

guardian and administrator-in-law. For some time prior to the death of petitioner's said wife negotiations had been proceeding among the co-owners of the said property with a view to the sale thereof. Owing to its insanitary condition and poor state of repair the said house could not be made lettable or habitable without considerable expenditure. The ward has no other heritage in Scotland, and the cost of the repairs required would be out of proportion to his small interest in the property. If the property were retained in the said condition it would be unsaleable when the ward attained majority. In or about January 1916 an offer of £400 for the said property was received by the said co-owners. The said offer had not been formally accepted by the whole co-owners prior to the death of the petitioner's said wife, but she had intimated her willingness to concur in the acceptance of the said offer. It is necessary and expedient and in the interest of the petitioner's ward that the said offer should be accepted. The other co-owners intend to proceed with the sale. With their consent the proposed purchaser has already consigned the price and entered into possession of the property, and at her own expense is having repairs executed which were required by the sanitary authorities. The granting of this application will avoid the expense of an action of division and sale, and the petitioner believes and avers that no better price can be obtained for the said property. This petition is brought before your Lordships as an appeal to the *nobile officium* of the Court."

The Court remitted to Mr William Smith, W.S., to inquire into the facts and as to the expediency of granting the crave. He confirmed the facts set forth in the petition; stated that "a purchaser—Mrs Tuffnell, a lady interested in an adjoining estate—was luckily found, who agreed to give a sum of £400, a price which, looking to valuations (including a partial Government valuation), rentals, and other documents examined, seems not unreasonable;" and referred to the following authorities:—Fraser on Parent and Child (3rd ed.), p. 752; *Carruthers' Trustees*, 1896, 24 R. 238, 34 S.L.R. 166; *Webb v. Clelland's Trustees*, 1904, 6 F. 274, 41 S.L.R. 229; *Allan's Trustees*, 1896, 24 R. 238, 34 S.L.R. 166, 532; *Lord Clinton*, 1875, 3 R. 62, 13 S.L.R. 31; *Coll v. Coll*, 1800, M. 16,387; *Logan*, 1897, 25 R. 51, 35 S.L.R. 51.

The petitioner argued—A Scottish Court only could order the transference of Scottish heritage, being the *forum conveniens*. Mere advantage to the pupil would not induce the Court to authorise the alienation of the pupil's heritage, but where the sale could be shown to be necessary the Court would grant such power. In this case the sale was highly expedient, as delay would probably render the subjects worthless. The granting of the petition could in no wise injure the pupil's estate. If need be the money could be consigned.

The hearing having been continued for further information, on 9th December 1916 counsel informed the Court that letters of

guardianship and letters of administration by the Canadian Courts had been lodged in process; that the petitioner had been compelled to get two sureties for £2000 in order to obtain these; that he was also the proprietor of his farm.

The Court granted the authority craved.

Counsel for Petitioner—D. R. Scott.
Agent—W. Marshall Henderson, S.S.C.

Wednesday, December 20.

SECOND DIVISION.

SIMPSON AND OTHERS (SHAW'S TRUSTEES) AND OTHERS.

Trust—Succession—Liferent and Fee—Administration of Trust—Expenditure Incurred on Heritable Property—Allocation of Expenditure between Capital and Revenue.

The owner of heritable property died leaving a trust-disposition and settlement under which his trustees held his whole estate for certain trust purposes. As a considerable portion of the heritable property had fallen into a dilapidated and ruinous condition it became in some cases necessary, and in others advisable, for the trustees to spend considerable sums on the properties. A dispute arose as to the extent to which this expenditure ought to be charged against capital and revenue respectively. *Held* that the expense of new work, work of reconstruction, and painting necessitated by constructional alterations formed a burden upon the fiars, the liferenters being liable in the annual interest on the bond during the existence of their liferents; and that new fixtures or fittings in substitution for old, and painting not necessitated by constructional alterations, were chargeable against the liferenters.

George Simpson, burgh assessor, Leith, and others, the testamentary trustees of the deceased James Shaw, Leith, *first parties*, and Mrs Jane Sinclair Shaw or Bruce, of 189 Kerford Road, Albert Park, Melbourne, Australia, with her husband's consent and concurrence, and William Niven Shaw, Clydesdale, Glen View, Gravesend, *second parties*, brought a Special Case to decide how certain expenditure upon the heritable estate of the trust should be charged, whether against capital or against revenue.

The Case set forth—"1. The late James Shaw, builder, Leith, died on 5th June 1912, leaving a trust-disposition and settlement, dated 23rd June 1905, and relative codicils, dated 25th April 1906, 24th December 1908, and 8th November 1909, all recorded in the Books of Council and Session, 10th June 1912. Under his said trust-disposition and settlement and codicils his whole estate is held by the first parties as trustees for certain trust purposes, *inter alia*, payment of an annuity of £40 to his housekeeper

Mrs Mills, and a yearly payment of a sum not exceeding £200 for the maintenance of his daughter Elizabeth Shaw (an invalid and incapax), or an annuity of that amount in the event of her recovering her health. With regard to the residue of his estate, the testator provided that one-third thereof should be held for the liferent of his daughter Mrs Jane Bruce as an alimentary provision for her, the capital being held on her death for behoof of her children in such proportions as she might direct, or being paid to herself if she should attain the age of fifty without having children; and in the event of her death before attaining the age of fifty and without leaving issue, or of her issue dying without receiving payment of their shares, he directed that the capital of her share should be divided in the manner provided with regard to the other two-thirds of the residue. With regard to these two-thirds he directed one-third to be held for the liferent use of each of his sons James Shaw and William Shaw, and the capital to be paid over to their issue in such proportions as they might direct, and in the event of either of his sons dying without issue it was provided that the share of the predeceaser should accresce to the survivor and his issue. It was further provided that none of the provisions in favour of the truster's children or their issue should vest in them until the period of payment should have arrived, and that the shares of issue in minority should be payable to them on their attaining majority. Power is conferred upon the trustees to apply the income of the prospective shares of minor beneficiaries for their maintenance and education until they attain majority. The said settlement and codicils contain power to invest the trust funds on such heritable or other securities either by purchase or mortgage as the trustees should think proper, and declared 'that my trustees shall be entitled to retain as trust investments any stocks, shares, or securities or property of any kind which I may happen to hold at the time of my decease . . . also power to borrow any sum or sums of money on the security of my estate or any part thereof, and to grant therefor bonds and dispositions in security or other deeds with all usual and necessary clauses.' The truster appointed his said trustees to be his sole executors and also to be tutors and curators to any pupil or minor beneficiaries taking under his settlement."

"2. The amount of the moveable estate left by the testator at his death was nearly £7000 and of the heritable estate £18,500. The annuitants Mrs Mills and Miss Elizabeth Shaw are alive. The testator's son William Shaw and his daughter Mrs Bruce are alive and have issue. The testator's son James Shaw predeceased his father, leaving a daughter, Miss Annie Walker Shaw, who was born on 21st October 1898, and is in minority. The fiars of the estate are (1) the children of Mrs Jane Shaw or Bruce, who may survive their mother and attain majority, (2) the children of William N. Shaw, who may survive their father and attain majority, and (3) the said

Miss Annie Walker Shaw on her attaining majority. The second parties are the said Mrs Jane Shaw or Bruce and William N. Shaw, who have estates of liferent under the said settlement.

"3. The testator was at his death the owner of a considerable number of heritable properties in Leith, including (1) a warehouse and yard, No. 17 Bowling Green Street, (2) six tenements of dwelling-houses, Nos. 1 and 3 Bangor Lane and Nos. 19 to 31 (inclusive) Bowling Green Street, and (3) the dwelling-house No. 10 Summerside Street, which had been occupied by him for some time previous to his death. The tenements Nos. 1 and 3 Bangor Lane and Nos. 19 to 31 Bowling Green Street were erected by the testator about the year 1877. Nos. 1 and 3 Bangor Lane are two five-storey tenements of small houses; Nos. 19, 23, 27, and 31 Bowling Green Street are four four-storey tenements of workmen's houses. The whole of the said tenements were at the date of the testator's death of an antiquated description, and did not satisfy the requirements of the burgh authorities; most of them were then and until recently in a dilapidated and even ruinous condition, and many of the houses in them were by reason of their condition unoccupied. Nos. 1 and 3 Bangor Lane had water-closets lighted by borrowed lights from the kitchens, and were ventilated by shafts carried across the passages between the kitchens and the bedrooms to the outside walls; the other tenements had water-closets opening into the staircases without effective light and ventilation; there were no back-greens for drying the tenants' clothes; the drainage systems were defective; and in consequence of their insanitary and antiquated condition those that were occupied were occupied by an undesirable class of tenants and were rapidly depreciating in value. Certain workshop buildings at the rear of the Bangor Lane tenements were in the same ruinous condition, and had been tenantless for a number of years. The drains of the testator's house at 10 Summerside Street were in a bad condition and in need of renewal.

"4. After Mr Shaw's death several reports were received by his trustees from the sanitary inspector for the burgh of Leith, in which complaints were made that the tenement houses were insanitary. In consequence of these complaints, and also with the view of securing tenants for the unlet houses and improving the class of tenants in the tenements, the trustees found it necessary to execute and did execute considerable improvements on the properties. Had they not done so closing orders would probably have been made by the burgh authorities against the properties. New soil and waste pipes and new water-closets and sinks were introduced into the tenements; the water-closets in Nos. 1 and 3 Bangor Lane were transferred from the centre of the tenements to the outside walls, and in Nos. 19, 23, 27, and 31 Bowling Green Street the windows opening into the common stairs providing light and ventilation to the water-closets were enlarged;

the back courts were paved, and steel clothes poles erected for the convenience of the tenants. In the case of the tenements 1 and 3 Bangor Lane, which consisted each of twenty two-apartment houses, each with water-closet, the reconstruction converted these into ten two-apartment houses and ten single-apartment houses, each with water-closet. The drains of the testator's said house were replaced by new ones, and the said workshop, which was in an almost ruinous condition, was restored. Had these operations on the workshop and tenements not been carried out they would have become untenable. The whole of the foregoing reconstruction and sanitary improvements were carried out as arranged with and executed to the satisfaction of the sanitary inspector. The gross amount spent up to the present time on these improvements is £3005, 2s. 2½d. To meet this expenditure it was necessary for the first parties to borrow the sum of £3000 on the security of other heritable subjects forming part of the trust estate. The interest payable on the said loan is deducted from the revenue of the residue of the trust estate. Owing to the alterations which have been carried out, a considerable improvement has been effected in the return from the property, due to the unoccupied houses having become tenanted and the loss of rental, owing to bad tenants, having been diminished. . . .

"5. The expenditure on the said improvements may be classified under five heads—(a) new work; (b) work of reconstruction; (c) new fixtures or fittings in substitution for old; (d) painting necessitated by constructional alterations; and (e) painting not so necessitated. . . .

"6. Under the heading 'new work' are comprised the construction, enclosing with iron railings, and paving with concrete of the new back courts behind the tenements; the erection of new steel clothes poles in the said back courts; the formation of new front and back passages in the tenements Nos. 1 and 3 Bangor Lane, and of accesses from the Bowling Green Street blocks to the back courts, and constructional work on the workshop premises, including the formation of two new water-closets, new roof, new cistern, introduction of electric light, and similar work. The total amount expended under this heading is £801, 3s.

"7. Under the heading 'work of reconstruction' are comprised the constructional work carried out on the fabric of the respective buildings in restoration or replacement of or substitution for work which was in existence prior to the commencement of the alterations. The total amount expended under this heading is £1662, 14s. 2½d. This branch may be sub-divided into four heads—

"(a) Formation of new water-closet apartments next the outside walls, in substitution for defectively-ventilated centrally-situated water-closets; the forming of two rooms into one; the enlargement of the windows opening from water-closets into staircases; new roofing; and

similar work. The total outlay for this is £894 15 11

"(b) Construction of new drains; erection of new soil, waste, ventilation, and water pipes in substitution for old drains, soil, waste, ventilation, and water pipes; and the introduction of new water cisterns to replace those existing previously. The total cost of these alterations is 651 4 10

"(c) Reconstructional work on the back buildings, formerly used as a workshop and now let to Messrs P. & R. Hay. This includes the repairing of the portions of the buildings which were previously in existence and which did not fall under the heading of 'new work,' and pointing and binding with iron bands the old chimney-stalk, the whole amounting to 77 3 5½

"(d) Proportion of the charges of the clerk of works 39 10 0

£1662 14 2½

"8. Under the heading 'new fixtures or fittings in substitution for old' are comprised the following—New flush-out water-closets in substitution for those of the old 'pan' type, which were insanitary; and new fireclay sinks in substitution for old iron sinks. The cost of these is £233, 18s. 9d.

"9. Under the heading 'painting necessitated by constructional alterations' is comprised all painting necessitated both by 'new work' and 'reconstructional work,' as above defined. The total cost amounts to £216, 6s. 3d., and may be sub-divided thus—

"(a) Painting caused by 'new work' £20 6 3

"(b) Painting caused by 'reconstructional work' 191 0 0

"(c) Proportion of the charges of the clerk of works 5 0 0

£216 6 3

"10. Under the heading 'painting not so necessitated' is comprised what would have been ordinary expenditure necessary in any case to keep the property in reasonable tenable condition. The total cost amounts to £91.

"11. . . . The first parties maintain that 'new work' alone of the five heads of the aforesaid classification ought to be charged against capital, and that the other classes of expenditure ought to be charged against revenue. They contend that the 'new work' alone of these classes was necessary to preserve the *substantia* of the various subjects, and that the work comprehended under the other heads was such as was necessary to keep the subjects in a lettable and tenable condition, was necessitated by ordinary wear and tear, and falls to be paid for out of revenue. Alternatively the first parties maintain that in the event of

the said expenditure specified in articles 7, 8, and 9 not being held to be wholly chargeable against revenue, it falls to be equitably apportioned between capital and revenue; and that in any event not more than one-half of it should be apportioned against capital.

"12. The second parties maintain that the whole of the said expenditure falls to be charged against the capital of the trust estate. They contend that the said expenditure is not such as is chargeable against a liferenter; and further, that as the revenue payable to them is diminished by the interest on the cost of the said expenditure, no further charge in respect of the same can be made on the revenue. Alternatively the second parties maintain that the whole of the said expenditure mentioned in articles 6, 7, 8, and 9 inclusive falls to be charged against capital, and that only the expenditure mentioned in article 10 can be charged against revenue."

The following questions were submitted—
"1. Do any of the several classes of expenditure set forth in articles 6, 8, and 10 hereof fall to be charged wholly against capital, and if so, which? 2. Do any of the said several classes of expenditure fall to be charged wholly against revenue, and if so, which? 3. Does the expenditure under any of the sub-heads (a), (b), (c), and (d) respectively set forth in article 7 hereof, or under any of the sub-heads (a), (b), and (c) respectively set forth in article 9 hereof, fall to be charged wholly against capital, and if so, in which cases? 4. Does any of the expenditure referred to in question 3 fall to be charged wholly against revenue, and if so, in which cases? 5. Do any of the several classes or sub-heads of expenditure referred to in the foregoing questions fall to be charged partly against capital and partly against revenue, and if so, which of them; and in what proportion does the expenditure in each of such classes or sub-heads fall to be charged against capital and revenue respectively?"

The first parties argued—The law seemed to be quite settled, but the difficulty lay in its application to the particular circumstances—*Johnstone v. Mackenzie's Trustees*, 1912 S.C. (H.L.) 106, at p. 109, per Lord Shaw, 49 S.L.R. 986; Bell's Prin., secs. 1062 and 1063. The trustees had here paid the expenses of the improvements out of the generality of the trust funds, and now wished to know how they were to make up their accounts. There were instances where if capital were charged the fiar would be unduly burdened whilst the liferenter escaped, as in the case of drains, renewed possibly twice in the lifetime of the liferenter. On the other hand, if revenue were charged the fiar might benefit by an improved property when possession opened to him. On meliorations *cp.* Bell's Prin., sec. 1052. As to an equitable division between fiar and liferenter, *cp.* *Halliday v. Gardine*, 1706, Morison, 13,419. Other cases cited were—*Hackett v. Watt*, 1672, Morison, 13,412; *Scot v. Forbes*, 1755, Morison, 8278; *Nelson v. Gordon*, 1874, 1 R. 1093, 11 S.L.R. 631. Items 8 and 10 at least should be borne by the liferenters.

The second parties argued—Item 10 was conceded, but not item 8. The liferenter might accept the dilapidated property and enjoy it, and was not required to spend anything on repairs. *Cunningham, Morison*, 8275, was referred to. In the case of *Scot (cit.)* the liferenter made improvements, but had relief against the fiar, only paying interest and expenses. *Brereton v. Day*, [1895] 1 I.R. 518, per M.R. at p. 526, was referred to.

At advising—

LORD JUSTICE-CLERK—This case raises a question as to certain expenditure by the trustees of the late Mr Shaw on heritable property in Leith which they hold. A portion of this property was found to be in an insanitary and untenable condition having regard to modern requirements; and the trustees having considered the matter, quite properly came to the conclusion that in the interest of the trust these properties should be put into good repair, with a view to securing tenants and improving the class of tenants, and also to prevent the closing orders, which otherwise in all probability would have been pronounced by the burgh authorities, being issued.

The repairs were carried out, with the result that there was a considerable enhancement in the rental return from the properties as compared with what had been received at the date of the testator's death, for owing to the condition into which he had allowed the property to fall there was at that date a considerable portion of the property which was standing vacant, no tenants being willing to occupy it. The amount spent on these improvements was £3005, of which £3000 was raised by means of a loan on the security of the other heritage belonging to the trust.

The question now raised is as to the apportionment of this admittedly proper expenditure between the liferenters and the fiars. In the special case this expenditure is divided into five classes. Of these classes article 6 of the case sets forth what is described as "new work," and articles 7 and 9 with expenditure on what is described as "work of reconstruction" and "painting necessitated by constructional alterations." As to the expenditure on all this work, I think the authorities which were cited to us justify the conclusion at which I have arrived, namely, that the expenditure forms a burden upon the fiars, but that the liferenters are liable in the annual interest on the bond during the existence of their liferents.

As to the expenditure set forth in articles 8 and 10—articles 8 dealing with "new fixtures or fittings in substitution for old," and article 10 with "painting not necessitated by constructional alterations"—this seems to me to be chargeable against the liferenters. It is of course the case that a greater number of fittings have been put in than formerly existed in the buildings, and that these were all put in at one and the same time. But expenditure on such fittings would have formed a proper charge against the liferents if instead of the work

being done all at once the necessity for the renewal of the fittings had arisen item by item in the several houses. Accordingly I think the £233, 18s. 9d. representing the amount paid for these new fixtures or fittings ought to be charged by the trustees against the liferenters; and in regard to article 10 it was conceded, and quite properly conceded, that the painting not necessitated by constructional alterations was a proper charge against the liferenters. The result therefore is that these two sums of £233, 18s. 9d. and £91 are chargeable against the liferenters, and that the rest of the expenditure must be borne by the fiars.

LORD DUNDAS—I concur.

LORD SALVESEN—I am of the same opinion. I think the facts stated in the case lead necessarily to the conclusion which your Lordship has arrived at as regards the expense of reconstructing the tenements in question, because in article 3 it is set forth that the whole of the tenements were at the date of the testator's death of an antiquated description, and did not satisfy the requirements of the burgh authorities, that most of them were then and until recently in a dilapidated and ruinous condition, and that many of the houses in them were by reason of their condition unoccupied. In these circumstances it seems to me that the expenditure both on the new work undertaken by the trustees and on the proper reconstructive work falls, under the decision in the case of *Scott, M. 8278*, to be charged on the fee. The assumption is that the work is of a permanent nature, the benefit of which will substantially effier to the fiars at the conclusion of the liferent, and that it is sufficient if the annual interest on the cost of these operations is charged against the liferenter as their contribution to the expense.

As regards the other two classes of expenditure described in article 8 and 10 of the case the opposite inference in fact falls to be drawn, namely, that they were primarily for the benefit of the liferenters, with a view to making the subjects more easily letttable, and that the work is not of the same permanent character as the other items with which I have already dealt. It is quite conceivable—indeed it is more than probable—that before the liferent runs out these new fixtures and fittings will have to be renewed, and it is certain that houses of this class will not be let unless periodical papering and painting are done for the benefit of the tenants. Such expenditure does not appreciate the value of the subjects when the fiars come into their own, but tends to increase the rental which the liferenter will be drawing; and accordingly I think it is only just that a distinction should be made between expenditure of that class, which must be held to have been made by the trustees presumably in the interests of the liferenters, and expenditure on more permanent work to which the contrary presumption will apply.

I therefore agree with your Lordships as to the manner in which the various heads of expenditure fall to be charged.

LORD GUTHRIE—I am of the same opinion. This Special Case does not deal with the kind of topic usually associated with this kind of procedure, but it shows that special cases may in certain circumstances be usefully resorted to in the course of trust administration, and for other purposes than the interpretation of settlements.

The Court found “that the expenditure set forth in articles 6, 7, and 9 of the case falls to be charged wholly against capital; and that the expenditure set forth in articles 8 and 10 thereof falls to be charged wholly against revenue.”

Counsel for the First Parties—W. Mitchell. Agents—W. & J. Burness, W.S.

Counsel for the Second Parties—R. Candlish Henderson. Agents—Wishart & Sanderson, W.S.

Wednesday, December 20.

SECOND DIVISION.

CHENEVIX-TRENCH, PETITIONER.

Public Records—Exhibition of Deeds in the Custody of the Keeper of the Register at Commission for Examination of Witness.

Where in an action for reduction of a will registered in the Books of Council and Session it was desired to produce the will before a commissioner for taking evidence, the Court, on a petition, authorised the Keeper of the Register, or person authorised by him, to attend with the will and exhibit it.

Miss Mary Eliza Chenevix-Trench, residing at Callander Lodge, Callander, petitioner, against whom, as executrix and as an individual with others, an action had been raised by John Theodore Churchill and others for the reduction of the will of the late Colonel James Peter Robertson, C.B., issues for jury trial having been approved on 18th October 1916, presented a petition in which she craved the Court “to grant warrant to and authorise the Keeper of the Register of Deeds, or other person authorised by him, to attend at the trial by jury fixed to take place before Lord Dewar, Ordinary, on Tuesday the 9th day of January 1917, and subsequent dates of the trial, and also before commissioners appointed to take the evidence of any witnesses on commission in Edinburgh in connection with said trial, and to bring with him the principal will and codicils before mentioned, and to exhibit the same for inspection at said trial and commissions.”

The petition stated—“That it is necessary for the purposes of the trial in said action that the will and codicils of the said James Peter Robertson, which were registered in the Books of Council and Session on the 3rd day of March 1916, and which are accordingly in the custody of the Keeper of the Register of Deeds, should be made available and exhibited at the said trial and at commission for the examination of witnesses,