the testator came to frame these later codicils he may have thought that what was said in the second codicil as to freedom from duties would be held as covering the bequests in the later codicils, but I am afraid we cannot treat that provision as being so elastic. Therefore I cannot hold the bequests in the third and fourth codicils to be free from duty.

The Court answered the question in the negative.

Counsel for the First Parties—Guthrie, K.C.—W. Thomson. Agents—Macgregor & Stewart, S.S.C.

Counsel for the Second Parties—A. S. D. Thomson—Grainger Stewart. Agents—W. & J. L. Officer, W.S.

## HOUSE OF LORDS.

*Thursday, November* 13.

(Before the Lord Chancellor (Halsbury) and Lords Shand, Davey, and Robertson.)

### MAXWELL *v.* M'FARLANE.

(*Ante*, June 14, 1901, 38 S.L.R. 665, and 3 F. 933.)

*Superior and Vassal—Feu-Contract—Construction—Additional Feu-Duty Stipulated for Ground "on which Buildings shall be Erected"—Approaches—Reservoir Banks.*

A feu-contract provided that the vassal should pay, in addition to the feu-duty stipulated, "the sum of two shillings sterling of additional feu-duty for every square pole of the said piece of ground on which buildings shall be erected, excepting an addition to the mansion-house and a porter's lodge." A singular successor of the original vassal erected a public laundry on part of the feu. *Held* (*reversing* the judgment of the First Division and *restoring* the judgment of Lord Stormonth Darling, Ordinary) that the additional feu-duty was exigible only for the ground used for the buildings which had been erected, and not also for ground utilised for approaches to the buildings, and certain grass slopes forming the bank of the laundry reservoir.

This case is reported *ante ut supra.*

The defender and respondent appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—In this case it appears to me that the ordinary and natural meaning of the words is the construction which I must place upon this contract. I do not understand how it is to be "enlarged." I could imagine that if the parties had in their minds all that the learned counsel have from time to time suggested as being in their minds for the purpose of making this bargain between them, they might have used language which was not open to any controversy at all and might have pointed out plainly what they intended. For instance, if they had intended that additional feu-duty should be paid not only in respect of actual buildings but in regard to everything that was convenient or necessary or proper or agreeable to be enjoyed with the buildings erected, then they would have said so. But they have used language which seems to me not to be open to any ambiguity; and to my mind the language is too plain to be enlarged or to be altered.

I think there is this fallacy in the arguments which have been addressed to your Lordships in support of this judgment—that there is a confusion between that which is a building and that which is agreeable to or convenient to a building erected. It is possible of course to conceive cases where the lines of thought become so narrow between what is a building and what is only something to be enjoyed together with a building that you can imagine very difficult questions to arise. But to my mind, looking at the language itself, no such question arises here.

It is broadly contended on the one side that everything that is appropriate to the condition of things that now exists—namely, a laundry—is a thing in respect of which the additional feu-duty may be claimed. I cannot see that. When Lord M'Laren points out that chimneys or the well of a house may be included by one view of this and excluded by the other, I think his Lordship seems, if I may say so with all respect to him, to confuse two totally different things. It may be sometimes a difficult question as a matter of construction (by the word "construction" I do not mean construction of language, but I mean the actual physical building of a house) to determine what is or is not part of a house. For my own part I should have thought there was no difficulty in saying that a paved yard, a chimney, or what we know as the well of a house—that is to say, the interior portion of a house uncovered by actual bricks, which in itself is a complete and perfect unity—is just as much part of the house as the most contained room in it is part of the house.

It appears to me that that gets rid of the whole difficulty which the learned Judge suggested. Once solve the question: Is this a house? and if it is, it is within the language. But if it is not inside a house—if it is not a house—you must show, to my mind, something in the language which the parties have used which contemplated that the additional feu-duty was to be paid for something which is outside and was not a house. I can find no such enlargement in any part of this contract. The result, to my mind, is that the only construction that ought to be placed upon this language is that which the learned Lord Ordinary has placed upon it, and I therefore move your Lordships that the interlocutor appealed from be reversed and that the interlocutor of the Lord Ordinary be restored.

LORD SHAND—I also am of opinion that the judgment of the Lord Ordinary must be reverted to in this case, and that the House ought to recal the decision of the Inner House of the Court of Session.

The case, as has been said in the course of the argument, is not at all like that of a conveyance or bequest of a house and grounds or a bequest of a house, which plainly in many cases must necessarily mean not only the house but include pertinents or curtilage — it may be a large portion of ground occupied and used as garden or otherwise in direct connection with the house. It is a case in which we have, as I think, a very peculiar clause to deal with and to construe. The clause in the narrow expression used to define the circumstances in which additional feu-duty is to become payable refers to and specifies "ground on which buildings shall be erected." It is quite unlike a case in which the expression used is more general in its nature, and the obligation is declared to arise where buildings are erected, and where the buildings and pertinents or ground used in connection with buildings are made subject to an additional feu-duty. It appears to me, upon the plain meaning of the words, that we must adopt the narrower construction, which has been maintained simply because language of a narrow and unambiguous character has been used, and we must give effect to that language.

I agree with his Lordship on the Woolsack in thinking that if any of this ground could be shown to be essential to the existence of the buildings and their use as buildings it would have been in a very different position from the ground in dispute. For example, as was put by the learned counsel for the superior in this case, if it were necessary that ground should be left and used round a building for the existence of that building as foundations for it, or if a well were part and necessary for the use of the building, or a stable yard for the use of the stable buildings, all these might be truly said to be properly parts of the buildings. But in this case the proposal is not merely to extend the obligation to ground essential to the existence and use of the building, but to roads and accesses, and it might even be to the use of the reservoir itself, because these are used in connection with the business carried on in the buildings. It appears to me that the language which has been used in the feu-contract is not broad enough to include land which is only in the position of being so used. I therefore concur with the opinion which has been expressed by your Lordship and by the Lord Ordinary.

LORD DAVEY—I must assume that this question is one capable of difference of opinion, because the learned Judges of the Inner House have expressed an opinion contrary to that of the Lord Ordinary, but I confess it appears to me a very plain case, and if it were not for the great respect I feel for the learned Judges who have differed from the view which I think is the right view I should not trouble your Lordships with any observations.

The learned counsel for the respondent, following the judgments in his favour, has put the case, as I understand it, in two ways. He seeks to define a building as including everything that would pass by a grant of a building in a conveyance, and he selected as his definition of what would be subject to the increased feu-duty in the present case the definition that it would include everything which was by the erection of the building rendered incapable of separate occupation. I think I have correctly interpreted his words. Now that seems to me a complete fallacy. It is quite true that, if you have a grant of a building, then both according to Scotch law and according to English law it would include everything that was appurtenant to that building, not only necessary for but actually used for the enjoyment of that building, or what in the English law is called the curtilage of the building. But we are not dealing here with the conveyance of a building. The construction of a grant of a building rests upon the well-known principle that if a thing is granted that also is granted without which the thing granted is incapable of enjoyment.

We are not dealing with a grant of a building in the present case. The real question we have to decide is what is the measure of the additional feu-duty to be paid under the terms of this contract between the late Sir John Maxwell and Mr Young under whom the appellant claims; and we have to determine as a matter of construction what is the meaning of "ground on which buildings shall be erected." As my noble and learned friend on the Woolsack has said, the question narrows itself to what is a building. Now, I should have thought that that would not have been a very difficult question. Although something may pass by the grant of a building as being appurtenant to the building, the building does not include in itself everything which is *de facto* enjoyed with it. What may be a building in any particular case is sometimes a difficult question. In the present case those difficult questions do not arise, and I am not going unnecessarily to express any opinion on the questions which have been propounded at the bar, whether this or that would be included in the definition of a building. Suffice it to say I agree with my noble and learned friend on the Woolsack that the only ground upon which the additional feu-duty can be charged in the present case is ground on which a building, according to the true meaning of the word "building" (which may vary in different cases), has *de facto* been erected. Once make up your mind what is a building in the case before you, then you have only to enquire what area of ground the building, according to the meaning which you attach to it in the circumstances of the particular case, covers.

I will only add that I think there is very good sense in the doctrine adopted by the Lord Ordinary, that where an additional

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

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

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

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

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

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

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

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

---

*Tuesday, August* 5.

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

## BAIN'S TRUSTEES *v.* BAIN.

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

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

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

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