

feu-duty is provided for the benefit of the superior in a particular event, and the superior comes forward claiming that additional feu-duty, it is for him to define with reasonable clearness the event in which that additional feu-duty is to be paid and the means by which it is to be measured; and if there were ambiguity in this description, which in my view there is not, I should say that the deed ought to be construed *contra proferentem*—viz., against the superior in the present case, following what was said by the learned Judges in the case of *Russell v. Cowpar*, February 24, 1882, 9 R. 660, 19 S.L.R. 443, which was referred to, because the penalty or fine in the shape of the increased feu-duty on a particular use of the land is to that extent a restriction upon the use of the land.

But this appears to me a simple case of the construction of this particular instrument, and with the greatest possible respect which I feel for the learned Judges of the Inner House I do not myself see any ambiguity in it. I have no hesitation therefore in concurring with the judgment which has been proposed.

LORD ROBERTSON—I see no reason at all for reading these words in any other than their natural meaning.

This is a stipulation for an additional feu-duty, and the parties have chosen a perfectly definite and intelligible standard of payment. That standard is such that it can be applied with minuteness to the ground, and implies a discriminating scrutiny of the ground.

In this view—and here I differ from the judgments appealed against—we have no opportunity and no occasion to consider these pieces of ground in their uses or their relation to buildings. The question is merely whether buildings have been erected on this grass slope and on these roads, and plainly they have not. There may be difficulty in other cases which we have not before us; here I can see none.

Interlocutor appealed from *reversed*, and interlocutor of the Lord Ordinary, whereby he dismissed the action, *restored*.

Counsel for the Pursuer, Reclaimer, and Respondent—Robert Younger, K.C.—J. H. Millar. Agents—Carment, Wedderburn, & Watson, W.S., Edinburgh—A. & W. Beveridge, London.

Counsel for the Defender, Respondent, and Appellant—The Lord Advocate (Graham Murray, K.C.)—Craigie. Agents—George Inglis & Orr, S.S.C., Edinburgh—John Kennedy, W.S., London.

Tuesday, August 5.

(Before Lord Macnaghten, Lord Davey, Lord Brampton, and Lord Lindley.)

BAIN'S TRUSTEES v. BAIN.

Succession—Liferent and Fee—Rights of Liferenter and Fiar—Interest of Testator in Colliery Joint-Adventure—Trust—Interest—Rate of Interest Allowed to Liferenters.

A testator, the residue of whose estate was divisible under his settlement in certain shares, directed his trustees as soon as convenient after his death to pay one of the shares to one of his sons, and to pay one-fourth of a share to each of his daughters, the remaining share and parts of shares being directed to be held for behoof of his other son and his daughters in liferent, and their children or certain of their children in fee. He authorised and desired his trustees to continue his interest in a certain colliery joint-adventure for such length of time after his death as they might consider expedient, and empowered them to assign any of his securities to any of the beneficiaries in payment of any capital sums falling to them, and in so doing, and for the purpose of ascertaining the amount of residue falling to be divided, he directed that his interest in the colliery should be valued by his trustees, such valuation not being subject to challenge by the beneficiaries. The trustees not having made a division of the residue, and having retained the testator's interest in the colliery joint-adventures, questions arose between the liferenters and the fiars as to the profits therefrom. *Held* that the trustees ought to proceed forthwith to a division of the residue of the estate, and for that purpose ought to value the deceased's interest in the colliery adventure, and that in case they should allot said interest or a portion thereof to any settled share, the liferenter would be entitled to £4 per cent. per annum on the sum at which said interest or portion thereof so allotted had been valued.

Observed (per Lord Davey and Lord Lindley) that, although interest was allowed at 4 per cent., that being the rate generally allowed, it was worthy of consideration whether in future, having regard to the fall in the rate of interest, more than 3 per cent. should be allowed in such cases.

This was a special case presented for the opinion and judgment of the Court of Session for the settlement of certain questions arising under the administration of the testamentary trust of the late Sir James Bain, ironmaster, Glasgow, who died at Glasgow on 25th April 1898, leaving a trust-disposition and settlement dated 5th April 1894, with relative codicils dated

17th April 1895, 21st September 1897, and 21st March 1898.

The following statement of the facts in the case is in substance taken from the opinion of Lord Macnaghten:—The residue of the trustor's estate under the disposition was divisible in equal shares between his six children. There were two sons and four daughters. The share of one of the sons was given to him absolutely. The other son was restricted to a life-rent. Each daughter took one-fourth of her share absolutely and three-fourths in life-rent. In the case of each settled share the trusts of the fee as declared were in favour of the issue of the life-renter, with further destinations and subject to further provisions with which it is not necessary to trouble your Lordships. The trustor directed his trustees to pay the share and the parts of shares given absolutely "as soon as convenient after my death." The trustees were directed either to retain the settled shares in their own trust or to create new and separate trusts in regard thereto. Towards the conclusion of the settlement the trustor declares his will as follows:—"I direct my said trustees to realise the various securities and investments belonging to me at the time of my death which do not fall within the power of investment hereinafter specified, at such time or times and in such portions as they shall think most suitable, but not later than five years after my death, with the exception of my interest in the South and North Sylhet Tea Company, the shares belonging to me in ships under the management of Messrs Burrell & Son, and my interest in the Whitehaven Colliery Company, which it is my desire my trustees shall continue for such length of time after my death as they may consider expedient, and should realise whenever they shall think it advisable or suitable. But I authorise and empower my said trustees, if they find it convenient and consider it proper to do so, to assign and make over any of the securities or investments held by me at my death (including my said interest in the South and North Sylhet Tea Company, my said ship shares, and my said interest in the Whitehaven Colliery) to any one or more of the beneficiaries under this settlement in payment or to account of any capital sums falling to them, and in so doing, as well as for the purpose of ascertaining the amount of the residue of my estate falling to be divided, the securities and investments (including as aforesaid) held by me at my death or such of them as shall be unrealised at the time, shall be valued by my said trustees at the market price of the day in Glasgow, and those which cannot be so valued shall be reckoned at such values as my said trustees shall consider fair and reasonable, having regard to the whole circumstances at the time and to the values at which the same appear in my private ledger at the date of my death, and the valuation so made shall not be subject to question or challenge by any of the beneficiaries under this settlement, but shall be accepted by them without any right or title on their part to impugn the same."

The trustees have not yet made a division of the estate between the beneficiaries. They have retained the testator's interest in the Whitehaven Colliery Company, which is a private partnership formed for the purpose of working certain leasehold collieries. Sir James Bain had a fourth share in the concern. It was and is a very profitable adventure, and now produces about £3500 a-year to the trust estate.

The parties to the special case were, (1) the trustees under the trust-disposition and settlement; (2) the partners of the late Sir James Bain in the joint adventure known as the Whitehaven Colliery Company; (3) certain persons who were interested in the trust estate by way of life-rent; (4) certain persons who were beneficiaries interested in the fee of the trust estate.

The Court held, in answer to the first and second questions of law in the case, (1) that the said contract of joint adventure was not terminated or terminable by the decease of Sir James Bain; and (2) that as in a question between the parties to this case the first parties were entitled to take up the share of the said Sir James Bain in the said joint adventure known as the Whitehaven Colliery Company, and carry on the same along with the other partners thereof until the ish or sooner termination of said leases.

No appeal was taken to the House of Lords as regards these questions, and it is not necessary for the purposes of this report to refer to them further.

The third parties maintained that the whole profits received or receivable by the first parties as partners in the said concern, to the extent of Sir James Bain's one-fourth share, should be treated as income of the trust estate, and paid to the life-rent beneficiaries in proportion to their respective interests.

The fourth parties maintained that the profits of the concern should not be wholly treated as profits, but that in view of the wasting character of the property they should either be treated wholly as capital or that a sinking or other fund should be formed out of the profits so as to preserve to the estate the same capital value as at Sir James's death. For this purpose they maintained that the first parties were bound to value the share in the Whitehaven Colliery Company owned by Sir James as at his death, and to maintain the capital value thereof accordingly.

The third question of law for the opinion and judgment of the Court was as follows:—"Are the whole profits received or receivable by the first parties as partners in the Whitehaven Collieries to be treated as income of the trust estate, and payable to the life-rent beneficiaries in proportion to their respective interests? or, are the said profits to be treated as capital?"

At advising—

LORD ADAM—[After narrating the facts and dealing with the first and second questions]—"The next question is whether the whole profits received or receivable by the trustees as partners in the Whitehaven Collieries are to be treated as income

of the trust estate and payable to the life-
rent beneficiaries in proportion to their
respective interests or are to be treated
as capital.

"I find it difficult to answer this question
as put, because it appears to me to pro-
ceed on the erroneous assumption that the
trustee has directed the income of the
trust-estate to be paid to the life-
rent beneficiaries in the proportion of their respec-
tive interests, and it is only in view of that,
as I think erroneous assumption, that we
are asked or that it is necessary to dis-
tinguish between the income and capital
of the trust estate, or to determine whether
the profits in question are to be treated in
whole or in part as income or capital.

"It appears to me that the parties have
failed to observe that the trustee himself
has not distinguished between the income
and capital of the trust estate—that is, the
residue of his estate, and has not directed
the income as distinguished from the capital
to be paid to anyone. What the trustee
has directed his trustees to do is to divide
the residue of his estate as and when
realised into six equal shares among his
six children and their issue respectively.
As has been pointed out, the fee of one
of these shares was given to his son James
Robert, another share was given to his son
John Dove in life-
rent, and the fee to two
of his children, and a fee of one-fourth
of each of the other four shares and the
life-
rent of the remaining three-fourths was
given to each of his daughters respec-
tively, and the fee of each of three-fourths
to their issue respectively. As regards the
fees so given, the trustee directed his trust-
ees, as soon as convenient after his death,
to make payment of them to the persons
entitled to them, and as regards the shares
life-
rented by his children, and those devolv-
ing on the issue of predeceasing children, he
directed his trustees either to retain them
under their own trust or to create new
and separate trusts.

"It is true that the trustee is here dealing
with estates of life-
rent and fee, but it will
be observed that it is not with the life-
rent and the fee of the residue of his estate, but
with the life-
rent and fee of the respective
shares of the children and their issue, after
division of the residue, which shares are
to be held for the respective beneficiaries
either by the trustees or by new and
separate trustees.

"My view of the case is a simple one. It
is that so long as any part of the residue of
the trustee's estate remains unrealised, the
income or profits derived from it fall into
residue and until division are as much part
of the residue as the estate from which they
are derived. In this case, accordingly, I
think that the profits derived from the
Whitehaven Collieries are part of the resi-
due of the estate, and it is not of any materi-
ality whether they are to be considered as
proper income or as being in part the realisa-
tion of the capital of a wasting estate, be-
cause in either case they form part of the resi-
due of the estate which has been realised or
converted into cash, and which the trustees
now find it convenient and are in a position

to divide. It is no doubt true that towards
the end of the leases the trustee's interest
in the collieries will be of little value, but
that will simply be because the trustees
have in the course of their administration
realised and divided it as they are directed
by the trustee to do, and the result will be
that those who are in right of the respec-
tive shares will have received an equal
share of the residue.

"When, however, the sum which the
trustees are now in a position to divide is
apportioned into shares among the children
and their issue, it ceases to be part of the
residue, and is a capital sum in their hands,
and is just in the same position as any
other portion of the residue which may
have already been realised and apportioned,
and each several share will be held by
the trustees themselves, if they have not
appointed new and separate trustees, or if
they have, by such trustees in trust for the
beneficiaries in right of such shares respec-
tively, and will be all administered by them
in terms of the trust-deed. But it is the
income of the share, and not the income of
the residuary estate, as is assumed in the
case, which is directed to be paid to the
life-
rent beneficiaries. If I am right in this
view of the case, the sum now to be appor-
tioned being simply a capital sum in the
hands of the trustees, no question arises as
to whether the profits of the colliery are to
be treated in whole or in part as capital or
income, and the cases of *Ferguson's Trust-
ees*, *Strain's Trustees*, and others of the
same class to which we were referred have
no application in the present case. I am
of opinion, therefore, that we cannot answer
the third question as it is put to us, but I
think we may declare that the profits
derived from the collieries are a capital
sum in the hands of the trustees, and when
and as apportioned by them will be held
and administered by them in terms of the
trust-deed in trust for the respective benefi-
ciaries of the several shares.

The LORD PRESIDENT, LORD M'LAREN,
and LORD KINNEAR concurred.

The Court pronounced this interlocutor:—
"The Lords having considered the special
case and heard counsel for the parties,
answer the first question in the case in the
negative, and the second question in the
affirmative: And in answer to the third
and to the alternative question thereto,
*Find and declare that the profits derived
from the collieries are a capital sum in the
hands of the trustees, and when and as
apportioned by them will be held and
administered by them in terms of the trust
deed in trust for the respective beneficiaries
of the several shares: and answer the fourth
question in the case in the negative, and
decern.*"

The third parties appealed to the House
of Lords against the part of the interlocutor
which is printed in italics.

At delivering judgment—

LORD MACNAGHTEN (read by LORD
DAVEY)—This appeal is presented in the
interest of the beneficiaries by way of life-

rent under the trust-disposition of the late Sir James Bain, who died in 1898. The question before the House is one of several questions submitted by special case for the opinion of the First Division of the Court of Session. On the other points raised by the special case the decision of the Court has been accepted by all parties.

[His Lordship then stated the facts, *ut supra*.] The question for determination on appeal is as to the proper mode of dealing with the profits of the Whitehaven Colliery Company. The interlocutor appealed from declares "that the profits derived from the collieries are a capital sum in the hands of the trustees, and when and as apportioned by them will be held and administered by them in terms of the trust-deed in trust for the respective beneficiaries of the several shares."

The opinion of the learned Judges of the First Division was delivered by Lord Adam. His Lordship's view was that that what the truster had directed his trustees to do was to divide the residue of his estate "as and when realised" into six equal shares among his six children and their issue respectively, and that "so long as any part of the residue of the truster's estate remains unrealised the income or profits derived from it fall into residue, and until division are as much part of the residue as the estate from which they are derived."

It seems to me that this view is contrary to the express directions of the truster. He has not directed his trustees to divide the residue of his estate "as and when realised." The direction is for an immediate division, and for the purpose of that division—"for the purpose" (as the deed itself declares) "of ascertaining the amount of the residue . . . falling to be divided"—he directs his trustees to set a value on the securities and investments held by him at his death or such of them as should be unrealised at the time.

It seems to me that the trustees ought to have divided the testator's estate as soon as practicable after his death, and that for this purpose they ought to have set a value on his interest in the Whitehaven Colliery Company. Their valuation is binding on the beneficiaries whether entitled in fee or in life; but if they allot as part of a settled share an unrealised investment or part of an unrealised investment not falling within the power of investment specified in the settlement, the life tenant will be entitled not to the profits of the unrealised investment but to interest at the rate allowed by the Court on the sum at which the investment is valued.

It seems to me, therefore, that the interlocutor appealed from should be discharged except as to expenses, and that in lieu thereof a declaration should be made in accordance with the directions of the settlement, to the effect that the trustees ought to proceed forthwith to a division of the residue of the estate, and that for that purpose they ought to value, in manner directed by the settlement, all unrealised securities belonging to the estate; and further, that in case they

should allot to any settled share any security or a portion of any security not falling within the power of investment specified in the settlement, the life tenant will be entitled to interest at the rate of £4 per cent. per annum on the sum at which such security or portion has been valued.

The costs of all parties ought, I think, to be paid out of the estate as between agent and client.

LORD DAVEY—I agree with my noble and learned friend, whose judgment I have just read, that the decision of this case does not involve the discussion of any general principle of law, but depends on the construction of the particular will before us. I think that the directions in the will mean that the securities belonging to the testator and not invested in an authorised manner are to be realised within five years after his death except as regards those which are specially mentioned, and as to them a discretion unfettered by time is given to the trustees in realising them. But he intends that the whole shall be realised sooner or later, and he does not intend that any shall be retained as a permanent investment of his trust estate. He also intends that the division of his estate shall take place in due course after his death, and for that purpose he directs a valuation of those securities the realisation of which the trustees think fit to postpone. As regards any settled shares, the life tenant and the flar together will be entitled to a share of the estate, the conventional amount of which must be ascertained by means of such valuation, and as between themselves the life tenant will be entitled to the interest on the amount so ascertained, neither more nor less. If he received more he would be receiving part of the capital of the share, and if he received less he would not get all he is entitled to.

My noble and learned friend has proposed interest at 4 per cent., and I will not object, as that rate has hitherto been the general rate where interest is allowed by the Court. But I think it deserves consideration whether, having regard to the fall in the rate of interest which can be obtained on investments of trust moneys, the normal rate to be allowed by the Court should for the future be more than 3 per cent. in cases like the present.

I move that the appeal be allowed.

LORD LINDLEY—I am authorised by my noble and learned friend Lord Brampton to say that he entirely agrees in the judgment of Lord Macnaghten. So do I; and I also desire to say that I agree in the observations which have just been made by my noble and learned friend Lord Davey as to the rate of interest.

Their Lordships allowed the appeal, discharged the part of the interlocutor appealed from, and in lieu thereof made a declaration in accordance with the directions of the settlement, to the effect that the trustees ought to proceed forthwith to a division of the residue of the

estate, and that for that purpose they ought to value, in manner directed by the settlement, all unrealised securities belonging to the estate; and further, that in case they should allot to any settled share any security or a portion of any security not falling within the power of investment specified in the settlement, the life-tenant would be entitled to interest at the rate of £4 per cent. per annum on the sum at which such security or portion had been valued, and that the costs of all the parties to this appeal be paid out of the estate as between agent and client.

Counsel for the Appellants (the Third Parties)—Haldane, K.C.—J. Wilson, K.C.—R. D. Melville. Agents—Mitchell & Baxter, W.S., Edinburgh—Helder, Roberts, Walton, & Thomas, London.

Counsel for the Respondents (the Fourth Parties)—Lord Advocate (Graham Murray, K.C.)—Solicitor-General (Dickson, K.C.) Agents—Webster, Will, & Co., S.S.C., Edinburgh—Grahames, Currey, & Spens, Westminster.

COURT OF SESSION.

Wednesday, November 5.

SECOND DIVISION.

[Lord Low, Ordinary.]

LAURENCE HENDERSON, SONS, & COMPANY, LIMITED, AND LIQUIDATOR *v.* WALLACE & PENNELL.

Bill of Exchange—Cheque—Name of Payee left Blank—Advance by Bank to Drawers—Liability of Drawers—Singuli in solidum or pro rata—Blank

In exchange for a cheque, signed by three persons as drawers, and left blank in the name of the payee, the bank upon whom the cheque was drawn, by way of advance to the drawers, paid the sum in the cheque to one of them, and opened an account in name of the three drawers which was debited with the sum so paid and advanced.

Held that the cheque was a bill of exchange, and that the three persons who signed the cheque as drawers were liable *singuli in solidum* to the bank as holders for the amount advanced on the cheque.

In this action Laurence Henderson, Sons, & Company, Limited, in liquidation, and James Craig, C.A., Edinburgh, liquidator thereof, claimed to be freed and relieved by the defenders Wallace & Pennell, W.S., Leith, and the partners of that firm, of all claims at the instance of the National Bank of Scotland under an overdraft granted upon a certain cheque signed by Wallace & Pennell, Laurence Henderson, formerly

managing director of the Company and the Company.

The pursuers concluded (1) for declarator that the defenders were bound to so free and relieve them, and (2) for payment of all sums drawn by the Bank as dividends in the liquidation upon their said claims, and in particular of a sum of £704, being a dividend so drawn by the Bank.

The question in the case was whether the cheque, in which the name of the payee was left blank, was a bill of exchange, and whether the drawers were liable to the bank, who continued to hold the cheque, *singuli in solidum* or only *pro rata*.

The cheque upon which the Bank made the claims from which the pursuers now sought to be freed and relieved was as follows:—

123 LEITH WALK,
LEITH, 26th November 1898.

No. 519.

THE NATIONAL BANK OF SCOTLAND, LIMITED
(Leith Walk Branch).

(Stamp id.)
or order,

Pay to
Three thousand five hundred pounds stg. which charge to the account of

(Stamped.) WALLACE & PENNELL,
LAURENCE HENDERSON,
Bank of Scotland, Limited,
For LAURENCE HENDERSON,
Leith Walk, SONS, & Co., Ltd.
LAURENCE HENDERSON,
Leith. £3,500 *Managing Director.*

Paid M. C. GRANT, *Director.*
7th Dec. RICH. W. HUIE, *Director.*
1898. DAVID CALLENDER, *Secretary.*

Note.—This Cheque is watermarked—Laurence Henderson, Sons, & Co., Limited, Leith, Glasgow, and Carlisle.

This cheque had been presented to the Bank by Wallace & Pennell, who received the sum of £3500 thereon from the Bank. This sum Wallace & Pennell paid into their own account with the Royal Bank. On the same day they drew a cheque for £3500 upon their own account in favour of Laurence Henderson, Sons, & Company, Limited, and this sum was put to the credit of the Company's account. Upon the same day the Bank also opened a new account in name of the Company, Laurence Henderson, and Wallace & Pennell, which they debited with £3500, the sum in the cheque. The sum at the debit of this account at the date when the Company went into liquidation, being the sum upon which the Bank claimed, was £3524.

Wallace & Pennell lodged defences, in which, while not disputing that by reason of certain transactions, which it is unnecessary to specify, they were liable to relieve the liquidator of any sum in which the Company, was indebted to the Bank, they maintained that the Company was only liable in a question with the Bank for one-third of the sum advanced.

They pleaded, *inter alia*—“(2) The pursuers not being liable to the National Bank for more than their *pro rata* share of the loan advanced by the Bank, the conclusions for relief against the defenders should be restricted to that extent.”

On 7th February 1902 the Lord Ordinary (Low) pronounced the following interlocu-