in which these questions ought to be answered. It does not appear to me that there are sufficient words of revocation to destroy the legacy of £200 in favour of the children of James Laing.

The words of cancellation are—"I hereby cancel and annul the legacy bequeathed to the within designed James Laing." Now, it would have been very easy to have added the words "and his children," or "cancel the legacy of £200," if it had been the testatrix's intention to cancel the legacy in favour of her brother's children. According to their strict meaning the only interest destroyed by these words of cancellation is that of James Laing. If James Laing survived he was by the terms of the trust-deed to have an allowance of £3 per month as long as the £200 set aside for him lasted. This was a distinct legacy in favour of James Laing, and if he lived two or three years his allowance would eat up the whole sum set aside for him. But the other event contemplated by the truster was that James Laing might predecease. In the one event the truster makes one set of arrangements, and in the other another. If he survives the testatrix the money is to be given to him in certain proportions while it lasts; if he predeceases her it is to be divided among his children.

Now, what this codicil says is that it "cancels and annuls the legacy bequeathed to James Laing." That I think clearly takes out all James Laing's interest in this bequest of £200, but I cannot see that these words affect the interest of his children. I cannot find any expression to show that the testatrix intended that the £200 which was to be given to the children in one event was not to be given to them. In that view it is only almost an unnecessary codicil. It is said by your Lordships that James Laing being dead it is a very unnecessary codicil if it only cancels his interest in the legacy, and does not recal it altogether, but I have seen in my experience that old ladies very often make unnecessary codicils. I could forgive them for that if they did not make them unintelligible, with the result as in the present case of dividing the Bench as to their true meaning.

The Court answered the first question in the affirmative, and found it unnecessary to answer the second.

Counsel for the First Parties—J. A. Reid. Agents—Philip, Laing, & Trail, S.S.C.

Counsel for the Second Parties — Craigie. Agent—A. M. Broun, W.S.

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*Thursday, May* 14.

## SECOND DIVISION.

[Lord Kinnear, Ordinary.

### TRAILL *v.* COGHILL.

*Arbiter — Oversman — Award Fixing Damage "Sustained and to be Sustained"*—Ultra fines compromissi.

A landlord and his agricultural tenant entered into a submission to determine whether the landlord had failed to fulfil certain obligations incumbent on him under the lease, and if so to fix what damage, if any, had been sustained by the tenant in consequence of such failure, and from time to time during the currency of the lease, or after the expiry thereof, to fix the damage that might thereafter be sustained by the tenant. The award, *inter alia*, found the landlord liable to the tenant in payment of certain annual sums payable from the date of entry, and continuing during the currency of the lease, "in respect of loss and damage sustained and to be sustained" by him in consequence of the landlord's failure to fulfil certain obligations under the lease. *Held* that the award, so far as finding the landlord liable for damage to be sustained in future years, was *ultra fines compromissi*, and fell to be reduced.

By lease dated in 1878, Thomas Traill, of Holland, in the county of Orkney, let to David Coghill from Martinmas of that year the contiguous farms of New Holland and Stratheast at a rent of £300 for the first seven years, and £350 for the remaining twelve. The farms were let with the privilege to the tenant of cutting peats for the use of himself and his servants and cottars, such cutting to be done in a specified manner, and for a certain payment to the landlord for the privilege, but reserving any servitude of peat cutting then enjoyed by any neighbouring proprietors or tenants free of charge. It was also provided by the lease that the tenant should be bound "to inform the proprietor against all trespassers so far as known to him, and to give all assistance in his power to enable the proprietor to prosecute trespassers, the proprietor being bound so far as in his power to prevent all illegal trespassing upon the said farms and lands for any purpose whatever, and also to prevent any person not having a right of servitude from using the farm roads for cartage or any other purpose."

By the third head of the lease the landlord bound himself to put the houses, offices, and other buildings upon the farms into a proper state of repair to the satisfaction of two neutral persons of skill to be mutually chosen by himself and the tenant, or otherwise as therein provided, the tenant being bound to keep them in repair thereafter. By the fourth head of the lease the landlord bound himself to enclose the farms with a stone dyke of a certain height if suitable quarries could be obtained within a reasonable distance, or with a turf dyke, where suitable turf could be obtained, with two strong galvanised wires on top properly placed and fastened, and failing both quarries and turf, with a six-wire fence of strong galvanised wire, with larch stakes not more than six feet apart, along the boundaries of the farms. The landlord also bound himself to put the whole roads, dykes, ditches, drains, gates, and enclosures on the farms in a proper state of repair, and to scour and clean the ditches, and keep the drains running clear to the satisfaction of two neutral persons chosen as aforesaid, the tenant being bound to maintain them thereafter.

In the course of the years 1879, 1880, and 1881, Coghill, the tenant, expressed himself dissatisfied with the manner in which Traill, the landlord, was implementing his obligations under the lease. In particular, Coghill complained to him by letters on various occasions that from the time of his entry to the farms numbers of persons had

begun in the peat-cutting season to cut peats in the pasture, causing loss and damage to him (Coghill), and asked Traill to supply him with the names of the persons who had a servitude-right to cut peats there. Traill, while denying that Coghill had any grounds for being dissatisfied, agreed to refer the whole matters in dispute to arbitration. A decree of submission was accordingly executed by the parties in September of that year to two arbiters therein named, or in case of a difference of opinion to any oversman whom they should choose. This deed proceeded on a narrative of the lease, and of the dissatisfaction of the tenant with the manner in which the landlord had implemented and was implementing his obligation under the lease, and submitted to the arbiters the following questions:—(1) Whether the landlord had failed to implement the obligations undertaken by and incumbent on him under the lease, or any of them, in whole or in part? and (2) If so, whether the tenant had sustained any loss or damage by or in consequence of such failure, and if he had sustained loss and damage, with power to fix and determine the amount thereof, and from time to time during the currency of the lease, or after the expiry thereof, to fix and determine the amount of any loss or damage that may be hereafter sustained by him?

The arbiters nominated accepted of office, and some procedure took place before them. Coghill lodged a statement of claims in which he estimated the damage he had sustained, and would continue to sustain, at a certain sum per annum. To this statement Traill lodged answers. The arbiters failed to agree, and in March 1883 devolved the whole matters submitted to them on the oversman whom they had chosen, who in October following issued an award. This award, on the narrative, *inter alia*, that he had visited and carefully inspected the farms, proceeded as follows:—"*Primo*, I find that the said Thomas Traill is liable to the said David Coghill in payment of the sum of £60 sterling per annum, commencing as from the date of the said David Coghill's entry as tenant to the said lands and farms of New Holland and Stratheast, and continuing during his occupancy thereof, in respect of loss and damage sustained and to be sustained by him through excessive, irregular, and injurious peat-cutting and other acts of trespass over the pasture lands of the said farms which under the lease the said Thomas Traill as proprietor was bound to prevent: Provided always, that in the event of the said Thomas Traill effectually remedying the damage and injury which the said pasture lands have sustained since the said David Coghill's entry thereto by the peat-cutting and trespass above referred to, and supplying the said David Coghill with a list of the parties who possess servitude rights over the said pasture lands, so that the said David Coghill may be in a position to protect himself against trespassers, and be enabled with safety to his stock to make use of the said pasture lands, then and in that case the said sum of £60 per annum shall cease to be payable by the said Thomas Traill to the said David Coghill from and after the date at which the said damage is remedied and made good, and the said list of parties produced to the said David Coghill." *Secundo*, He found Traill liable to Coghill in payment of £100 on account of loss, damage, and inconvenience sustained by the latter owing to the former's non-fulfilment of his obligation under the lease in regard to the houses, roads, &c., above mentioned. "*Tertio*, I find that the said Thomas Traill is liable to the said David Coghill in payment of the sum of £30 sterling per annum, commencing as from the 1st day of February 1880, and continuing during the said David Coghill's occupancy of the said lands, in respect of loss and damage sustained and to be sustained by him, owing to the failure on the part of the proprietor to erect a boundary fence around the said lands of a suitable description, and in accordance with the provisions of the lease."

Traill then raised the present action against Coghill for reduction of the decree-arbitral. He averred that the award was *ultra vires* of the oversman, "it being *ultra fines compromissi* to award a sum to be paid yearly in the future during the currency of the lease, or to do more than assess damages for loss already sustained by the defender." He also averred that the decree-arbitral was unjust and corrupt in certain particulars condescended on.

These averments were denied by the defender, who averred, *inter alia*, that the pursuer had taken no notice of his letters, above mentioned, in regard to the peat cutting, and had never informed him who had the servitude right to cut them. He stated that he had lodged claims in the submission for sums to be paid annually during the lease, and that no objection had been taken to the competency of these claims.

The pursuer pleaded, *inter alia*—"The decree-arbitral being *ultra fines compromissi*, should be reduced."

The defender pleaded—"(3) The decree-arbitral not being open to any objection, the defender should be assoilzied. (4) *Separatim*, the defender having claimed in the said submission for sums of money to be paid annually during the currency of the lease, and the pursuer not having objected to the said claims as outwith the submission, but having proceeded in the reference, he is barred from challenging the award on the plea of *ultra fines compromissi*."

The Lord Ordinary sustained the reasons of reduction in so far as applicable to the first and third findings of the decree-arbitral, and to that extent and effect reduced, declared, and decerned in terms of the conclusions of the summons; *quoad ultra*, repelled the reasons of the reduction and assoilzied the defender.

"*Opinion.*—The contract of submission refers to the arbiters or the oversman to determine—1st, Whether the pursuer had failed to implement the obligations incumbent upon him, in whole or in part; and 2d, if so, whether the defender had sustained loss or damage in consequence of such failure; 'and if he has sustained loss and damage, with power to fix and determine the amount thereof, and from time to time, during the currency of the said lease, or after the expiry thereof, to fix and determine the amount of any loss or damage that may hereafter be sustained by the said David Coghill.' There can be no question as to the construction which must be put upon this contract. The arbiters are empowered to fix the amount of damage, if any, which has been actually sustained by the tenant in consequence of the landlord's failure to perform his obligations in whole or in part. It is contemplated,

however, that the submission shall continue in force until after the expiry of the lease, and they are accordingly empowered to fix from time to time the compensation to be paid for any farther damage which from time to time may be shown to have been sustained; but they are not authorised to estimate future or probable damage, or to award compensation for any damage which has not been actually suffered. But the oversman, by the first and third findings of his decreet-arbitral, has found the pursuer liable in two sums of £60 and £30 per annum, to continue during the tenant's occupancy of the lands, 'in respect of loss and damage sustained and to be sustained by him,' in consequence, first, of excessive and irregular peat-cutting, and other acts of trespass, which the proprietor was bound to prevent; and second, of the proprietor's failure to erect a suitable boundary fence in accordance with the provisions of the lease. These findings are, in my opinion, incompetent and *ultra vires* of the arbiters or oversman. The amount of damage occasioned by the specified causes, and especially from the first of them, may vary indefinitely from year to year; and the parties had therefore substantial reason for stipulating that compensation should not be awarded by anticipation upon an estimate of probabilities, but should be fixed from time to time according as the damage to be compensated has been actually sustained. But whatever may have been their reasons, it is clear that they so contracted. The decreet-arbitral can have no force except by virtue of the contract of submission, and in so far as it fixes an annual sum for past and future damage, it is, in my opinion, *ultra fines compromissi.*

"The other objections which are stated raise questions of greater difficulty. But it is unnecessary to determine whether they afford sufficient grounds for reducing the first and third findings, since these must, in my opinion, be set aside for the reason already given. They cannot be sustained even as fixing the amount payable for damage already suffered, because it cannot be assumed that the oversman would have fixed precisely the same sums if he had taken the entire damage actually sustained, and that alone, into account, instead of awarding an annual payment which may possibly have been fixed with reference to an estimated average of the annual damage to be sustained one year with another during the currency of the lease.

"The second finding is distinct and separate from the others; and it was admitted at the bar that it ought to be sustained."

The defender reclaimed.

The Court allowed a proof before answer, before one of the Judges of the Division, in which a considerable amount of evidence was led, principally on the question of corruption in the proceedings in the submission.

Thereafter the defender argued—The award was not *ultra fines compromissi.* The submission was a continuing submission, the oversman being entitled, in terms of the contract of submission, "from time to time during the currency of the lease to fix and determine the amount of damage that may be hereafter sustained" by the tenant, and he had merely taken the most convenient method of doing this by awarding a sum of money to be paid annually during the currency of the lease, under the first and third findings in his award, which sum he could afterwards abate or increase as the damage became less or greater. The claims lodged in the submission by the tenant asked for a sum of money to be paid annually during the currency of the lease, "for loss sustained and to be sustained," and in his answers the landlord made no objection to the competency of the form of these claims. The landlord was now barred from raising the plea of *ultra fines compromissi.—North British Railway Company* v. *Barr*, November 20, 1855, 18 D. 102.

The pursuer replied—The award of a sum payable in the future for damage not yet suffered and unascertained was clearly *ultra fines compromissi.* There was no standard by which such damage could now be estimated, for it depended upon future contingencies, and, in the case of the peat cutting at least, on the action of third parties, which could not now be predicted.

At advising—

Lord Justice-Clerk—I think the Lord Ordinary is right. I had doubts of the view on which he proceeded before I heard the case so fully stated, but it seems to me that the arbiter could not by possibility decide what the damage might be, even on his own way of estimating it for the future. It is plain that his duty was, first, to decide what damage had been suffered, and, apparently, according to the terms of the arbitration, he was bound simply to decide that question, and leave the parties to come back if an additional claim emerged in the course or currency of the lease. It is certainly an unusual provision. I do not know exactly what effect is to be attributed to it, even if the arbiter had taken that course, but, in the first place, to estimate the existing damage, and then to assume that such damage will continue, and especially damages arising from an apparently illegal use by the public of this part of the farm, was entirely out of the question. Upon that ground alone I think the Lord Ordinary's judgment should be adhered to. In regard to the rest of the dispute, it seems to be a very tangled and confused business. I think if the tenant had anything to complain of, those who acted for the landlord would not have dealt unmercifully or unreasonably in ascertaining what the rights of the tenant were. On the whole matter, however, I do not think that this award of the arbiter can be sustained.

Lord Young—I am of the same opinion. I confess that the evidence in the case makes me the reverse of sorry that the award should be set aside. For I cannot help thinking that whatever the law of the matter may be, or however we should decide the question in regard to the arbiter's conduct, it seems to have been a high-handed proceeding. I agree with your Lordship and with the Lord Ordinary that there is sufficient in the reasons which the Lord Ordinary has stated for setting aside that award under the first and third heads. The damage sued for is really for periodical operations—that is, from time to time, or year by year—and for the arbiter to say—"there has been excessive or irregular cutting of peats in certain years past, and therefore I will give a fixed annual sum for that excessive and irregular cutting, which I assume will be continued in the

future"—to say that is I think *ultra vires* of the arbiter, the parties having so expressed themselves as to indicate that they meant to refer to the arbiter only the damage for a time, the damage sustained by any failure on the part of the landlord. It is quite sufficient in regard to the rest of the case to say that the judgment complained of applies equally to the fence. I should not say equally perhaps, because one can see room for distinction and argument; still, considering that matter to the best of my ability, I think it impossible to distinguish between them, and I do not think a judgment giving a slump sum of damages for one fence existing rather than another—I mean an average or even sum from 1880 to the end of the lease—can be sustained. I think the interlocutor of the Lord Ordinary should be adhered to.

Lord Craighill—I am entirely of the same opinion. I agree with all that has been said by your Lordship and by Lord Young, and I would only add the expression of a hope that the parties will not think it necessary to go before arbiters or any Court with respect to the matter about which they have now been in controversy. They have led a proof, and we have had what has been advanced on the one side and on the other, and I think they will act to their common advantage if the controversy can be reasonably settled.

Lord Rutherfurd Clark concurred.

The Court adhered.

Counsel for Pursuer — Mackintosh — Low. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for Defender—Lang—Lyell. Agents—Home & Lyell, W.S.

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*Saturday, May* 16.

## SECOND DIVISION.

[Sheriff of the Lothians.

## SCOTTISH PROPERTY INVESTMENT COMPANY BUILDING SOCIETY *v.* STEWART AND OTHERS.

*Building Society — Winding up — Withdrawing Members' Liability for Losses appearing in Balance-Sheet Prepared after Date of Withdrawal, but for Year previous to that Date.*

The rules of a building society provided—"Any member holding unadvanced shares shall be entitled to withdraw from the society on application to the directors in writing, and shall be entitled to receive the amount standing at his credit in the books of the society in respect of his shares as at the immediately preceding annual balance, together with the amount of subscriptions paid by him thereafter." *Held* that under this rule a member withdrawing on 3d March 1881 was liable to a deduction of 40 per cent. on the value of his shares in respect of losses incurred by the society, as appearing from the balance-sheet for the year ending 31st January 1881, although that balance-sheet was approved after the date of his withdrawal.

*Building Society — Cancellation of Notice of Withdrawal—Conditional Cancellation.*

A shareholders' committee of investigation of a building society reported that in view of the unsatisfactory financial position of the society, and of the large proportion of shareholders who had given notice of withdrawal, two courses only could be adopted—(1) liquidation, and (2) to ask the withdrawing members to cancel their notices, but "only on the express understanding that these cancellings are not to be used unless shareholders representing at least nine-tenths of the amount under notice of withdrawal should cancel their notices within a limited time." The committee "strongly recommended" the second course, and a meeting of the society subsequently "gave a general approval to the committee's report." The form of cancellation sent out to withdrawing members was enclosed along with a circular bearing reference to the committee's report, and was unconditional in its terms. Nine-tenths of the members who had withdrawn did not cancel their notices.

*Held*, in the liquidation of the society, that the cancellation was conditional on nine-tenths of the withdrawing members cancelling, and as this condition had not been purified the notice of withdrawal remained uncancelled.

The Scottish Property Investment Company Building Society was a society incorporated under the Building Societies Act 1874. By the 2d of its rules its objects were declared to be—"By the subscriptions or payments of its members, to form a fund in shares of £25 each—half-shares of £12, 10s. each, and quarter-shares of £6, 5s. each—out of which fund members who are desirous of erecting or acquiring dwelling-houses, or other heritable property, may receive advances upon heritable security by way of mortgage to enable them to do so, and generally the objects allowed by 'The Building Societies Act 1874.' No preferential shares shall be issued."

In November 1881 an order was pronounced by the Sheriff of the Lothians directing the society to be wound up under supervision; and in August 1882 the liquidators petitioned the Sheriff to approve of the state of assets and liabilities, with relative schedules, which they had prepared and lodged in the Sheriff Court in terms of the Act of Sederunt 17th March 1882.

The state of assets and liabilities showed that the ordinary creditors would be paid in full, and the following schedules showed the proposed ranking of members of the society:—

Schedule G, containing the names and amount at the credit of members whose shares had matured regularly in terms of the rules. The amount due to members in this class, exclusive of interest, was £26, 12s.

Schedule H, containing the names and amount at the credit of borrowers whose properties had been sold by the society, leaving a surplus at their credit. The amount due to members of this class, exclusive of interest, was £358, 4s. 10d.

Schedule I, containing names of members whose shares were paid in advance, *i.e.*, who had