'S TRUSTEES v. GRAINGER.

Burgh—Ruinous Buildings—Title Given by Decree of Sheriff—Action for Rent by Lessor under Long Lease—Burgh Police Scotland Act 1892 (55 and 56 Vict. c. 55), secs. 196, 197, and 200.

Certain ruinous buildings in a burgh were sold by public auction by order of the Sheriff under section 200 of the Burgh Police Act 1892, and a decree in terms of section 197 of the Act was pronounced by the Sheriff declaring the purchase duly completed, and authorising immediate possession of the sub-

jects sold to be given to the purchaser. The decree of the Sheriff was recorded in the Register of Sasines.

In an action subsequently brought by a landlord against a singular successor of the purchaser for payment of rent alleged to be due in respect of the ground on which the ruinous buildings stood, under a long lease duly recorded, *held* that the Sheriff's decree, registered in the Register of Sasines, was an absolute title to the purchaser independent of the long lease, and action accordingly *dismissed*.

Opinion (per Lord M'Laren and Lord Kinnear) that the claim by the lessor under the long lease for payment of rent was properly a claim against the purchase money consigned in bank under section 196 of the Act.

The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. c. 55), sec. 195, deals with ruinous buildings belonging to two or more owners, which cannot therefore be rebuilt or disposed of to advantage without the consent of all parties interested, and it authorises the Sheriff to have such buildings valued, distinguishing the different portions and apportioning the value, and to give the parties interested the option of a purchase and sale amongst themselves within a time fixed.

Section 196 enacts—"If any of the said parties fail to take advantage of the said option within the time so fixed, or shall not be able to agree as to which shall be the buyer and which the seller, it shall be lawful to the said sheriff to cause such houses, buildings, and areas to be exposed to sale by public auction at a price not being less than the appraised value, and in case of no offers, to reduce the upset price from time to time, and to sell the same to the highest bidder, under such regulations and upon such conditions, and after such public notice by advertisement in the newspapers or otherwise as the sheriff shall appoint, and the purchaser thereof shall be then bound within ten days after the sale, or within such time as may be fixed by the sheriff, to consign the purchase money in any bank to be named by the sheriff, upon a receipt or voucher, subject to the orders of the sheriff, otherwise the sale to be void and null, and the money so deposited shall remain at interest for the behoof of all parties interested therein, and subject to the future orders of the sheriff."

Section 197—"Upon such deposit being so made, the sheriff shall pronounce his decree or warrant declaring the purchase duly completed, and authorising immediate possession of the tenements so sold to be given to the purchaser thereof; and such warrant or decree shall, upon being registered in the proper register of sasines, be a valid and sufficient title to such purchaser."

Section 200—"If any houses, buildings, or areas have become waste or ruinous, or have become receptacles for filth and other nuisances, or unsafe and unfit for use and occupation, the commissioners may, by a notice addressed to the owner if his address shall be known, or if not known, by a notice

affixed to a conspicuous part of such houses, buildings, or areas, require the same to be rebuilt or otherwise put into a state of repair to their satisfaction within three months of the date of such notice; and in the event of such requisition not being complied with the commissioners may apply to the Sheriff for warrant to sell such houses, buildings, or areas, and it shall be lawful to the sheriff to order the same to be valued and exposed for sale by public auction, and to sell the same, and such sale shall be made and carried out, or re-sale effected, the price deposited and applied, and the purchaser's title completed, in the way and manner hereinbefore directed with reference to waste and ruinous buildings, houses, or areas within the burgh held by two or more joint owners."

The word "owner" is defined in section 4 (22) to "include joint-owner, fiar, liferenter, feuwar, or other person in the actual possession of or entitled to receive the rents of lands, and premises of every tenure or description, and the factor, agent, or commissioner of such persons or any of them, or any other person who shall intronit with or draw the rents."

On 31st March 1904 Mrs Mary Isobel Murdoch or Young and others, the trustees acting under the trust-disposition and settlement of the deceased John George Kirkpatrick Young of Glendoune, Girvan, Ayrshire, dated 26th February 1902 and recorded 16th July 1902, raised an action in the Sheriff Court at Ayr against Dr John Grainger, 25 Monteith Row, Glasgow, concluding for payment of £1, 1s. 11½d., being the rent due at Martinmas 1903 for the year preceding that term of a certain area of ground in Girvan, of which Grainger was in possession.

The pursuers averred that the ground in question formed part of a larger area of ground included in a lease granted by their author Thomas Francis Kennedy, of Dunure, in favour of John M'Kenzie, manufacturer in Girvan, dated 25th December 1836 and 7th December 1839 and recorded in the General Register of Sasines 12th May 1894, which lease was for the period of 999 years from the term of Martinmas 1832 as to some portion, and from the term of Martinmas 1834 as to other portions, of the subjects let, and stipulated for a cumulo rent of £4, 7s. 9d. They averred that the sum sued for had been regularly paid to them up to the term of Martinmas 1902 by Hugh M'Ghie, a grandson of the said John M'Kenzie, who had many years ago acquired the rights under the lease to the portion of the ground now in question.

The defender averred that he "acquired the said subjects from Robert Wotherspoon, residing at 79 Roselea Drive, Dennistoun, Glasgow, conform to disposition by the said Robert Wotherspoon in favour of the defender, dated 26th and recorded in the Division of the General Register of Sasines applicable to the County of Ayr, 27th, both days of November 1903. The said Robert Wotherspoon acquired the said subjects by decree of the Sheriff of Ayrshire at Ayr, dated 22nd January 1903, and recorded in the said Division of the Genera

Register of Sasines 16th February 1903, all in terms of the Burgh Police (Scotland) Act 1892."

The decree of the Sheriff referred to was in the following terms:—"At Ayr the 25th day of November 1902 years and the 22nd day of January 1903 years, in a petition under section 200 of the Burgh Police (Scotland) Act 1892, in the Sheriff Court of Ayrshire at Ayr, by the Provost, Magistrates, and Councillors of the burgh of Girvan, petitioners—the Sheriff of the first date hereof having considered the said petition with the valuation produced therewith, appointed the houses or buildings described as follows, viz.: . . . to be sold heritably and irredeemably by public roup at the upset price of £42 sterling; appointed the sale to proceed upon articles of roup and sale to be prepared by the petitioners' agent and adjusted at the sight of the Clerk of Court and signed by him; appointed the sale to proceed at the sight of the Clerk of Court as judge of the roup in terms of said articles of roup and sale, and that upon such day and at such hour and place as should be fixed by him; appointed the sale to be publicly advertised once a week for three successive weeks in the *Ayr Advertiser*, *Ayr Observer*, and *Ayrshire Post* newspapers; appointed the price of said subjects to be consigned in the hands of the Clerk of Court to abide the orders of Court, and decreed *ad interim*. And of the second date hereof approved of the report of sale, dated 12th January 1903, of the said houses or buildings above described to Robert Wother- spoon, 79 Roselea Drive, Dennistoun, Glas- gow, at the price of £116 sterling, and in respect that deposit of said price had been made by the said Robert Wother- spoon, declared the purchase duly completed, and authorised immediate possession of the said houses or buildings so sold to be given to the said Robert Wother- spoon, the purchaser thereof, and decreed."

No question was raised as to the regu- larity of the procedure before the Sheriff leading up to the foresaid decree.

The pursuers pleaded—" (3) The defender having under said decree only acquired the lessee's interest in said ground, the pur- suer's claim is not excluded."

The defender pleaded—" (3) The defender being absolute proprietor of the subjects in question in virtue of a statutory title and a decree of Court, the pursuers' claim is excluded and is incompetent, and the action should be dismissed with expenses."

Upon 14th June 1904 the Sheriff-Substitute (SHAIRP) sustained the third plea-in-law for the defender and dismissed the action.

Note.—"The origin of the defender's title is the decree of the Sheriff Court of Ayr- shire pronounced in terms of section 200 of the Burgh Police Scotland Act 1892, and referred to in article 5 of the defences.

"Now the pursuers may have excellent grounds for reducing that decree, but till that decree is reduced it is in my opinion a complete bar to the present action."

The pursuers appealed, and argued—The ground in question was part of the ground included in the long lease. Such a right had

at first received doubtful recognition (*Jor- danhill Creditors*, 1752, Elchies (Tack) No. 18, 5 Brown's Sup. 797), but was fully recog- nised later (*Lord Advocate v. Fraser*, 1758, 2 Paton App. Cas. 66). The right came to be assimilated to that of a vassal (*Maule v. Maule*, March 4, 1829, 7 S. 527), and any doubt as to its nature was removed by the Registration of Leases Act 1857. It was the lessee's right under the lease which the Sheriff had to sell and to which he gave a title by his decree. The lessor was not "the owner." He received no notice, and it would have been incompetent for him to step in and repair the ruinous build- ings. He could not therefore prevent the sale, and it was very doubtful if he could claim on the price, for it was the interest of the "owner" which was sold, and it was those claiming through the owner to whom the purchase-money would belong. The result of the Sheriff's judgment was to wipe out every right above that of the owner, e.g., a superior's interest, as well as every right below that of the owner, e.g., a creditor's. That could not have been contemplated by the statute, and could not be defended on the ground of a disagreement amongst joint owners, such as was contem- plated in sections 195 and 196. The effect of the respondent's contention would be to introduce a new species of tenure independ- ent of the title of a predecessor or of any feudal superior.

Argued for the respondent—The proce- dure prior to the Sheriff's decree of Novem- ber 1902 and January 1903, was presumably regular, and what was sold was the whole buildings and area with an absolute title without any reference to tenure or burdens. The purchaser was not the assignee of a lease, but the holder of an absolute title, and he had no contract with the lessor. He could not enforce the conditions of the lease against his neighbours. Further, it was not a judicial sale where the purchaser would take *tantum et tale* the right of his pre- decessor; but a compulsory sale, as in the case of land acquired by a railway com- pany or school board. The object was to get rid of the nuisance, and that object would with difficulty be effected if burdens and conditions were to be imposed on a purchaser of ruinous property. Finally, the purchase price was there for all inter- ested, and it was against it the appel- lants should seek their remedy.

LORD ADAM—This is an appeal from the Sheriff Court at Ayr in which the pursuers claim a right to rent as lessors under a long lease granted by Mr Kennedy, their prede- cessor, and which has been duly recorded. The sum which the appellants seek to re- cover is £1, 1s. 11½d., being the proportion of the total rent of the original subjects effeiring to the portion in the defender's possession, but it has been pointed out that this is a continuing payment, and of suffi- cient value to entitle the pursuers to appeal to the Court of Session. The defender says in defence to the action that he has nothing to do with the long lease, and that he is proprietor of the subjects, and therefore not due rent. The question therefore is, whether

this defence is well founded, and whether the defender is in fact not tenant but proprietor. The title which the defender produces is an extract decree in a petition in the Sheriff Court at Ayr, which sets forth — [*His Lordship quoted the extract decree of 29th November 1902*]— and that decree has been duly registered in the Register of Sasines. The appellants do not attack the decree, but they say—*esto* that the decree is good, still the effect of it is not to relieve the purchaser from the obligation to pay rent under the long lease. The decree proceeds under section 200 of the Burgh Police Act 1902, and it is not disputed that the proceedings have been properly carried out. That section deals with ruinous and insanitary buildings, and it is not disputed that this was the condition of the buildings in question. With regard to such buildings, the section enacts that the Commissioners may, if the address of the owner is not known, by a notice affixed to the buildings require them to be put in proper repair within three months, and may, if the requisition is not complied with, apply to the Sheriff for a warrant to sell the buildings and thereafter carry out the sale. In this case the Commissioners did not know the owner of these derelict buildings, with the result that after three months no one came forward to say that he would remove the nuisance, and the buildings were sold under the warrant of the Sheriff, and the price duly consigned to await the decision of anyone having an interest in the buildings. With regard to the purchaser's title, section 197 enacts that the Sheriff's decree declaring the purchase duly completed, shall upon being registered in the proper register of sasines be a valid and sufficient title. This section does not say that the purchaser is to be the assignee of a lease and the vassal of a superior, but that the decree shall be a valid and sufficient title to such purchaser, and I am of opinion that on a proper construction of the Act the purchaser here is not the tenant but the proprietor of the buildings. That is my short view of the case. The result may be anomalous, as the property would be held under no superior, but it is not new when one compares the provisions for the purchase of lands by railway companies or by school boards. On the whole matter it appears to me that the provisions of the statute have been properly carried out, and that the interlocutor of the Sheriff-Substitute dismissing the action is right.

LORD M'LAREN—I have not found this case very easy of solution, but I shall state the considerations *hinc inde* which have affected my mind. Section 200, in connection with previous sections, relates to ruinous and insanitary property. Under section 200, with which we are most directly concerned, the first proceeding is that the burgh authorities may issue an order requiring the owner to put the property in repair to their satisfaction. If the owner cannot be found, sufficient intimation may be given by a notice affixed to

the building. If that order is not implemented, the burgh authority may then proceed to sell the property under a warrant to be issued by the Sheriff. The definition of "owner" in section 4 (22) does not throw much light upon the question, but it may at least be said that if there is a hierarchy of owners in the feudal sense, the definition includes the person who draws the rent payable by the occupier, and it can hardly be disputed that the tenant under a long lease is the owner to whom notice has to be given. To my mind the difficulty of including the superior, or owner of the ground rent, who has the *dominium* of the lands, is that a person in that position has neither a right nor a duty to repair the building because he has parted with the possession of the subjects in exchange for an annual payment. I cannot think that it is a sound construction of the statute to hold that the pursuers were in fault for not having obeyed an order which is was not in their power to fulfil, and the result arrived at by the Sheriff must be supported upon some other ground. Section 200 contemplates the case of a ruinous tenement in a burgh the owner of which is unknown. If it were made a condition of the sale that rights to ground rents are reserved, it might be difficult to find a purchaser, and the clause would be inadequate for its purpose. I am not satisfied that this is a good answer or that it was intended to confiscate the rights of a superior or the owner of a ground annual. But while I feel the force of this difficulty I am not inclined to dissent—indeed, I am reconciled to the decision which your Lordship proposes for two reasons. First, because the statute makes the right to rent a preferential claim upon the price; and second because this is the only way in which the clause can be effectually worked. The effect of these proceedings is to confer a valid and unimpeachable title upon the purchaser and any person who can show an interest must claim against the purchase price.

LORD KINNEAR—I agree, and substantially on the grounds stated by your Lordships. The action is raised by a landlord for payment of rent due under a long lease, and he has brought it very naturally against the person whom he finds in possession of the premises. The defender puts forward as his defence that he is not a tenant holding under the lease, nor does his title proceed from anyone who was in right of the lease, but that he holds an absolute title based on a decree of the Sheriff—a title quite independent of any rights or obligations under the lease. I think if that is made out it is a perfectly good answer to the demand for payment of rent.

In considering the title of the defender, it is necessary to observe the object of the power under which the burgh authorities sold these premises. The object is to abate a nuisance arising from houses that have become waste and ruinous, or receptacles for filth, or unsafe and unfit for use.

With regard to such property the burgh authorities may give notice, individual or public as the case may be, calling for its repair, and if this order is not complied with they may then apply to the Sheriff for an order to sell the property. The object of the power therefore is to provide a practical method of abating a nuisance by selling derelict buildings if the owner fails to put them in repair. When the purchaser has consigned the purchase money in bank, subject to the orders of the Sheriff, the Sheriff will pronounce a decree declaring the purchase completed and authorising immediate possession, and the statute further provides that such decree, upon being registered, shall be "a valid and sufficient title to such purchaser." Now that seems to me to be a perfectly clear provision that this decree is to be in itself a sufficient title, and that the purchaser is not bound to connect it with any previous title in order to make it effectual. If it had been intended that he should make up a title by transmission it would have been perfectly easy to make that clear. If the Act had said that the Sheriff's decree was to be equivalent to a conveyance from the last proprietor we might have understood that the purchaser was intended to take the property subject to all the previous burdens upon it. Failing such a provision I cannot see that he is bound to connect with any previous owner, and I think that we must give effect to the precise words of the statute.

It is true that this provision of the statute introduces two somewhat startling anomalies into our law of conveyancing, for in the first place it gives a purchaser a title without connecting his holding with that of any predecessor in the subjects, and secondly it gives him a right to hold heritable property on a title independent of any known feudal tenure. But these anomalies are not unprecedented, for as we all know there are other cases of statutory titles which are perfectly good independently of any feudal title whatever. But whether unprecedented or not we must give effect to the plain words of the statute.

But another point has been urged by the appellants against the view taken by the Sheriff, namely, that it will have the effect of extinguishing rights which were in existence at the time of the sale, and that without giving notice to the owner of these rights so as to enable him to step in and prevent the sale by himself taking steps to abate the nuisance. I think that is exactly the result which is contemplated by the provisions of the statute. But it is said that the effect of this will be a confiscation of the rights of the landlord. I cannot agree with that view. The only prejudicial result of these proceedings will be that they will have the effect of a compulsory conversion of heritable property into money. The terms of the clause show that the statute contemplates that there will always be someone with such an interest in the property that he can or may put it in repair and so abate the nuisance, and if such a person can be

found he is to get notice. But if no such person can be found a requisition is to be affixed to the buildings themselves so that anyone with an interest in them may see what is going to be done. Now, I do not think it matters to the carrying out of these provisions whether this person can be found or not, for the statute clearly provides that if he is found he is to put the premises in repair, but if not then the nuisance is to be abated in another way, namely, by sale. There is no provision for ascertaining what are the rights and burdens affecting the property before the sale, but there is a provision that after the sale the purchase money is to be consigned in bank and the Sheriff is then to proceed to ascertain what share in the consigned money each person interested in the property is entitled to. Now, from that it appears to me that it is not intended that these interests should be ascertained first, but that the property should be sold first, and then these people claiming rights in the property are to come before the Sheriff, who will ascertain their interests and rank them to their proper shares of the sum consigned in bank. I think, therefore, that the judgment of the Sheriff was right and that we should dismiss this appeal.

The LORD PRESIDENT was absent.

The Court dismissed the appeal.

Counsel for the Pursuers and Appellants
—H Johnston, K.C.—J. H. Millar. Agents
—Carment, Wedderburn, & Watson, W.S.

Counsel for the Defender and Respondent
—Clyde, K.C.—R. S. Horne. Agents—
Carmichael & Miller, W.S.

HIGH COURT OF JUSTICIARY.

Friday, December 9.

(Before the Lord Justice-Clerk, Lord
M'Laren, and Lord Stormonth Darling.)

DONALD (COWIE'S EXECUTOR)
v. PATERSON

Justiciary Cases—Review—Sheriff—Small Debt Action—Appeal—Reference to Oath—Refusal to Hear Statement by Witness after Examination—Deviation from Statutory Requirements—Small Debt Act 1837 (1 Vict. c. 41), sec. 31.

In an action in the Small Debt Court the Sheriff-Substitute allowed the pursuer to refer his claim to the defender's oath. After the defender had made his deposition his agent proposed to cross-examine him, and (in the hearing of the defender) stated what he expected to prove by his cross-examination. The Sheriff-Substitute refused to allow the cross-examination, whereupon the defender, being still in the witness-box, volunteered a statement.