

different from that of the Lord Ordinary, that the pursuer is not entitled to an issue, and that the defenders should be assoilzied.

LORD KINNEAR—I am of the same opinion. The only wrong alleged is the use of diligence in breach of an undertaking. I do not think the defender gave any such undertaking, or came under any obligation not to exercise his legal rights. It seems to me that the letter was truly a demand for payment of an already overdue bill. The creditor was entitled to immediate payment, and he goes on to say that if payment is not made within two days he will take proceedings. The recipient of the letter might not unnaturally understand that to mean that the creditor did not at the time of writing intend to take proceedings for two days. But a mere indication of intention, if it had been much more unequivocal than it really is, will not make a contract or infer an obligation. It might perhaps have been converted into an obligation if the pursuer had treated it as an offer for acceptance, and the writer had assented to that construction. But the pursuer took no notice of the letter whatever. He thought it expressed an intention, and he ran the risk of his creditor adhering to his intention, and so delayed payment of an overdue bill without attempting to get an undertaking from his creditor not to proceed with diligence.

I think the letter amounts to nothing more than notice that the creditor will certainly take proceedings after two days, but without any promise that he will not take proceedings earlier if he thinks it necessary. If he thought the pursuer's silence a sufficient reason for using diligence earlier, he was within his legal right in taking the steps complained of.

I agree therefore in thinking that there is no issuable matter on record, and that the defenders must be assoilzied.

LORD ADAM concurred.

The LORD PRESIDENT was absent.

The Court recalled the interlocutor of the Lord Ordinary and assoilzied the defenders.

Counsel for the Pursuer—Clyde—Sandeman. Agent—A. C. D. Vert, S.S.C.

Counsel for the Defenders Davis & Sons—Guthrie—A. S. D. Thomson. Agent—Marcus J. Brown, S.S.C.

Counsel for the Defender Brown—Cullen. Agent—Party.

Saturday, February 16.

SECOND DIVISION.

M'CLYMONT'S EXECUTORS v. OSBORNES.

Succession—Fee or Liferent—Substitution in Moveable Estate.

A testator directed his executors to invest one-third of the residue of his estate in the name of his niece Mrs O., "she to receive the interest or dividends from the same during her lifetime for the maintenance, upbringing, and education of her children, and at her death the principal to be divided equally among her children except George and Thomas, who are provided for in this will otherwise; declaring, however, that the principal is not to be divided until her youngest child is twenty-one years of age in the event of her dying before that term."

Mrs O. and six children, including George and Thomas, survived the testator. Thereafter Mrs O. died intestate and without having disposed of any part of the one-third of the residue during her life. She was survived by three children, George, Thomas, and John.

Held (1) that under the will Mrs O. took the fee of one-third of the residue, and (2) that failing her there was a substitution in favour of her children other than George and Thomas, and that, as Mrs O. had done nothing to evacuate the destination, her son John succeeded on her death to the fee of the said share.

Frog's Creditors v. His Children, 1735, 3 Ross's L.C., Land Rights, 602, and *Lindsay v. Dott*, 1807, M. voce Fiar, App. 1, followed.

Thomas M'Clymont, who died unmarried on 16th February 1883, left a holograph will or testament dated 19th February 1880, by which he ordained his executors nominated under the will to pay over the residue of his estate as follows:—"One-third of said residue to be invested in railway debentures or railway preference shares in name of Agnes Smith or Osborne, wife of George Osborne, my niece, she to receive the interest or dividends from same during her lifetime for the maintenance, upbringing, and education of her children, and at her death the principal to be divided equally among her children except George and Thomas, who are provided for in this will otherwise; declaring, however, that the principal is not to be divided until her youngest child is twenty-one years of age in the event of her dying before that term."

The capital sum represented by the one-third of residue in question was invested by the executors in railway preference or debenture stock, and amounted to £3800, and the revenue was not less than £140.

At the dates of the execution of the said will and at the death of the testator, Mrs Osborne's family consisted of six children,

viz.—(1) Joseph Smith Osborne, born on 26th February 1873, who died in July 1883; (2) Margaret Rorison Smith Osborne, born on 3rd December 1867, who died on 27th February 1886; (3) Marion Josephine Smith Osborne, born on 17th January 1870, who died on 28th June 1886; (4) George Smith Osborne, born on 24th July 1860, and (5) Thomas M'Clymont Osborne, born on 25th January 1865, being the second parties to this case; and (6) John M'Clymont Osborne, the third party to this case, who was born on 29th March 1876.

At the dates of their respective deaths, Joseph, Margaret, and Marion Osborne were all minors, and none of them left any testamentary writings.

Mrs Osborne died on 11th February 1888 intestate, and her husband Mr Osborne on 28th April 1888, also intestate.

After Mrs Osborne's death the executors applied part of the revenue of the said one-third share of residue in the educating and maintaining of John M'Clymont Osborne, and they added the surplus income to the principal sum, which they still held.

In these circumstances a special case was presented by (1) Mr M'Clymont's executors; (2) George Smith Osborne and Thomas M'Clymont Osborne; (3) John M'Clymont Osborne and his curator, in order to obtain the opinion of the Court on, *inter alia*, the following questions of law:—“(1) Did the fee of one-third share of the residuary estate of Mr Thomas M'Clymont vest at his death in his niece, Mrs Agnes Smith or Osborne, free of any trust? (2) In the event of the first question being answered in the affirmative, did the third party, John M'Clymont Osborne, succeed in terms of the said testament to the fee of the said one-third share, upon the death of Mrs Agnes Smith or Osborne intestate, and without having disposed of any part thereof during her life?”

Argued for the second parties—Mrs Osborne's right was a liferent, or she held the fee of the third share in trust for herself in liferent, and her children *nascituris* in fee. The fee vested in the children *a morte testatoris*, and the second parties were entitled as next-of-kin to take equally with the third party the portions of the residue which had vested in their deceased brothers and sisters. The share of residue in question might be stated at £3800, of which under this contention one-fourth or £950 admittedly belonged to the third party. But according to their contention three-fourths or £2850 were vested in the three deceased children, and at their death half of that sum vested in the father, and the other half vested equally in each of the surviving children. On the death of the father intestate in April 1888 his share also vested equally in the surviving children, and therefore the second parties were each entitled to one-third of the £2850, or £950 each—*Frog's Creditors v. His Children*, 1735, 3 Ross's L.C. (Land Rights), 602, was decided on doubtful principles to satisfy a technical rule of feudal law. The judgment in that case must not be extended to cases like the present, where the words of the destination

were not the same, and the intention of the testator was plain—*Ramsay v. Beveridge*, March 3, 1854, 16 D. 764; *Main v. Taylor*, June 8, 1827, 5 S. 727. The phrase, “She to receive the interest or dividends from same during her lifetime,” was equal to the word “allenerly.” The mother therefore only got the liferent, and the fee vested in the children who were alive at the testator's death—*Newlands v. Newlands' Creditors*, 1798, 3 Ross's L.C. (Land Rights), 634; *Mickel's Judicial Factor v. Oliphant*, December 7, 1892, 20 R. 172; *Bryson's Trustees v. Clark*, November 26, 1880, 8 R. 142, contrasted with *Forbes v. Luckie*, January 26, 1838, 16 S. 374; *Hay's Trustees v. Hay*, June 19, 1890, 17 R. 961, opinion of Lord Shand, 968; *Horne's Trustees*, July 14, 1891, 18 R. 1138. In the event of its being held that the fee of the estate vested in Mrs Osborne, the second parties claimed to take the one-third share of the residue along with the third party equally as heirs *ab intestato* of their mother.

Argued for the third party—(1) At the death of the testator the fee vested in Mrs Osborne subject to a substitution in favour of the children, other than these second parties, who might survive her, in the event of her not disposing of the fee during her lifetime. Mrs Osborne having died intestate without having disposed of any part of the fee during her life, the third party being the only child alive at her death other than the second parties was entitled to the whole fee of the estate in terms of the substitution contained in the will. There was no word “allenerly” in the destination, or any words equivalent to “allenerly.” The case therefore fell under the rule laid down in *Frog's Creditors*. If the argument of the other side was upheld a destructive blow would be given to *Frog's Creditors*. [LORD RUTHERFURD CLARK—I should not be very much grieved if the blow was to kill *Frog*]. The cases of *Lindsay v. Dott*, 1807, M. voce *Fiar*, App. 1; and *Murray v. Scott's Trustees*, December 5, 1872, 11 Macph. 173, was also in point. (2) Alternatively, if the mother took the liferent only, the fee vested, not *a morte testatoris*, but at her death, and the third party being the only child other than George and Thomas surviving at her death, he took the whole fee—*Bryson's Trustees*, *supra*; Lord Trayner's opinion in *Boyle's Trustees v. Cochrane*, November 29, 1892, 20 R. 113.

At advising—

LORD TRAYNER—The clause in this will which we have to construe would probably not present any difficulty if read according to the popular meaning of the language used, and apart from the authority, which has placed what I may call a technical meaning upon a clause so expressed. I should think it not doubtful, if the former of these two standards of interpretation were adopted, that the testator's intention was to give a liferent merely to his niece Mrs Osborne of one-third of the residue of his estate, and the fee to her children, except the two children who are *nominatim* excluded. But I think it is just as clear on

the authorities that the right conferred on Mrs Osborne was a right of fee, when the language of the clause receives its technical meaning and effect. The truster directed his trustees to invest the third of his residue in Mrs Osborne's name, "she to receive the interest or dividends from the same during her lifetime, . . . and at her death the principal to be divided equally among her children, except George and Thomas." This might be regarded as giving Mrs Osborne something more than a lifeferent by having placed the fee within her power of disposal, or subjected it to the diligence of her creditors. However that might be, taking Mrs Osborne's right at the lowest, it was a lifeferent to her with a fee to her children not named. Such a destination, according to the rule laid down in the case of *Frog's Creditors*, confers a fee on Mrs Osborne; and accordingly I am of opinion that Mrs Osborne's right under the will before us was a right of fee. It occurred to me in the course of the discussion that this case might be distinguished from the case of *Frog's Creditors*, in respect the destination there was to children *nascituri* in fee, whereas in the present case Mrs Osborne's children were all living at the date of the testator's will as well as at the date of his death, that therefore, although the children were not named, it might fairly be concluded that the persons intended to be benefited as with the fee were present to the mind of the testator, and being persons in whom the fee could vest directly on his death, no difficulty arose on the head of the fee being left *in pendente*, unless held to be vested in the lifeferenter. But I find that that distinction was suggested and rejected in the case of *Lindsay v. Dott*, December 9, 1807, *M. voce Fiar*, App. 1.

The clause in question, however, appears to me to do more than merely confer a fee on Mrs Osborne. Failing her I think there is a substitution of her children. That substitution now takes effect, as Mrs Osborne has done nothing to evacuate the destination in her children's favour. Accordingly, the third party, John M'Clymont Osborne, the only child who survived his mother (except the two who were excluded by name) takes the third of the residue destined to Mrs Osborne and her children. This conclusion is, I think, quite in accordance with what the testator intended, although reached by a means which he had not in contemplation.

The first and second questions in my view should be answered in the affirmative.

LORD JUSTICE-CLERK—That is the opinion of the Court.

LORD YOUNG was absent.

The Court answered the first and second questions in the affirmative.

Counsel for the Second Parties—H. Johnston—A. S. D. Thomson. Agent—Marcus J. Brown, S.S.C.

Counsel for the Third Party—Mackay—Moncreiff. Agents—W. & F. C. M'Ivor, S.S.C.

Saturday, February 16.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

BERKELEY v. BAIRD.

Property—Mutual Gable—Letter Qualifying Title.

The proprietor of two adjoining building stances erected a house upon one of them, and conveyed the stance with the house erected thereon to A. The north gable of the house was built half upon the one stance and half upon the other, and the disposition declared that that wall was to be a mutual gable. On the day before the disposition was executed the seller wrote to A's agent, "It is of course understood that the unused halves of gables and boundary walls are not conveyed to your client." The seller subsequently sold the vacant stance to B, who proceeded to build upon it, and to make use of the wall which had been declared to be a mutual gable.

Held that A was entitled to recover from B one-half the cost of the mutual gable.

Observed that the letter was quite consistent with the disposition, but that it would not have been competent to refer to it in contradiction thereof.

William Murray was heritable proprietor of two adjoining building stances in Braid Road, Edinburgh, numbered 2 and 3 respectively on a feuing plan.

Having erected a house upon lot 3, he conveyed the stance and the house upon it to Colonel Edmund Robert Berkeley. The north gable wall of the house was built half upon lot 3 and half upon lot 2, and the disposition, dated and recorded 8th June 1888, contained the following description—"All and whole that area or piece of ground . . . marked lot 3 on the plan No. 2 annexed and signed as relative to a feu-contract . . . and bounded the said area or piece of ground hereby disposed as follows, *videlicet*:—"On the north by the area or piece of ground marked lot No. 2 on said plan above mentioned; . . . Together with the whole buildings erected on the said area or piece of ground hereby disposed: Together also with the whole parts, privileges, and pertinents thereof, and the teinds of the same in so far as I have right thereto: Declaring that the gable and walls and parapet walls and railings surrounding the subjects hereby disposed are mutual with the exception of the wall and railing on the east, which belongs solely to said lot 3."

On the day before the disposition was executed Mr Murray's agent, John Baird, wrote to the agent of the purchaser, "It is of course understood that the unused halves of gables and boundary walls are not conveyed to your client."

In July 1891 Murray conveyed the un-built stance (lot 2) to John Baird, his