

ground taken for the purpose of planting. This claim was made to Lord Seafield's factor, by whom the farm had been let. He suggested that it should be withdrawn as untenable, and stated that he had a counter-claim against the tenants which would compensate the sum asked. An action having been brought, Lord Seafield pleaded that he was not liable, because the planting had not been made under the reserved power of the lease, thereby raising up an obligation against him, but had been made at the request and for the convenience only of the tenants.

The Sheriff-Substitute (SMITH) assolized the defender.

The Sheriff (BELL) adhered.

The pursuers advocated.

LANCASTER (with him CLARK) argued on the facts of the case, that the understanding of parties must be taken to be that the planting was under the lease; that it was not to be presumed that the pursuers had renounced any of their rights; and that the concurrence of the facts that there was a reservation in the lease of planting, and that planting had taken place, threw upon the defenders the *onus* of showing that it was not done under the lease.

GIFFORD and W. A. BROWN, for the respondent, were not called upon.

The Court unanimously adhered to the judgment of the Sheriff, holding it to be clear as a question of the understanding of parties, that the planting had not been done under the lease, and that that was confirmed by the delay that had occurred in bringing forward the claim.

Agents for Advocators—H. & A. Inglis, W.S.

Agents for Respondent—Mackenzie, Innes, & Logan, W.S.

Thursday, July 18.

## SECOND DIVISION.

### THE DUMFRIESSHIRE ROAD TRUSTEES *v.* JOHNSTON.

*Contract—Road Trustees—Alleged Failure to Perform—Judicature Act—Interim Possession—Right to Complete.* Circumstances in which held that road trustees who had employed a contractor to erect a bridge over a river were entitled, he having performed his work in an inefficient manner, and that remaining unfinished, to take it of his hands, not only for *interim* custody but for the purpose of completing it, and that with his tools and materials.

This was an application by Alexander Simpson, clerk to the Road Trustees of Dumfriesshire, to obtain possession of a bridge and works which the respondent, Robert Johnston, contracted to erect over the river Annan at Shillahill. The bridge was commenced in March 1865, and the contract between the parties stipulated that it should be completed by August 1866. The road trustees allege that the works have been carried on in an unsatisfactory manner, owing to the contractor's negligence and incapacity; that from the first his operations were insufficient; and that the portion of the bridge which is erected is of an insecure and unworkmanlike character, and that it will require to be taken down. These statements were

denied by the contractor who alleges, as a reason for the delay in completing the bridge, that a large amount of extra work was required by the trustees. The road trustees, however, had obtained from the engineer in superintendence two certificates testifying to the bad quality of the work done; and the arbiter under the contract had corroborated this view, and, in pursuance of a provision to that effect in the contract, had authorised the road trustees to take the works out of the respondent's hands. The contractor refused to hand over the works in obedience to this order, and raised two actions of reduction against the decree-arbital and the certificates of the engineer. These actions of reduction being in dependence, the contractor maintained his right to keep possession of the works, and to carry them on to completion. The present application by the road trustees for interim possession was founded on the 42d section of the Judicature Act.

The Lord Ordinary (JERVISWOOD) granted the order craved, and the case came before the Court on a reclaiming note by the respondent Johnston. The Court expressed a desire to obtain information from a neutral person regarding the present condition of the works, and a remit was made to Mr Leslie, C.E., to examine the bridge and to report upon its state, and how far there is urgency for the work being immediately proceeded with. Mr Leslie visited the bridge, and reported that though the piers were built, none of the arches were covered or thrown, and that the timber centring is "very deficient, being very badly framed and insufficiently fastened, so as to be liable to sink, and they do show systems of sinking by the opening of the beds of the archstones at the springings." Mr Leslie also reported that the works in their present unfinished state might be endangered by floods, and that there appeared great urgency for the bridge being completed with the least possible delay.

The road trustees, alleging that the whole procedure prescribed by the contract had been observed, and founding also upon their right at common law to expel the contractor from the works at their discretion, subject to any claim of damages at his instance for non-implementation of the contract, maintained a right to take the works out of his hands and to complete them at his expense, and with his tools and implements. The contractor argued that the circumstances did not warrant such a proceeding; and, moreover, that, under the Judicature Act, it was not competent for the Court to hand over the works to the trustees to the effect of allowing them to complete them, but that simple custody alone could be granted.

The Court to-day adhered to the interlocutor of the Lord Ordinary, and allowed the trustees to take the works out of the hands of the contractor and complete them by the means of tools and materials belonging to him; caution being found by the trustees for any damages which may result to the contractor in the event of his ultimately succeeding in the actions of reduction. Interdict was also recalled against Hunter, a new contractor whom the trustees had employed, and the works were permitted to be completed by him.

Counsel for Road Trustees—Mr Fraser and Mr Stewart. Agent—James Stewart, W.S.

Counsel for Contractor—Mr Gifford and Mr Black. Agent—Mr Curror, S.S.C.

Friday, July 19.

FIRST DIVISION.

ROGERS' TRUSTEES v. ROGERS AND OTHERS.

*Trust—Liferent—Fee—Stocked Farm.* A testator left to his widow the liferent of a stocked farm. Held, that the obligations of the liferentrix were to keep up the working stock on the farm, supplying the place of what became extinguished, and to leave about the same amount of crop at the end of the liferent as she took at the beginning, but that her executors would be entitled to the benefit of any material increase in the amount or value of the farm plenishing.

This was an action of multipleponding and exoneration raised by the trustees of the late John Rogers of Northfield, in the county of Fife. Mr Rogers died in January 1844, leaving a widow and three children. He directed his trustees to make over to his widow the whole household plenishing, and to allow her, as long as she remained his widow, the liferent of the whole free residue of his estate, heritable and moveable, declaring that she should be entitled to actual possession, if she wished it, of the subjects and effects to be liferented by her, so long as the same were not required to be otherwise disposed of in fulfilment of the purposes of the trust. The trustees were to have power to sub-feu or lease the heritable property with the written consent of the testator's widow; and in the event of a lease, the trustees were to sell by public roup or private bargain the whole crop, farm-stocking, and implements of husbandry belonging to the trust-estate. After the death of the testator's widow, the residue of the trust-estate was to go equally to the children then alive. Mr Rogers himself farmed the estate of Northfield, and the property left by him mainly consisted of that estate, and the crops and stocking on the farm. After Mr Rogers' death, his widow entered into possession and management of the farm, and continued to possess and manage it until her death in January 1862. At her death she left a settlement, conveying her whole property to her daughter, Mrs Scott.

In this action, raised for the purpose of distributing the residue of Mr Rogers' estate, the claimants were his two sons and his daughter, Mrs Scott, and her husband. The principal question between the parties related to the effect of the liferent provision given by the testator to his widow. The construction contended for by Mrs Scott, who, besides being entitled to one-third of the free residue of her father's estate, was also entitled to the whole property left by her mother, was, that a liferent of stock, farm implements, and other subjects which naturally wear out by use, does not impose any obligation on the liferenter to replace the articles as they become worn out or useless; that the whole stock, implements, &c., on the farm of Northfield, including the horses and cows, having been worn out or extinguished by the proper use thereof during the liferent of Mrs Rogers, she was not bound to replace the same for behoof of the fiars; and that the whole crops, stock, and utensils on the farm of Northfield, at the death of Mrs Rogers, having been her own exclusive property, and no part thereof having ever belonged to her deceased husband, the same became vested in the claimant, her daughter, in virtue of her settlement. The other claimants did not admit this construction of the liferent

right of Mrs Rogers, and contended that in no view could Mrs Scott claim any part of the crop or stocking on Northfield at the time of her mother's death, without accounting for the value of the crop and stocking on the farm at the death of the truster.

The Lord Ordinary (JERVISWOODE) found that the value of the crop on the lands when Mr Rogers died—of turnips and autumn sown wheat, and of certain acres of grass and quantities of manure—ought to have been accounted for by Mrs Rogers to the trustees, as forming a portion of the capital of the trust-estate, of which she had the liferent only, and that the value of horses, cows, cattle, and stocking on the trust-property ought also to have been so accounted for to the trustees by the liferentrix; but that she was not liable so to account for the value, or for the tear and wear of implements of husbandry which were taken possession of and used by her, or for the articles themselves, excepting in so far as these were at the period of her death still extant and available for use.

Mrs Scott reclaimed; and, she having died, the reclaiming note was insisted in by Mr Anderson, the trustee under her marriage-contract, and Mr White, her testamentary trustee and executor.

CLARK and GIFFORD for Anderson.

GEBBIE for White.

WATSON and FRASER for other claimants.

**LORD PRESIDENT.**—We are now to dispose of the Lord Ordinary's interlocutor of 6th February 1866. It is necessary to attend to the facts of the case, and the provisions of the trust-deed of the late Mr John Rogers.

That gentleman died on 17th February 1844, leaving a widow and three children, and his widow survived him for eighteen years, and died on 27th January 1862. She liferented the entire estate of the testator, or what is called the free residue, and on her death the fee fell to be divided. The widow, during her enjoyment of the liferent, became possessed of some money, and Jane Scott, her daughter,—the other two children being sons,—is entitled to the entire succession of her mother, whatever that may be.

In the adjustment of the fund *in medio*, certain questions arose as to the effect of Mrs Rogers' possession of the estate during her viduity. These questions, I think, depend entirely on the construction of the trust-deed, which is undoubtedly somewhat peculiar. The estate of Mr Rogers consisted chiefly of the heritable property of Northfield, in the county of Fife, which he had himself been in the habit of farming, and where he resided with his wife and family; and his settlement provided that his trustees should, in the first instance, pay his debts, &c., in common form; secondly, he appointed his whole household furniture to be at the absolute disposal of his widow; and then follows the third provision, which is the most material one:—"Thirdly, I appoint my trustees to allow the said Elizabeth Dykes, so long as she remains my widow, the liferent of the whole free residue of my estate, heritable and moveable." It is with reference to this form of expression it is so important to keep in view the nature of the estate. If it had been an estate which was to be at once converted into money, and then the liferent given to the widow and the fee to the children, there would have been no difficulty; but the estate consisted mainly of heritable property, which he had himself farmed down to his death, and of course that farm was a stocked farm. He had debts, and in some of