the generality of the proposed gift, and therefore the trust, so far as these interests are concerned, is really nothing more than the constitution of a system of administration of the shares for the benefit of the person who is truly the fiar. But, of course, a testator may begin by dividing his estate into shares, giving one to each member of his family, and may go on to limit that gift and to make it clear that he intends that a daughter, for example, shall take no more than a life interest, the fee being given over to her children. But in order that we should prefer such a limitation it is necessary that the fee should be given to someone, because, unless it is given to another person, there is nothing inconsistent with the original gift, if, as in the present case, it is an absolute gift. On these grounds I concur with Lord Adam on both points raised in this case.

LORD KINNEAR and the LORD PRESIDENT concurred.

The Court answered the first and third questions in the affirmative.

Counsel for the First Parties—H. Johnston—Greenlees. Agents—Murray, Beith, & Murray, W.S.

Counsel for the Second Parties—C. S. Dickson — M'Clure. Agents — Ronald & Ritchie, S.S.C.

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*Friday, December 7.*

## FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

## COMMISSIONERS OF CALEDONIAN CANAL *v.* COUNTY COUNCIL OF ARGYLL AND OTHERS.

(*Ante*, vol. xxxi. p. 830.)

*Valuation Acts — Canal — Whether Two Canals One Undertaking—Valuation of Lands (Scotland) Act* 1854 (17 *and* 18 *Vict. c.* 54). *sec.* 21.

The Caledonian and Crinan Canals were constructed at different dates—the former by a body of public commissioners, the latter by a company of private undertakers. To enable the Crinan Company to complete their canal considerable sums were advanced by the Treasury. In 1848 an Act of Parliament was passed, whereby the Crinan Canal was transferred to and vested in the Commissioners of the Caledonian Canal, but a right of redemption (which was not exercised) was reserved to the company on payment of their debt within twenty years. In 1860 another Act was passed which, among a number of provisions applicable to both canals indiscriminately, authorised the commissioners to expend all rates and rents levied from, or money borrowed upon the security of the two canals, upon both or either of them. In practice, separate accounts continued to be kept for the two canals.

*Held* (*aff.* judgment of Lord Stormonth Darling) that, for the purpose of fixing the yearly value of the canals under the 21st section of the Valuation Act 1854, the two canals were to be treated as one undertaking, the profits upon one being set against the losses upon the other.

The Caledonian and Crinan Canals, which are situated at a distance of sixty miles from one another, were constructed at different dates, and by different sets of persons—the Caledonian Canal by a body of public commissioners, and the Crinan Canal by a company of private undertakers.

In order to enable the proprietors of the Crinan Canal to complete its construction large sums were advanced to it by the Treasury prior to 1848. In that year an Act was passed (11 and 12 Vict. c. 54), which, proceeding upon the narrative, *inter alia*, that it appeared to the Commissioners of Her Majesty's Treasury "to be essential that the Crinan Canal and works connected therewith should be vested in the Commissioners of the Caledonian Canal in order that both navigations may be united under the same management," enacted by section 5 "That from and after the passing of this Act, the tolls and rates arising from the Crinan Canal, and also the canal itself, and all the estate, right, and title and interest in and to the same . . . shall be and become the property of, and the same are hereby transferred to and vested in the commissioners, . . . and the commissioners shall henceforth have and enjoy all the rights, powers, and authorities for levying, taking, altering, and managing the tolls, rates, and duties leviable on the Crinan Canal, and all other rights, powers, and authorities, . . . and shall and may henceforth undertake and exercise the management and administration of the Crinan Canal, and of everything connected with it in as full and ample a manner as now appertains to them with regard to the Caledonian Canal." . . . By section 6 the Crinan Canal Company were given a power of redemption on payment within twenty years of the debt due to the Treasury, and any sum that might have been expended by the Commissioners upon the canal, over and above the rates received from it, but this power was never exercised. By the Act 23 and 24 Vict. cap. 46, the powers and provisions of the Acts relating to the Caledonian and Crinan Canals were amended and enlarged. The powers of rating and borrowing conferred by the Act were made applicable to the two canals indiscriminately. By sec. 25 it was provided that "All rates levied and all rents received, and all moneys borrowed under the authority of this Act, shall be applied and expended on or in connection with the canals, or either of them, and in providing additional accommodation for the traffic thereon, or in making any docks, basins, or slips as aforesaid as shall from time to time

appear to the Commissioners expedient."

After the passing of the said Acts both canals were managed by the Commissioners of the Caledonian Canal, everything connected with the management being dealt with at the statutory meetings of the Commissioners held at Westminster, the same secretary acting in regard to both undertakings. A joint purse was kept for the two canals, but the accounts of receipts, &c., were kept separate.

By section 21 of the Valuation Act of 1854 (17 and 18 Vict. c. 91), it is enacted that "The Assessor of Railways and Canals under this Act shall . . . inquire into and fix *in cumulo* the yearly rent or value in terms of this Act of all lands and heritages in Scotland belonging to or leased by each railway and canal company in Scotland and forming part of its undertaking." . . .

The Assessor for Railways and Canals in Scotland assessed the Caledonian Canal and the Crinan Canal as one undertaking, and valued the combined canals for the year to Whitsunday 1894 at *nil*, the loss on the Caledonian Canal more than extinguishing the profit on the Crinan Canal. Against this valuation the County Council of Argyll appealed to the Sheriff of Argyll, who sustained the appeal, fixing the valuation of the Crinan Canal at £290, 19s. 6d. The Caledonian Canal Commissioners, who had objected to the jurisdiction of the Sheriff, on the ground that the canal being one undertaking situated in different counties, Argyll and Inverness, the appeal should have been brought to the Lord Ordinary on the Bills, brought an action of declarator and reduction against the County County Councils of Inverness and Argyll, the inspectors of poor of the parishes having an interest in the assessment of the Crinan Canal as representing the parochial boards of these parishes, and William Munro, the Assessor for Railways and Canals in Scotland, to have it found and declared that the two canals formed one undertaking, and to have the deliverance of the Sheriff reduced.

The County Councils of Inverness and Argyll and the inspectors of poor of the said parishes lodged defences.

They pleaded—"(3) The pursuers being neither a canal nor a railway company within the meaning of the 21st section of the Valuation Act 1854, the declaratory conclusions fall to be dismissed. (4) The canals in question being separate undertakings in the sense and for the purposes of the Valuation Acts, the defenders should be assoilzied from the declaratory conclusions of the summons."

Upon 23rd June 1894 the Lord Ordinary (STORMONTH DARLING) assoilzied the defenders, and the pursuers having reclaimed, the First Division, upon 18th July 1894, repelled the defenders' third plea, and remitted the case to the Lord Ordinary for further procedure (*vide ante*, vol. xxxi. p. 830).

On 16th October 1894 the Lord Ordinary repelled the remaining defences, and granted decree in terms of the conclusions of the summons.

"*Opinion.*—It is now settled by the judgment of the Inner House that the pursuers, the Commissioners of the Caledonian Canal, are to be treated, for the purposes of the Valuation Act, exactly as if they were a canal company, and that being so, the question is, whether the Assessor of Railways and Canals was right in treating the two canals under the pursuers' management as one undertaking, and fixing the valuation at *nil*. In doing so, Mr Munro had before him the 21st section of the Valuation Act of 1854, which directs him to inquire into and fix *in cumulo* the yearly rent or value of all lands and heritages in Scotland belonging to or leased by each railway and canal company, and forming part of its undertaking. Applying his mind to that section, he came to the conclusion that both the Caledonian and Crinan Canals formed part of the undertaking of the pursuers, and, setting the loss upon the one against the profit on the other, he reached the conclusion that there was no assessable value. The County Council of Argyll, being dissatisfied with his valuation, appealed to the Sheriff of that county, and the pursuers appeared in the appeal, and maintained before the Sheriff that the appeal ought to have been taken to the Lord Ordinary on the Bills, and that therefore the Sheriff had no jurisdiction. That of course raised the very question which I have now to decide, namely, whether the two canals were to be considered as one undertaking, for, if they were, the lands and heritages belonging to the pursuers were undoubtedly situated in more than one county, and the appeal lay to the Lord Ordinary. On the other hand, if each canal was to be treated as a separate undertaking, then the Sheriff of Argyll was the proper appellate judge with reference to the Crinan Canal. The Sheriff repelled the objections of the pursuers, and, by a deliverance dated 26th September 1893, sustained the appeal of the County Council, and fixed the valuation of the Crinan Canal at £290, 19s. 6d, In doing so, he must have held that the two canals were not one undertaking but two undertakings.

"The question, whether they are or not, depends entirely upon the Acts of Parliament, particularly on the Act of 1860. Originally the canals were in every sense of the word separate undertakings. Geographically, they are separated by a distance of sixty miles; historically, they were constructed at different times and by different sets of persons—the Caledonian Canal by a body of public Commissioners, the Crinan Canal by a body of private undertakers. But the Crinan Canal, though begun by private enterprise, seems to have required and received from time to time very large assistance from the public purse, and accordingly in 1848 it was transferred to the Commissioners of the Caledonian Canal, with a power of redemption on the part of the original undertakers, to be exercised within twenty years. In 1860, before the period of redemption had fully run out, an amending Act was passed, on which the present question truly turns. By that Act

the Commissioners were empowered to borrow such sums of money as the Treasury might approve, upon the security of both canals, and by section 25 they were empowered to expend all rates levied, and all rents received, and all moneys borrowed under the authority of the Act in connection with the canals or either of them. Now, it seems to me that these provisions truly made one undertaking of the two canals. There was to be no distinction in future between them, either as regards the power of borrowing or the power of expenditure, and, so far as I see, there was no obligation on the part of the Commissioners even to keep separate accounts applicable to the two canals.

"I say that, subject to this qualification, that until the twenty years elapsed within which the power of redemption might be exercised, I think it was their duty to keep separate accounts, because unless they did so it would have been impossible for the original undertakers of the Crinan Canal to exercise their power of redemption, looking to the terms of section 6 of the Act of 1848. But the moment that period elapsed (and it did elapse without the power being exercised), it seems to me that the Commissioners were no longer under any obligation to keep separate accounts for the two canals, and it is of no consequence to the present question that they did so, if in point of law they were not bound to do so. In short, it seems to me that for all purposes they were directed by the statutes to treat the two canals as one undertaking.

"If I am right in that, the pursuers are entitled to decree in terms of the declaratory conclusion, and it only remains to consider whether they are also entitled to decree of reduction of the deliverance of the Sheriff of Argyllshire dated 26th September 1893. Mr Stewart urged that it was impossible to go back upon what had been done by the Sheriff, because his decision was declared by the Valuation Act to be final, and not subject to review. But the real ground of attack against the Sheriff's judgment is that he had no jurisdiction to entertain the appeal at all. If the objection to his judgment had been that, having jurisdiction, he exercised it in some way which was objectionable, or that he deviated from proper form, then I should have thought there was some force in the defenders' answer. Or, if it had been possible for them to make out that the pursuers could have taken some other and more convenient way of raising the point, I should have been slow to re-open a question of valuation which had been judicially decided. But it seems to me that there was no way in which the pursuers could have raised the question at an earlier stage unless they had proceeded by way of interdict, because the moment they went before the Sheriff they depended entirely upon his view of the law, whether he sustained his jurisdiction or not, and if he was wrong in sustaining it, I should not like to say that all remedy was past, and that the Supreme Court could not reduce his judgment if it proceeded without any jurisdiction to sustain it. I think in this case it did, because the jurisdiction which is conferred by section 24 of the Valuation Act upon the Sheriffs of counties is expressly limited to the case where the lands and heritages are all situated in one county. That is not, according to my judgment upon the merits, the case here, and therefore I am of opinion that the pursuers are entitled to decree both of declarator and reduction."

The defenders reclaimed, and argued—The two canals were historically and geographically two undertakings. The mere fact that they were under one body for the purposes of management did not make them one undertaking. Section 6 of the Act of 1848 gave the Crinan Canal Company the power of redemption on payment of their debts within twenty years, and though this power was never exercised, it showed that the two canals had not been merged into one undertaking by the Acts of 1848 and 1860. There had never been a case where two undertakings with so many elements of separation had been held to be one unless under express statutory provision. The elements of separation were (1) the local discontiguity of the two canals, which were sixty miles apart. This was a very important feature. The cases of *Edinburgh, Perth, and Dundee Railway Company* v. *Arthur*, December 22, 1854, 17 D. 252; *Edinburgh and Glasgow Railway Company* v. *Adamson*, June 28, 1855, 17 D. 1007, showed that the two undertakings to be one must be continuous. (2) The fact that there were no through rates on the two canals showed they were still separate. (3) Separate accounts were kept, and it was therefore quite possible to allocate the earnings of each canal within the different counties. In 1848 there had been two sets of persons to be considered, viz., the legal *persona* of the Treasury, which had advanced large sums of money, and the proprietors. It was therefore quite necessary to keep the accounts separate, so as if possible to repay the Crown. In the case of the Caledonian Canal, the Commissioners were the real proprietors, while in the case of the Crinan Canal they were also trustees for the Crown. Accordingly they were separate undertakings with separate liabilities. There were cases in which railway companies possessed subjects which were not actually part of their undertakings, and which were therefore not assessed along with their regular undertaking—*North British Railway Company* v. *Greig*, March 20, 1866, 4 Macph. 645; *Dundee and Arbroath Joint Line*, December 21, 1883, 11 R. 396. On those analogies the two canals should be assessed separately.

Argued for the pursuers—The historical difference in the two canals was ended by the 1848 Act, which made them one. The geographical separation was of no importance; thus the Forth and Clyde Canal and Caledonian Railway, the Union Canal and North British Railway, were dealt with

by the Assessor as respectively forming one undertaking. The terms of the Acts were quite inconsistent with the view that the canals were separate undertakings. Thus the terms of the narrative and of the 5th section of the 1848 Act pointed conclusively to the canals being merged in one. So too did the terms of sections 11, 23, 25 of the 1860 Act. They had a joint purse; money might be borrowed on the security of both, and applied exclusively to one. The keeping of separate accounts was merely for convenience, and not under any statutory direction.

At advising—

LORD PRESIDENT—It cannot be disputed that the Crinan Canal is a heritage (in the sense of the 21st and 22nd sections of the Valuation (Scotland) Act 1854) belonging to the Commissioners of the Caledonian Canal. The question which we have to determine is, whether or not, in the sense of those sections, the Crinan Canal forms part of their undertaking. The powers and duties of the Commissioners are regulated by a series of statutes, and, as the Lord Ordinary has pointed out, the one bearing most directly upon the present question is the Act of 1860. If anyone desired to know what is the undertaking of the body known as the Caledonian Canal Commissioners, he would go to this Act. At the same time, I think it convenient to point out that the Act of 1860 was led up to by the Act of 1848; and, in the first place, it is important to observe the passage in the preamble to the earlier Act, which has already been quoted at the bar. The passage runs—"Whereas it appears to the said Commissioners of Her Majesty's Treasury to be essential that the Crinan Canal and works connected therewith should be vested in the Commissioners of the Caledonian Canal, in order that both navigations may be united under the same management." Then the 5th section of the same Act, which vested the Crinan Canal in the Commissioners, provided that they should "henceforth undertake, and exercise the management and administration of the Crinan Canal, and of everything connected therewith, in as full and ample a manner as now appertains to them with regard to the Caledonian Canal." It was therefore the intention of Parliament, and they carried out that intention, that the undertaking of the Crinan Canal should be transferred to the Caledonian Canal Commissioners.

But when we come to the Act of 1860 we find a complete fusion and incorporation of the two undertakings. They had not merely as theretofore one set of managers, but they had now one purse. I found my judgment not only upon the sections in the Act of 1860 to which we have been specially referred, and more notably section 25 of the 1860 Act, but on what appears to me to be equally conclusive, viz., the structure of the Act taken as a whole. For, being an Act amending and enlarging the powers and provisions in former Acts relating to the Caledonian and Crinan Canals, it proceeds, after setting out the previous statutes, in a most marked way to use general terms about both canals indiscriminately. There is in fact no hint or indication that the two undertakings are to be administered otherwise than as one. I asked the question early in the discussion, "What sign of duality in the undertakings could be pointed out, either in the whole statutes or outside of them?" and three points were indicated to me. The first was the fact that there was a distance of 60 odd miles between the two canals. But this fact seems to me to be much more obvious than its bearing upon the legal question which we are considering. Secondly, we are told that the rates are different on the two canals. But that means no more than this—A man who uses the Crinan Canal pays for its use, and not for that of the Caledonian Canal, which he is not using; in the same way as if I travel to Falkirk, I take my ticket to Falkirk and pay for my journey there, and not to Glasgow, although the whole is within the undertaking of the North British Railway Company. But the money received for the use of the Crinan Canal, in accordance with the directions of the 25th section of the 1860 Act, goes not for the purpose of keeping up the Crinan Canal alone, but into the joint purse of the Comissioners of the two canals.

The third point suggested was that separate accounts were kept. Now, assuming that to be the fact—and there is some reason to think it probable—it comes to no more than this, that these enterprises being originally local enterprises, and having on the commission persons connected with the localities, it is felt to be interesting and gratifying as a matter of historic record to see which of the two is paying or not paying, or pays worse or better than the other. The keeping of separate accounts is not a statutory duty of the Commissioners; and it is not a condition of the consolidation of the two enterprises.

It appears to me, therefore, that we have here every indication to be found in a statutory record of a complete fusion and consolidation of the two enterprises, so as to form one undertaking.

Two sets of decisions have been brought to our notice. One was a small set of cases in which the Court in former days had to construe the 45th section of the Poor Law Act. We are not construing that section, but one which proceeds on a totally different theory of valuation. The words of that section put to the Court the question, whether under a statute directing the valuation of a railway, a ferry could be considered as a part of the railway. But in this case, to adhere to the illustration of a railway company, the Act tells us to consider not whether anything is part of a railway, but whether it is part of the undertaking of the owners of the railway. That, I need hardly say, constitutes a difference, the effect of which is to render that set of cases wholly inapplicable.

In the other set of cases the Court held that the character and use of the subject of valuation must determine the question, and that the supplying of meat and drink was something collateral and external to a railway company's undertaking. That decision may be right or wrong, but it is quite intelligible, and is leagues distant from anything which we have to consider.

I entirely concur with the judgment under review, and with everything said in the Lord Ordinary's note.

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

The Court adhered.

Counsel for the Pursuers—C. S. Dickson—Wilson. Agent—James Hope, W.S.

Counsel for the Defenders—Guthrie—Graham Stewart. Agents—M'Neill & Sime, W.S.

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*Saturday, December 8.*

## SECOND DIVISION.

[Dean of Guild Court, Glasgow.

## TODD *v.* WILSON.

*Property—Common Interest.*

*Held* that the proprietor of an upper flat in a tenement was entitled to connect it with the adjoining building by cutting through the gable of the flat, in respect that the proposed operations were entirely *in suo*, and that there was no allegation that they would result in injury to the chimneys of the owner of a lower flat which passed through the gable in question.

*Gellatly* v. *Arrol*, March 13, 1863, 1 Macph. 592, *distinguished.*

George Todd, wholesale hardware merchant, presented a petition to the Dean of Guild, Glasgow, for authority to make certain alterations upon subjects in Wilson Street, Glasgow, of which he was the proprietor, described as "the flat immediately above the shop No. 10 Wilson Street."

The petitioner proposed to make a connection between the said flat and the house immediately to the east, of which he was also the proprietor, by breaking through the gable wall of the flat (which was not a mean gable, but formed part of the tenement itself) and the gable wall of the adjoining property, and making a doorway or passage between them, his intention being to occupy the flat above the shop No. 10 Wilson Street as an addition to his warehouse, which was situated in the adjoining building.

John Wilson, C.A., who, as judicial factor on the trust-estate of the deceased Thomas Forrest, rope and twine manufacturer, was proprietor of the shop No. 10 Wilson Street, lodged objections. He averred—"(Objection 2) . . . Access to the upper flats of the tenement was obtained by a common stair. . , . The flues from the fireplaces of the objector's shop passed up through the gable forming the eastern wall of the tenement. (Objection 4)The petitioner . . . carries on in the adjoining building the business of a hardware and fancy goods merchant. His stock is of an inflammable description. . . . (Objection 5) From the plans produced with the petition it appears that the petitioner proposes to break through the two gable walls separating his present warehouse from the flat above the petitioner's said shop, to insert in the opening a wide doorway or passage, to shut up the present entrance to said flat from the common stair No. 12 Wilson Street, to occupy said flat as an addition to his warehouse, and to use said passage or opening as the only means of access thereto. The result will be that for all practical purposes said flat will be part of the petitioner's warehouse, and through it the whole of the tenement will be subjected to the same risk of fire as the petitioner's warehouse. (Objection 6) The petitioner further proposes to occupy the flat for the storage of goods. . . . By the bye-laws enacted by the Police Commissioners on 21st November 1892 the floors of warehouses and workshops must be able to carry 224 lbs. per square foot as a safe load. The floors in question are not nearly strong enough."

The petitioner in answer denied that the proposed alterations would lead to any increased risk of fire, and explained that his flat would be shut off from the objector's property by fireproof doors, and that the floor would be strengthened to the satisfaction of the Master of Works.

The petitioner pleaded—"(2) The petitioner being the sole proprietor of the portion of the gable through which the proposed entrance is to be formed, and said alterations being safe, he is entitled to decree as craved."

The objector pleaded—"(1) It is incompetent for the proprietor of one flat of a tenement to connect it with the adjoining building by cutting through the intervening gables. (2) The alterations proposed being unsafe, the petition ought to be dismissed."

Upon 9th July 1894 the Dean of Guild pronounced this interlocutor—"Finds that the petitioner is proprietor of the first flat of the tenement No. 10 Wilson Street, Glasgow, being the flat immediately above the shop in said tenement belonging to the objector: Finds that the petitioner is not entitled to cut through the east gable of the said first flat for the purpose of connecting the flat with the building belonging to him adjoining the said tenement on the east: Therefore sustains the objections and refuses the lining craved," &c.

"*Note.*—This case seems ruled by *Gellatly* v. *Arrol*, 1 Macph. 592. It is true that in that case the chimneys of the lower proprietor were interfered with, while that is not here alleged. But the interlocutor of the Court is expressed in general terms, and unless the petitioner could show that the plan of the original construction of the tenement No. 10