the same thing. It is alleged that the pursuer had ascertained, by inquiries of his own from an accountant extrajudicially employed, that the report which had been made about the rents was by no means correct, and the pursuer says that he instructed Mr Mackersy to get a judicial remit to an accountant to report on this matter to the Court; but this he neglected to do. Without getting a remit in conformity with these instructions, as the pursuer alleges, Mr Mackersy prevailed on the country agent to consent to the amount of rents being adjusted by counsel—that is to say, by the counsel on each side. Mr Pattison was made fully aware of the pursuer's wishes, and yet, notwithstanding, he went on with the counsel on the other side to adjust the amount of rents for which Lindsay, the trustee, was to account. This is set out in the 12th article of the condescendence—[*reads* ut supra].

Then it is said that the authority was withdrawn, and that Mr Pattison was made aware of the withdrawal, yet that he went on to adjust the amount of rent for which Lindsay, the trustee, was to account. Now, here again there were several courses open. It was quite possible to have an inquiry, and to a certain extent there had been inquiry. Whether it was possible in the circumstances to carry any inquiry further we have not the means of knowing, but it was a very proper question to be settled by adjustment—there is no doubt about that—and that the counsel upon both sides should meet together and consider the matter upon fair and equitable grounds, and fix the amount for which the defender, the trustee, should be liable to the pursuer, was certainly a very advantageous and convenient mode of proceeding. That that was within the power of counsel, after the exposition which I have given regarding their powers, I do not suppose anybody can doubt. Mr Pattison was not only *bona fide* exercising his right, but he was doing it for the benefit and advantage of his client.

Now, these are really the whole grounds of action, and it is needless to advert further to them. They are stated in a very pleonastic way, but they resolve themselves simply into this. The conduct of the case was in the hands of Mr Pattison, who was entitled to decide what was to be done in regard to the whole of these matters. He did decide, and instructed Mr Mackersy to act according to his advice and direction. Mr Pattison himself is not answerable for the exercise of his own judgment in these matters; and Mr Mackersy, as agent, is not answerable because he acted under the instructions of Mr Pattison. Therefore I am clearly of opinion that the interlocutor of the Sheriff-Substitute, and the Sheriff affirming it, were just and well founded.

Lords Deas, Ardmillan, and Mure concurred.

The Court adhered.

Counsel and Agent for Pursuer (Appellant) Party.

Counsel for Mackersy (Defender and Respondent)—Burnet. Agent—George Begg, S.S.C.

Counsel for Pattison (Defender and Respondent) — Dean of Faculty (Watson) — Black. Agent—William Saunders, S.S.C.

Friday, June 30.

FIRST DIVISION.

[Lord Rutherfurd-Clark, Ordinary.

CUMSTIE *v.* CUMSTIE'S TRUSTEES.

Fee and Liferent—Destination—"Heirs whomsoever"—Fiduciary Fee.

Certain heritable property was disponed "to A, B, and C (three brothers), equally betwixt them in liferent, for their liferent use allenarly, and the respective heirs whomsoever of the said A, B, and C, equally betwixt them in fee, heritably and irredeemably:"—*Held*, in a question between C, claiming as the immediate younger brother of B, and B's trustees, that B's right was a mere liferent, without any power of disposal—*diss.* Lord Deas, on the ground that the words "liferent use allenarly" were inserted to protect the fee for issue of B's body, and since they had failed, the destination over to his heirs whomsoever implied a fee in his person.

Observations on the case of *Newlands*.

On 23d August 1843 the late William Cumstie acquired from a family of the name of Bayne certain heritable subjects in Oban, and took the disposition in favour of himself, his wife, three of his sons and their heirs, in the following terms:—"To and in favour of the said William Cumstie and Mrs Jean Harriot or Cumstie, his spouse, and the longest liver of them two in liferent, for their liferent use allenarly, and after the death of the longest liver to and in favour of James Cumstie, merchant in Oban, Arthur Cumstie, merchant there, and Alexander Cumstie, merchant there, equally betwixt them in liferent, for their liferent use allenarly, and the respective heirs whomsoever of the said James Cumstie, Arthur Cumstie, and Alexander Cumstie, equally betwixt them in fee, heritably and irredeemably." Infeftment followed thereon in favour of the respective parties in liferent and fee, in the precise terms of the destination. Certain other heritable subjects in Oban, held by the said William Cumstie under a feu-charter granted by the Marquess of Breadalbane in favour of William Cumstie and his heirs and assignees, he disponed in terms of the following destination:—"To and in favour of myself and Mrs Jean Harriot or Cumstie my spouse, and the longest liver of us two, in liferent for our liferent use allenarly, and after the death of the longest liver to and in favour of James Cumstie, merchant in Oban, Arthur Cumstie, merchant there, and Peter Cumstie, merchant there, my sons, equally betwixt them in liferent for their liferent use allenarly, and the respective heirs whomsoever of the said James Cumstie, Arthur Cumstie, and Peter Cumstie, equally betwixt them in fee, heritably and irredeemably." Infeftment followed upon this disposition also in favour of the parties in liferent and fee respectively in the precise terms of the destination. William Cumstie, the purchaser of the two properties, died in November 1852, and Mrs Jean Harriot or Cumstie died a few days after her husband. They were survived by their four sons named in the two destinations. The first subject was thereafter liferented by

James, Arthur, and Alexander Cumstie, and the second by James, Arthur, and Peter Cumstie. Arthur Cumstie, who was liferented in one-third of each of the subjects, died in September 1874, leaving a widow but no family, and the question in this action related to the fee of the one-third of the two subjects liferented by him. By his trust-disposition and settlement, dated 12th June 1872, and registered in the Books of Council and Session 7th October 1874, the said Arthur Cumstie conveyed to the defenders, "heritably and irredeemably, All and sundry lands and heritages, debts, heritable and moveable, and whole goods, gear, and effects, and in general my whole means and estate, heritable and moveable, real and personal, of whatever nature or denomination, or wheresoever situated, at present belonging or addebted, or which shall belong or be addebted to me at the time of my death, or the succession to which after my death I have or may have power to regulate, together with the writs and evidents of the said heritable estates, and the whole vouchers and instructions of my said moveable estate."

The pursuer Alexander Cumstie, as being the immediate younger brother and heir whomsoever of the deceased Arthur Cumstie, claimed the shares in question, raised this action of declarator, and pleaded,—"The pursuer, as heir of line of the deceased Arthur Cumstie, is entitled to the fee of the subjects in question in respect that —(1) Under the destinations contained in the deeds of conveyance libelled the said Arthur Cumstie was merely a fiduciary fiar, his heir of line being the beneficial fiar and disponee. (2) Even if the said Arthur Cumstie was vested with the fee so as to open the same to the diligence of his onerous creditors, he was not entitled gratuitously to defeat the right of succession conferred upon his heirs, and therefore the conveyance of the said subjects by his trust-settlement was inept."

The trustees pleaded—"The defenders, as trustees of the deceased Arthur Cumstie, are entitled to absolvitor from the conclusions of the summons, in respect that on a sound construction of the dispositions of the subjects mentioned in the summons, the said Arthur Cumstie was fiar of the subjects conveyed by said deeds, or at least had right to nominate, and has by his trust-disposition and settlement nominated the heirs to succeed to said subjects."

The Lord Ordinary pronounced the following interlocutor and note:—

"*Edinburgh*, 18*th December* 1875.—The Lord Ordinary having considered the cause, repels the defences: Finds and declares in terms of the conclusions of the libel: Finds the defenders, Arthur Cumstie's Trustees, liable to the pursuer in expenses: Allows an account thereof to be lodged, and remits the same to the Auditor to tax and report.

"*Note.*—The only defenders who have appeared are the trustees of Arthur Cumstie. They maintained that from legal necessity Arthur Cumstie was absolute fiar of a *pro indiviso* third of each of the two properties mentioned on record, or that if he was fiduciary fiar there was no restriction in the trust, inasmuch as he held for such persons as he might appoint to be his heirs. The Lord Ordinary cannot adopt either of these views. He thinks that Arthur Cumstie had a bare right of liferent only, and that his trust-settlement was not effectual either as a conveyance of the property or as a nomination of heirs. The Lord Ordinary has therefore given decree of declarator as concluded for."

The defenders reclaimed, and argued—There is no possibility of holding that Arthur Cumstie was fiduciary fiar. That character can only be held by a parent for children. The destination here to heirs whomsoever is so wide that the principle which ruled the cases of *Newlands* and *Allardice* cannot be extended to it. There must of course be a fiar, and in these circumstances Arthur Cumstie must be held to be absolute fiar. In all the cases in which the character of fiduciary fiar has been given to the liferenter there has been some *persona prædilecta* following him in the destination for whom he was to hold in trust; there is no such *persona* here, and there is no more room for supposing William Cumstie to have intended any one in particular to become fiar than for supposing that he intended to allow his son to nominate the fiar. There is no one here to say as against Arthur Cumstie that he is fiar. In an entail when the succession opens to heirs whatsoever the entail is held to be at an end, for there is no longer a *successio prædilecta*, and the principles applicable there are also applicable to such a case as this. To hold that there was a mere liferent here would be to legalise a species of entail without its fencing clauses.

Authorities—*Newlands* v. *Newlands' Creditors*, M. 4294, 8 Ross' Leading Cases, Land Rights, 634; *Allardice* v. *Allardice*, Ross, 655; *Primrose* v. *Primrose*, 16 D. 498, (opinions of Lords Rutherfurd and Deas); *Ramsay* v. *Beveridge* (Lord Deas' judgment), 16 D. 764; *Tod* v. *M'Kenzie*, 1 Rettie, 1203.

Argued for Alexander Cumstie—The principle is, that you are to give effect to the intention of the granter of the deed, and if those who are *nominatim* constituted fiars are not in existence, the *nominatim* liferenter is held to be fiar. Where the fiars are children *nascituri*, the fee in the parent, necessary to prevent the fee being *in pendente*, is merely fiduciary, if the intention of the granter has been made apparent by the use of the word "allenarly." That principle as to children *nascituri* has been extended to children *nati* but not yet in a position to take by the cases of *Allardice* and of *Ferguson*, 2 Rettie 627. The force of the word "allenarly" in limiting the liferenter's right is not to be overcome. The only reason suggested here for setting aside the plain intention of the granter as to Arthur Cumstie's liferent is that the destination to "heirs whatsoever" is no guide to the granter's wishes as to the ultimate fiar. But that objection will apply to a destination to the heirs of the body, which was the destination in *Ferguson's* case, for they cannot be ascertained till the death of the liferenter. The law in entail cases is not applicable here, for there the expression "heirs whatsoever" indicates an abandonment of a *successio prædilecta* and a desire to return to ordinary rules; here the destination practically is to heirs of the body, whom failing, to heirs of line. The argument on the other side must go this length—"The heirs of the body cannot take except by their father's destination, because they have

been coupled with others;" the truth is, however, that the presumption of a fee in the parent weakens with every step that the children are removed from him, for it is only in virtue of his position as parent that he has a fiduciary fee. The case of *Newlands* authoritatively settled that the word "allenarly" limits the right of the life-renter to a bare liferent, and leaves it out of his power to defeat the destination over. The views of the minority were influenced by the fact that that was a case with creditors; between creditors and gratuitous disponees, as here, there must always be a broad difference, and therefore the reasoning even of the minority is inapplicable to this case.

Authorities—*Harvey* v. *Donald*, 26th May 1815, F.C.; *Mein* v. *Taylor*, 5 Shaw 779 (Lord Corehouse's opinion); *M'Donald* v. *M'Lauchlan*, Ross' Leading Cases, Land Rights, 630; *Dundas* v. *Dundas*, 2 Shaw 145, Ross 671; *Wellwood's Trustees* v. *Wellwood*, Ross 673; *Mountstewart* v. *Mackenzie*, M. 14,903; Duff on Feudal Conveyancing, sec. 243, p. 320–21.

At advising—

Lord Ardmillan—I am not aware that there is any question—certainly not any important question—of fact involved in this case. The question of law involved, raised on the construction of the titles flowing from the late William Cumstie, is very important. The subjects in dispute are heritable, and the competition which has arisen relates to the share of the late Arthur Cumstie in these heritable subjects situated at Oban. There are two subjects, but the language of the titles is substantially the same in regard to both. William Cumstie, merchant in Oban, died in November 1852. He acquired by purchase, from one David Jardine, one of the two subjects, and the other he acquired by feu-charter from the Marquis of Breadalbane. In regard to both subjects the title is taken or granted to and in favour of William Cumstie and Jean Harriot or Cumstie, his spouse, and the longest liver of them, in liferent for their liferent use allenarly, and after the death of the longest liver the one subject is conveyed to James, Arthur, and Peter Cumstie, sons of William, and the other subjects are conveyed to James, Arthur, and Alexander Cumstie, sons of William. In both cases, and in regard to both subjects, the conveyance to these sons is "equally betwixt them in liferent, for their liferent use allenarly, and the respective heirs whomsoever" of the three sons respectively named in the said deeds. Infeftment followed on both dispositions in favour of the parties in liferent and fee respectively, in terms of the destination. Mrs William Cumstie, the wife of the granter of the deeds, died a few days after her husband. They were survived by the four sons named.

Arthur Cumstie, who in terms of the deeds had a liferent right allenarly in one-third of each of the subjects, died in September 1874, leaving a widow but no family. Alexander Cumstie, the pursuer of this action, was at the date of Arthur's death, and is now, the next younger brother and heir-at-law of the deceased Arthur Cumstie, and he has been served heir of provision to him accordingly.

By trust-disposition and settlement dated in June 1872, Arthur Cumstie conveyed to the defenders, as trustees, his whole heritable and moveable estate. The question now before the Court is raised in a competition between the pursuer, as brother and heir-at-law of Arthur Cumstie, and the defenders, as trust-disponees of Arthur Cumstie. The point of law involved is, Whether the subjects in Oban belonged to Arthur Cumstie in fee, and were thus effectually disposed of by him? or, Whether they belonged to Arthur Cumstie only for liferent, and for liferent use allenarly, and could not be disposed of by him?

There is no doubt that this question is attended with difficulty. Many interesting and important authorities have been quoted to us, and very many decisions are in the books closely touching and instructively illustrating the general point involved, though not the precise point at issue.

William Cumstie, the father of the pursuer and of Arthur Cumstie and the other brothers, was the proprietor in fee of one of these subjects, and the purchaser of the other, taking the title as he thought fit. It has never been disputed that William Cumstie and his wife, apart from his prior ownership, had under these deeds and in terms of this destination a liferent right allenarly. Then the conveyance is on the death of the longest liver of the two spouses, to the three sons equally in liferent, for their liferent use allenarly, and the respective heirs whomsoever of each. There is no clause of survivorship. The heirs whomsoever of each deceasing son take the fee whenever the liferent of their father ceases. The Lord Ordinary has decided the question in favour of the pursuer—the heir whomsoever — the heir-at-law—the immediate younger brother, of Arthur. His Lordship's opinion is that Arthur had a bare right of liferent only, and that his trust-settlement was not effectual either as a conveyance of the property or as a nomination of heirs.

I concur in this opinion. It appears to me clear that unless Arthur Cumstie had the fee—the true fee—the absolute fee—these trust-disponees from him can have no title. That the trust-disposition operated as a nomination of heirs has not been contended by the defenders, and could not be contended with success. The conveyance to trustees, however reasonably granted, was a voluntary alienation. Unless Arthur had such a right of fee as could have been attached by his creditors, he could not, in my opinion, legally and effectually execute a voluntary conveyance of his estate. No man can give away an estate which his creditors could not attach. If he could bestow it effectually he could not withhold it from creditors. I do not think that the creditors of Arthur could have effectually attached the fee of the estate, carrying it away from the heir, who is his brother, and might have been his son.

But then it is contended that, according to the terms of these deeds, and especially bearing in mind that the ultimate destination is to the heirs whomsoever of the respective sons, the right conferred on Arthur, though in words a liferent, must be considered as truly a fee, the true and absolute fee of the estate, entitling him and enabling him to dispose of it at pleasure.

After much anxious consideration of all the authorities touching this question I am satisfied that the defender's argument is not well founded.

Where a subject is conveyed to a father

in liferent and his children *nascituri* in fee, and where the word "allenarly" or some clearly equivalent word has not been used, it has been long settled that the fee is in the father, though he is termed liferenter in the deed. This has been so repeatedly decided that I need not detain you by referring to the authorities. The rule had been introduced in consequence of the feudal maxim that the fee cannot be *in pendente*, and that, the granter being divested, the fee can be nowhere else than in the liferenter, and thus a result, not always according to the intention of the maker of the deed, has been accomplished by the pressure of this nicety of feudal law. I am not surprised that some of the earlier judgments were given with hesitation; but the point is now completely settled.

Where, however, the right of the person to whom the liferent is given is expressly qualified and limited by the words "for liferent use allenarly," the question is very different. In my opinion the person whose liferent is thus qualified by the words "for liferent use allenarly" is not the fiar—by which I mean is not the substantial and absolute fiar with the power of a fiar to dispose of the subjects. I shall afterwards advert to the recognition of a fiduciary fiar. In the meantime I may observe that a fiduciary fee would not support the defender's plea, because a fiduciary fiar is a trustee, and cannot effectually alienate the subject of the trust.

I think the word "allenarly" was selected because of its simplicity and its power. I read the word as creating a very marked and stringent limitation of the word "liferent," as meaning "only a liferent," "a mere liferent," or, still more accurately, "a liferent and nothing more," which is, I think, the true meaning of the expression. A feudal exigency arising from the rule that a fee cannot be *in pendente* had led to the result that in certain cases a conveyance or destination in liferent was construed as conferring a fee on the person called a liferenter. But the addition of the word allenarly excluded such a result, and fixed the character of the liferenter, by declaring it to be only a mere liferent,—a liferent and nothing more. Any attempt to found on the feudal maxim that a fee cannot be *in pendente*, so as to convert a right conferred as a liferent into a right of fee, is met and defeated by the force of the word "allenarly," because if the right be a liferent and nothing more it cannot be converted into a right of fee without violating the express words and clear meaning of the deed. It is the *enixa voluntas* of the maker of the deed that the right of liferent conferred with the qualifying word "allenarly" shall be a liferent and nothing more.

The views which I have now ventured to express are, I think, in accordance with a series of decisions subsequent to the case of *Frog's Creditors*, 25th November, where the successful argument for the creditors was, that "if the disponer had intended to give the parent a bare liferent she would have used the word 'allenarly.'" This decision in the case of *Frog's Creditors* was given with regret, and has been regretted frequently since. The case of *Newlands* v. *Newlands' Creditors*, of which there are several reports, and one of much interest by Mr Ross, is too well-known to render it necessary for me at present to do more than very briefly advert to it. The case was most deliberately considered, and the effect of the word "allenarly" as qualifying and limiting the right of liferent was, I think, fully recognised. There was a difference of opinion, and, in particular, one very distinguished Judge differed from the judgment, but in so far as regards the meaning and effect of the word "allenarly," the judgment was clear, and it was affirmed. I am humbly of opinion that the authority of the decision has never since been shaken, and must now be held as conclusive. When the liferent has been by force of the qualifying words restricted so as to limit it to a bare liferent, then the doctrine of a fiduciary fee for the benefit of those to whom the beneficial fee was destined came to be introduced, and in the case of *Newlands*, and in the case of *Allardice* and other cases, effect was given to it. In the case of *Allardice* there was a succession of liferenters allenarly, and the heirs of two sons in succession were declared to be fiars, and yet the law laid down in the case of *Newlands* was applied. In many subsequent cases the authority of these decisions has been fully recognised. Eminent lawyers have expressed their concurrence and approval. The opinion of Lord Corehouse in *Mein* v. *Taylor*, on 8th June 1827, 3 Ross' Leading Cases, 696, is most instructive. His judgment was adhered to by this Court and in this Division, and was affirmed in the House of Lords. This is what Lord Corehouse says—"When a conveyance is made to one in liferent and his children unnamed or unborn in fee, it is settled law that the fee is in the parent, and that the children have only a hope of succession, to prevent the infringement of the feudal maxim, that a fee cannot be *in pendente*. It is perhaps to be regretted that the point was so settled, because the plain intention of the maker is in consequence often sacrificed to a mere form of expression, and the feudal maxim might have been saved by supposing a fiduciary fee in the parent, as is done when the word liferent is restricted by the word allenarly or only. Upon this point, however, it is too late to go back, but certainly the principle ought not to be extended to cases which have not yet been brought under it. In the present case the subjects are not disponed to the Messrs Taylor in liferent and their children in fee, but, on the contrary, to the Messrs Taylor in fee, because the obligation to infeft is in favour of them and their heirs and assignees. The question therefore is, Whether the fee so given is absolute or qualified?—a question to be determined by the ordinary rules of construction. It appears clearly that it is a qualified or fiduciary fee, because it is granted under certain burdens and conditions. The disponees are required to divide the property into twelve equal shares, four and a-half of which are to be held by James Taylor in liferent, one by Robert in liferent, and four and a-half by William in liferent, and it is declared that at the death of each liferenter his share or shares shall belong to his children. The mode of division is also distinctly pointed out. In the case of James Taylor, who had children in existence, the disponees, or the survivor or survivors, are specially directed to divide the shares of the two daughters who are named equally betwixt them, and to secure them to the ladies in liferent and their children in fee; and particular directions are also given with

regard to the division of the shares of Robert Taylor and William Taylor, all which implies that the disposition to the Messrs Taylor is a trust to enable them to execute certain purposes. But where a fiduciary fee is given to a person, and it is directed that he himself shall enjoy the liferent, and still more clearly when a fiduciary fee is vested in several persons collectively and the survivor or survivors, and each of them separately is to have a liferent, such liferent must be construed a naked usufruct, in the same manner as if it had been qualified by the word allenarly; see the case of *Seton* v. *The Creditors of Hugh Seton*, March 6, 1793." This opinion of a most distinguished lawyer is extremely interesting; I think it cannot be doubted that, both as regards the effect of the word "allenarly" and as regards the recognition of a fiduciary fee, the decision in the case of *Newlands* is law at this day. It is to be observed that it was a case with creditors who attempted to attach the interest of a liferenter with a fiduciary fee. The creditors did not succeed. The fiduciary fee was a trust. Now, I have already explained that unless creditors could attach the right of Arthur Cumstie, he himself could not alienate the subject by his voluntary deed. Therefore, on this part of the case there can, I think, be no doubt that the decision in the case of *Newlands* is conclusive, and that the trust disponees of the liferenter cannot succeed. The meaning of William Cumstie's deed is not doubtful, and it is according to justice and common sense that his intention should receive effect.

But then it is maintained that the destination of the fee to the heirs whomsoever of Arthur Cumstie prevents the application of the law settled in regard to a liferent limited to a liferent allenarly. It is rightly urged that a destination to heirs whomsoever is just a destination to heirs as law may direct. That is quite true. A succession of heirs whomsoever is not a *successio predilecta*. It is a *successio provisione legis* not *provisione hominis*. The flow of succession along the channel of heirs whomsoever is governed by law and not by the will of the maker of the deed. Thus there is no doubt that an entail is at an end when we come to heirs whatsoever. On this point there is abundance of authority. But it does not appear to me to follow from the admission of this law in regard to succession *provisione leges* that the heir-at-law, called under such a deed as this, is at the mercy of the party called as liferenter and liferenter only. I fully accept the authority of cases such as *Primrose* and many others in regard to a substitution in favour of heirs whomsoever. But that is not the question here. We have to deal with a question of liferent on which the meaning of the deed is not doubtful. The alternative is between the recognition on the one hand, of the liferenter, who is restricted to a liferent allenarly as being notwithstanding that restriction a real and absolute fiar, whose creditors could attach the estate and whose voluntary disposition could convey it,—and the recognition, on the other hand, of a fiduciary fee for the benefit of the heir-at-law. If Arthur Cumstie had had a child he would have been an heir whomsoever. The pursuer is his brother and his heir-at-law, and the trust-disponees of the liferenter are the only other competitors.

I appreciate the difficulty arising from the words "heirs whomsoever," for I have not been able to discover any case in which a fiduciary fee for the benefit of an heir-at-law—an heir whomsoever—has received effect. On the other hand, I am not aware of any case—and certainly none has been quoted to us—where it has been rejected; so the difficulty must be met on principle. In the case of children and grandchildren, and in the case of a succession of liferenters, the theory of a fiduciary fee has been accepted in order to prevent the consequence, the unreasonable consequence, of making a person fiar who is declared to be liferenter "allenarly." I can see no sufficient reason why it should not be accepted in this case, where the parties competing for the fee are the heir-at-law of the liferenter, to whom as heir whomsoever the fee is destined by the deed, and the trust-disponees of that liferenter, who, in respect of the restriction and limitation of his liferent, could not effectually grant the disposition. Unless Arthur was absolute fiar, the defenders can have no case. I cannot hold that he had an absolute fee.

A conveyance to A and his heirs whomsoever confers on A the fee. A conveyance to A in liferent and his children *nascituri* in fee, has also been found to confer on A the fee. This result was effected by force of a feudal maxim of Scottish law which forbids the fee to float on poised wing till it finds fitting settlement, and which demands that from the first the fee shall have a local habitation as well as a name.

The enforcement of this maxim by converting the liferent into a fee was not according to the intention of the maker of the deed. It was the triumph of a legal subtlety over the intention of the maker of the deed, and this was judicially felt and acknowledged in several of the earlier cases. But when by the use of the word "allenarly" liferent was restricted and limited as I have already explained, the converting of that limited liferent into a fee would be clearly and strikingly opposed to intention. Some remedy was required to sustain intention, to disarm subtlety, and to vindicate the essential equity of law. This remedy was found. A new subtlety was evoked to redress the balance disturbed by the regretted enforcement of the former subtlety. A fiduciary fee in the person of the liferenter was recognised in order to sustain the intention—as I think the clear intention—of the deed. A liferenter declared expressly to be a liferenter allenarly can never be held to be an absolute fiar. He is held to be a trustee, with only so much of the character of a fiar as is required to sustain the trust. He cannot alienate the estate, nor can the fee be attached by his creditors.

Accordingly, there has been no judgment and no authority presented to us for refusing effect to the word "allenarly."

I am not aware of any decision—I really do not think there has been any decision—in which a person to whom a subject was disponed in liferent for liferent use allenarly, was notwitstanding that limitation found to be fiar—by which I mean absolute fiar, having the power to alienate the subject. The case of *Falconer* v. *Wright* is not a precedent or authority on this point. No doubt his liferent was limited by the word "allenarly," but then he was himself the disponer of the lands, and the infeftment on the conveyance to himself

in liferent, for his liferent use allenarly, and to his children in fee, was blundered; no mention of the children or of the fee being in the infeftment. In these circumstances the creditors of the father attached the lands, and the case is put by Lord Mackenzie on these grounds:—His Lordship particularly finds that "the sasine taken on the contract and disposition is so expressed that it cannot have the effect of conveying the fee out of the said Robert Macarthur, or even changing it into a fiduciary fee in his person." A similar decision, and on similar grounds, was pronounced in the case of *Spalding* in 1847. Then the case of *Wilson* v. *Reid*, 4th December 1827, was quoted to us. I do not think that it supports the defender's pleas. The question related to the disposal of the estate of Mrs Wilson. But she, though disponing to herself and her husband in conjunct fee and liferent, for their liferent use allenarly, and to the heirs to be procreated of the marriage, was herself at the date of the marriage the absolute and unlimited fiar, and was so described by Lord Balgray, who rested his opinion specially on that circumstance. There were no children of the marriage, and the decision rested mainly on the fact that her original fee was never taken out of her. The judgment was unanimous, and turned on this specialty. Besides, that deed was to a large extent *mortis causa*.

The more recent cases of *Tod* v. *Mackenzie* and of *Ferguson* do not seem to me to be applicable to the precise point before us. I may be permitted to say that I have no doubt of the soundness of both decisions. But the circumstances here are different, the deeds are different, and the question is different. Either we must here decide that a right, limited and restricted to a liferent and nothing more by the force of an unambiguous expression, adopted and used for the purpose of restriction and limitation, and now held to be a *vox signata*, is nevertheless and in spite of that restriction not a right of liferent but a right of substantial and absolute fee; or we must extend one step further the principle of fiduciary fee by applying it to the case of an heir-at-law to whom the fee is disponed by the clear words of the deed.

Between these two alternatives I cannot say that I have not had some little hesitation, for the question is certainly difficult, and I am aware that views differing from mine are held in a quarter which I highly respect, but I have not been sparing of time or labour in studying the question and the authorities, and the result is, that according to the best of my judgment I concur with the Lord Ordinary.

Lord Mure—I concur in the result of the opinion that has just been delivered, and I have very little to add to what has fallen from Lord Ardmillan with regard to the series of decisions that he has referred to as regulating the law as to destinations of this description. The destination in this case is, I think, substantially in the terms of the destinations in the early cases of *Newlands* and *Allardice*, already referred to. It is a destination first to Mr Cumstie and his wife in liferent for their liferent use allenarly, and after the death of the longest liver to and in favour of James Cumstie, Arthur Cumstie, &c., equally betwixt them in liferent, for their liferent use allenarly, and the respective heirs whomsoever of the said James Cumstie, Arthur Cumstie, and Alexander Cumstie, equally betwixt them in fee, heritably and irredeemably. Now, there is here no express destination to the children of either of these four liferenters. But I apprehend that under the words "heirs whatsoever" the children are necessarily included as children to be born. Now, the question that was put to us very distinctly by Mr Reid in opening was, whether the doctrine laid down in the cases of *Newlands* and *Allardice* could be extended to the case where the fee was taken directly to the heirs whatsoever, as here. The circumstance that the destination is taken to heirs whatsoever must necessarily have been before the Court in disposing of these earlier cases of *Newlands* and *Allardice*, for in each of these cases, after the destination to liferenters in their order, they concluded with a destination to the heirs whatsoever. Yet, in looking over the reports of these decisions I do not find that there was any difficulty raised by any of the Judges from the circumstance of that being the ultimate destination. But with that destination standing before them, no argument was raised against the result that the majority of the Court in these cases arrived at, from the circumstance of these words occurring in the destination. So that in these circumstances the question we have here to decide is, whether there is such a difference here as can warrant us in holding that from the failure of the children of Arthur Cumstie he was (as is pleaded in the defences given in for him) in the position of a party who, in respect of a feudal necessity, had become the fiar of the subjects? That is the first plea in law for the defenders; and there is a second plea in law, that he was a fiduciary fiar with a right to nominate the heirs to succeed to the subjects. No authority was referred to in support of that second proposition, as to there being such a fiduciary fiar with the right to nominate the heir to succeed him; and in the absence of all authority on that point we have simply to consider the question, What was the nature of the right that Arthur Cumstie held? His right is described as that of a liferenter allenarly. He was fiduciary fiar beyond all question, according to the earlier decision, for any children who might be born to him. The question then resolves into this—Did the non-existence of children at the death of Arthur Cumstie put an end to the fiduciary fee which had been created in him by the terms of the deed, and make the fee absolute in his person? that is to say, Did the fact of his having no children change the nature of his right to that of absolute fiar from that of a liferenter allenarly? Now, I am unable to find any authority for any such transformation of a right. I conceive that, according to the decision in *Newlands* and *Allardice*, a party who is described as a liferenter allenarly is a liferenter and nothing more; that he remains a liferenter holding as fiduciary fiar for the heir who may be called on to succeed him at his death, if there is no other person named, but that by the decisions in *Newlands* and *Allardice*, as approved of by Judges of the greatest eminence—Lord Ardmillan has referred to some of them—in subsequent cases, a party so situated never has any other right in him but that of a liferenter allenarly with a fiduciary fee, and that he never can trans-

form that fiduciary fee into an absolute fee, or make it a fiduciary fee with a right to nominate heirs. In addition to the opinion of Lord Corehouse, referred to by Lord Ardmillan, I find that in the case of *Hutton's Trustees* the late Lord Justice-Clerk Hope and the late Lord Moncreiff, in dealing with the matter, described that as the appropriate and technical term for constituting a liferent; and it having been so constituted a liferent by that appropriate and technical term I do not think he can be held to have had any disposal of the subjects. We had occasion to consider this question not very long ago in the case of *Ferguson*, referred to by Lord Ardmillan, and also the case of *The Honourable Mrs Maule* the other day, under an entail. In that case the words were children of the marriage, and there was no specialty there. But in *Ferguson's* case there was a succession of liferenters called, and the difficulty occurred to us whether there might not be some different rule applicable to a case of that sort; but all our difficulties in the case of *Ferguson*, at least all the difficulties I had, were obviated by an examination of the terms of the conveyance and the opinions of the Judges in the case of *Allardice*, where there was a succession of liferenters, and where the ultimate destination was to heirs whatsoever. But the opinions of the Judges in that case, who had also dealt with the case of *Newlands*, and who had the greatest hesitation in that matter, are not unimportant in dealing with this question, for Lord Eskgrove says—"I remember in *Newlands'* case it was said that to support such deeds would be to authorise a series of liferents, and to introduce a new way of making an entail. Here we have an instance of it, but you did not think that a sufficient ground for setting aside the deed; you found that according to the principles of our law there must be a fee somewhere, and that the fee in the liferenter must be fiduciary; and I do not see how I can refuse my assent to the rule in this case also. There is no liferent given to any not named; and although there be a succession of liferenters, yet if you find that there can be one liferenter possessed of this fiduciary right I see no difference betwixt that case and the present." And there the fiduciary fiar with no children was held to possess as fiduciary fiar with a succession of liferenters, and with the words heirs whatsoever ultimately called; there is not an observation to the effect that the words heirs whatsoever would make any difference in the matter. And Lord President Campbell, who was in the minority in the case of *Newlands*, says—"This differs from the case of *Newlands* in this respect, that the question here is with heirs, whereas in that case the question arose amongst creditors." In all questions with heirs or gratuitous claimants the destination must be strictly adhered to, and even had this question occurred with creditors I should have been of the opinion expressed in *Newlands'* case. Now, I conceive it to be perfectly settled by this series of decisions that the party so situated is a liferenter, and nothing more; and therefore I do not think that Arthur Cumstie, consistently with these authorities, can be held to have had any power to settle this right in the way that he has attempted to do.

Lord Deas—The late William Cumstie, merchant in Oban, and Jean Harriot or Cumstie, his wife, both died in November 1852. They had four sons—James, Arthur, Alexander, and Peter, all of whom survived them. In August 1843 William Cumstie purchased certain subjects in George Street and Argyle Street of Oban, and took the disposition in favour of himself and his wife, "and the longest liver of them two in liferent for their liferent use allenarly, and after the death of the longest liver to and in favour of James Cumstie, merchant in Oban, Arthur Cumstie, merchant there, and Alexander Cumstie, merchant there, equally betwixt them, in liferent for their liferent use allenarly, and the respective heirs whomsoever of the said James Cumstie, Arthur Cumstie, and Alexander Cumstie, equally betwixt them in fee, heritably and irredeemably."

The disposition contained a declaration "that it shall be in the power of the said William Cumstie and Mrs Jean Harriot or Cumstie, and the longest liver of them, at any time of their lives or of the survivor's life, or even on deathbed, to sell, alienate, and dispone the several subjects and others above described, contract debts thereupon, or even gratuitously to dispose thereof in the same manner, and as freely in all respects, as if the said several subjects and others had been disponed by these presents absolutely and irredeemably in fee to the said William Cumstie and Mrs Jean Harriot or Cumstie and the survivor of them."

James, Arthur, and Alexander Cumstie were three of the four sons of William Cumstie and his wife, although they are not so described in the deed. Infeftment followed on the deed in terms of the above-quoted dispositive clause in September, and was recorded in October, 1843.

On 25th January 1850 William Cumstie, on the narrative of "certain good and onerous causes and considerations," executed a disposition of certain other subjects belonging to him in Argyle Street and Tweeddale Street of Oban, the dispositive clause of which was in these terms:—"I hereby give, grant, alienate, and dispone from me, my heirs and successors, to and in favour of myself and Mrs Jean Harriot or Cumstie, my spouse, and the longest liver of us two, in liferent for our liferent use allenarly, and after the death of the longest liver to and in favour of James Cumstie, merchant in Oban, Arthur Cumstie, merchant there, and Peter Cumstie, merchant there, my sons, equally betwixt them, in liferent for their liferent use allenarly, and the respective heirs whomsoever of the said James Cumstie, Arthur Cumstie, and Peter Cumstie, equally betwixt them in fee, heritably and irredeemably, all and whole," &c.

In this deed the name of the disponer's son Peter is introduced instead of the name of his son Alexander in the other deed. The term of entry is declared to be Martinmas 1849. In all other respects the clauses of the two deeds seem to be identical, except that this deed does not contain the clause of reservation above quoted in favour of the spouses and the survivor of them. Infeftment followed on this deed, and was recorded in January 1850.

Upon the death of the spouses in November 1852, the sons entered respectively into possession of the subjects. Arthur died in September 1874, leaving a widow but no children. He left a trust-disposition and settlement, dated in June 1872

whereby he conveyed his whole heritable and moveable means and estate then belonging "or which shall belong and be addebted to me at the time of my death, or the succession to which after my death I have or may have power to regulate," to the present defenders, as trustees for the purposes therein mentioned, which may be shortly summarised as consisting, 1st, of the regulation of the rights of his wife and their children after his death, if they should have and leave any children; and 2d, a provision that, failing children, his wife, if she survived him, (which she has done) should liferent his whole means and estate, subject to payment of debts and legacies, (of which last it does not appear that he left any) and that the fee should be divided equally among his next-of-kin and their issue.

Arthur Cumstie's children were, of course, comprehended under the general description of his heirs whomsoever, and if he had left a child or children I do not doubt that it must have been held that a fiduciary fee had vested in him for behoof of such child or children. This, although not expressed, is plainly implied in the deed, and the destination is therefore, I think, to be read as if this had been expressed. It is only just and reasonable so to read the destination in a family deed, intended to regulate the succession of the granter amongst his descendants, which is the nature of both deeds here, although they are in an *inter vivos* form—the four sons having been, so far as it appears, the whole family of the spouses. I therefore read the destination in each of the deeds as running thus, viz., to and in favour of the granter and his wife and longest liver of them in liferent for their liferent use allenarly, and, after the death of the longest liver of them to and in favour of their three sons named in each deed respectively, equally betwixt them, in liferent for their liferent use allenarly, and the child or children born or to be born of the respective bodies of these sons, whom failing, the respective heirs whomsoever of these sons in fee.

In other words, so far as Arthur Cumstie's share is concerned it is to be held destined after the death of his father and mother, to him in liferent for his liferent use allenarly and the child or children born or to be born of his body, whom failing to his heirs whomsoever in fee.

Under such a destination I am of opinion that each of the sons, failing issue of his body, (and consequently Arthur as one of these sons) became fiar of his equal share of the subjects so conveyed, and might dispose of that share at his pleasure, either by *inter vivos* or *mortis causa* deed, subject always to the condition (which the law would imply if not expressed in the deed) that the deed was to take effect only failing issue of his own body.

The issue of Arthur Cumstie, the son, would necessarily have been at sometime the issue of the granter himself, and the deed cannot therefore reasonably be read without implying a fiduciary fee in Arthur, the son, for behoof of such issue, whatever may be said of the effect of the destination beyond. Suppose it had been argued in opposition to the claim of such issue that the issue could be in no better position than the heir whomsoever would have been, the answer would, I think, have been conclusive that the issue were entitled to the benefit of the presumption arising from nearness of blood, not only to their immediate parent but to their grandfather, the granter of the deed, by direct descent both from the one and the other, whereas the heir whomsoever might be a collateral, however distant, or possibly the Crown as *ultimus hæres*. The mere fact that the granter of the deed has comprehended both classes of heirs under one general description of heirs whomsoever could not have excluded the heirs of the body from the benefit of the protection of the fiduciary fee, however clearly it had been made out that no such protection had been extended to collateral or remoter heirs.

But while I thus concede readily that issue of Arthur's body would have been in the same protected position in which all the cases, from the case of *Newlands* downwards, have placed issue of the body under a destination to a parent in liferent for his liferent use allenarly, and his child or children, born or to be born, in fee, I desiderate either principle or authority for extending or applying that protection and restriction, so as to tie up the parent in a question with his own heir whomsoever.

The case is very different from what it might have been if the destination (or what in this case may fairly be called the destination over) had been in favour of the heir-male in general, or of any particular class of heirs or persons short of heirs whomsoever, whether described as a class or as individuals. Hitherto, all the cases in which the words "liferent allenarly" have been held to create a fiduciary fee, when otherwise the fee would have been absolute, have been cases of parents and children, and I do not choose to speculate unnecessarily as to how far the same principle might be held to sanction or create a fiduciary fee for the benefit of a specified class of heirs or persons, or for the benefit of one of such specified class of heirs or persons, although not an heir or heirs of the body. For the purposes of this case I shall assume, in the fullest manner, that in all such cases there would be a fiduciary fee for behoof of the person or persons, or heir or heirs, for whom the granter had thus shewn his predilection; still, I remain of opinion that there can be no fiduciary fee beyond such *persona prædilecta* for behoof of the heir whomsoever.

It would be quite a fallacious mode of reasoning to say that you first find it fixed by the words "liferent allenarly" that the *nominatim* disponee is a liferenter merely, and then you go on to inquire who else is the fiar. That would be against all feudal principle and against the rule followed in all the decisions in this class of cases. It is true that a conveyance in liferent allenarly, if no other words had followed, would have given Arthur Cumstie nothing but a bare liferent; but that would have been because the fee would have remained in *hæreditate jacenti* of his father, the granter of the deeds. The case becomes very different where the granter, as here, has parted out and out with the fee after the death of himself and his wife, and has added to the liferent a conveyance of the fee to the heirs whomsoever of Arthur Cumstie, the so called liferenter. You must consider both questions—the liferent and the fee—before you can determine either of them. If there be any difference in the order in which the two things ought to be considered, the law would rather give the

preference to the question of fee; for the feudal law imperatively demands a fiar, but does not at all demand a liferenter. The true view, however, is, that the one question cannot be solved without considering the other. What would be a bare liferent may be, and indeed in this class of cases must be, a fiar, if there is no other fiar.

Here the intermediate destination to Arthur Cumstie's issue, which was conditional upon their coming into existence, has failed entirely by his having no issue. The word "allenarly" was necessary to protect and preserve the fee for the issue if they had come into existence. If that word had not been used Arthur Cumstie would have been absolute fiar in a question with his own children. The word may, therefore, fairly be held to have served its purpose, without supposing that it was meant for a purpose never before attempted in any recorded instance, unless indeed in entails, and then attempted unsuccessfully. If this view were not of itself satisfactory or sufficient, the observation would remain, that as the last words used (viz., the destination to his heirs whomsoever) naturally imply a fee in the person of Arthur Cumstie, these must overrule and negative the effect of the prior words, which, if taken by themselves, might have limited his right to a liferent merely.

As Lord Brougham observed in the case of *Gordon* v. *M'Intosh*, H.L., April 17, 1845, 4 Bell's Ap. 121, 122, the word "allenarly" may be defeated in its operation by other words in the deed.

Of this we have an instance in the case of *Reid or Wilson* v. *Reid, &c.*, Dec. 4, 1827, 6 S. and D. n.e. 198, and F.C. The conveyance by Margaret Reid was to herself and her husband "in conjunct fee and liferent, for our liferent use allenarly, and to the heirs to be procreated betwixt us, the said spouses, whom failing" one-half to her own heirs and one-half to her husband's heirs; and this conveyance bore to be in consideration of a conveyance by the husband's father of a different subject containing a precisely similar destination. After the marriage had subsisted for twenty-seven years, and the prospect of issue was considered hopeless, and the husband, although still alive, was in bankrupt circumstances, the wife brought an action against the heirs-presumptive both of herself and her husband, concluding, *inter alia*, to have it found and declared that "the pursuer has the only good and undoubted title, not only to the liferent but also to the fee of the subjects belonging to her and conveyed as aforesaid."

The Lord Ordinary (Newton) found "that, on the principle of the case of *Newlands*, and the later cases founded on by the defenders, the right of the pursuer was, by her disposition of 14th May 1807, reduced to a liferent; at least, that if the fee remained in her person or that of her husband, it was a fiduciary fee for behoof of the children of the marriage, and failing them of the pursuer's heirs *quoad* the one-half, and of her husband's heirs *quoad* the other," and therefore assoilzied from the declaratory conclusions of the libel. But Mr Shaw's report bears—"The pursuer having reclaimed, the Court called on the counsel for the defenders to support the interlocutor, and, without hearing the counsel for the pursuer, unanimously altered"—the Lord President (Hope) observing, "It is quite impossible that the interlocutor can stand." The judgment, as the Faculty report shows, decerned and declared in terms, *inter alia*, of the declaratory conclusion of the libel.

It is true that in that case it was an important fact that the subject had originally flowed from the wife, and that accounts for the fee being found in her and not in the husband. But it will be distinctly understood that I am not citing the case as a precedent in the present case (for direct precedent I know of none, either the one way or the other), but as an illustration of the principle that the use of the words "liferent allenarly" is not conclusive of the right being a bare liferent, but that we must look beyond, and in the present case must consider carefully the effect of the destination which follows in favour of Arthur Cumstie's heirs whomsoever, before we can affirm that he is is a liferenter merely. It is not immaterial, however, as bearing upon the present case, to observe the ground on which Lord Balgray (no inconsiderable feudalist) placed his judgment in *Reid's* case, as reported in the Faculty Collection. After observing that the deed was both *inter vivos* and *mortis causa*, and therefore that it was important to attend to the previous rights of the parties—that is, of the husband and wife respectively—his Lordship said—"So far as regards the heirs of the marriage, the deed was onerous; but whenever the parties came to consider their heirs whatsoever, it was a deed merely *mortis causa*, to which their heirs could not make up titles without serving heirs; and therefore (his Lordship thought) that the fee of the subjects still remained with the pursuer."

It is not, however, upon any supposed repugnance between the restrictive words "liferent allenarly" and the destination which follows in favour of Arthur Cumstie's heirs whomsoever, that I rest my opinion in the present case. On the contrary, I think the two expressions are in this deed quite consistent, being applicable to two different contingencies,—the one, that of Arthur Cumstie having a child or children,—and the other, of his having none. The first of the two deeds was unskilfully framed in not expressing this more fully, and the conveyancer in the second deed obviously followed the model of the first. But the meaning shines out clearly enough. It is easy to understand that the granter should intend the fee to go to his own grandchildren subject to their father's liferent, so that they, as well as their father, might be reasonably provided for; but it is not easy to understand that the granter should intend to prefer his son's heir whomsoever, however remote, to his son himself, to exclude his son's widow, if he left a widow (as he happens to have done) from the benefit of her terce or of any provision her husband might wish to make for her failing their having issue, and likewise to exclude the son, if he resolved to live and die a bachelor or a widower, from all power to dispose of the estate conditional on his having no issue, in order to preserve it for some unknown heir whomsoever, who was not himself to be under any limitation, and might possibly be the Crown as *ultimus hæres*. I think that would be an irrational construction of the deed, or at least a construction in support of which we are not justified in applying, for the first time in the history of our law, the fiction of a fiduciary fee.

The use of the words "liferent allenarly" in the deed is quite sufficiently accounted for without putting upon the deed any such improbable construction. Arthur Cumstie might have had issue. Without the word allenarly his liferent would have been a fee, absolute and unlimited, in a question with his own issue. It was, therefore, necessary that the word should be used, but the purpose of using it is fully satisfied without supposing that, besides the protection of the issue, it was meant to serve a purpose to which it had never hitherto been applicable, and which, if really entertained, should have been made the subject of an ordinary trust-deed, in which the granter could have expressed his purpose in plain and intelligible language, and without the risk of being misunderstood.

The cabalistic word allenarly is no such favourite in the law of conveyancing as to entitle it to receive effect in a case like the present, contrary to all the presumptions of intention on the part of the granter arising from the law of nature as between parent and child. Prior to the case of *Newlands* it had been immemorially the established law of Scotland that a conveyance to an individual in liferent and his issue, born or to be born, in fee, where nothing more appeared, gave the fee to the parent. This is the undoubted law of Scotland still. It might have been better that this had never been so, but the general law could not be gone back upon at the date of the case of *Newlands* without unsettling the titles to many valuable estates, and what the Court did in that case was to sanction an exception to the general law, of the occasional hardship of which the case before them, where the estate was being carried off by the father's creditors, presented a strong instance, although, as a general rule, the hardship is really not so great as it seems, for all that has to be done is, in place of resorting to the fiction, to execute a trust-deed for behoof of the disponee in liferent and his issue born or to be born in fee, which effectually secures the fee to the children, although neither the word allenarly nor any corresponding word or expression occurs in the deed, as is well known to every conveyancer, and was long ago decided in the case of *Seton* v. *Seton's Creditors*, March 6, 1793, M. 4219. If the granter prefers it, I know nothing to prevent the father himself from being named as the trustee, and infeft under an appropriate precept of sasine in that express character.

It was with great hesitation and difficulty that the judgment in the case of *Newlands* was affirmed in the House of Lords. But the hesitation arose, not from any idea that the general law could or ought to be gone back upon, but from the more than doubtful expediency of sanctioning an exception to that law so long settled and so well understood that the rule had come to express the intention. The Lord Chancellor Loughborough (afterwards Lord Rosslyn) observed—"These propositions have been agreed on in the argument which has been maintained. If a conveyance is granted to a person in liferent and thereafter to the heirs of his body in fee, then such person must of necessity be fiar. It is also an agreed principle, recognised in the law of Scotland, that a fee cannot be *in pendente*;" but if the word allenarly was added to liferent it was then contended that the fee was to be somewhere, —his Lordship said he could not tell where. "This distinction," he proceeded to say, "which the counsel admitted could not be maintained in reasoning or in principle, does not add one distinct idea to the limitation," but as he had been assured that the exception had been very generally understood and acted on, and as "the judgment gives effect to the intention of the testator, which in equity ought always to be supported, so far as can be done consistently with the rules of law, and though I feel no conviction, though my mind inclines to doubt exceedingly that the judgment proceeded on safe grounds, yet I have not courage to venture on a reversal" (M. 4294-5).

In like manner Lord Eldon, in the case of *Dewar* v. *M'Kinnon*, speaking of the ordinary rule that a conveyance in liferent to a parent and the issue, born or to be born, in fee, gives the fee to the parent, says—"My Lords, in respect to the doctrine itself I should take it to be clearly established (and whether right or wrong it is not of much consequence to inquire when the point is clearly established) that if there is a limitation in a conveyance of an interest *in presenti* and unconnected with any question of contract to a man and his wife and the children of the marriage, on feudal principles the fee is in the parents—one of the parents is the fiar—which of the parents depends upon the circumstances—and it is impossible, in my view of the case, to read what fell from my Lord Rosslyn in the case of *Newlands* without seeing that it was his notion that, after that doctrine was once clearly established it would have been infinitely better to have adhered to that doctrine than to deny the application of that doctrine because the word 'allenarly' was used." Lord Eldon added—"I am ready to go this length, namely, to say, that as this House was advised by my Lord Rosslyn that the effect that was originally attributed to the word allenarly ought in his judgment still to be attributed to it, so it ought to have that effect; at the same time I apprehend your Lordships will take great care not to extend the effect of that word farther unless you are convinced that you ought to extend it farther."

The observation of Lord Brougham in *Gordon* v. *M'Intosh*, concurring with an observation of Lord Corehouse, to the effect that the feudal maxim might have been saved by supposing a fiduciary fee in the parent, equally whether the word allenarly was used or not, and expressing regret that it had not been so settled, cannot be regarded as conflicting with the observations of Lord Rosslyn and Lord Elgin in reference to the case of *Newlands*, but as referring to what might have been done at some period greatly more remote, when alone the general law could have been settled differently from what it had immemorially been. At the date of the judgment in the case of *Newlands*, while there was said to have been practice in support of the exception, it had become just as impracticable to go back upon the general law as it would be in the present day.

But it was one thing to sanction, as was done in the case of *Newlands*, an exception to the general law, in order to give effect to the predilection which the granter of the deed had intensified by the use of the word "allenarly" in favour of his son's issue, who were his own descendants, and quite another thing to sanction such an exception in a case like the present, where by the law of nature all the predilection is in favour of

the son, and where, at the same time, by the law of the land the son's heir whatsoever is not within the recognised category of *personæ prædilectæ* at all.

It has been suggested by my brother Lord Mure that the case of *Allardice*, 5th March 1795 (fully reported in Bell's Folio Cases, p. 156, and noticed briefly, and therefore imperfectly, by Mr Ross, vol. iii, 655) is more favourable for the heir whatsoever than the case of *Newlands*. I have been familiar with both these cases for more than half a century. I have renewed my study of them on the present occasion, and I own I am utterly unable to discover in the difference of details in the case of *Allardice* any difference in principle which can make it an authority in this case for the heir whatsoever any more than the case of *Newlands* and the other cases of that class, all of which leave the present case untouched either one way or the other, except in so far as they stand in contrast to it.

The granter of the deed in the case of *Allardice* was understood to have been displeased with the then subsisting marriage of his eldest son Robert, of which there was a daughter, Jean, alive at the date of the deed. Consequently, he destined his estate of Memus to Robert in liferent allenarly, and to the heirs of Robert's body by any future marriage he might enter into, which failing, to the granter's second son David in liferent allenarly and the heirs of his body in fee, which failing, to the granter's own nearest heirs or assignees whatsoever in fee.

Robert survived the granter, and accepted of the deed by taking infeftment upon it and exercising a power conferred upon him to burden the estate with £200, and, indeed, as was observed on the bench, he had no power to have repudiated the deed. Afterwards, however, he obtained a precept of *clare constat*, and took infeftment thereon as his father's heir-at-law. Acting on this fee-simple title he executed a disposition altering the destination in his father's deed so far as to substitute his own daughter Jean, *nominatim*, immediately after the heirs of any marriage he might subsequently enter into, and before his brother David, the *nominatim* substitute in the fiduciary fee, and the heirs of David's body.

David Allardice and his son, for whom he was the substituted fiduciary fiar, brought a reduction of Robert's deed, coupled with a declarator; and what the Court decided was that this deed was *ultra vires* of Robert, and could not affect the succession—a judgment in which I should have entirely concurred.

There was some alarm expressed among the Judges—particularly by Lord President Campbell—as to whether they had not, by their decision in *Newlands'* case, introduced a principle which would sanction a new kind of entail by a succession of liferents allenary. It is unnecessary here to go into that speculation; but I may observe, in passing, that I think the President pretty well solved his own difficulty when he said—"Had Robert, the son, been succeeded by heirs of his own body of a subsequent marriage, I have some notion that the substitutions would have been at an end." He afterwards referred to *Brown* v. *Coventry*, Bell's 8vo Cases, p. 310, where this principle was applied in the case of a legacy, and said—"It is in some respects different, to be sure, but I should retain my opinion even in the case of a land estate."

The only doubt in the case of *Allardice* was that suggested by Lord Eskgrove, whether the fiduciary fee could be held by Robert not only for his own future issue, if he should marry and have any, but for his brother and his brother's children. This was not very accurately expressed by his Lordship, for it did not require a fiduciary fee in Robert to sanction the substitution or succession of David as a *nominatim* liferenter, whether allenarly or not; and none of the other Judges took any notice of this supposed difficulty. They thought it enough that the question was amongst heirs, and that the obvious intention of the granter of the deed, that David should be both liferenter and fiduciary fiar failing the existence of any objects for whom Robert could be fiduciary fiar, must therefore receive effect. Thus Lord Justice-Clerk Macqueen said—"I own I did not see a question in this case; the only difference betwixt it and *Newlands* is that there is here a succession of liferenters; but there is nothing in that." He then distinguishes the position of Robert, the son, from that of a stranger, and says—"There is nothing more clear than that an heir is bound by the settlements of his predecessor." That appears to me to be perfectly sound doctrine, and, indeed, I have no occasion for the purposes of the present case to impugn anything whatever affirmed in the case of *Allardice*.

My brother Lord Mure has farther said, and made it, I think, the keystone of his opinion, that in the cases of *Newlands* and of *Allardice* the Judges must have seen that there was a destination to heirs whomsoever failing heirs of the body, and yet this fact did not influence the opinions which they formed, that the fee was fiduciary only. Now, in the first place, his Lordship has overlooked the fact that in both of these cases the destination, failing heirs of the body, was not to the heirs whomsoever of the fiduciary fiar, but to the heirs whomsoever of the granter of the deed. And, in the next place, he has overlooked the fact that in both of these cases, and indeed in all the cases of this class which have been decided, issue of the body existed, so that there was no room for raising any question as to what would have been the result if such issue had totally failed, and the question had been either with the disponees of the fiduciary fiar or with his heirs whomsoever, or with the heirs whomsoever of the granter of the deed.

I do not, of course, mean to represent either the case of *Newlands* or the case of *Allardice*, or any of the other cases of that class, as authorities for my opinion in this case. But I may confidently affirm that none of them are authorities to the contrary. All of the cases related to the rights of the issue for whom the fiduciary fee was held, and none of them either raised or could have raised such a question as occurs in this case, where there is no issue, either *in esse* or *in posse*, to compete with the disponees of the deceased fiduciary fiar, and the party claiming is in the eye of law *eadem persona cum defuncto*, to or through whom he must make up a title inferring that he represents him universally in his debts and deeds. The proposal to apply the exceptional doctrine of fiduciary fee to the case of that party by the use of the word "allenarly," brings up, in the most forcible of all ways, the caution given by Lord Eldon—"I

apprehend your Lordships will take great care not to extend the effect of that word farther unless you are convinced that you ought to extend it farther."

I cannot but think it a startling extension of the effect of the word allenarly to attempt by means of it to bring within the category of *personæ prædilectæ* the heirs whomsoever of the granter's son, in competition with the son himself. Even in a deed of strict entail, heirs whatsoever are never regarded as *personæ prædilectæ;* and it would be strange if they were to be so regarded in such a case as this of fiduciary fee. In *MacIntosh* v. *Gordon* (4 Bell's App. 120, and 3 Ross 624) Lord Campbell said that "if the word allenarly is added, this is tantamount to fencing clauses in a deed of entail, and prevents alienation, though still the parent would be fiar." But his Lordship did not suggest that the word allenarly was stronger than the fencing clauses of a strict entail. The case of *Macgregor* v. *Gordon*, 1st December 1864, 3 D. 148, settles the question which the case of *Macalpine Leny* had barely left open, that although heirs-portioners be expressly excluded by the deed of entail, the destination in favour of A B and his heirs whomsoever makes A B at once fee-simple proprietor. In that case it was the clear intention of the granter to fetter A B as in a question with A B's heir whomsoever, whereas in the present case there is not even probability in favour of such an intention. We could hardly have a stronger proof than this case of *Macgregor* v. *Gordon*, that heirs whomsover are not within the category of *personæ prædilectæ* by our law and practice, and it is for that alone that I here refer to it.

I may observe, in passing, that the late case of *Todd* v. *Mackenzie*, although too peculiar a case to allow of the judgment being directly applicable to any other, contains some suggestive matter, very proper to be considered in connection with this case. For instance, I agree with the observation of your Lordship in the chair in that case, that "a man's heir has no existence until he dies, and it never can be ascertained until he dies who is to be his heir." I farther agree with your Lordship, as I observe I stated at the time, that there was in that case no destination, in the event of Mr Todd surviving his daughter, to the person who should then be nearest in blood to Mr Todd. That might possibly have been regarded as a destination to a *persona prædilecta*, as distinguished from a destination to heirs whomsoever, a distinction to which we gave effect in the late case of *Ferguson* v. *Ferguson's Trustees*, 19th March 1875, 2 Rettie 627.

The case of *Jameson*, 2d March 1775, M. 4284, referred to in the case of *Reid*, which I have cited above, if it cannot be called a precedent in the present case, is at least highly instructive with reference to the question whether the fee given to the heirs whomsoever of Arthur Cumstie was or was not, in the event which has happened, given to himself. By the contract of marriage between Rachel Wilson and her first husband David Russel, her father assigned to her husband the sum of 5000 merks, which was accepted in full of all her legal claims. It was, however, conditioned in the contract that "in case there be no child alive at the time of the said Rachel Wilson her death, then there shall 1000 merks of her tocher return to her nearest heirs and executors." The marriage was dissolved by the death of David Russel without issue. Rachel Wilson, by a postnuptial contract with her second husband Andrew Jameson, assigned to him the 1000 merks, and after her death Jameson conveyed this sum and his other estate to a trustee for his creditors. In a multiplepoinding the above sum of 1000 merks was claimed, on the one hand, by the executors and nearest in kin of Rachael Wilson, and, on the other hand, by her second husband, Jameson, as her assignee, and the trustee to whom he had conveyed his estates for behoof of his creditors. The report bears—"The Lord Ordinary gave a judgment preferring Jameson, the husband, to the wife's next-of-kin, who reclaimed," and pleaded, that after Rachael Wilson's marriage to David Russel the fee of the whole tocher was in him, and as to the 1000 merks, part of that tocher, "the right never could be in Rachel, because the condition on which the sum was to return being her death without children, it could not be purified during her life. Upon the death of Russel both the liferent and fee of this sum devolved upon his heir, burdened with the return thereof, at the death of Rachel Wilson, to her nearest heirs and executors, so that at no period whatever had Rachel either the liferent or the fee of this money."

To this it was answered—"By the words of the contract itself the fee of the 1000 merks must have been vested in Rachel Wilson upon this ground, that where a sum of money is taken to a person's heirs and executors, such sum will undoubtedly belong to the person himself, and be at his disposal, unless it shall evidently appear that the designation of heirs and executors was intended to demonstrate and point out certain individuals intended to be favoured. The right to the 1000 merks must have been in somebody after the dissolution of the marriage between Rachel Wilson and her husband by his death. It could not be in the husband's heirs, who had not right thereto by the contract. It could not be in the executors of Rachel, because till her death no such persons did exist. It must therefore have immediately vested in her own person, and become assignable at will. It is therefore evident that in the eye of law a right granted to the heirs and executors of any person is virtually granted to the person himself, and of consequence, that the 1000 merks in question were as much provided to return to Rachel Wilson as if she herself had been expressly mentioned in the clause of return."

It is obvious I think from the report that the Court, in adhering to the Lord Ordinary's interlocutor, adopted this reasoning, which I conceive to be sound in itself, and equally applicable to the present case as it was to the case of Jameson. I need not say that it makes no difference in such questions whether the subject in dispute be heritable or moveable. (*Vide* observations as to the application of feudal principles equally to money and land, *per* Lords Brougham and Campbell in *Gordon's* case, already referred to).

My brother Lord Ardmillan has observed that the creditors of Arthur Cumstie could not have attached the fee of the subjects in Arthur Cumstie's lifetime, and unless they could have done

so his Lordship concludes that there could have been no fee in Arthur Cumstie which could be carried by his *mortis causa* deed. But that conclusion does not follow at all. The creditors of Arthur Cumstie could not attach and sell the subjects in his lifetime, because Arthur Cumstie might have left issue; and it was on this principle that the subjects were struck out of the ranking and sale in the case of *Newlands*. But the creditors of Arthur Cumstie might have been entitled to inhibit him from disposing of the fee to their prejudice if, by the failure of issue, it should happen to come to him, and, in any view, they could not be excluded from vindicating their preference over his *mortis causa* disponees. This accordingly has not been attempted by Arthur Cumstie's trust-disposition and settlement, the leading purpose of which is for payment of all his just and lawful debts.

I need hardly say that if the destination to the heirs whomsoever of Arthur Cumstie, failing heirs of his body, was virtually a destination to himself failing heirs of his body. There is nothing either subtle or anomalous in holding that he might dispose of the subjects by *mortis causa* deed, subject to the implied condition that he should die childless. He was in this view subjected conditionally to the heirs of his own body, and, as the event shews that the condition was purified, I am humbly of opinion that his trust-deed and settlement ought to receive effect. I am therefore for altering the interlocutor reclaimed against, and I shall greatly regret, for the sake of our general law of conveyancing, (hitherto clear and consistent in this department) if your Lordships shall affirm a different result.

Lord President—After the very full opinions which have been been given on both sides of this question, I shall endeavour to confine my observations within a reasonable limit. But the question is one undoubtedly of great importance, and involving principles of law, and considerations even of expediency and utility, which make the case more than usually interesting. The deeds here it is unnecessary to examine at any length, because I quite agree with my brother Lord Deas that the question really is, whether a conveyance to Arthur Cumstie in liferent for his liferent use allenarly and his heirs whomsoever in fee, vests a right of fee in Arthur Cumstie. I am not sure that I can concur in holding that this is exactly the same thing as if the conveyance had been to Arthur Cumstie in liferent for his liferent use allenarly and to the issue of his body whom failing his heirs whomsoever in fee. That introduces other considerations, which perhaps I may advert to hereafter; but I take the words as I find them, and dealing with this as a liferent in Arthur Cumstie, restricted by the use of the word "allenarly," with a fee given to his heirs whomsoever directly, I think if Arthur Cumstie had had children, his eldest son must have succeeded under this deed as his heir whomsoever, and not as the heir-male of his body. That it is a mere right of succession in substance I think nobody can very well doubt, because these were testamentary arrangements that were made by Mr William Cumstie, the father of Arthur, providing a right to his son which appears to me to be a right of bare liferent, and providing also where the estate should go after the death of that son. That the law of Scotland sometimes holds what is *ex figura verborum* a liferent to be in legal effect a fee nobody can dispute; but I apprehend that that has never been done except in two classes of cases. The first is where the words of the deed itself make it perfectly clear that it was the intention of the maker of the deed that the liferenter should be fiar. Of that the most familiar and obvious example is where an estate is conveyed to a person in liferent and to another in fee, but giving to the liferenter a power of disposal at pleasure. The liferenter there has the whole attributes of an absolute proprietor. He has the beneficial enjoyment of the estate, and he has the absolute power of disposal. There the law holds the liferenter to be fiar, out of deference to the plain intention of the maker of the deed. The other class of cases is that which is represented by the judgment in *Frog's Creditors*. Now, that is an extremely important case, and it fixes undoubtedly that where the words used are simply to A in liferent and to his children in fee, or the heirs of his body in fee, or the issue of a marriage in fee, there the parent is the fiar. That authority, and the principle upon which it proceeds, has never been extended to any case except the case of parent and child, and it has never been extended to any case except where the conveyance is in these terms—to the parent in liferent and to the children *nascituri* in fee. It was perhaps a strong thing to hold that because the fiar was non-existent it must therefore have been the intention of the maker of the deed that the liferenter should be fiar. But the necessity of complying with what was supposed to be a rule of the feudal law induced the Court to fix that, and to settle it in such a way that the rule has never been and never can be now disturbed. That it was done with regret at the time, and that it has been regretted ever since, I think is abundantly clear. Some of your Lordships have referred to expressions of regret upon that subject by Judges in modern times; but it is not immaterial to observe that we have the recorded testimony of Lord Kilkerran that the very Judges who decided the case of *Frog's Creditors* did it with reluctance. He says in the case of *Lilly* v. *Riddell*—a case precisely of the same description which occurred in 1741—"The point was formerly so determined in the case of the children of Robert Frog against his creditors, No. 55, and only because the Court had given different judgments upon it in that case is the present case taken notice of, in which it was so much considered as an established point that a bill reclaiming against the Lord Ordinary's interlocutor was rejected without answer, many of the Court at the same time declaring, as likewise had been done in the said case of *Frog*, that but for the course of decisions they should have been of opinion that the son was not fiar but fiduciary for his children." That case of *Lilly* v. *Riddell* occurred just six years after the case of *Frog's Creditors*, and Lord Kilkerran, who was then upon the bench, must have been intimately acquainted with the sentiments of the Judges who decided both cases. Now, it appears to me that a rule so fixed is not to he extended. It is a rule which was settled in deference to a feudal difficulty, but that feudal difficulty, it has been more than once suggested, might have been

got rid of afterwards without violating the apparent intention of the maker of the deed by the invention of that other subtlety, viz., a fiduciary fee, which after all had to be invented to prevent the farther progress of this unfortunate doctrine. The rule, if it had been absolutely applied, and if it had been understood as it was in *Frog's Creditors* that the only way of preventing a fee being *in pendente* when an estate was given to the parent in liferent and to his children in fee was to hold the fee to be in the liferenter;—if that had been carried out to its full consequences it would not have in the least mattered how plainly the matter of the deed had expressed his intention that the man he called a liferenter was intended to be a liferenter merely, because the feudal difficulty would still have remained. But it very soon became apparent, and in the case of *Newlands* more particularly, that the Court were not disposed to carry out the doctrine of *Frog's* case to its logical consequences, but, on the contrary, felt the necessity of stopping in that course. And accordingly the rule of *Frog's Creditors* received a very severe check, I think, in the case of *Newlands*, and all the class of cases to which it belongs; and there the rule remains to this day. It is applicable to a case of parent and child, and it is applicable to a case where no more is said than that the conveyance is made to the parent in liferent and to the children *nascituri* in fee; but it is not applicable to any other case whatever; and I, for one, am not prepared to carry that doctrine any farther. I am prepared to hold that when a testator says that he intends a person to hold a liferent, and nothing but a liferent, which is what is signified by the use of "liferent" or "liferent use allenarly," it is not the rule of law that that liferent shall under any circumstances be extended farther. My brother Lord Deas says that it is not the custom of the Court, and it would be inconsistent with feudal principle, to consider what is the intention of the maker of a deed in regard to the liferenter without considering at the same time what is to become of the fee, and I am quite sensible of the importance of that observation. But what I mean is this, that I will not construe the intention of the maker of the deed in regard to the fee in any sense inconsistent with his plainly expressed intention as to the nature of the liferent. For example, in the present case, if I could concur with my brother Lord Deas in holding that the conveyance of the fee here to the heirs whatsoever of Arthur Cumstie is not a good conveyance of the fee to them—as is the substance and result of his opinion—I should then seek for a solution of the difficulty, not by holding the liferenter to be fiar in contradiction to the expressed intention of the maker of the deed, but by holding that the fee was not disposed of at all; for that a liferent may be created without disposing of the fee at all, or that a liferent may be created while an ineffectual attempt is made to dispose of the fee, I suppose is quite a legal impossibility. And therefore if the fee is not well given in this case to the heirs whatsoever of Arthur Cumstie, then in my humble opinion it would remain with the granter. I am not speaking now of the form of these particular deeds, but of the simple case which I supposed at the outside. It would remain with the granter, and in the event of his death it would be in his *hæreditas jacens*. Now, is it matter of doubt upon the face of this deed that when the truster said that he desired Arthur Cumstie to have a liferent for his liferent use allenarly he intended these words to convey the meaning which they have always been understood to convey for nearly a century. I cannot see any reason to doubt it. I cannot see the slightest reason to doubt that he had an *enixa voluntas* that Arthur Cumstie should not be fiar of this estate; and I cannot see any reason for not giving effect to his intention. I think it must be conceded that the use of the word "allenarly" in connection with the liferent has always been held to have the effect of restricting to a bare liferent, as it is called, that is to say, preventing the possibility of its being construed to be a fee. The cases which have been noticed, apparently bearing somewhat to the opposite result, are all very easily explained. The case of *Falconer* v. *Wright*, referred to by my brother Lord Ardmillan, is obviously a case where the fee was held to be in the party who under the marriage-contract had a liferent allenarly because of his pre-existing infeftment which was not discharged, and which made him absolute proprietor of the estate, and the Court said that the case was different from that of *Newlands* because Falconer had an unqualified title independent of that created by the contract of marriage, whereas *Newlands* had only one title, in which his right was expressly limited. And in the other case referred to by my brother Lord Deas, of *Wilson* v. *Reid*, there also it was the pre-existing title of the wife, as absolute proprietrix of the estate, which was the determining consideration. In Lord Balgray's opinion, which has been referred to, this statement is made—"The disposition in question"—that was the marriage-contract—"is of a mixed nature, being on the one hand onerous and *inter vivos*, and on the other *mortis causa*. The pursuer was at the date of the marriage the absolute and unlimited fiar of the subjects. Now, how was that fee taken out of her? She could not divest herself of the fee by a mere renunciation, or otherwise than by an actual conveyance to and vesting of it in another party. So again, as regarded the heirs of the marriage, this was an onerous deed, and bestowed upon them a *jus crediti*; but so far as regards the heirs whatsoever it is merely a *mortis causa* deed, not vesting in them any right whatever, but merely giving them a *spes successionis*, which could never vest the fee in them. Now that is just, in my opinion, the position of the heirs whatsoever of Arthur Cumstie in this case. Under this deed, which is of a testamentary character, they have a *spes successionis* and nothing else during the lifetime of the granter, and they cannot have anything else. But why they should not, when the testament becomes confirmed by the death of the testator, receive that which *ex figura verborum* is given to them, I am not able to see. I do not dispute that it might be possible to get the better of what has hitherto been the universal effect of the use of the word "allenarly" by the use of other words in the deed inconsistent with the notion of a bare liferent, but then I rather apprehend that that would be a contradiction in terms. Suppose a man gets a liferent, for his liferent use allenarly, with a full power of disposal, that is a plain

contradiction in terms. That is not a liferent for his liferent use allenarly. It is a fee, and therefore it is a misuse of language altogether to call it by that name. The testator himself would in that case have given you the means of contradicting his own words. But without such contradictory expressions in the same deed I am quite unable to believe that a liferent for liferent use allenarly either has been or ever can be construed as a fee. Now, the reason which my brother Lord Deas assigns for arriving at the conclusion that this ought to be construed as a fee here is this, that after the children of Arthur Cumstie there is no *persona prædilecta* to take the fee. That may be so, but is it impossible to constitute a bare liferent and a fee to the heir of line either of the granter of the deed or of the liferenter? I do not see the legal difficulty there. The testator may choose to limit his son, or whoever the party is, to a bare liferent, from considerations which may very easily suggest themselves in many cases —the prodigality of the liferenter or some other consideration of that kind, his unfitness to be entrusted with the power of disposal of the estate—and yet he may have no predilection for any one beyond that son, and may have no desire to interfere with the operation of the law of succession, but be quite willing that the estate shall go to the son's heirs after his liferent comes to an end. That is surely not an irrational purpose. I cannot believe it to be so. And if it is not an irrational purpose, why may a man not carry it out by such form of expression as is here used; for the literal and obvious meaning of the expression here used is unquestionably what I have just represented. Can there be the least doubt that it was the intention of this gentleman to limit his son to bare liferent, and at the same time to provide that the fee should go to his heirs whatsoever? He has said so in so many words. I know no legal authority for giving his words any other construction than their obvious and literal meaning, and I know no legal difficulty which should prevent him from having that intention carried out. The notion on the part of my brother Lord Deas seems to be that this limitation of the right of Arthur Cumstie in the first instance was intended merely for the benefit of his issue. If it had been so I think it would have been so expressed, and that was what led me in the outset to say that I do not think the case is just the same as if this had been a liferent allenarly with the fee to the issue of the liferenter's body, and failing them to the heirs whatsoever, because in that case there might have been room for supposing that there was in the mind of the testator a difference between his feelings and desires as regarded the issue of the body of his son and the heirs whatsoever of his son. But it is the absence of any such words here that satisfies me that he intended to make no such distinction, and that he did not care, as regards the disposal of the fee, whether the heir of his son was the heir of his body or a heir of a more remote kind; and therefore it is that he expresses himself in the terms here used, and expresses himself in settling, not one estate only but two separate subjects, in precisely the same language.

For these reasons, I am of opinion with the majority of the Court and with the Lord Ordinary. I cannot participate in the legal difficulties of my brother Lord Deas, nor see that there is any reason whatever for refusing effect to what appears to me to be the very plainly expressed intention of Mr Cumstie.

We shall therefore adhere to the Lord Ordinary's interlocutor.

Mr KINNEAR having stated that there was no decerniture in the interlocutor—

LORD PRESIDENT—We had better perhaps recal the interlocutor, and find, decern, and declare in terms of the libel as amended.

Counsel for Pursuer—Dean of Faculty (Watson)—Kinnear. Agents—D. & W. Shiress, S.S.C.

Counsel for Defender—Thoms—J. A. Reid. Agents—Philip, Laing, & Monro, W.S.

HIGH COURT OF JUSTICIARY.

Friday, June 30.

[Before Lords Justice-Clerk, Young, Mure, and Craighill.]

APPEAL—NICOL *v.* M'CALLUM.

Harbours, Docks, and Piers Clauses Act 1847 (10 *and* 11 *Vict. c.* 27, *sec.* 82) *incorporated with Greenock Port and Harbours Act* 1866,—*Conviction—Licensed Weighers.*

A staff of licensed weighers having been appointed by harbour trustees in terms of the Harbours, Docks, and Piers Clauses Act 1847, for the purpose of weighing cargoes unshipped at a certain port—*held* that consignees of goods were not thereby prevented from having cargoes consigned to them weighed by their own servants for their own purposes.

This was an appeal, brought in terms of the Statute 38 and 39 Victoria, c. 62. for Duncan Nicol, clerk, residing in Eldon Street, Greenock, against Archibald M'Callum, procurator-fiscal, Greenock. Nicol was charged before the Police Court of Greenock with having been guilty of an offence within the meaning of the 82d clause of the Harbours, Docks, and Piers Clauses Act 1847, which clause is incorporated with the Greenock Port and Harbours Act 1866, in so far as "a sufficient number of weighers having been appointed by the Trustees of the Port and Harbours of Greenock, under the powers of the Greenock Port and Harbours Act 1866, and the Harbours, Docks, and Piers Clauses Act 1847, the said Duncan Nicol, not being licensed as a weigher by the Trustees of the Port and Harbours of Greenock, and not being appointed as such by the Commissioners of Her Majesty's Customs, did, on the 28th, 29th, 30th, and 31st days of March 1876, or on several or one or more of these days, upon the pier or quay situated on the west side of the West Harbour, within the port and harbour of Greenock, weigh a cargo, or part of a cargo, of sugar or of other goods, then being unshipped or delivered from the brigantine 'Annie,' of Swansea, upon the pier or quay situated on the west side of the West Harbour aforesaid." The Harbour Trustees had the appoint-