NOVEMBER 23, 1852.

PETER FERRIE, *Appellant*, *v.* GEORGE FERRIE, *Respondent.*

Agreement—Family compromise—Contract—Construction—Proof—*A father left a trust-settlement, by which he apportioned his estate, after a specified time, in a particular way, among his children. Difficulties having presented themselves to the working of the trust, and the trustees having declined to act, it was superseded by a deed of agreement executed by the whole of the beneficiaries, and by it a particular arrangement for division was settled. After this agreement had been acted on, P., one of the beneficiaries, contended that he executed the agreement on the condition that he was to get one fourth of the residue and that the others assented to this.*

HELD (affirming judgment), *that no assent to this claim of P. was shewn as against the others, nor did the settlement give such share.*[1]

The pursuer Peter Ferrie appealed, pleading that the interlocutor of 3d Dec. 1850 should be reversed—1. Because, according to the sound construction of the deed of agreement, the appellant was entitled to one fourth part of the residue. 2. Because he executed the deed of agreement only on condition that he should be placed on the same footing with his brothers and sister, and have an equal share with them in the division of the residue, in lieu of the annuity provided for him by his father's settlement, (which was represented as equal to a fourth part when he signed the deed of agreement); and this condition was part of the family arrangement, under which he was entitled to one fourth part of the residue. 3. Because, the condition was satisfactorily proved by the alterations made by him on the deed before execution, by the letters which passed between him and the respondent, and Charles Atherton and the trustees, and by the other documents, facts and circumstances. 4. Because the respondent, in the full knowledge that the appellant executed the deed of agreement, and consented to the residue being divided in the manner proposed, only on the above stipulation and understanding, took the benefit of the arrangement, and thereby adopted the stipulation and understanding.

The respondent supported the interlocutor on the following grounds:—1. The appellant had no right to a fourth share of the residue, either under the deed of settlement or deed of agreement; and he was only entitled, under these deeds, or any of them, to an annuity of £125. 2. As the respondent never agreed to account for a fourth share of the residue in lieu of the appellant's annuity, and as there was no evidence of such an agreement, either in the correspondence or otherwise, the claim now brought forward was properly rejected by the Court below.

Bethell Q.C., and *Anderson* Q.C., for appellant.—[The argument turned entirely on the construction of the alterations in the deed of agreement, and of the correspondence, and no cases were cited at the bar. The following were referred to in the printed case]:—When family arrangements are entered into by way of compromise, and to prevent litigation, the Court will liberally interpret and carry into effect any reasonable agreement—*Stockley* v. *Stockley*, 1 Ves. & B. 30; *Westby* v. *Westby*, 2 Dr. & War. 503; *Bellamy* v. *Sabine*, 2 Phill. 425; *Stewart* v. *Stewart*, 6 Cl. & Fin. 911. The circumstances here amounted to acquiescence on the part of the respondent; and as he claimed the benefit of the deed, while he rejected the condition on which the appellant conceded that benefit, the Court would compel the respondent to implement the condition—*Hammersley* v. *Baron de Biel*, 12 Cl. & Fin. 45.

Sol.-Gen. Kelly and *B. Andrews* Q.C., for respondent, were not called on.

LORD CHANCELLOR ST. LEONARDS.—My Lords, the facts of this case appear to me so clear, that I am prepared at once to move your Lordships to give judgment upon them. According to the original settlement, the appellant now at your Lordships' bar had an annuity of £125 a year for his life, charged upon half the property. That annuity, though granted for his life, was to be redeemable upon a capital of £2500,—which circumstance explains in a great measure certain expressions, which have been very much relied on, in different parts of the correspondence. It was discovered after the death of the settlor, who was the father of the various parties in this suit, that the estate was so encumbered, that unless they could rate (annul?) the settlement, as they called it, it would be impossible even to pay the debts. A deed was accordingly regularly prepared in Scotland, but without any previous consultation with the appellant or Mr. Atherton, they both being in America, and both being interested in this property, and that deed did beyond all question, though it effected the purpose for which it was prepared, (that is, it enabled a sale of the estate to be made,) in no respect whatever altered the rights of the parties as they

[1] See previous report 23 Sc. Jur. 498. 3 Dec. 1850; also next case. S. C. 25 Sc. Jur. 49.

existed under the father's settlement, independently of the facility intended to be given for selling the property.

Now that arrangement was for the benefit of the whole of the family. It was not simply for the benefit of George Ferrie. It was as much for the benefit of the appellant as of anybody else, for in the state of the debts with reference to the value of the property, it did not appear that the appellant ever could have had his annuity, if the property had not been sold at the proper time, the estate realized, the debts paid, and the residue actually ascertained, and in hand to answer his annuity. The deed, there can be no doubt whatever, was received in America, and received there by persons competent to deal with it. Nobody ever understood a deed better than Mr. Atherton, and the appellant, with the assistance of Mr. Atherton, understood this deed. Every remark in their letters, and all the alterations which they made, prove a perfect knowledge of the contents and object of the deed.

My Lords, it appears that the appellant was originally discontented with his father's settlement. He would have relieved himself from it if he could. His father, it appears, framed the settlement in the way in which he meant it to be framed, giving the appellant an annuity instead of, like his other children, a portion of the property; because, as the letters state, he was afraid that the appellant's litigious disposition would lead him to embarrass the property of his other children. This, of course, was a source of great discontent to the appellant, and he desired not to abide by the settlement if he could set it aside.

When this deed was received in America, it is quite clear Mr. Atherton did all that he could, and he tells you that he did all that he could, to induce the appellant to accept and execute the deed as it stood. In the result, the transaction was simply this, that they altered the deed in a very workmanlike manner, so as in no measure to bind the appellant by his father's settlement if he could be relieved from it, but to leave it an open question, if he could establish his right to a fourth of the estate instead of an annuity. There is not a word upon the face of the deed as now altered, which any lawyer at your Lordships' bar can seriously argue would give the appellant the right which he seeks. I can state to your Lordships without the slightest hesitation, that the alterations in question, though they might tend to reserve the right, if he had the right, of claiming one fourth instead of the annuity, in no respect give to him any portion of the property, other than that to which he was entitled before the execution of the deed. That was the real nature of the transaction. Mr. Atherton meant that it should be so; there is no doubt about it. The appellant was forced to come to the conclusion that it should be so, but with this peculiar reservation. He said, I am now come to this situation, (as he saw perfectly,) that if I send back this deed, the property cannot be sold, and my own annuity will be in peril. He had £2500 of his own dependant upon it. What claim had he, I beg to know, to have the terms of his father's settlement altered in any way whatever? Recollect that there must be some motive —there must be some consideration moving—there must be some ground upon which the claim must be founded. There is apparently no ground whatever, except that he was discontented with the way in which his father has dealt with the property.

Mr. Atherton seems to have managed the matter in this way. He said to the appellant, "Let us be content; it is to our common interest that you should write me a letter in which you shall state that our understanding or your understanding is, that you are to have one fourth of the property and leave me to negotiate it;—but keep that quiet—do not send that back with the deed, for, if you do, they will not accept the deed, and then the property will not be sold;—therefore, let us have two classes of letters—let us write common business letters with the deed, approving of the deed, and not setting up any such claim, and then, behind the backs of the other parties, you write to me a letter setting out your understanding;—do not put it as a matter of right, but as a matter of claim—throw yourself upon the good feelings of the other parties, and then bye and bye we will try to work out for you, in consequence of the connection with them, and in consequence of your having executed this deed, that relief which we could not give to you or claim for you, by this deed, without endangering the whole transaction."

My Lords, the case admits not of a particle of doubt. We have only to read the letters. No man who is competent to read, could read these letters without seeing the difference of tone, and the difference of intention between them. Take the letter, for example, upon which the whole is originally founded—the letter of the appellant to Charles Atherton, written of course by the one to the other in the same room, and concocted between them. They are both sitting at a table. One writes it, the other probably dictates it, and then takes it up. This is what is to bind the parties:—"Before executing the deed of agreement which has been sent us from Scotland relative to my deceased father's estate, it is proper to state, that I have been induced to do so on the express understanding that as the trust deed is thereby annulled, George will award to me on the allocation of the property, the fourth share of my father's estate." Now, what he understands —not from that deed, because the deed left the thing as it stood under the settlement—but what he understands is this, he hopes and believes that George his brother will award this to him, and that without any communication with George:—"It being clear, from the terms of the deed of settlement, and all of us being conscious my father would have done so were he now alive, and

entering into the arrangement now made—the estimated proportion specifically bequeathed to me by the trust deed, having been made solely for the purpose of excluding me from the management of the trust, in the event of its being continued—George is therefore bound,"—by what? by the deed? by the contract?—"George is therefore bound in honour, at least if he considers me as his lawful brother, to mete to me this justice. Were I, before executing this deed of agreement, to make a legal question of it, I would be entitled to succeed; for it is well known, that in all questions relative to testaments, unlike all others, the meaning and intention of the testator is invariably given effect to, and not the literal meaning and construction of the words themselves. I have partially altered the deed of agreement to the above effect, but cannot, without spoiling the deed, do so fully; and as there is no time to communicate, I am under the necessity of leaving the matter as it is in your hands as mediator, to get this arrangement effected between George and myself." That is to say, if I chose to go to law, I could establish my right to that which I claim, namely, one fourth of the property instead of the annuity, but it does not suit me to do so: I have made alterations in the deed pointing to what I wish, though I have not fully carried it out, but I trust George will award it, and I am under the necessity of leaving the matter as it is in your hands (that is, in Charles Atherton's) as mediator, to bring about this arrangement. But let us pass for a moment to other letters which were written at the very time that the deed was executed. It is not worth while troubling your Lordships with them in detail, as they have been already read; but we have letters from the appellant to Peebles and Campbell, who were the solicitors, and a joint letter from the appellant and Atherton to the trustees of the settlement,—those two letters being perfectly conclusive upon this question, that the deed was executed as altered,—was executed and accepted in the terms in which it was originally transmitted to America. No claim is set forth in either of those letters to one fourth of the estate instead of to an annuity. No right is set up—no hint is given—that the appellant is entitled to anything except the annuity, but the deed is executed,—it being perfectly clear that these parties meant, while they reserved this right, to endeavour by way of mediation to prevail upon George to enter into this arrangement, and they took care, therefore, to send the deed with such letters from them both to different parties, as should enable and induce those parties to act upon the deed precisely as it stood in point of law.

With respect to the letters which passed between Mr. Charles Atherton and the respondent, I cannot call them a correspondence, because the letters were all on one side. Your Lordships will find from the examination of Mr. Atherton, that this gentleman having been examined in regard to the letters he had written and the answers he had received, is under the necessity of stating that he never received any answer at all. He says he has no letters on the subject matter of the appellant's letter of the 28th April; and he says, "I know this because, having been very anxious to receive an answer to my letter of 12th May 1845, I never got any so far as regarded the business put into my hands by Peter Ferrie's letter of 28th of April." That is the letter to which I have called your Lordships' attention. Then the next question to Mr. Atherton is, "Did you ever receive from the defender George Ferrie any letter in reference to the pursuer's said letter of the 28th April 1845, on the proposal therein contained? Depones negative." Then they say, "Being shewn the letters written by you to the defender, you are requested to state, whether, in answer to these letters or otherwise, you ever received from the defender George Ferrie any letter or other written communication consenting or agreeing to allow the pursuer one fourth share of his father's succession, and if so, produce the same." The answer is, "I did not receive and could not get any answer from George Ferrie, either written or verbal, to any of the letters referred to." What does it amount to, therefore? That the mediation was undertaken and failed—that Mr. Atherton, who was to act as the agent or friend of the appellant, was never able to extract from the respondent a single syllable in reference to the claim made upon him, or the wish that was expressed to him.

Then comes the correspondence between the appellant himself and the respondent. That certainly does not in any manner assist the appellant's case. In the letter of the appellant to his brother of the 27th of June 1845, he winds up in this way: After telling his brother that he wished to be dealt with on an equal footing with the other children, and so on, he says this—"At first it appeared to me, that though the provision made me by the deed, might at its date have been equivalent to a fourth part, from the great rise of the property since then, it would not be so now. It therefore became a fair subject for treaty between us before I agreed to any alteration for your benefit, and probably to my serious injury, that a new apportionment should take place. It would however appear from Peebles and Campbell's communications to me, that my provision will be equivalent to a fourth share—if so, or even if it be at all near the mark, I have nothing to say, and would not think of disturbing the matter as it now stands." Is that a claim? It appears that, in the letter he wrote to the respondent, he particularly pressed upon the respondent to carry out by agreement the arrangement which was referred to in that very letter, to which he never got any answer. No agreement therefore was ever come to; and here the appellant himself tells you, that it being represented by the attornies that his annuity was about equal to one fourth share, if that were so, he did not desire to disturb the arrangement. But if

he does not disturb the arrangement, how does it stand? If the arrangement is carried out according to the manner in which he himself would have determined it, he is entitled only, under that arrangement, to his annuity, and not to the principal sum. And even up to the last moment of the correspondence, he does not desire to disturb that arrangement unless it should turn out to be to his advantage to do so. He has no desire to disturb that contract, which is definite in its terms, which he would have executed, but he desires it to remain in order to see whether the value of the property would make it worth his while to advance this demand or not. The answer to that is evasive. It is contained in a letter which no man with a contract of this sort before him ought to have written. It reflects great discredit upon the respondent; but here, my Lords, we are not upon the conduct of the parties, but upon a question of law. It is perfectly clear, and does not admit of the shadow of a doubt, that the deed gives no such interest to the appellant as that which he claims, and there is nothing in the correspondence upon which he could found such a claim. The case would have been very difficult, and would have introduced questions of great nicety in point of law, as to what might have been the effect of such a correspondence if it had taken a different turn; but, as it is, there is not before us a single word which binds the respondent. I am clearly of opinion, therefore, however we may disapprove of some part of the conduct of the respondent, that this appeal ought to be dismissed, and I think with costs.

LORD TRURO.—My Lords, I agree in the opinion which has been pronounced by the Lord Chancellor. It appears to me upon the most careful examination of the letters, attending particularly, as I have done, to the reasoning of the learned Judges whose opinions I cannot adopt, and weighing that reasoning with all the caution which I should ever be disposed to exercise in forming an opinion contrary to that entertained by such learned persons, that I cannot agree in their conclusion; but I think the arguments which are urged, and the facts which are referred to by the four Judges who differed with those learned persons, are more applicable to the case, and are conclusive against the claim made on the part of the appellant.

My Lords, the situation of these parties has been correctly described by my Lord Chancellor. A gentleman who appears to have been a builder, and to have engaged in very extensive building speculations, leaves a very large property, which he imagined would improve in value at some future time, and he charges that property with very heavy encumbrances. Among other encumbrances is that in favour of the appellant, his wife and children; but whether that would ever be fruitful and yield any advantage, depends entirely upon what should be realized by the sale of the testator's property. His settlement is made in 1837; he lives several years afterwards: and when he dies, it is found that the property at that time has reached its maximum value—that there is no probability that delay will add to the price which can be obtained for it, and great doubt is entertained whether, even if sold at that time, it would realize enough to discharge the encumbrances upon it, including the debts which were chargeable upon the property, and also satisfy those claims which he had given to his family.

All the parties were therefore interested in making some arrangement different from that which his deed of settlement prescribed; and accordingly there is a suggestion made, not for the benefit of George or of Peter, or any other particular individual, but of the whole family combined. They took the advice of those who were supposed to possess the best means of judgment on the subject, who thought that delay would ruin the estate, and deprive the parties of any fruits under the will, and that, therefore, some new arrangement should be made. Each party would of course gain some advantage, according to the interest which he took under the father's will; but the proposition did not emanate at all from any desire to benefit George beyond the rest of the family. On the contrary, it appears that there was a view to benefit all the family equally, according to the extent of their interest.

A deed was accordingly prepared under the advice of a gentleman whom the testator himself appears to have referred to, and under whose advice he desired his trustees to act. That deed having been prepared, was sent, not to two ignorant and uninformed persons, but to a gentleman who had been a writer in Glasgow for some time, and a gentleman who, it is said, was an engineer, both of them undoubtedly being in a respectable position of life—both persons of intelligence and experience. The deed is sent to them. That deed is returned executed with a certain letter, which letter, it will be observed, is signed by the appellant and Mr. Atherton. That letter is a formal document which might have been expected, if the deed had been executed under any condition, or if anything remained to be acquiesced in on the part of those in Scotland before they were at liberty to act upon the deed, expressly to state it. It appears that at the time of the execution, however, there was another document in the form of a letter from the appellant to Mr. Atherton. If that letter was intended to be forwarded to Scotland, one cannot very well understand why that was not done, but it never was done. It was the most natural thing in the world that it should have been done, and one cannot understand why that letter should have been kept in America, when it was intended to be submitted, or professed to be submitted, to those in Scotland for their acquiescence.

My Lords, what was the nature of the document which was sent to England with the deed so executed? After some other matters, with which it is not material to trouble your Lordships,

the document proceeds to state, that these gentlemen, in accordance with their own private judgment, and in concurrence with the advice which has been given with regard to the interests of the estate and of their duty, "concur in the proposed deed of agreement, and have signed the same accordingly," &c.—(reads the joint letter). That is the whole substance of the document written by the appellant and by Mr. Atherton to be sent forward with the deed.

Now, that is the document which should have contained a statement of any conditions upon which this deed had been signed. What was more calculated to mislead, than to send forward the deed with a document making observations on alterations which are altogether beside what is now suggested to have been the principal object of the alterations. Any persons receiving the document, would read the corrections with reference to that document, and would construe them as effecting those objects, and those only, to which their attention was particularly called by the document. But to send this letter, and to keep back in America a document containing any special conditions for the execution of the deed by a lawyer, strikes me, I own, as extraordinary.

My Lord Chancellor, in the course of the argument, put to the bar this question, What is your case? Is your case, that, by the alterations in the deed, a contract was created, changing the nature of the appellant's interest; or do you say, that, independently of the deed, such a contract arises out of the correspondence? An answer was given, which it is rather difficult, I think, rightly to apply. The learned counsel, feeling the difficulty of the question, and how much the case must suffer by entering into the inquiry, how the party proposes to make out his case, whether by the deed or by the correspondence, answers, that it is by both. Well, but a lawyer would hardly think of explaining a deed by writing a letter. That is not the mode of doing it. But, in truth, giving counsel the benefit of that, taking either the deed by itself, or the correspondence by itself, or uniting them, the case equally fails on the part of the appellant. I cannot discover one word in the deed which leads me to suppose, that those who executed it had contemplated or intended that a life interest only in an annuity was to be changed for an interest in the capital sum at the expense of one of the other parties to the deed; because the fact of there being at that time no children, as there are none now, might easily lead Mr. George Ferrie to expect that he would become entitled to the capital sum of that property which formed the security of the annuity in the event of the appellant dying without children. So important an alteration therefore as that, one cannot but think a lawyer would have felt it necessary to have made in terms much more express—at all events, he would have made it in terms perfectly consistent with the continuance of his interest as it then stood. A gentleman so altering the deed with the particular view to change the nature and the extent of his interest, but leaving the deed consistent with the preservation of the interest in its then condition, must be indeed a very unskilful person. But I own it does strike me, that although there has been an absence of candour and honourable feeling in this case, that absence is as much to be complained of on the one side as the other. Nay, it is more apparent on the part of the appellant than of the respondent.

Your Lordships will recollect, that the respondent wrote back in answer to the appellant's letter—"I decline to enter into a detail of your father's will." And observe what it was that elicited that remark: It was a statement as to their father's supposed wish and intention in framing the settlement,—the father having said that he gave the son a life interest only in the annuity, but that he meant at the same time to place him in as good a situation as the rest of his children who had an interest in the capital of the estate or capital sum. In answer to a remark to that effect, and to the suggestion, that the father, if then alive, and making a will, would have introduced stipulations into it of a totally different import, and more advantageous to the appellant, and that, therefore, the respondent should give effect to what is supposed would have been the father's intentions and wishes, the respondent says—"I decline to enter into any detail of my father's will;"—and this when, according to the evidence of Mr. Atherton, they are writing repeatedly for an express assent and acquiescence.

It appears to me, that, taking the whole correspondence together, the parties stood in this position—The respondent was anxious not to commit himself by any acquiescence in the proposal made. The appellant thought that, by his communication with Mr. Atherton, and the paper which was kept in America, he had laid the foundation of a claim, which, if it should be his interest at a future time to do so, he could bring forward and advance. But at the same time he would not give it the shape of a demand, which might stand in the way of carrying into effect the proposed arrangement in substitution of the will, for fear his interest might be damaged with regard to the annuity, in consequence of the estate not being sold, but being managed under the terms of the deed of settlement, which would lead to a postponement of the sale for 19 years, and give rise to the probable loss of so much as would render his annuity unproductive. I think, therefore, both parties have been deficient in candour in their conduct towards each other. I repeat, looking at the deed, I can discover nothing warranting any change of interest. Looking at the correspondence, I perceive undoubtedly, that gradually the claim and pretensions of the appellant advance, and that the allegation with respect to stipulations and conditions at the time of the execution as if the deed were to be regarded only as binding in case certain conditions

were complied with, is put more strongly forward. I say I observe that such a claim advances very much after the object has been attained by the sale of the estate, and a considerable portion of the property realized: but I cannot imagine that there is any good foundation for the argument, that, at the time the deed was executed, this was in truth made a condition. For what do I find? They are constantly, as they say, writing for an acquiescence. If it was in the deed, the deed itself would be a proof of the acquiescence. There required nothing else. But besides that, while they are complaining that they can get no answer, in effect, nay, in terms, Mr. Atherton writes, "If you acquiesce, as I hope you will, and recommend you to do, let Messrs. Peebles and Campbell prepare an agreement and send it out." And this is not answered. No such agreement is prepared. Another letter says, "If things turn out so-and-so, I do not wish to alter it from the way in which it now stands." How did it then stand? If it stood as is now pretended, that observation would have had no place; but the whole correspondence shews that it was never understood that the respondent had expressed any acquiescence in the alterations, except so far as receiving the deed, and acting upon it, went. But receiving the deed as he did, that deed did not import any such alteration, and nothing was sent with the deed which could prevent the parties duly executing the trust, or powers I should rather say, given by the deed.

It appears to me, therefore, that the deed itself is inconsistent with the claim now set up on the part of the appellant. The appellant has utterly failed in shewing that any amendments which were at any time made, were acquiesced in by the respondent in favour of the claim which is now set up; and the repetition in his letter, that there were conditions and stipulations at that time, is utterly inconsistent with any condition or stipulation by which it was intended that the other parties to the deed should be bound. When I look at the document which was sent with the deed signed by both parties, and which is a document purporting to explain why and how, and to what extent, they had made alterations, that document is entirely silent on the subject; and I cannot therefore give any effect to that private document, which the parties framed as between themselves, and which appears to me to be open to very many remarks. And it is remarkable that Mr. Atherton writes, and that in many instances, that the deed had been altered in the way in which they thought necessary. I find the way which they thought necessary is the document to which I have before referred, which is a document calling for much more attention and respect than many of the others which are to be found in this case.

I repeat, therefore, that after having attended to all the arguments which have been urged at the bar, fortified as they are by the concurrence of three very learned Judges, I still think that the four Judges who differed from them, have taken the more correct view of the case, and that the motion which has been made by the Lord Chancellor, that your Lordships should dismiss this appeal, is a motion to which it would be advisable for your Lordships to agree.

Mr. Anderson.—I hope your Lordships will not give the costs of this appeal. Your Lordships see that three of the Judges were in our favour; there was the narrowest possible majority against us.

LORD CHANCELLOR.—On what ground those learned Judges were in your favour, I cannot conceive.

Interlocutor affirmed with costs.

Second Division—Thomas Deans, *Appellant's Solicitor.*—T. W. Webster, *Respondent's Solicitor.*

NOVEMBER 30, 1852.

PETER FERRIE, *Appellant*, *v.* GEORGE FERRIE and FERRIE'S TRUSTEES, *Respondents.* (NO. 2.)

Heritable and Moveable—Conversion—Settlement—Construction—Trust Settlement. *A testator by trust deed directed that no part of his heritable property should be sold till his eldest grandchild, if any, should attain* 21, *or, if none, then till* 19 *years after the date of the deed; and then the trustees were to convey all the property to the children in certain proportions. The trustees, having declined to accept the trust, all the children by deed agreed that part of the heritable property should be sold at once, which was done to pay debts, and the rest held in trust for* 19 *years, and then divided.*

HELD (partly affirming judgment), *that the deed of agreement operated at once as a conversion of the heritable into moveable estate, except as to the portion to be held in trust, and the rents of this portion were heritable till a sale actually took place.*[1]

---

[1] See case immediately preceding; also previous report, 23 Sc. Jur. 219. S. C. 24 Sc. Jur. 52.