

first, are shipping shares in their nature wasting securities, and second, whether they are or are not wasting securities in the general case, did the testator so regard and treat them in his will? I answer both these questions in the affirmative. No doubt there is a sense in which every possible subject of security is wasting. The sea encroaches on the land, and the surface of the earth in non-volcanic countries is gradually being worn down. But in the sense of a subject with an ascertainable and well-recognised length of life, which is never indefinitely prolonged, and which could only be indefinitely prolonged for repair sooner or later amounting to replacement and rebuilding, a ship is a wasting security in a reasonable sense and land is not. As to the testator's intention, taking the terms of his will, and the fact that except shipping shares he possessed no securities which could reasonably be called wasting, I cannot doubt that he intended to treat, and did treat, his shipping shares as wasting securities.

If, then, the testator's shipping shares must be treated as wasting securities, were his trustees entitled to make final appropriations of the amounts annually yielded by them as between capital and income? This matter is expressly regulated by the terms of the concluding part of the settlement, under which they were not only entitled but bound every year to settle the amount payable to the liferenters, the balance going to capital. The result may be hard, as the circumstances have turned out. But there is nothing improbable in the idea that the testator desired the liferenters to know year by year how they stood, and did not wish any questions to arise at an indefinite distance of time either as to under-payment or over-payment. The duty of the trustees to settle year by year "the proportion of the return which shall be treated as income" seems to me to involve that no sums which they did not so treat at the time when they applied their minds to the subject can afterwards be treated as income when it happens, from unexpected and unforeseeable circumstances, that the liferenters might have got as income more in any one or more years than was actually appropriated to them.

The last question assumes, contrary to my opinion, that the trustees had power either to make a final or an interim appropriation. On that assumption I think it clear that the appropriation they made was a final one. Had it been intended to be interim, that would have been easily expressed by putting the amount not appropriated to income to suspense account.

The Court answered the first and second questions of law in the affirmative, finding it unnecessary to answer the remaining questions.

Counsel for the First Parties—Watson, K.C.—MacRobert. Agents—Boyd, Jameson, & Young, W.S.

Counsel for the Second Parties—Constable, K.C.—Gentles. Agents—Boyd, Jameson, & Young, W.S.

Counsel for the Third Parties—Sandeman, K.C.—Black. Agents—Gillespie & Paterson, W.S.

Tuesday, April 15.

## OUTER HOUSE.

[Lord Mackenzie, Ordinary  
on the Bills.

### ABERDEEN CORPORATION v. RAILWAY AND CANAL ASSESSOR.

*Valuation Cases—Annual Value—Water-works—Non-Profit-Earning Subject—Revenue Principle—Cost of Construction—Cost of Act of Parliament—Sinking Fund—Reserve Fund.*

The Railway and Canal Assessor in arriving at the annual value to appear in the valuation roll of the statutory water undertaking of a city, from which undertaking no profit could be derived, departing from his previous practice, proposed to add to the amount raised by assessment a percentage on the cost of construction of the works, and to deduct the amount put to a sinking fund and to a reserve fund and the cost of a recent Act of Parliament, charges against revenue made under the statutory powers, before deducting therefrom the cost of management and maintenance. The cost of construction of the works had been paid off. *Held* that the assessor was wrong.

The Lord Provost, Magistrates, and Town Council of the Royal Burgh of Aberdeen appealed to the Lord Ordinary on the Bills under the Valuation of Lands (Scotland) Act 1854 (17 and 18 Vict. cap. 91), secs. 23 and 24, against the value sought to be set against the city's water undertaking by the Assessor for Railways and Canals.

The Case stated—“(2) The valuation put by the assessor upon the said undertaking for the year from Whitsunday 1919 to Whitsunday 1920 is £16,108, 10s. 5d. (3) The valuation for the year ending Whitsunday 1920, made up on the same basis as for the year ending Whitsunday 1919 and previous years, would be £9224, 12s. 5d. (4) The principal difference between these two valuations is due to a change in the mode of valuation which the assessor proposes to apply to the undertaking. Hitherto the undertaking has been valued upon the revenue principle. The assessor has not in the proposed valuation now under appeal departed from that principle, but he has made an innovation which is inconsistent therewith, in that for the first time he has made an addition to the revenue side of the account of the undertaking of £12,797, 18s. 7d. in respect of 'interest on structural cost of the works and pipes,' viz., £355,498 at a rate of 3·6 per cent. No such interest charge is in fact received by the appellants, nor does it correspond with any entry or entries in their books, accounts, or estimates. The appellants submit that this innovation is contrary to all

precedent and authority, and is unjustifiable. (5) A further difference between the said valuations is due to the deduction by the assessor from revenue of three items in respect of (1) sinking fund, being amount of previous year's capital expenditure on new mains (£481, 15s. 11d.); (2) first instalment of costs, charges, and expenses of and incident to the appellants' Water Order of 1916, and the Act confirming the same (6 and 7 Geo. V, cap. 1), which costs and others fall in pursuance of section 53 of the order to be paid out of the revenues of the water undertaking or out of moneys borrowed under the authority of the order (£1520); and (3) sum set aside to revenue reserve fund under and in pursuance of section 49 of the said order (£4176, 5s. 9d.). These deductions although not formerly appearing in the valuation of the undertaking are not inconsistent with the revenue principle, and are not in any way in conflict with the mode of valuation applied in previous years, and the appellants submit that these deductions should stand. There is the still further difference that the assessor has based his valuation on one year only instead of as previously on a three years' average. The appellants are willing that the assessor's past practice in that respect should be adhered to for the year in question. (6) The appellants accordingly submit that the proposed valuation should be altered and amended by (a) disallowing the addition to revenue in respect of interest amounting to £12,797, 18s. 7d.; and (b) giving effect to the three years' average. The valuation on this basis would be £7165, 4s. 11d."

Appendix II of the case gave the valuation on the basis adopted in previous years, made up thus:—

<i>Revenue for the Year to Whitsunday</i>	
1918—	
Public water rate for year to Whitsunday 1918 (less arrears written off) . . . . .	£2,787 19 3
Domestic water rate (including arrears) do . . . . .	3,824 4 5
Special water charges (less arrears written off) do . . . . .	3,969 13 7
Water supplied by meter . . . . .	11,393 11 3
Water supplied to shipping . . . . .	1,383 2 5
Water for new buildings . . . . .	30 12 3
Fees for stamping and testing water fittings . . . . .	40 4 1
	£23,434 7 3
<i>Working Charges, &amp;c.—</i>	
Repairs and maintenance of works, &c., including meter depreciation and rent of Water Engineer's office . . . . .	£7,345 8 6
Occupiers' rates and taxes . . . . .	1,367 19 1
Cult's pumping engines . . . . .	2,389 2 5
Stamping and testing water fittings . . . . .	110 15 8
Shipping water . . . . .	616 16 10
Irrigation farms of Kin-cardine O'Neil, Aboyne, Braemar, Ballater, Tarrand, and Lumphanan . . . . .	251 0 11
Office salaries and general charges . . . . .	766 13 4
	12,847 16 9
NET REVENUE . . . . .	£10,586 10 6
Carry forward, . . . . .	£10,586 10 6

	Brought forward, £10,586 10 6
<i>Tenants' Allowances—</i>	
5 per cent. on £6423, half of working charges, being capital estimated to carry on the business—for interest . . . . .	£321 3 0
5 per cent. on £11,781, value of meters &c., (including £500 for apparatus other than meters)—for interest . . . . .	589 1 0
5 per cent. on £3752, cost of Deacon Waste Water system — for interest . . . . .	187 12 0
	1,097 16 0
	£9,488 14 6
Amount for year 1918-19 . . . . .	£10,226 9 8
Do. 1917-18 . . . . .	7,958 13 3
	18,185 2 11
	3/£27,673 17 5
VALUE—(three years' average) . . . . .	£9,224 12 5

LORD MACKENZIE—This is an appeal against the valuation of the Assessor of Railways and Canals in Scotland of the water undertaking of the city of Aberdeen, for the year 1919-20, the value being fixed by the assessor at £16,108 10s. 5d. That compares with a valuation for the year 1918-19 of £10,226, 9s. 8d. and for the year 1917-18 of £7,958, 13s. 3d.

In my opinion the valuation for the year 1919-20 should be the figure of £9224, 12s. 5d. In taking that figure rather than the figure of £9488, 14s. 6d, I give effect to what was accepted on the part of the assessor, that if I came to be of opinion that the principle upon which he proceeded in previous years should be adhered to, then he is willing that the three years' average should be applied and not the year in question alone. In effect I consider that the true view is contained in Appendix II, which is printed in the Case, and that gives effect to the principle which has been adopted and acted upon in previous years in the case of Aberdeen.

It is based upon authority, and that authority is contained in the case of the *Magistrates of Glasgow v. Dempster*, 1884, 12 R. 3, 22 S.L.R. 10, a judgment of Lord Kinnear, who had before him the views of Lord Lee and Lord Fraser in the case of the *Local Authority of Dalbeattie*, 1882, 10 R. 23, 19 S.L.R. 568. Lord Kinnear expressly endorsed the view taken by Lord Fraser in these words—"The true view, in my judgment, is that stated by Lord Fraser, that the net income derived from the rates, after deduction of all necessary outlays, is the yearly rent or value of the water-works." And in that view the only question for consideration came to be—what are the deductions which should be made from the gross revenue for the purpose of ascertaining the rent.

I put it to counsel for the assessor whether any distinction could be drawn between the assessing powers of the Glasgow Water Authority, as contained in their Act, and the assessing powers of the Aberdeen Water Authority as contained in their Act here, and he replied that there was no distinction. Both were excluded from making a profit,

and therefore the same considerations apply in both cases.

The duty of the Valuation Court is prescribed by section 6 of the Lands Valuation (Scotland) Act 1854—"In estimating the yearly value of lands and heritages under this Act, the same shall be taken to be the rent at which, one year with another, such lands and heritages might in their actual state be reasonably expected to let from year to year."

In taking the agreed figures as they appear in Appendix II the revenue for the year was £23,434, 7s. 3d.; the working charges, which under the authority of the *Glasgow* case have to be deducted, are also represented by an agreed figure of £12,847, 16s. 9d., leaving a net revenue of £10,586, 10s. 6d. From that has to be deducted the usual tenants' allowances, amounting to £1097, 16s. leaving £9488, 14s. 6d. as the net income derived from the rates after deduction of all necessary outlays. The question I put to Mr Constable was this—What other fund would there be available in the hands of a hypothetical tenant for the purpose of paying rent over and above the sum of £9488, 14s. 6d.? and I did not gather from his argument that anything could be added to that consistently with the powers contained in the assessing clauses in the statute.

Now if that is so, I am unable even apart from authority to see how a hypothetical tenant could be found who would offer a rent in excess of the net surplus of the revenue over the working charges. What the Assessor of Railways and Canals suggests in Appendix I is this, that there should be added to the amount of the revenue "interest on structural cost of works and pipes" as returned to the Assessor, viz, £355,498 at an average rate of 3·6 per cent., bringing out £12,797, 18s. 7d.

I think a conclusive answer against that being taken into consideration by a hypothetical tenant in estimating what rent he could afford to offer for the undertaking is this, that he would have no authority to pay that interest. The capital expenditure has been wiped off, and there is no legal assessing power to raise revenue equivalent to the amount of 3·6 per cent. and therefore he could not have the wherewithal to satisfy any demand for rent in excess of the net surplus as brought out in the manner I have indicated, of £9488, 14s. 6d.

Accordingly it seems to me that not only on authority but also on principle, as regards the figures that are put before me, the course that should be taken is the one that I have indicated.

A larger question was raised in the course of the argument, and it was said that what made all the difference was this, that if there is debt to be paid off, this results in the assessment being large, and if the debt has all been paid off, as has been the case here, then the assessment falls to a smaller figure. The circumstance that is founded upon here was certainly not absent from Lord Kinnear's mind, because he expressly refers to it. Objection has been taken to the fact that revenue raised for the purpose of paying debt should not be included in

the *cumulo* valuation. But that attempt has failed in the past, and I find that in the schedule which has been furnished to me of the previous valuations of this undertaking it has gone as high as £20,792 in the year 1905-06, when the maximum was reached. It is said that there ought to be some method devised by which there should be a power to equalise over a period of years and that the amount of the valuation as appearing in the valuation roll should not depend upon whether there is debt or whether there is not.

That, it appears to me, in view of the decided cases and of the practice which has followed upon them, is a matter appropriate to be considered by the Legislature. I am unable to take the view that it is for me sitting in the Appeal Court here to endeavour to formulate a principle different from that enunciated by Lord Kinnear, which has been approved in subsequent cases, and which has been ever since acted upon by the Assessor of Railways and Canals himself.

And if it is said that there is a want of equity, I think that counsel for the Corporation was able to demonstrate that if the question be, as it is, what has the hypothetical tenant got to pay the rent out of, then there is no more than the sum of £9488 in the present case. He has not got the power of raising money to meet this interest on the structural cost.

Accordingly I propose to sustain the appeal and to allow the value to be entered for the year in question at the sum I stated at the beginning, viz., £9224, 12s. 5d.

His Lordship sustained the appeal and substituted £9224, 12s. 5d. for the figure proposed by the assessor.

Counsel for the Appellants—Chree, K.C. —Gentles. Agents—Gordon, Falconer, & Fairweather, W.S.

Counsel for the Assessor—Constable, K.C. —W. T. Watson. Agents—Ross Smith & Dykes, S.S.C.

Thursday, June 12.

## FIRST DIVISION.

[Lord Anderson, Ordinary.]

REID v. MACFARLANE.

*Reparation—Seduction—Master and Servant—Connection Obtained through Ascendancy of Master.*

In an action of damages for seduction the evidence was to the effect that the pursuer, a girl of about eighteen, was employed as a domestic servant by the defender; she was trained by the defender's wife, having been over four years in the defender's service, and was trusted by the defender and his wife. Two acts of connection were proved. On the first occasion the defender, in spite of the pursuer's struggles and while she was in a state of bewilderment, had connection with her; on the second occasion the defender came upon