opinion this appeal fails for the reasons stated in that judgment.

I hope I do no injustice to the learned argument which has been used at your Lordships' Bar if I endeavour to summarise that argument in a few words. It seems to me that that argument amounted to this—that a partnership may have an affair which is not an affair of the partnership. To my mind that is a contradiction in terms. I can give no assent to such a proposition. It seems to me that obligations and responsibilities arise in respect of the signature of the deposit-receipt that was in the hands of the firm, and the *terminatio*, the working out, of that obligation was the working out of an affair of the partnership—an affair of the partnership to be dealt with in the winding up of the partnership affairs—and that the section of the Act of Parliament is exactly applicable to enable Robertson, if he was, as he was, a member of the dissolved firm, to sign as he did in 1904. That is the only question your Lordships have to determine.

I add one other word, and that is this. Apart altogether from these considerations, I have from first to last been unable to see how these pursuers, that is to say the beneficiaries with the concurrence of the executors, could sue in this action at all against the National Bank of Scotland in the absence of Wyllie, Robertson, & Rankin. The executors upon the receipt have no right of action at all, they have parted with the money, upon the terms that the Bank should not be responsible for it, to somebody else. I quite agree that it would have been competent to them, in a proceeding for which they joined Wyllie, Robertson, & Rankin as defenders, to have recovered upon proving a certain state of facts as against the Bank, but how they can do it in the absence of Wyllie, Robertson, & Rankin I do not understand.

I am of opinion that the appeal should be dismissed, with costs.

Their Lordships dismissed the appeal.

Counsel for the Appellants—W. T. Watson—Douglas Jamieson. Agents—Wyllie, Robertson, & Scott, S.S.C., Edinburgh—Warren & Warren, London, Solicitors.

Counsel for the Respondents—The Hon. W. Watson, K.C.—G. W. Wilton. Agents—Mackenzie, Innes, & Logan, W.S., Edinburgh—Murray, Hutchins, Stirling, & Company, London, Solicitors.

# COURT OF SESSION.

*Wednesday, May* 23.

## FIRST DIVISION.

## BELCH'S TRUSTEES *v.* DALZIEL AND OTHERS.

*Revenue—Fee and Liferent—Undeveloped Land Duty—Finance* (1909-10) *Act* 1910 (10 *Edw. VII, cap.* 8), *secs.* 16, 19, *and* 42—*Incidence of Undeveloped Land Duty as between Fiar and Liferenter.*

By the Finance Act 1910, sec. 19, undeveloped land duty is recoverable from the owner of land. By section 42 "owner" is defined as meaning the fiar of the land. *Held* in a special case that undeveloped land duty fell to be debited against the capital of a heritable estate held by trustees for a liferentrix and fiars, the liferentrix suffering the loss of income on the amount of capital so applied.

The Finance (1909-10) Act 1910 (10 Edw. VII, cap. 8) enacts—Section 16—"*Duty on Site Value of Undeveloped Land.*—(1) Subject to the provisions of this part of this Act, there shall be charged, levied, and paid for the financial year ending the thirty-first day of March Nineteen hundred and ten, and every subsequent financial year, in respect of the site value of undeveloped land, a duty called undeveloped land duty, at the rate of one halfpenny for every twenty shillings of that site value. . . ."

Section 19.—"*Recovery of Undeveloped Land Duty.*—Undeveloped land duty shall be assessed by the Commissioners . . ., and any such duty for the time being unpaid shall be recoverable from the owner of the land for the time being as a debt due to His Majesty, and shall be borne by that owner notwithstanding any contract to the contrary. . . ."

Section 42—"*Application of Part I to Scotland.*—In the application of this part of this Act to Scotland, unless the context otherwise requires—(1) . . . The expression 'owner' means the fiar of the land, except that where land is let on lease for a term of which more than fifty years are unexpired, the tenant under the lease shall be deemed to be the owner, and includes an institute or heir of entail in possession. . . ."

Mrs Janet Belch or Smyth or Dalziel, daughter of the late John Belch of Drumoyne, and others, his testamentary trustees, *first parties*, the said Mrs Dalziel as an individual, *second party*, and John James Belch Smyth and others, the children of the second party, and the marriage-contract trustees of the said John James Belch Smyth, *third parties*, brought a Special Case for the opinion and judgment of the Court as to whether undeveloped land duty payable in respect of heritable property belonging to the first parties was a charge against the capital or the income of the trust estate.

John Belch of Drumoyne died 28th December 1881, leaving a *trust-disposition and*

*settlement* dated 30th March 1865, which, after conveying his whole estate, heritable and moveable, real and personal, wheresoever situated, to the first parties, provided, *inter alia*—"*Fourth*, I direct my trustees to hold the whole residue of my means and estate for behoof of John Belch, presently residing in New Zealand, my son, and Janet Belch, my daughter, equally between them, share and share alike, in liferent for their liferent alimentary use allenarly during all the days and years of their respective lives and for their lawful issue equally among them *per stirpes*, if sons in fee, and if daughters in liferent for their liferent alimentary use allenarly during all the days and years of their respective lives, and their issue equally among them, share and share alike, in fee; declaring that in the event of either of my said children predeceasing without issue, the share of such predeceaser shall be held by my trustees for behoof of the survivor and his or her issue in liferent or fee, under the same provisions and restrictions as are applicable to their own respective shares as hereinbefore provided; declaring further, that the shares of the residue hereby bequeathed shall not become vested interests in my said children and their issue until they respectively attain the age of twenty-four years complete if males, and the said age or marriage if females."

The Special Case set forth—"2. The testator had only two children, John and Janet. The testator's son John Belch attained twenty-four years of age. He survived his father, but died on 25th April 1889 intestate without leaving issue. The truster's daughter Janet survives, and since her brother's death she has been entitled to receive as liferentrix the whole revenue of the trust estate. She has issue, one son and four daughters. Her son John James Belch Smyth, by the said antenuptial contract of marriage between him and the said Mary Dickie Douglas, assigned one-half of his share and interest in his grandfather the testator's estate to his marriage-contract trustees.

"3. The testator died possessed of considerable heritage. Part thereof consisted of three feuing estates known as Teucharhill, Craigton, and Mid-Drumoyne, all situated in the burgh of Govan. The estates of Teucharhill and Craigton adjoin, and are practically one property, extending to 34 acres or thereby. At the date of the testator's death in 1881 they were let as agricultural subjects at the rent of £223, 16s. At that time the lands were suitable for agricultural and dairy purposes, there being no public works in the vicinity, and the population at this part of the burgh being small. Since then, however, the lands have become more and more unsuitable for agricultural purposes, and the rental obtained has gradually decreased until in 1900, the previous tenant having gone out leaving arrears of rent due, the lands were let at a rental of £32 on a lease for ten years. On the expiry of the lease the tenant refused to renew. Since that date it has been impossible to get the lands let, and owing to their situation on the verge of a densely populated district, to their being almost surrounded by engineering and other works, and to the practical impossibility of excluding trespassers, they are now incapable of being let or used for agricultural purposes. At the testator's death none of the lands had been feued, but as the agricultural value declined the trustees recognised that it would be desirable, if possible, to make the lands remunerative by endeavouring to feu for the erection of tenements or public works. They accordingly took steps for doing this, and in 1892 they feued off a small part of said estates, but they have since then only succeeded in feuing off some further small portions, the last being in the year 1908. The estates of Teucharhill and Craigton therefore now yield yearly feu-duties from the feus given off amounting to £304, 9s., but the larger portion of the estates is unfeued and unbuilt on, and being as before mentioned useless for agricultural purposes yields no revenue to the trust. The first parties have in furtherance of their desire to make the said estates remunerative by feuing, and also with the view of selling them if possible, repeatedly advertised said estates for sale, or to be feued at very low rates, but they have not received a single offer for the sale of any part thereof, nor have they been able to give off a feu since 1908 as before mentioned. Further, an area of ground which was feued in 1906 is still unbuilt on, and the vassal has offered the first parties the sum of £1500 to cancel the feu and take that ground back. The estate of Mid-Drumoyne, which is situated to the west of Teucharhill, is still occupied as a farm, and it yields an agricultural rent of £100 per annum.

"4. The income of the trust-estate is about £1180, whereof £654 is derived from heritable estate. This income of £1180 is arrived at after deduction of interest on heritable bonds, taxes, ground burdens, insurances, teinds, repairs, &c., but before allowing for the full expenses of management. The difference between the £1180 and £654 is income derived from feu-duties, ground annuals, and bonds—investments made by the trustees out of the proceeds of the sale of certain portions of the original heritable estate of the testator.

"5. On the passing of the Finance Act 1909-10 the first parties were advised by expert valuators, and under their advice made returns of said estate under Form IV, and adjusted the assessable site value of the estates as follows:—Lands of Teucharhill and Craigton £22,720; Mid-Drumoyne £11,200. Under section 16 of the said Finance Act they have been called upon to pay and have paid as undeveloped land duty in respect of the first named lands for the years 1910-1914 a total sum of £127, 6s. 4d., and in respect of the second named lands a total sum of £73, 0s. 8d., in all £200, 7s. Said payments have been made by the first parties out of the general funds of the trust estate, and no allocation thereof against either capital or income has yet been made by them. Further payments in name of undeveloped land duty will require to be made by the first parties for the year

1915, and annually thereafter so long as said estates remain undisposed of."

The second party *contended* "that said duty falls to be charged wholly against the capital of the trust estate, and that no part thereof should be charged upon the revenue arising therefrom."

The third parties *contended* "that said duty should be charged wholly upon the income arising from the said trust estate, and that no part thereof should be debited against the capital of the trust estate."

The *question of law* was—"Is the undeveloped land duty levied in respect of the said lands of Teucharhill and Craigton and Mid-Drumoyne, or any and which of them, a charge against (*a*) the capital, or (*b*) the income, of the trust estate."

Argued for the second party—The undeveloped land duty ought to be paid out of capital, for it was a tax on the holding up of land so as to obtain an enhanced price therefor, which price would go into the fiar's pocket. The object of the Finance (1909-10) Act 1910 (10 Edw. VII, cap. 8) was to provide a compulsitor to sell land for which there was a growing demand. That compulsitor was provided by taxing those who held up their land; the increment value duty enabled the Crown to obtain a share of the increased value when the land was sold; the undeveloped land duty was to secure a similar result in the absence of transmission of the land. The two were similar in nature and increment value duty and likewise reversion duty were chargeable against capital—*re Smith-Bosanquet's Settled Estates*, 1912, 107 L.T. 191; Finance (1909-10) Act 1910, sec. 39 (1) to (4). Undeveloped land duty was made a burden upon the fiar—Finance (1909-10) Act 1910, secs. 16, 19, 42 (1), 39 (5), which sections plainly fixed the incidence of that duty on the fiar, not upon the liferenter. The liferenter, however, would bear a share of the burden, for the liferent would suffer with the diminution of the capital caused by meeting that charge. Mineral rights duty was payable by the "proprietor" and not by the "owner"—Finance Act 1910, sections 20 (4), and 24, as contrasted with sections 19 and 42 (1). *Johnstone* v. *Mackenzie's Trustees*, 1912 S.C. (H.L.) 106, *per* Lord Shaw at p. 108, 49 S.L.R. 986, and Napier, New Land Taxes, 2nd ed., p. 413-4, were referred to.

Argued for the third parties—Increment value duty was payable by the transferror or lessor, *i.e.*, was a capital charge—Finance (1909-10) Act 1910, secs. 3 (6), 4 (1) and 5; so was reversion duty—section 15(1). Mineral rights duty (which was more analogous to undeveloped land duty than the foregoing duties for it was an annual payment) was payable by the person in receipt of the mineral rents. By section 39 (1) mineral rights duty and undeveloped land duty were for some reason placed, so far as payment was concerned, on a different footing from increment value duty and reversion duty. Those two duties were associated together in the scheme of the Act. Minerals were treated as parts of the land which were sold in mineral form year by year—sections 23 (2) and 24. If the second party's argument were sound, where minerals were held for a liferenter, the mineral rights duty would fall upon the fiar, who might never get any benefit. Mineral rights duty and likewise undeveloped land duty had both to be paid by the fiars, who in the present case were the trustees, and section 39 (1), which showed how trustees were to proceed after payment, did not authorise payment out of capital. The trustees could not be regarded as entitled to charge the land with those duties, for they were not persons "having a limited interest" in the land in the sense of section 39 (5). Both of those duties were annual charges and should be met out of income. The charging by trustees of the cost of changing investments held in trust bore no analogy to the present case, for that was not an annual charge. No difficulty was presented by the case of land bearing no rent; in that case the trustees would pay the undeveloped land duty and recover the payment out of the trust estate. Section 39 (1) to (4), except for the reference to settled land, applied to Scotland, and so did section 41 in so far as not inconsistent with section 42; thus section 41 contained the only definition of "transferror." *Allen* v. *Inland Revenue Commissioners*, [1914] 1 K.B. 327, 2 K.B. 327, was referred to.

At advising—

LORD PRESIDENT—I am of opinion that the undeveloped land duty ought to be correctly charged against the capital of this trust estate. I should have reached that conclusion on a consideration of the character and quality of the duty—a duty upon the assumed capital value of land—apart altogether from express statutory provision. But the terms of the Act of Parliament seem to me to leave no doubt upon the question. By the 19th section of the Finance Act it is expressly provided that the duty shall be recoverable from "the owner for the time being of the land," and in the 42nd section the "owner" is defined as being "the fiar of the land." That appears to me to be quite decisive, and I propose to your Lordships therefore to answer the question put accordingly.

LORD MACKENZIE—The only question put in this case is whether the undeveloped land duty, levied in respect of the heritable properties held in trust, forms a charge against the capital or the income of the trust estate. The trust estate is held by the trustees for the testator's daughter in liferent for her alimentary use allenarly, the fee being destined to her issue in the manner provided by the deed. The parties to the case are the liferentrix on the one hand, and those who are interested in the fee, which has not yet vested, on the other.

Undeveloped land duty is a tax of a peculiar nature, and was unknown to the law of Scotland prior to the Finance Act of 1910. It is of a different character from those burdens which, being charges on annual income, are regulated on the principle of *ubi commodum ibi incommodum*, and fall within the general law as stated

in Erskine's Institutes, ii, 9, 61:—"Liferenters, as they are entitled to the profits, must also bear the burdens attending the subject liferented, as taxations, duties payable to the superior, ministers' stipends, and the other yearly payments chargeable on the lands which may fall due during the liferent." Undeveloped land duty is not a burden upon income or annual value. It is a tax upon the notional entity created by the legislation called site value. By section 16 of the Finance Act it is provided that "there shall be charged, levied, and paid" in each financial year, "in respect of the site value of undeveloped land, a duty, called undeveloped land duty, at the rate of one halfpenny for every twenty shillings of that site value." Site value is not income. It is, if anything, capital. Section 19, which provides for the recovery of undeveloped land duty, says that it shall be recoverable from the "owner" of the land for the time being as a debt due to His Majesty. Section 42 enacts that "in the application of this part of this Act to Scotland (*i.e.*, sections 1-42), unless the context otherwise requires— . . . The expression 'owner' means the fiar of the land, except that where land is let on lease for a term of which more than fifty years are unexpired the tenant under the lease shall be deemed to be the owner, and includes an institute or heir of entail in possession." There is nothing in the context which makes it necessary to read "owner" as equivalent to "liferenter." The Finance Act therefore provides in terms for the incidence of the undeveloped land duty. It is to be paid by the fiar. In the result the liferenter bears the burden to the extent by which the interest on the capital expended diminishes his estate; the fiar bears the burden to the extent by which the capital value of the estate is diminished.

The explanation given in argument of the theory of the Finance Act appears to me to be correct. Increment value duty and undeveloped land duty are the complements of one another. The former is defined in section 2 as the amount by which the site value of the land, on the occasion of any transfer on sale, exceeds the original site value ascertained in the manner provided by the Act. The amount of the increment value duty by section 1 is stated to be one-fifth of the excess. In such a case the potential value is not included in the site value as originally fixed. If, however, the land is treated as undeveloped land, then its potential value is discounted, and this is reflected in the larger figure put on the site value. The annual value is not correlated to this. If and when this larger figure is realised, there is no excess upon which increment value duty is leviable. The purpose of the undeveloped land duty, according to the argument for the liferentrix, is to prevent the land being held up, and to force it for sale upon the market. The person for whose benefit the land is held up is not the liferentrix but the fiars. It is out of their pockets that the undeveloped land duty ought therefore to come, as they will be recouped when the price is ultimately realised. This seems a correct view of the theory of the Act, though in point of fact the land in question cannot be sold as no one will buy it. The undeveloped land duty is therefore paid year by year in order that the owner, *i.e.*, the fiar, may have the land. There is no benefit to the liferenter, who is the poorer if the land has an undeveloped value, for he is receiving an annual income from the land less than the annual return from the proceeds if the land were sold. All this seems to point to the language of sections 16, 19, and 42 being interpreted as above indicated.

The provisions of section 39(5) are peculiar, and it is unnecessary to construe what is meant by "any person having a limited interest in the land or interest in land," or to express an opinion upon whether the sub-section confers a right, or merely provides the machinery for effectuating a right otherwise existing. The reason why in this case it is unnecessary to decide this question is because there is in the hands of the trustees sufficient moveable estate to meet the claim, and this moveable estate is held for the same persons as the heritage in liferent and fee.

It may be pointed out that under the Act the position of undeveloped land duty is in marked contrast to that of mineral rights duty, which by section 20 (1) is imposed on rental value at the rate of one shilling for every twenty shillings of that rental value. By section 20 (4) it is to be recoverable as a debt due to "His Majesty from the proprietor of the minerals where the proprietor is working the minerals, and in any other case from the immediate lessor of the working lessee." Section 24 defines proprietor as "the person for the time being entitled in possession to the minerals, or to the rents and profits thereof." The person so entitled is the liferenter, and the mineral rights duty is a burden upon annual receipts. Its position is therefore different from undeveloped land duty, which in its incidence should be assimilated to increment and reversion duty.

It was not disputed that increment duty is a payment of a capital nature, and is payable by the fiar, or that reversion duty, under sections 13 and 15, is recoverable from the person in the position of proprietor. We were informed that it had been decided in England that increment and reversion duty are chargeable against the remainder man.

For these reasons I am of opinion that the answer to the question should be that the undeveloped land duty should be debited to capital, the liferentrix suffering the loss of the income on the amount of the capital so applied.

LORD SKERRINGTON—I agree with your Lordships and have nothing to add.

LORD JOHNSTON was absent.

The Court found "in answer to the question of law . . . that the undeveloped land duty should be debited to capital, the liferentrix suffering the loss of the income on the amount of the capital so applied."

Counsel for the First and Third Parties—Chree, K.C.—Macquisten. Agents—John C. Brodie & Sons, W.S.

Counsel for the Second Party — Macmillan, K.C.—MacRobert. Agents—Bonar, Hunter & Johnstone, W.S.

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*Friday, May 25.*

## SECOND DIVISION.

## WEST *v.* MACKENZIE.

*Reparation—Slander—Malice and Want of Probable Cause—Innkeeper Instructing Constable to Detain Guest who had Left without Paying Bill.*

*Process—Jury Trial—Verdict Contrary to Evidence—All Evidence Reasonably to be Expected before the Court—Jury Trials Amendment (Scotland) Act* 1910 (1 *Geo. V, cap.* 31), *sec.* 2.

The Jury Trials Amendment (Scotland) Act 1910 enacts, section 2—"If after hearing parties upon (*a*) a rule to show cause why a new trial should not be granted . . . on the ground that the verdict is contrary to evidence . . . the Court are unanimously of opinion that the verdict under review is contrary to evidence, and further that they have before them all the evidence that could be reasonably expected to be obtained relevant to the cause, they shall be entitled to set aside the verdict, and in place of granting a new trial to enter judgment for the party unsuccessful at the trial."

A guest who had resided for a considerable period in an hotel left without paying the bill, the accuracy of which was in dispute. A police constable, acting upon instructions in a letter from the proprietor of the hotel to detain the guest, met her and accompanied her to her destination. She raised an action of damages for slander against the hotelkeeper, founding upon the letter as having been written maliciously and without probable cause. A verdict having been returned for the pursuer, the defender moved for a rule upon the pursuer to show cause why a new trial should not be granted on the ground that the verdict was contrary to evidence.

*Held* that in the circumstances the hotelkeeper acted without malice and with probable cause in writing the letter, and that all the evidence that could be reasonably expected to be obtained was before the Court, and the defender *assoilzied.*

The Jury Trials Amendment (Scotland) Act 1910 (1 Geo. V, cap. 31), section 2, is quoted *supra* in rubric.

Mrs Mary West, Lossiemouth, *pursuer*, brought an action of damages for slander against William Mackenzie, hotelkeeper, Poolewe, Ross-shire, *defender*.

The *facts* of the case appear from the following narrative, which is taken from the opinion of the Lord Justice-Clerk—"The pursuer is a fish merchant residing and carrying on business at Lossiemouth. In the beginning of last year, in furtherance of her ordinary business, she went to Poolewe, for a few days at first, and then she returned later in the month of February to take up her residence in the hotel belonging to the defender in order to superintend the operations of some fishermen and other employees concerned in the catching and preparing of fish for market for her ordinary fishdealer's business at Lossiemouth. She says that when she first went to the defender's hotel she made inquiries and apparently satisfied herself that she was to be taken on trade terms—if I may so express it—of £1 per week, and in her condescendence she founded upon that position to the effect of making her case one where she was entitled to stay in the hotel at that tariff. After she had been in the hotel for some nine or ten weeks she for some reason or other—perfectly legitimate I do not doubt—found that she had to leave more hurriedly than she originally intended. She gave intimation to the defender or his employees that she wanted her bill. The bill was rendered to her about 11 o'clock at night, she having to leave next morning about 8 o'clock by the mail cart which took her from Poolewe onwards through Gairloch and Kinlochewe. She found, she says, that she had too little time to check the bill that night, and when she was asked about it in the morning she said that she had not had time to check it. There was some question as to whether if she had not the money she would give a cheque, but she refused either to give cash or cheque. When she left the defender protested against her going, and finding that she had gone away he despatched a messenger to the constable at Gairloch with a letter in these terms—'Mrs West left without paying bill —£69, 4s. 2d. Please detain.' The constable on getting that letter at Gairloch awaited the arrival of the mail cart, and informed the pursuer of the communication he had received, whereupon she stated that the bill was disputed. The constable then, quite rightly, being himself of opinion that the matter was one of civil obligation, not involving any question of criminal action, declined to do anything except that he put himself in the mail cart and proceeded along with it to Kinlochewe, and at the same time despatched a telegram to his superior at Dingwall informing him of the circumstances and asking for further instructions. At Kinlochewe he received these instructions, which were to the effect that he was to do nothing further."

The Lord Ordinary (ORMIDALE) approved the following issue:—"Whether on or about 24th February 1916, in or near the Poolewe Hotel, Poolewe, the defender wrote and despatched to Constable Mackenzie, Gairloch, a letter in the following terms:—'*Hotel, Poolewe, Ross-shire, N.B., 24th February* 1916. Constable Mackenzie, Gairloch. Mrs West left without paying bill, £69, 4s. 2d. Please detain. MACKENZIE, Poolewe