

of opinion, on the construction of this contract, that the respondent, in her right, has failed to do so.

I think the provision related solely to effects intended for domestic use and enjoyment, whether in the way of utility or of ornament, which should be attached to the principal residence of Mr Tod, and which were provided for the ease and comfort of his widow after his decease. Their proximity in point of situation was clearly not the test of the class of moveable property conveyed. If Mr Tod prospered—was the owner at his death of a landed estate—it might have been otherwise. If his house had been close to his foundry, or within 100 yards of his mill, the clause would hardly have covered the machinery in either. Nor do I think that, in the case which has occurred, it covered agricultural implements—thrashing-mill, reaping machine, or even the farm horses or dairy cows. None of the articles now in question are within the category. They are not, as moveables, articles intended for domestic use. The greenhouse and the iron fences are of use as fixtures, not as moveables. The telescope is no more a part of the establishment at Aytoun than the foundry or the mill would have been. Its proximity is an accident, not an essential of its character, nor does it alter its nature that it was used for recreation by the owner, and not for profit.

In this view it is unnecessary, and indeed might be improper, to decide absolutely on the character of these articles, for that question may arise between heir and executor in this case. In regard to the greenhouse and the iron fencing, the inclination of my opinion would be with that of the Lord Ordinary, on the simple ground that they were intended for the permanent benefit of the real estate to which they were attached, and were so attached by the owner of the land; and when this element concurs with sufficient physical attachment to keep the articles permanently in their place, they become accessories to the land—*solo cedunt*. The telescope is a much more difficult question, for there the building was the accessory, and the fixture was for the better use of the moveable article so affixed. If this question had occurred purely between heir and executor by devolution of law, there might be grounds for holding that the telescope's character as moveable property was not changed by its temporary resting-place.

The other Judges concurred.

Agents for Complainers—Ronald & Ritchie, S.S.C.

Agents for Respondent—Andrew & Wilson, W.S.

Saturday, January 27.

SPECIAL CASE—SCOTT v. GORDON.

Trust—Entail—Fee—Mansion-house.

A trustor directed his trustees, in the event of the marriage of his son, to entail certain lands in favour of the heirs of his son, &c. He further directed that his widow should have the right to occupy the mansion-house of the estate ordered to be entailed "so long as my said son continues unmarried." The son died without being married, and a substitute heir of entail succeeded to the estate, and became entitled to have it entailed in his favour, under the trustor's destination. *Held*, in a

question with the succeeding heir and the trustor's widow, that the intention of the trustor was that the widow's right to the mansion-house should terminate when the fee of the estate was full, and that the death of the son evacuated her right.

This was a question between Mrs Scott of Gala and Mrs Gordon, widow of the late Mr Francis Gordon of Kincardine Lodge, and came before the Court in the form of a Special Case. Mr Gordon died in 1857, leaving a trust-disposition and settlement, dated in 1851, to which there were six subsequent codicils annexed. By this deed he provided that his trustees should entail the lands of Kincardine in favour of the eldest son of his son, and his heirs in the event of the son marrying and having a family. There were a number of substitutions in the event of the son failing, and, among others, Mrs Scott of Gala, who is a granddaughter of the trustor, was called to the succession. By the sixth purpose of the deed Mr Gordon left his widow his house in Golden Square, Aberdeen, and by one of the codicils he gave her a liferent of the furniture of the house in Kincardine Lodge. The deed further provided as follows:—"It is my will and desire that my dear wife should occupy the house, offices, and garden at Kincardine Lodge, with such farm as my trustees may deem proper, and that so long as my said son continues unmarried; but if at any time it should appear a desirable arrangement that my said son, though unmarried, should reside at Kincardine Lodge, it is my wish, but only if my spouse approves of such arrangement, that she and my son should occupy together the said house, offices, and garden; if my said son should marry with approbation, as aforesaid, he shall then be entitled to the sole possession of the said house, offices, and garden at Kincardine Lodge." The question put in the Special Case turns on the construction of this clause.

Mr Gordon was survived by his widow, a daughter, who married, but who is now dead, and a son, who died last year, unmarried. The event has thus occurred which required the trustees to entail the lands of Kincardine in favour of Mrs Scott of Gala, the eldest daughter of the trustor's daughter, and she raised the question whether she is not entitled to succeed to the mansion-house, offices, and garden, &c., as well as to the lands directed to be entailed.

For Mrs Scott it was contended that the trustor only intended to give his widow a limited right to the mansion-house, viz., "so long as my said son continues unmarried;" and that event being no longer possible, the widow's right was now defeated. The provision of the trust-deed, that the trustees should entail the lands when the son married and succeeded, evidently showed the trustor's intention that the person succeeding under the destination should have the lands and the mansion-house, &c., together.

On the other hand, it was argued by Mrs Gordon that the conveyance to the widow of the mansion-house was truly a liferent, and that the trustor intended to defeat her right only in the event of his son marrying. That event could not now occur, and therefore the widow had a right of occupation, which was only defeasible on her death. If the trustor had intended that his granddaughter when succeeding to the lands should deprive the widow of the mansion-house, as well as the son, he would have expressly provided so. There was no authority in the deed for equiparting the death of the son to his marriage.

The Court held, without difficulty, that the trustor only intended to confer a limited right on his widow—viz., so long as his son remained unmarried, and as his death rendered it impossible that that could be predicated, her right had ceased. Further, it was clearly the intention of the trustor that the widow's right to the mansion-house should terminate when the fee of the lands was full, as it had now become.

Counsel for Mrs Scott—The Lord Advocate, the Solicitor-General, and Mr John M'Laren. Agents—Messrs Morton, Neilson, & Smart, W.S.

Counsel for Mrs Gordon—Mr Watson and Mr W. A. Brown. Agents—Messrs Richardson & Johnston, W.S.

Tuesday, January 30.

FIRST DIVISION.

FRASER v. FRASER.

Process—Reclaiming-Note—Competency—30 and 31
Vct. c. 100, sec. 54.

Held that an interlocutor containing findings which, so far as they went, disposed of the first conclusion of the summons, was one disposing in part of the merits of the cause, in terms of section 11 of the Court of Session Act, 1850, and that a reclaiming-note against such interlocutor was still competent within twenty-one days of its date, provided that it was also presented within ten days of the date of the interlocutor granting leave to reclaim, in terms of the 54th section of the Court of Session Act, 1868.

The circumstances under which this reclaiming note was presented will appear from the opinion of the Lord President.

BALFOUR, for the respondent, objected to the competency of the reclaiming note, and referred to the case of *Bannatine's Trustees*, May 25, 1869, 7 Macph. 813.

STRACHAN for the claimer.

At advising—

LORD PRESIDENT—The Lord Ordinary's interlocutor in this case was pronounced upon January 9th. Upon the 19th of the same month he granted leave to reclaim against this interlocutor, and on the 25th a reclaiming note was lodged by the pursuer. This reclaiming-note is therefore lodged within ten days of the interlocutor granting leave to reclaim, but not of the interlocutor reclaimed against. It is, however, within twenty-one days of that interlocutor. The question is, whether this reclaiming note is not incompetent in consequence of its being lodged too late. Now, the interlocutor reclaimed against is, in my opinion, an interlocutor disposing in part of the merits of the cause. It contains findings which, so far as they go, dispose of the first conclusion of the libel. The term used in the Act of 1850, "interlocutors disposing in whole or in part of the merits of the cause," means only interlocutors containing a decretum which in effect disposes of a part or the whole of the merits of the cause. The question therefore is, if the interlocutor, being as I think it is of that nature, can be reclaimed against under the Act of 1850, in like manner as before the passing of that Act, whether any objection can be raised under the Court of Session Act of 1868.

The Act of 1850 introduced for the first time a limitation of the period within which a certain

class of reclaiming notes should be presented. Formerly all reclaiming notes were in respect of time in the same category. But the statute provided that it should not be competent to reclaim against any interlocutor of the Lord Ordinary at any time after the expiration of ten days from the date of signing such interlocutor, with the exception only of reclaiming notes against interlocutors disposing in whole or in part of the merit of the cause, and against decrees in absence, which reclaiming note shall continue to be competent in like manner as at the passing of this Act. Now, no doubt this statute of 1850 did regulate in a very important respect the period during which reclaiming notes were to be competent. It divides them, for the first time, into two classes. The Act 1868 introduces another division, and provides that a third class of reclaiming notes shall be taken within six days, namely, those under sections 27 and 28 of that Act. There are now therefore three different classes of reclaiming notes, each competent within a different period of time. Sections 27 and 28 of the new Act have no application to the present case, but it is said that section 54 does apply, and requires this and all reclaiming notes of the same class to be taken within ten days. It does not appear to me that section 54, or indeed any sections of that Act, except 27 and 28, alter in any way the time within which reclaiming notes are to be presented. The 54th section provides that "Except in so far as provided for by the 28th section hereof, until the whole cause has been decided in the Outer House, it shall not be competent to present a reclaiming note against any interlocutor of the Lord Ordinary without his leave first had and obtained." Now, so far, this section has nothing to do with the time within which such reclaiming note must be presented. The condition newly imported by this section is the leave of the Lord Ordinary, and it is needless to say that if the section had stopped there the time would be just exactly the same as under the former Act of 1850, except as regards reclaiming notes under section 28. But the section goes on to say, "but where such leave has been obtained, a reclaiming note presented before the whole cause has been decided in the Outer House may be lodged within ten days from the date of the interlocutor granting leave, . . . and such note shall not have the effect of removing the cause or the process from the Outer House, or of staying procedure before the Lord Ordinary," &c. Now, I do not think that this part of the section was intended to alter the time within which reclaiming notes are to be lodged, even in those cases to which it applies. The language is peculiar. It says, a reclaiming note "may be lodged," it does not say *must*; nor does it say that the reclaiming note *will* be competent if presented within ten days from the date of the leave being granted. It merely says *may* be lodged, and I think there was reason for this. It then goes on to speak very particularly with regard to the effect which such reclaiming note is to have upon the conduct of the process during the dependence of the reclaiming note. I do not mean to say that the expression used is not intended to imply that the reclaiming note, when leave has been granted, *shall* be within ten days of the date of the interlocutor granting leave. But that is all the limitation as to time that it establishes. Now, this reclaiming note has been presented within ten days of the interlocutor granting leave, and I can see nothing to justify us in saying that this interlocutor would