

benefit—the one in consideration of the other. And I am also of opinion that the trust was not intended to come into operation until after the death of the survivor. During life each was to be the uncontrolled proprietor. The trustees were not even to have a title till after the death of the survivor; for the deed provides that when one of the parties dies the survivor is to be his or her executor, and the trustees are not to be executors till the death of the last survivor. The intention of the parties, that the administration of the estate was not to vest in the trustees till the death of the last survivor, was quite a reasonable one; and therefore I cannot agree with the Lord Ordinary in his view of the clause of reservation. I find no machinery for working that clause out under his view. I cannot interpret that clause as indicating a mere liferent. I think it means the very opposite.

We then come to the point, how far the clause of reservation is necessarily limited by the ultimate destination contained in the deed. The reservation of power to revoke and alter must be read collectively and not separately. It was a power reserved to the whole three parties collectively, as they collectively might think fit. While thinking the Lord Ordinary is not accurate in reading the clause of reservation as a clause merely of liferent, I think him quite correct in holding that the deed could not be altered without the consent of the whole three parties.

This leaves over a question of great importance. If the deed, while all the three parties were alive, could not be altered but with their collective consent, what effect has the death of one or more of the parties? Apparently the law is in the general case well established. Where there is a mutual settlement, by which each of the parties gives and receives a substantial benefit, that deed cannot be altered after the death of one of them. Whether it can be revoked during the life of the parties by all or by one depends on the terms of the deed. Generally speaking, it requires the consent of all. But if one of the parties is dead then the deed is unalterable. This rule is, however, subject to the consideration that the party deceased must have an interest in the provisions of the deed being carried out. Here, if Agnes Craich had predeceased, I do not know that Mr and Mrs Mackie could not have altered. But this is not the actual case. Mr Mackie, who predeceased the others, had a direct interest in the proper carrying out of the provisions of the deed. For these affected his children.

Looking to all the authorities, I am of opinion, while not agreeing with all the views expressed in the Lord Ordinary's note, that the Court should adhere to the Lord Ordinary's interlocutor.

LORD COWAN—The trust-disposition and settlement is an anomalous one, and not consistent with the ordinary character of deeds of the kind. But its general character is undoubted. It is a mutual disposition and settlement. If the power of altering it after the death of one of the parties comes in question it becomes necessary to look at the clause of reservation. That clause is clear and distinct. There is, I think, no room for doubt that the reservation applied to all the parties during their joint lives; but that the deed, being a mutual deed, became irrevocable on the death of one. There is a clause of great importance in it which is never found in an ordinary disposition and settlement—a clause of absolute warrantice. This

shows the onerous and irrevocable character of the deed, as it is never found in any deed not intended to be invested with that character. On the other grounds mentioned by your Lordship, I concur in thinking that the Lord Ordinary's interlocutor should be adhered to.

LORD BENHOLME and **LORD NEAVES** concurred.

Expenses allowed against the claimer.

Agent for Mackie's Trustees—William B. Glen, S.S.C.

Agents for Real Raiser—Murray, Beith & Murray, W.S.

Saturday, June 25.

FIRST DIVISION.

LOVAT v. FRASER AND OTHERS.

Expenses—Interdict. A complainer who had asked for interdict in respect of two alleged infringements of his proprietary rights, latterly insisted only in one branch of the prayer of his note; and to the granting of interdict as thus restricted no opposition was offered. *Held* he was only entitled to one-half of his expenses.

This was a suspension and interdict at the instance of Lord Lovat to have the respondents, who are resident in the town of Beaul, in Inverness-shire, interdicted from entering upon certain lands belonging to the complainer, and cutting and taking away grass therefrom. The lands in question extend along both sides of the river Beaul, are covered with grass, and formed by the erection of embankments. They are held by Lord Lovat as proprietor of and duly infeft in the lands and barony of Lovat, in which they are comprised. Upon various specified occasions the respondents had, the complainer said, gone upon these lands and cut and carried off large quantities of grass. The respondents pleaded access to, and use of, the lands for forty years and upwards, and also the exercise of cutting and carrying off grass, &c., during all that time. The Lord Ordinary (**JERVISWOODE**) granted the parties respectively a proof, before answer, of their averments.

The respondents reclaimed.

THOMS and **RHIND** for them.

SOLICITOR-GENERAL and **RUTHERFORD** in answer.

After some procedure the complainer modified the prayer of his note for interdict. Originally it was in the following terms:—"May it therefore please your Lordships to suspend the proceedings complained of, and to interdict, prohibit, and discharge the said respondents from unlawfully entering or in any way trespassing upon the complainer's lands of Barnyards, Tomich, and the carse lands of Beaul, situate in the parishes of Kilmorack and Urray, and county of Inverness; and the complainer's lands of Wester Lovat, situate in the parish of Kirkhill, and county of Inverness; and from in any way interfering with the complainer and his tenants in the peaceable possession and enjoyment of his said lands in any manner of way, and from cutting and taking away grass from the said lands, or any part thereof, or to do otherwise in the premises as to your Lordships shall seem proper."

The complainer now asked the Court only "to interdict, prohibit, and discharge the said respondents from cutting and taking away grass" from the lands mentioned. The complainer was only allowed half of his expenses, as he had asked for

interdict from trespassing on the lands and cutting the grass, and had now given up one-half of what he had asked for.

Agents for Complainer—Gibson-Craig, Dalziel & Brodies, W.S.

Agent for Respondents—W. Officer, S.S.C.

Saturday, June 25.

SECOND DIVISION.

GORDON'S TRUSTEES v. MELROSE.

Landlord and Tenant—Lease—Fences—Petition—Sheriff. A summary application by the trustees of a landlord to the Sheriff to have a remit made to men of skill to ascertain the existing state of the fences, &c., on a farm, for preservation, with the view to a settlement of questions under the lease between the landlord and the out-going tenant, *held* competent.

This is an appeal from the Sheriff-court of Peebleshire. The case originated by a petition presented to the Sheriff by Gordon's trustees against Robert Melrose, lately tenant of the farm of Stoneypath, in the county of Peebles, and now residing at West Baldrige near Dunfermline. The petition set forth:—“(1) That by conditions of set entered into between the said Richard Gordon, then accountant in Edinburgh, on behalf of Charles Ferrier, Esq. of Badingsgill, and the said Robert Melrose, then residing at Grayknowe, parish of Lasswade, and subscribed by them the 14th day of March 1849, there was set to the said Robert Melrose the farm of Stoneypath, in the parish of Linton and county of Peebles, then belonging to the said Charles Ferrier, now deceased, and that for nineteen years, commencing at Whitsunday 1849 as to the houses and grass, and separation of that year's crop as to the arable land. The said farm was disposed by the said trust-disposition and settlement to the petitioners, as trustees foresaid, and they are now proprietors thereof. The said Mrs Catherine Montgomery Ferrier or Gordon died on the 23d day of May 1867. (2) It was stipulated and agreed to by the said conditions of set that the fences then on the farm should be put into proper order, the same to be maintained during the currency, and left at the termination of the said lease in the like good order; and that such further subdivision fences on the lands contemplated to be in crop should be made for the more commodious occupation of the same as the said Robert Melrose, the tenant, might require, he paying 5 per cent. on the outlay occasioned thereby; and as to which fences it was conditioned that the obligations on his part before stipulated should likewise apply. There was reserved ground for a strip of plantation, extending to 140 feet or thereby in breadth, running north and south between the lands contemplated to be arable and the grazing land to the north and south of the burn between Old and New Stoneypath, also a roundel containing about two Scotch acres on Old Stoneypath for the same purpose; and the fencing of those intended plantations was to be made and afterwards maintained by the landlord, but one-half of the expense of the said after maintenance was to be paid by the tenant. (3) It was further conditioned and agreed by the said conditions of set that the house and steading should be put by the proprietor in habitable and tenantable repair, at the

sight of Charles Lawson, mason, and Archibald Ritchie, wright, and that they should be maintained and left by the tenant in proper habitable and tenantable condition. (4) The respondent entered into possession of the said farm, and occupied the same for the said period of nineteen years, under and in virtue of the said conditions of set, and he was allowed by the petitioners to continue tenant of the said farm by tacit relocation as under said conditions for one year after the expiration of the said period of nineteen years. The respondent removed from the houses and grass of the said farm of Whitsunday 1869, and from the arable land at the separation of that year's crop from the ground. (5) The petitioners, on and subsequent to the 21st day of May 1869, acting by their agents, have repeatedly desired and required the respondent to concur with them in appointing two arbiters to inspect the state of the fences, and of the house and steading on the said farm, and to report whether or not they are in the state in which he was bound to leave them by the said conditions of set, prolonged as the same were as aforesaid to Whitsunday 1869, and the separation of that year's crop from the ground, and if not in that state, which the petitioners aver they are not, then to report what sum or sums are requisite to put them into that state, excepting always from such inspection and report the line of old buildings in the court, and reserving all other questions between the petitioners and the respondent entire. The respondent, however, refused, and still refuses, to concur with the petitioners in having the said fences and houses inspected and reported on in any manner of way. The petitioners therefore find it necessary to make the present application to your Lordship.” And the petition concluded with the following prayer:—“May it therefore please your Lordship to remit to a person or persons of skill to visit the said farm of Stoneypath, and to inspect the fences and the house and steading thereon (excepting said line of old buildings in the court), and to report what is necessary to put the same respectively into the state mentioned in the said conditions of set as aforesaid, and the probable expense thereof; and thereafter, on considering the report or reports of such person or persons, to approve thereof; and in the event of the respondent entering appearance and opposing this application, to find him liable in expenses, and to decern therefor; or to do otherwise in the premises as to your Lordship shall seem proper, reserving all other questions between the petitioners and the respondent entire.”

Condescendence and answers were lodged.

The petitioners pleaded:—“(1) The petitioners are entitled, at their expense and under reservation of all questions, to have the state of said houses and fences judicially ascertained, as prayed for. (2) The application is well founded in fact and in law, and should be granted. (3) The defender is not justified in entering appearance and opposing the prayer of the petition, and therefore he should be found liable in all expenses occasioned by his appearance. (4) The petitioners have set forth sufficient title and interest, and made sufficient averments, to warrant the prayer of the petition. (5) The pleas of the respondent are irrelevant in this action, and, besides, are ill-founded in fact and in law.”

The respondent answered:—“(1) The petitioners have no title to raise the present proceedings, and have no title to follow out the same, and