1914: Of new assoilzie the defenders from the conclusions of the action, and decern."

Counsel for the Appellant (Pursuer)—A. O. M. Mackenzie, K.C.—Gentles. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Respondents (Defenders)—Christie, K.C.—J. B. Young. Agents—Weir & Macgregor, W.S.

Tuesday, December 14.

SECOND DIVISION.

BRASH *v.* BRASH.

Succession — Will — Fee and Liferent — Executry Trust.

Where a testator by his holograph will directed his trustees to "make over to my son A (certain) properties with the Burden upon them of Thirty pounds stg to his two oldest children by his First Marriage during his lifetime And at his death so as to Equally divided amongst his other Children," *held* that the trustees were bound to execute a conveyance of the properties to A in liferent allenarly, and his other children born and to be born in fee.

Frog's Creditors v. *His Children*, (1735) M. 4262, *distinguished.*

Thomas William Brash and others, the testamentary trustees of Thomas Brash, retired grocer, Dumfries, who died on 6th February 1915, leaving a holograph will dated 24th June 1914, *first parties;* Mrs Elizabeth Ellen Brash or Phillipson and Mrs Marion Wightman Brash or Brewer, the two eldest and only surviving children of the said Thomas William Brash by his first marriage, *second parties;* Hilda Mary Brash, Annie Rickerby Brash, and Jessie Ronald Brash, the only children of the said Thomas William Brash by his second marriage, *third parties;* and the said Thomas William Brash, who was a son of the deceased, as an individual, *fourth party*, brought a Special Case to settle the respective rights of the parties in a bequest by the testator.

The *bequest* was in these terms:—"I direct that my trustees make over to my son Thomas Wm. all my property at 162, 164, 166, 168 High Street, and Coffee Close and Chapel Street, with the lodgings above the same, also Cellars belonging to me at present, with Burden upon them of Thirty pounds stg, to his two oldest children by his First Marriage during his lifetime And at his death so as to Equally divided amongst his other Children."

The Case stated—"3. Without actually conveying his estate or any part of it to his said trustees, the testator's first direction in the said holograph will is in the following terms:—'. . . [*v. sup.*] . . .' The annual value of the properties thus dealt with amounts to £230, 4s."

The *questions of law* were, *inter alia*—"1. Is the fourth party, Thomas William Brash, the fiar of the property in question, and is he entitled to a conveyance thereof by the first parties in his favour in absolute fee? or otherwise, 2. Is the fourth party, Thomas William Brash, restricted to a liferent of said property? 3. In the event of the second question being answered in the affirmative are the first parties bound to convey the said property to the fourth party (*a*) in liferent only, and to the third parties in fee? or (*b*) in liferent only, and his children born and to be born (other than the second parties) in fee?"

The Court appointed Mr Robert Candlish Henderson, advocate, *curator ad litem* for the third parties, who were in minority.

Argued for the third parties—The fourth party was entitled only to a conveyance in liferent allenarly, the destination of the fee being such that at his death his whole children born and to be born (other than his two eldest daughters) would take the property in equal shares. *Frog's Creditors* v. *His Children*, (1735) M. 4262, was distinguishable, because here there was really an executry trust, the trustees being directed to settle the property so as to bring about the above result—*Gifford's Trustees* v. *Gifford*, (1903) 5 F. 723, *per* Lord M'Laren at 731, 40 S.L.R. 476, at 480; *Mitchell's Trustees* v. *Smith, &c.*, (1880) 7 R. 1086, 17 S.L.R. 736; *Mein* v. *Taylors*, (1830) 4 W. & S. 22.

Argued for the fourth party—The fourth party was entitled to a conveyance in absolute fee of the property. The case was ruled by *Frog's Creditors* v. *His Children* (*cit.*). The rule in that case had been extended to moveables, to a trust, and to children *nati*—*M'Clymont's Executors* v. *Osborne*, 1895, 22 R. 411, 32 S.L.R. 279. The case of *Gifford's Trustees* v. *Gifford* (*cit.*) was distinguishable—see Lord Kyllachy, *ibid.*, at 5 F. 732, 40 S.L.R. 481. So also were the other cases cited by the third parties. The phrase "make over to my son" had a recognised legal significance which it was not legitimate to disturb—*Ralston* v. *Hamilton*, (1862) 4 Macq. 397, *per* Lord Chelmsford at 418.

At advising—

LORD JUSTICE-CLERK—The first question in this case is whether the fourth party is the fiar of the property referred to in the first bequest in his father's will on the principle of *Frog's Creditors*, M. 4262, or whether he is only a liferenter. Now in regard to that case I accept as a correct statement of the law what was said by Lord Stormonth Darling in *Gifford's Trustees*, 5 F. 723, at 734, 40 S.L.R. 476, at 482—"I understand it to be the universal desire of Scots lawyers not to carry the rule of *Frog's Creditors* one inch further than it has already been carried. No one expresses that desire more decidedly than the late Lord President Inglis when he said in *Cumstie* v. *Cumstie's Trustees*, 3 R. at 942, 13 S.L.R. 606—'There the rule remains to this day. It is applicable to a case of parent and child, and it is applicable to a case where no more is said than that the conveyance is made to the parent in liferent and to the children *nascituri* in fee; but it is not applicable to any other case whatever; and I for one am not prepared to carry that doctrine any further.'" Accept-

ing that view as correct, the result in my opinion is that questions 1 and 3 (*a*) should be answered in the negative, and questions 2 and 3 (*b*) in the affirmative. The result is that the fee must be conveyed to the fourth party in liferent only and to his children born and to be born (other than the second parties) in fee.

LORD DUNDAS—The testator, a retired grocer residing in Dumfries, left a holograph will written by him "in order" (as it bears) "that no dispute by my family may take place after my death." I am afraid that the testator's preparation of his own will was not the best means to that end; for the portion of the document with which we are here concerned is certainly not well expressed, and the presentation of this special case has become necessary. It seems to me, however, that what the testator meant and intended by the clause in question is reasonably clear. If one leaves out of account for the moment the "burden" of £30 sterling, I think Mr Brash's desire was that his trustees should convey the heritable property described in such manner that his son Thomas should enjoy it in liferent, and that the fee should be divided on Thomas' death equally amongst the children of Thomas other than the two children of his first marriage alive at the testator's death or who should be subsequently born. If this was Mr Brash's intention, it is conceded that there would be no difficulty in giving effect to it by a deed in appropriate form. But it is contended for the fourth party, the son Thomas, that the question is not merely one of intention, but that the words used must be held, in accordance with certain well-known decisions of which *Frog's Creditors* v. *His Children* (1735, M. 4262) is the prototype, to have a special legal signification and to import a right in the fourth party to demand a conveyance of the property to himself in fee. The "rule of *Frog's Creditors*" is certainly no favourite in our law. I agree with Lord Stormonth Darling's observation in *Gifford's Trustees*, (1903, 5 F. at 734, 40 S.L.R. at 482) that it is "the universal desire of Scots lawyers not to carry the rule of *Frog's Creditors* one inch further than it has already been carried." But within its established limits the rule stands firmly fixed, and imports, I apprehend, that a gift of property, whether heritable or moveable, to a parent in liferent and his children unnamed, whether in existence or *nascituri*, in fee, infers a fee in the parent; and the rule is not necessarily excluded by the interposition of a trust. Accordingly if we had here a bare direction to the trustees to convey this heritage to Thomas Brash in liferent and his children in fee, I think the case would fall within the rule of *Frog's Creditors*. But I do not so read this will; I think the testator in effect directs his trustee to "make over" the property in such manner as shall effectually destine it to his son Thomas for his liferent use only, and on the death of Thomas for equal division in fee amongst his children, born and to be born, other than the two children of his first marriage. In other words, I think the testator has merely expressed in general terms an intention which was to be carried out by the trustees in a complete and legal form. I may refer, by way of analogy, to the well-settled rule of law that where a truster directs his trustees to entail lands on a certain series of heirs, the trustees will not fulfil their duty unless they make such a deed as will in all respects satisfy the requirements of the Statute of 1685. On the other hand, if the truster directs his trustees to execute a deed in certain specified terms which he erroneously supposes will effect a strict entail, it may be that they will fulfil their duty by obeying his directions implicitly, although the consequence is that the person who first takes the lands under the deed will be in a position to evacuate the destination at will, and possess the lands in fee-simple. *Sandys* v. *Bain's Trustees* (1897, 25 R. 261, 35 S.L.R. 211) is an instructive case in this region of the law (*cf.* also Lord M'Laren's observations in *Gifford's Trustees* (*sup. cit.*) at 5 F. 732, 40 S.L.R. 480). It seems to me that Mr Brash's will falls under the first of the categories described, and that his trustees will not fulfil their duty unless they convey the property in such a way as to carry out in effectual and specific legal phraseology the general intention which he has expressed in his own inartificial language. In this connection the words "so as to" seem to me to be significant, as indicating a discretion to the trustees as to the appropriate form in which the testator's general intention may best receive effect. The rule of *Frog's Creditors* has therefore, in my judgment, no application to this case; and if one is left free to judge what the testator intended as to the destination of the property, I think the fourth party's contention must fail. It follows that, in my judgment, we should answer the first question in the negative and the second question in the affirmative. It was conceded that, upon this footing, branch (*a*) of the third question must be answered in the negative and branch (*b*) in the affirmative.

LORD SALVESEN—In this case we have to construe the holograph will of a somewhat illiterate man who was certainly not acquainted with legal technical terms. . . . In my opinion the plain intention of the testator was that his son should have a liferent only of the properties.

[*After referring to other questions in the case with which this report is not concerned, his Lordship continued*]—Assuming that I have correctly interpreted the intention of the testator, it was maintained that we cannot give effect to it because of the decision in the well-known case of *Frog's Creditors* (M. 4262). I am of opinion that that case does not apply to the particular gift which we have here. The direction is that the trustees shall make over the properties to Thomas William during his lifetime, and so that on his death they may be equally divided amongst the children of his second marriage. There is no doubt that the trustees can perfectly well carry the testator's direction into effect by conveying

the properties to Thomas William for his liferent use allenarly and to his said children in fee equally amongst them. It was implied in the argument that the trustees could not legally insert the word "allenarly" in the conveyance, because the testator had not himself used it, and that they are bound to convey to him for his liferent use and to his said children equally amongst them in fee, which would be equivalent, according to the chain of decisions of which *Frog's Creditors* was the first link, to giving the liferenter a fee. I do not think we are bound so to hold, having in view the particular language of this holograph will. The conveyance is to be in such terms as that the properties will be equally divided amongst the said children, and this can only be effected according to our forms of conveyancing as now settled in the manner I have stated. To quote the words of Lord Young in the case of *Mitchell's Trustees* (7 R. 1086, at 1090, 17 S.L.R. 739)—"It is the duty of the trustees . . . to do what will be legally efficacious to fulfil the intention." This is not a case (to which the rule of *Frog's Creditors* has also been applied) of a testator directing trustees to convey in specified terms, but is rather the case of a man ignorant of the forms of conveyancing, who directs his trustees what he wishes done with certain properties, leaving them to take the necessary legal advice to enable them to carry out his wishes. I am accordingly of opinion that the first question should be answered in the negative and the second in the affirmative.

[*His Lordship then dealt with the other questions in the case.*]

LORD GUTHRIE—I agree that the questions should be answered as your Lordship proposes. It was not denied by counsel for Thomas William Brash, the fourth party, the father of the second and third parties, that according to the ordinary and natural construction of the words used by the testator, especially in a will written by an illiterate testator as he evidently was, it was intended that his rights should be limited to a liferent and that the fee of the property in question should belong to the children of his second marriage. But it was said that the case of *Frog's Creditors*, M. 4262, compelled the Court to come to an opposite decision. This unfortunate result does not seem to me to follow unless it be held that there is nothing more in the testator's settlement than a direction to his trustees to make a conveyance to Thomas William Brash in liferent and to the children of his second marriage in fee. That is not the position, because the trustees, as I read the will, are to take the necessary steps to secure that at Thomas William Brash's death the estate shall be equally divided amongst the said children, which implies that any conveyance to him must be a conveyance for his lifetime only. The decision on this part of the case reached by your Lordships is in accord with the view expressed by Lord President Inglis in *Cumstie* v. *Cumstie's Trustees*, (1876) 3 R. at 942, 13 S.L.R. at 606, to which your Lordships have referred.

[*His Lordship then dealt with the other questions in the case.*]

The Court answered the first question of law in the negative, the second question in the affirmative, branch (*a*) of the third question in the negative, and branch (*b*) thereof in the affirmative.

Counsel for the First and Second Parties—Carmont. Agents—Beveridge, Sutherland, & Smith, W.S.

Counsel for the *Curator ad litem* to the Third Parties — Leadbetter. Agents — Beveridge, Sutherland, & Smith, W.S.

Counsel for the Fourth Party—Chree, K.C.—MacRobert. Agents—Webster, Will, & Company, W.S.

HOUSE OF LORDS.

Tuesday, January 18, 1916.

(Before Viscount Haldane, Lord Kinnear, Lord Shaw, Lord Parmoor, and Lord Wrenbury.)

SCOTT PLUMMER *v.* BOARD OF AGRICULTURE FOR SCOTLAND.

(In the Court of Session, July 20, 1915, 52 S.L.R. 806, and 1915 S.C. 1048.)

Landlord and Tenant—Property—Statute — Small Holdings — Compensation to Landlord on Constitution of Small Holdings—"Depreciation in the Value of the Estate"—"In Consequence of and Directly Attributable to" — Small Landholders (Scotland) Act 1911 (1 *and* 2 *Geo. V, cap.* 49), *sec.* 7 (11).

The Small Landholders (Scotland) Act 1911, sec. 7 (11), provides—"Provided that where the Land Court are of opinion that damage or injury will be done . . . in respect of any depreciation in the value of the estate of which the land forms part in consequence of and directly attributable to the constitution of the new holding or holdings as proposed, they shall require the Board, in the event of the scheme being proceeded with, to pay compensation to such amount as the Land Court," or in certain circumstances an arbiter, "determine. . . ."

Held (*aff.* judgment of the Second Division) that an arbiter was entitled to allow compensation for "depreciation on the saleable value" of the estate due to the presence of the small holding.

This case is reported *ante ut supra.*

The defenders, the Board of Agriculture for Scotland, appealed to the House of Lords.

At the conclusion of the argument on behalf of the appellants, counsel for the respondent being present but not being called upon, their Lordships delivered judgment as follows:—