

upon a true state of the accounts between the two parties concerned. As I have already pointed out, upon a true accounting between the parties concerned there were no funds in the hands of the Clydesdale Bank belonging to this gentleman at this time; and I am accordingly of opinion that the result which the Sheriff has come to is right, and his judgment ought to be affirmed.

LORD M'LAREN, LORD KINNEAR, and LORD PEARSON concurred.

The Court dismissed the appeal and affirmed the interlocutor of the Sheriff-Substitute.

Counsel for the Appellants—Hunter, K.C.—Sandeman. Agent—J. Mullo Weir, S.S.C.

Counsel for the Respondents (The Clydesdale Bank, Limited)—The Solicitor-General (Ure, K.C.)—W. J. King. Agents—Ronald & Ritchie, S.S.C.

Counsel for the Respondent (The Judicial Factor)—The Dean of Faculty (Campbell, K.C.)—Macmillan. Agents—Campbell & Smith, S.S.C.

Wednesday, October 16.

FIRST DIVISION.

MILLAR AND ANOTHER v. MILLAR'S TRUSTEES.

Succession—Liferent and Fee—Trust—Direction to Divide into Shares Followed by Subsequent Direction to Hold and Manage Certain Shares for the Liferent Alimentary Use of Certain of the Beneficiaries—Right of Beneficiary to Demand Payment of Share—Repugnancy.

A testator directed his trustees "to divide the whole residue and remainder of my means and estate into nine equal shares, being one share for each of my following children" who were then named; and subsequently he directed them to invest the shares of two of the sons and to pay to or expend for them the produce thereof for their "liferent alimentary use" as the trustees should think fit, with a power of paying capital up to a sum named. He subsequently spoke of these shares as being "liferented" by the two sons, and directed that any sums accruing should be held "for their liferent use only as above provided with reference to their original shares." He, however, made no provision as to the fee of these shares, although he did so with regard to the fee of the shares of the other sons and of the daughters. *Held* that, there being no direct gift of fee, the two sons were not entitled to immediate conveyance of their shares, but that their shares fell to be administered by the trustees as prescribed by the testator, there being no repugnancy between

the first direction and the subsequent direction.

Miller's Trustees v. Miller, December 19, 1890, 18 R. 301, 28 S.L.R. 237, distinguished by Lord M'Laren.

John Millar, confectioner, Seagrove House, Leith, died on March 31, 1895, survived by his widow, Mrs Helen Winton or Millar, four daughters and five sons, and leaving a trust-disposition and settlement dated February 28, 1891, and recorded in the Books of Council and Session, April 8, 1895, whereby he conveyed to James Pirret Ferrier, merchant, Edinburgh, and others as trustees his whole means and estate.

By his trust disposition and settlement the testator, *inter alia*, gave the following direction—"(*Fourth*) On the death of the survivor of me and my said wife, I direct my trustees to divide the whole residue and remainder of my means and estate into nine equal shares, being one share for each of my following children, *videlicet*, Helen Millar or Somerville, wife of David Somerville, Scotland Street, Edinburgh, Jessie Millar, Jane Millar, Marion Winton Millar, John Millar, George Millar, William Millar, Thomson Millar, and Thomas Millar; and my trustees shall invest in their own names the shares of my said daughters, and shall pay to them during their respective lives the free annual interest or produce thereof for their liferent alimentary use, and the fee of said shares shall, on the death of my said daughters, respectively be paid or made over to their respective children, equally among them if more than one, and that on each child attaining twenty-one years of age or in the case of daughters on being married, whichever event shall first happen. . . . With regard to the shares of my sons, the said John Millar and George Millar, my trustees shall invest the same in their own names, and shall pay to my said two sons, or expend for their behoof, in such way, by such instalments, and at such times as my trustees in their discretion shall think best, the free annual interest or produce thereof for their liferent alimentary use respectively. But notwithstanding the foresaid provisions for the shares of my said daughters, and of my said sons John and George, being liferented by them, my trustees shall have power in their discretion to pay to each of them out of the capital of their shares a sum not exceeding £400, if my trustees consider that such payment may be for the benefit and advancement in life (my trustees being the sole judges on this point) of my said daughters and my said two sons or any of them; and with regard to the shares of my sons William, Thomson, and Thomas my trustees shall . . . apply said shares, including the part of any other share which may have accrued to them under the provisions hereinafter mentioned, or so much thereof as may be necessary, in extinction of the loan of £7000 made by me to them as partners of the firm of John Millar & Sons, or of any part thereof which may then be unpaid, and shall pay or make over to them at the first term of Whit-

sunday or Martinmas occurring six months after the decease of the longer liver of me and my said wife, the residue or remainder of said shares respectively. . . . And it is hereby declared that the foresaid provisions in favour of my children and their issue shall not vest in them or any of them until the death of my said wife in the event of her surviving me, and that if any child shall die either before or after me leaving lawful issue and without having acquired a vested interest in such provision, such issue shall be entitled to the share or shares original and accruing which their parent would have taken by survivance, and the share of any child dying without leaving lawful issue shall be divided among the surviving children and the lawful issue of such children as may have died leaving such issue in equal shares *per stirpes*, but any sum which may accrue to my daughters and said sons John and George under this provision shall be held by my trustees for their liferent use only as above provided with reference to their original shares."

The testator's widow having died on June 8, 1906, questions arose as to the rights conferred on the two sons John and George, and a special case was presented.

The parties to the case were—(1) George Millar, the one son, *first party*, (2) Robert Hoy Miller, S.S.C., *curator bonis* to John Millar, the other son, who was insane, *second party*, (3) James Pirret Ferrier and others, the testator's testamentary trustees, *third parties*, (4) William Millar and others, the remaining children of the testator, *fourth parties*.

The case *inter alia* stated—"The first party and the second party contend that the intention of the truster was, and the effect of the said deed is, to confer on the first party and on the said John Millar the sole right and title to and beneficial interest in the fee of one-ninth part or share of the residue of his whole means and estate in each of them; that the provisions of the said trust-disposition and settlement make an absolute gift to the first party and to the said John Millar of a right to the fee of said one-ninth part or share of said residue, and are ineffectual to limit their respective interests to a right of liferent merely. The first party and the second party further contend that the third parties are bound immediately to divide the estate among the testator's children in terms of the said trust-disposition and settlement, and to pay or convey to the first party, and to the second party, as *curator bonis* of the said John Millar, their respective one-ninth shares. The third parties on the other hand contend that they are neither bound nor entitled, on a sound construction of the testamentary writings of the truster, to pay to the first party and to the second party respectively more than the liferent of one-ninth of the fee of the truster's estate. The fourth parties adopt the contention of the third parties."

Certain questions were submitted, which however need not be referred to, not having been answered by the Court.

Argued for the first and second parties—The direction by the testator to divide was equivalent to a direction to divide and pay. In the case of daughters the fee of their shares was dealt with, but in the case of the two sons in question the fee of their shares was not disposed of expressly. The primary direction was equivalent to a gift of the fee, and the subsequent direction restricting the enjoyment was repugnant thereto, and therefore was not to be given effect to—*Jamieson v. Lesslie's Trustees*, June 19, 1889, 16 R. 807, Lord Justice-Clerk, at p. 809, 26 S.L.R. 538; *Wilkie's Trustees v. Wight's Trustees*, November 30, 1893, 21 R. 199, Lord Rutherford Clark at p. 203, 31 S.L.R. 135; *Hargrave's Trustees v. Schofield*, October 25, 1900, 3 F. 14, 38 S.L.R. 9; *Miller's Trustees v. Miller*, December 19, 1890, 18 R. 301, 28 S.L.R. 236; and *Millar v. Millar's Trustees*, October 29, 1896, 4 S.L.T. 122. *Forrest's Trustees v. Reid*, November 25, 1904, 7 F. 142, 42 S.L.R. 133, was distinguished from the present case because in that case there was a clear disposal of the fee of the daughters' shares by the testator; nor did *Anderson's Trustees v. Anderson*, December 7, 1904, 7 F. 224, 42 S.L.R. 167, apply, since there the earlier direction specially referred to the subsequent direction.

Argued for the third and fourth parties—The testator had clearly expressed his intention, and there was nothing in the cases cited to derogate therefrom. The restriction on the sons' shares in question was in more precise terms than that on daughters' shares. Their interest was limited to a liferent and not a fee. Even if there had been a direction to pay and convey, the subsequent restriction would have abridged the enjoyment of the gift—*Tweeddale's Trustees v. Tweeddale*, December 16, 1905, 8 F. 264, the Lord President at p. 273, 43 S.L.R. 193. But in any event in order to give such a right as would override the subsequent restriction it was necessary that there should be, what were lacking here, prior words equivalent to a gift of fee—*Forrest's Trustees, ut supra*, Lord Adam at p. 145; *Anderson's Trustees v. Anderson, ut supra*, Lord M'Laren at p. 229.

LORD PRESIDENT—Mr John Millar left a family of nine children. By his trust-disposition and settlement he directed his trustees "to divide the whole residue and remainder of my means and estate into nine equal shares, being one share for each of my following children, *videlicet*—Helen, Jessie, Jane, Marion, John, George, William, Thomson, and Thomas." He then directed the daughters' shares to be invested, for their liferent alimentary use, with the fee to their children. The will continues—"With regard to the shares of my sons the said John Millar and George Millar, my trustees shall invest the same in their own names and shall pay to my said two sons, or expend for their behoof in such way, by such instalments, and at such times as my trustees in their discretion shall think best, the free annual interest or produce thereof for their liferent alimentary use respec-

tively. But notwithstanding the foresaid provisions for the shares of my said daughters and of my said sons John and George, being liferented by them, my trustees shall have power in their discretion to pay to each of them out of the capital of their shares a sum not exceeding £400 if my trustees consider that such payment may be for the benefit and advancement in life (my trustees being the sole judges on this point) of my said daughters and my said two sons or any of them." There is then a clause providing that no share shall vest in any child until the death of the survivor of the spouses, but that the share of any child predeceasing the period of vesting leaving issue shall go to such issue, or, if there be no issue, to his surviving brothers and sisters. This clause concludes—"But any sum which may accrue to my daughters and said sons John and George under this provision shall be held by my trustees for their liferent use only, as above provided with reference to their original shares." The truster's son George and the curator of his son John are the first and second parties to this case, and they ask the trustees to denude themselves of the portions of the trust estate held on their behalf, and to pay the same to them now. This is resisted by the trustees on account of the direction to hold these shares for these sons in liferent only. This is one of the class of case of which there are many examples in the books, and regarding which it has been said that one case cannot be taken as an authority for another. But from these decisions I think one or two general rules may be gathered which will be of assistance in determining the present case. In the first place it is quite settled that if a testator begins by conferring an undoubted and unrestricted fee, any subsequent expressions in the deed seeming to limit the fee will be disregarded on the ground of repugnancy. Of course a testator may change his mind either in a later deed or in a later part of the same deed, but where the gift and the limitations fall to be read together, the rule of construction will be as I have indicated. There is also another rule that where an undoubted fee has been conferred on a beneficiary, trust management will not be kept up where it is unnecessary. But neither of these rules, in my opinion, apply in the present case, for here there is no direct gift of fee to these beneficiaries, nor do I think that any such gift can even be inferred from the terms of the will. I do not doubt that, if there were nothing more, the direction to divide the estate into shares, "being one share for each of my following children," might be construed into a gift of fee. But here there is something more. The direction to divide merely concerns the number of parts into which the estate is to be apportioned, and the truster then proceeds to say what is to be done with each share. He first deals with the daughters' shares and then directs his trustees to hold the shares of his sons John and George for their liferent use only. So I do not think

that this case falls under the decision in *Wilkie's Trustees*, 21 R. 199. The matter becomes still clearer if we look at the clause dealing with lapsed shares, the reference in which to the directions regarding original shares shows that the truster did not intend these sons to have immediate payment of their portion of his estate.

I do not think that the questions of law can be answered as stated either in the affirmative or the negative, as that would involve a decision as to the fee of these shares which we are not able to come to at present seeing that all the parties who might have an interest in the matter are not before us. I therefore think that a finding should be pronounced in accordance with the opinion which I have expressed.

LORD M'LAREN—We are only concerned in this case with two out of the nine shares into which the testator directed that his estate should be divided. As to these shares the question arises whether the interest given to the testator's sons John and George is limited to an alimentary liferent or whether it extends to the capital or fee. Now where there is a gift of an unqualified liferent and also an unqualified gift of fee to the same beneficiary I suppose it is not doubtful that the right of the donee is the right of a fiar, because the lesser interest expands and is merged in the fee. Again, if the gift of fee is qualified only by some contingency, and that contingency is purified, the result is the same. This is the principle of the decision in *Miller's case* and in the other cases consequent upon it. The principle was enunciated by the Lord President in that case where he says "that where by the operation of a testamentary instrument the fee of an estate or part of an estate has vested in a beneficiary, the Court will always, if possible, relieve him of any trust management which is cumbersome, unnecessary, or expensive." But his Lordship is careful to add—"Where there are trust purposes to be served which cannot be served without the retention of the vested estate or interest of the beneficiary in the hands of the trustees the rule cannot be applied, and the right of the beneficiary must be subordinate to the will of the testator." It has never been held that in the case of the gift of an alimentary life interest in an estate with a gift of the fee which subsequently comes to the same beneficiary, the principle of *Miller* will apply to the effect of excluding the operation of trust purposes intended for the beneficiary's protection.

For the purposes of this case I think it is enough to say that in quite plain terms there is a direction to the trustees to invest the shares of his sons John and George in their own names, and to pay to the two sons or expend for their behoof in such way, by such instalments, and at such times as the trustees in their discretion should think best, the income thereof for their liferent alimentary use. I am of opinion that whether these sons have the fee or whether the fee is in the next-of-kin, the

trustees must meanwhile pay over the income of these shares under the testamentary directions.

I agree with your Lordship that we cannot at present say whether the fee will go to the heirs of John and George or to the testator's heirs in intestacy, for there is not an eventual gift of fee to these sons except in so far as an inference to that effect may be drawn from the subsequent provision to the effect that in certain circumstances the sons may have advances out of capital.

LORD KINNEAR—I agree with your Lordship that the questions in the case are not put in such a form that a direct answer in the affirmative or negative would correctly determine the rights of parties, but the decision which your Lordship proposes entirely satisfies the difficulty which had occurred to me in that respect. The first question is not properly stated any more than the third. The true question in the case is raised by the contentions of the parties as set forth in condescendence 7—“The first party and the second party contend that the intention of the truster was to confer on the first party and on the said John Millar the sole right and title to and beneficial interest in the fee of one-ninth part or share of the residue of his whole means and estate in each of them; that the provisions of the trust-disposition and settlement make an absolute gift to the first party and to the said John Millar of a right to the fee of one-ninth part or share of said residue, and are ineffectual to limit their respective interests to a right of *lifereit* merely”; and as a consequence of that contention they maintain further that the trustees “are bound immediately to divide the estate among the testator's children, and to pay or convey to the first party and to the second party as *curator bonis* of the said John Millar their respective one-ninth shares.”

Now, for the reasons your Lordship has stated I am of the opinion that the first and second parties are not entitled to immediate payment of their shares. The truster has clearly directed his trustees to pay to these two sons the income of their shares for their alimentary use, and there is no direction to pay the capital. The inference to be drawn is clear enough in itself, and is strengthened when we consider the different way in which the truster directs his trustees to deal with the shares of his other sons, viz., that they are to be paid over at once. But not only is there no direction to pay over the whole shares in question here, but there is a direction to pay over, in the discretion of the trustees, a sum not exceeding £400 to each of the beneficiaries, if the trustees think fit. Now, that appears to me equivalent to an express direction not to pay over more than £400, and, subject to the discretionary power to advance that amount, to hold the capital in their own hands, paying the income only to the two sons in question during their lives. For these reasons I concur with your Lordship.

LORD PEARSON concurred.

The Court pronounced this finding:—

“That the trustees are bound to hold the shares in question for the *lifereit* alimentary use of the said first and second parties to the case respectively, with the discretion and power as to payment and advancement of capital expressed in the fourth purpose of the testator's settlement, and that the first and second parties are not entitled to an immediate conveyance of said shares.”

Counsel for the First and Second Parties—Welsh. Agents—Welsh & Forbes, W.S.

Counsel for the Third and Fourth Parties—Craigie, K.C.—D. P. Fleming. Agents—R. H. Miller & Company, S.S.C.

Wednesday, October 16.

FIRST DIVISION.

(SINGLE BILLS.)

M'GREGOR v. BUCHANAN (LIQUIDATOR OF THE BALLACHULISH SLATE QUARRIES COMPANY, LIMITED).

Expenses—Company—Winding-up—Petitioning Creditor—Taxation—Agent and Client—Creditor Petitioning for Winding-up Order and Company Petitioning for Supervision Order, and Latter Granted.

A creditor having presented a petition for an order for the winding-up of a company, and the company, which had on the day when the creditor's petition was presented resolved on a voluntary winding-up, having through its liquidator presented a petition for a supervision order, the Court continued the voluntary liquidation subject to supervision, but granted the petitioning creditor his expenses “as these may be taxed” out of the company's estate.

Held that the petitioning creditor's expenses were rightly taxed as between agent and client.

On August 13, 1907, John M'Gregor, colliery agent, Dumblane, a creditor of the Ballachulish Slate Quarries Company, Limited, presented a petition for an order for the winding-up of that company. On the same date, at an extraordinary meeting, a resolution for the voluntary winding-up of the company was adopted by its shareholders, and John Hamilton Buchanan, C.A., Edinburgh, was appointed liquidator. The company and liquidator lodged answers to the creditor's petition, and petitioned for the continuance of the voluntary winding-up subject to supervision. On August 29, 1907, the Lord Ordinary on the Bills (KINNEAR) continued the voluntary winding-up, under the supervision of the Court, refused the prayer of the petitioning creditor's petition, and found “the petitioner and the respondents entitled to their expenses as these may be taxed by the Auditor . . . and directs these expenses to be expenses in the liquidation.”