all the requisites of the statute had also been complied with. It was unnecessary to search for and cite the representatives of the deceased for their interest, a course which if ordered by the Court might in some instances be found to be an impossible task. An immediate award should therefore be made. In this case the matter was urgent, in view of the near approach of the Licensing Court, where the trustee to be elected would become an applicant for a transfer of the licence.

The Lord Ordinary officiating on the Bills (TRAYNER) awarded sequestration *de plano.*

The following was the interlocutor:—

"The Lord Ordinary having resumed consideration of the petition with the writs produced, together with a minute now given in for the petitioners, execution of intimation, copy of the *Edinburgh Gazette*, and other productions made therewith, and heard counsel for the petitioners, Finds that the respondent Thomas Hall died after the presentation and service of this petition, and (as appears from the Report of Commission No. 10 of process and execution of charge No. 6 of process) was notour bankrupt at the date of his death on 4th October 1902: Sequestrates the estates and effects of the said Thomas Hall, publican, Bonchester Bridge, near Hawick, now deceased, in terms of the Bankruptcy (Scotland) Act 1856, and Acts explaining and amending the same, and declares the same to belong to his creditors for the purposes of said Acts: Ordains any successor who has made up a title to or is in possession of the estate of the said deceased Thomas Hall to transfer the same, so far as liable for the debts of the deceased, to the trustee to be elected by his creditors: Appoints the creditors to hold a meeting at the time and place mentioned in the said minute, viz., on Friday, the 24th day of October 1902, at 12·30 o'clock afternoon, within the Tower Hotel, Hawick, to elect a trustee or trustees in succession and commissioners as directed by the statute, and remits to the Sheriff of the counties of Roxburgh, Berwick, and Selkirk at Jedburgh to proceed in manner mentioned in the said statutes.

Counsel for the Petitioners—T. B. Morison. Agents—P. Morison & Son, S.S.C.

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*Thursday, November 6.*

## FIRST DIVISION.

## DOUGLAS'S TRUSTEES *v.* COCHRANE.

*Succession—Trust—Liferent and Fee—Gift One of Liferent or of Fee—Liferent with Power of Disposal—Protected Liferent.*

In order that the gift of a liferent of the income of a fund, coupled with a power of disposing of the capital, may amount to a gift of the fee, both the liferent and the power of disposal must be given in unqualified terms.

A truster directed his trustees to invest in their own names the sum of £1000 for behoof of his daughter A, and to "pay the interest for her maintenance and support during her life." Then followed a clause excluding the creditors of her husband in the event of her marrying, and the following direction:—"Should my said daughter be married said sum of £1000 shall on her death be paid to her heirs or assignees." A married but became a widow. In a special case brought in her lifetime, *held* that the gift to her was a liferent and not a fee.

This was a special case, the parties to which were (1) the trustees of the late Alexander Douglas, draper, Stranraer, and (2) Mrs Helen Morton Douglas or Cochrane, daughter of the said Alexander Douglas.

The question at issue was the interpretation of the following clause in the trust-disposition and settlement of the said Alexander Douglas:—"That my said trustees shall out of my means and estate invest and secure in their own names in good heritable or personal security the sum of £1000 sterling for behoof of my daughter Helen Morton Douglas, the interest of which they shall apply towards her board and education, and until completed, when they shall pay the said interest to her for her maintenance and support during her life, declaring that in the event of my said daughter marrying the interest of the said sum of £1000 shall not be liable for the debts or attachable by the creditors of any husband or husbands she may marry, the *jus mariti* of whom are expressly excluded; and that a simple receipt by my said daughter shall be a sufficient discharge to my trustees; and should my said daughter die unmarried said principal sum of £1000 is to form part of the residue of my estate, and be equally divided between my two sons as aftermentioned; but should my said daughter be married said sum of £1000 shall on her death be paid to her heirs or assignees."

The case set forth that the second party was married on 14th January 1891 to Dr Hugh Cochrane; that he died on 26th May 1897, and that there was no issue of the marriage.

The contentions of the respective parties were set forth in the case as follows:—"The first parties maintain that the provi-

sion to the second party is limited to a liferent of the said sum of £1000, and that the right to the fee of the said sum cannot be determined until the death of the second party, when the condition of the second party as a married or unmarried woman at such period is ascertained. The first parties further maintain that the liferent is alimentary, in respect of the direction by the testator that the trustees are to pay the interest to her 'for her maintenance and support during her life.'

"The second party, on the other hand, maintains that the expression 'unmarried' means never having been married, and that as she has been married, although her husband is dead, the fee of the said sum of £1000 cannot now be carried by the destination over to the testator's two sons, but falls on her death to be paid to her heirs or assignees. She contends that as she has thus not only the liferent but an absolute power of disposal over the said sum of £1000, her right to the same is one of fee, and there being no further trust purposes to fulfil with regard to said sum, she is entitled to immediate payment thereof. She has accordingly called upon the said trustees to pay over to her the said sum of £1000."

The questions of law were as follows:—'(1) Is the second party entitled to a liferent in the said sum of £1000? Or (2) Does she take a fee therein? (3) Assuming the first question is answered in the affirmative, is her liferent an alimentary one? (4) Assuming the second question is answered in the affirmative, is the second party entitled to immediate payment of the said sum of £1000?"

Argued for the first parties—In order that the gift of a liferent, coupled with a power of disposal of the capital, should amount to a fee, both liferent and power of disposal must be unqualified—*Alves' Trustees* v. *Alves*, March 8, 1861, 23 D. 712; *Cumstie's Trustees* v. *Cumstie*, June 30, 1876, 3 R. 921, 13 S.L.R. 594; *Beveridge* v. *Beveridge's Trustees*, March 6, 1878, 5 R. 1116, 15 S.L.R. 414; *Rattray's Trustees* v. *Rattray*, February 1, 1899, 1 F. 510, 36 S.L.R. 388. Here there was neither an unqualified right of liferent nor an unqualified power of disposal.

Argued for the second party—The power of disposal here was absolute, though it might not take effect till the death of the second party. She could, however, assign it, and although the assignee could not get immediate payment the assignation would be perfectly valid. The liferent here also was unrestricted, not alimentary. To restrict a liferent it must either be given as a liferent allenarly or declared expressly to be alimentary, or there must be an express exclusion of the creditors and assignees of the liferenter—*Dickson* v. *Braidfoot*, February 3, 1705, M. 10,394; *Irvine* v. *M'Laren*, January 24, 1829, 7 S. 317; *Martin* v. *Bannatyne*, March 8, 1861, 23 D. 705; *Rogerson* v. *Rogerson's Trustees*, November 6, 1885, 13 R. 154, 23 S.L.R. 102; *Reliance Mutual Life Assurance Co.* v. *Halkett's Factor*, March 4, 1891, 18 R. 615, 28 S.L.R. 589.

At advising—

LORD PRESIDENT — The question is whether the second party, Mrs Cochrane, is entitled only to the liferent, or whether she has right to the fee, of a sum of £1000, under her father's testamentary settlement. If it had not been for the provisions in the settlement applicable to the event of the second party marrying, it would, in my judgment, have been quite clear that she had a liferent and nothing more. The question therefore comes to be whether the remarkable change of phraseology in the part of the settlement relative to the event of marriage converts the gift of the liferent into a fee. It is necessary to consider the settlement step by step. The first provision of the third purpose is that the trustees shall invest and secure in their own names the sum of £1000, the interest to be applied to the board and education of the second party, and for her maintenance and support during her life. So far the clause provides for the trust being kept up, the capital being retained by the trustees, and the income being paid to the second party during her life, not merely until her marriage. This being so, one would not expect to find in a later part of the settlement something quite inconsistent with this leading provision—in other words, that in a certain event the second party should have the capital paid to her. It appears to me that if doubtful language occurs in a later part of a deed the primary and leading provision should be kept in view in construing it. The clause then provides that in the event of the second party marrying the interest of the £1000 is not to be liable for her husband's debts or subject to his *jus mariti*. Here again the provision is treated as only relating to the interest. If the testator had intended that in the event of the second party's marriage the fee was to vest in her, he would naturally have protected it, as he did the interest, from liability for her husband's debts and also from his *jus mariti*, but he appears to have thought that there was no need to protect the fee because it was protected already. The clause then provides that should the second party die unmarried the £1000 shall become part of the residue of the testator's estate. Again it is clear that so far no event is provided for in which the fee is to go to the second party or to pass out of the testator's estate. The clause then provides for the event which has occurred, as follows:—"But should my said daughter be married, the said sum of £1000 shall on her death be paid to her heirs or assignees." This part of the clause does not declare that in the event of the daughter's marriage the £1000 shall cease to be part of the testator's estate, but that on her death it shall be paid to her heirs or assignees as takers by gift of the testator, not as representatives of the second party. I understand that it is contended that the direction to pay to assignees implies that the testator contemplated that she would have power to assign, otherwise the provision would be inappropriate. This is quite a fair argument, but it does

not appear to me to displace the effect of the unambiguous provisions of the settlement. I do not think the declaration contained in this clause can reasonably be construed so as to subvert the earlier and leading provisions of the settlement. For these reasons I am of opinion that the second party is not entitled to a fee but only to a liferent.

LORD ADAM—I am of the same opinion. The question is what was the intention of the testator. For myself I think that his intention was that his daughter should have only a liferent. He nowhere in the will expresses any desire that his daughter should have a fee, but it is said that the fee not having been destined to anyone else, and the daughter having been given a power of disposal, therefore the fee is in her. Now, in the first place, I do not think that that was the testator's intention, and, in the second, it is to be noted that the daughter does not claim the fee as at the commencement of the will. Her claim is that on her marriage her liferent comes to be converted into a fee. The reason for so stating her claim is that there is a provision to the effect that in the event of the daughter dying unmarried the principal sum or fee is to go to the testator's two sons, and accordingly that it is only on her marriage that the provision vests. It is to be observed that what the testator does is this—he gives the money to trustees to pay the interest for the maintenance and support of the daughter. I agree that that cannot be considered an alimentary liferent, but still we have the declaration that the interest is to be paid during her life. Now, in the view that no fee vested, the trustees' duty was simple, viz., to keep the fund in their own hands and to pay the interest to the daughter. If the other view be taken, viz., that she had the fee, then the trustees would afford her no protection, and if married she could hand over the whole fund to her husband's creditors.

But it is said that the argument for the vesting of a fee is much strengthened by the words "shall on her death be paid to her heirs or assignees." Does the word "assignees" refer to assignees *inter vivos*? If it does, that no doubt is a strong argument in favour of vesting. My view is that the words "heirs and assignees" mean that if the daughter dies without leaving a settlement then the fund is to go to her heirs, but if she dies leaving a settlement then to her assignees under that settlement. Her whole right therefore under the settlement is one of liferent with a power of disposal, and that doesnot give a full fee.

LORD M'LAREN—I agree that this is a case in which it is well that we have had a full argument, because it presents some points of novelty. I gather from the terms of the will that it was the general intention of the testator to give his daughter as large an interest in her provision as he could give consistently with the capital being kept safe. Now, in many cases on the construction of wills, when you have ascertained the testator's intentions that disposes of the whole matter in dispute. But there are some positive rules of law which limit the interpretation of wills, or at least limit the testamentary powers. One is that the fee must be given to someone. Another rule, which we have lately had to consider in a larger Court than this (*Yuill's Trustees* v. *Thomson*, 1902, 39 S.L.R. 668), is that when a testator has given an unqualified right of fee it is not in his power to impose restrictions limiting the enjoyment of his rights by the fiar. A third rule is that when once a fee has been given it cannot be taken away or resolved upon a future event. There may be other rules, but I mention these because they are the only rules which may possibly conflict with the intention of the testator in the present case. It is argued that the second party to this case is given the full right to the income and a power of disposal of the capital, and that these gifts taken together constitute a fee simple. I am somewhat in sympathy with the argument that the second party has an unqualified power of disposal of the capital, though I say so with some reserve, because, as observed by one of your Lordships, the testator might only have contemplated a power of testamentary disposal. It is provided that payment is to be made at the lady's death, but I do not think that restriction would prevent her from assigning it to marriage-trustees, or even from assigning it in security of a loan if the creditor was willing to wait for the realisation of his security until her death. But there is a very clear expression of opinion by Lord Justice-Clerk Inglis in *Alves' Trustees* (23 D. 712, at p. 717), that in order that a right of liferent and a power of disposal taken together may amount to a fee both must be given in unqualified terms. Now I am unable to satisfy myself that there is here an unqualified liferent, because the trustees are directed to hold the provision for the second party, and only to pay the interest for her maintenance and support. Now this is not a case in which a testator begins by making a gift in general terms and then inserts qualifications; then it may be that in certain events the qualifications fly off and the fee remains. But here the gift is qualified in its inception. The testator directs his trustees to hold this sum for his daughter, and then goes on to explain how she is to get the benefit of it. The words are that the trustees "shall pay the said interest to her for her maintenance and support during her life." That appears to impose upon the trustees the duty of retaining the capital for an alimentary purpose. There is no especial virtue in the word alimentary; a direction to trustees that they shall administer a fund for the maintenance and support of a daughter during her life is a very good way of expressing the intention that she should have an alimentary liferent. It is true that in the case of a bond or a conveyance direct to a beneficiary an alimentary direction such as this, without the addition of

clauses excluding assignment and the diligence of creditors has been held insufficient to protect the fund, but that is because in the case supposed there are no trustees interposed who can then withold the fund from the control of the person entitled to the liferent enjoyment of it. But when, as here, there is a continuing trust and the truster has clearly indicated his intention to make a gift of income and of income alone, the direction that the application of the fund shall be for the maintenance and support of the beneficiary supplies all that is necessary. I am therefore of opinion that the second party is not entitled to immediate payment, and that the trustees are charged with the duty of protecting the fund for her maintenance and support.

LORD KINNEAR concurred.

The following was the interlocutor:—

"Answer the first question in the case in the affirmative, and the second question in the negative: Find in answer to the third question that the right of the second party is a protected one; And answer the fourth question in the negative, and decern."

Counsel for the First Parties—D. Anderson. Agents—Macpherson & Mackay, W.S.

Counsel for the Second Party—H. Johnston, K.C.—A. S. D. Thomson. Agent—P. Adair, Solicitor.

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*Thursday, November* 20.

## SECOND DIVISION.

[Lord Pearson, Ordinary.

## LOCKHART *v.* THE ROYAL NATIONAL LIFEBOAT INSTITUTION.

*Property—Burgage—Writs by Progress—Original Grant by Burgh not Produced—Onus—Boundaries—Sea-shore—Sea—Burgh—Royal Burgh—Title to Heritage—Fore-shore.*

In an action of suspension and interdict at the instance of a proprietor of subjects within a royal burgh, brought to prevent certain lessees of the magistrates from making certain erections on a piece of ground within that burgh above high-water mark, both the complainer and the magistrates claimed this piece of ground, the complainer maintaining that it was part of the subjects belonging to him, and the magistrates maintaining the contrary. The burgh produced a royal charter dated in 1568, conveying to them certain lands described as bounded "by the sea on the north part." The ground in question was part of the lands so conveyed. The proprietor did not produce the original grant in favour of his author from the burgh, but he produced among other titles (1) an instrument of resignation and sasine dated in 1797 in favour of one of his authors, and (2) an instrument of cognition and sasine by which the burgh cognosced another of his authors as the heir entitled to succeed to said subjects. In both these titles the property was described as bounded "by the sea-shore on the north parts." In the disposition upon which the complainer himelf held the northern boundary was stated to be the sea-shore.

*Held* (*rev.* judgment of Lord Pearson, Ordinary) (1) that the complainer had sufficiently instructed a title flowing from the burgh; (2) that where a property is described as bounded by the "sea-shore" such a description at least includes the ground at the place in question above the high-water mark for the time being, such a boundary following the sea, and not being fixed by the position of matters as at the date of the grant; (3) that as the complainer's property, if taken to be bounded by the high-water mark at the present time, included the piece of ground in dispute, that piece of ground was consequently embraced within the description in the titles produced by the complainer; (4) that, in the absence of proof by the magistrates that the original grant to the complainer's author was of a more limited character than the writs by progress produced, or that they had had exclusive possession of the piece of ground in question, that piece of ground, being part of the lands described in the complainer's sasine, must be held to be his property; and that therefore (5) he was entitled to interdict the operations complained of.

*Opinion* (*per* Lord Moncreiff) that a boundary "by the sea-shore" and a boundary "by the sea" mean one and the same thing, and each gives to the grantee property in and down to the sea ebb-mark at ordinary tides, subject to the rights of the public.

William Lockhart, contractor, North Berwick, was the proprietor of a strip of ground within the burgh of North Berwick, situated at the east corner of the West Bay, under a disposition in his favour by the trustee of his deceased father Andrew Carlaw Lockhart, with consents therein mentioned, dated 14th, 17th, 22nd, and 27th February, and recorded in the Burgh Register of Sasines 2nd March 1893. In this disposition the subjects were described as bounded "on the north by the sea-shore."

In December 1900 Mr Lockhart presented a note of suspension and interdict against the Royal National Lifeboat Institution, praying the Court to interdict the respondents from encroaching on his property lying immediately to the south of part of the southmost side parapet of the old lifeboat slip, North Berwick, in making erections or digging foundations, or in any way interfering with his property, and to ordain the respondents to fill up excavations made by them, to level the surface, and to