

America is extremely well versed in this kind of business, and because their ability to lend in this way would prove very attractive to their customers. I think that these points are very fairly supported by the evidence adduced by the petitioners, and that they have ground for saying that they have already shown that a business of this kind could be profitably carried on by them, because they have been in the habit of using surplus funds in their hands in this way. And I agree further with an observation of the Solicitor-General, that if the question is whether it will be advantageous for them to employ their capital formally and directly for this purpose, and to raise additional capital for the same object, the experience of those who are actually engaged in the business is of very great value, and that we could hardly set against their judgment and experience any speculation of our own as to the probability of the new trade being profitable. I assent to that observation of the Solicitor-General. But then on the other hand the respondents, who are very large shareholders in the company, say that whether the surplus funds of the company might be profitably employed in this way or not, the proposal we are asked to confirm is one, not for providing an outlet for the company's balances, but for turning the company into what they call a cattle-credit bank, and for engrafting on the enterprise of cattle ranching the totally distinct and unconnected business of money-lending, subject only to the qualification that the money is to be lent to persons who are engaged in dealing with cattle and in grazing cattle. Further, they say that this new business is of a highly speculative kind, and that it is to be carried on by the company's agent in America who has himself engaged in a business of the same kind on his own account, and who may therefore have interests sometimes conflicting with those of the company, if the company engage in the business also, and further that it is a business of a kind which can only be carried on by a person on the spot, and that the directors at home could have no efficient control over the management of such a business at all. I think these objections are established by the proof as being well founded in fact. I am very far indeed from saying that there is anything before us to show that the business could not be profitably carried on if well managed, and still further from suggesting that the confidence of the company in their agent in America is not perfectly well deserved. But still the fact remains that it is a speculative business depending for its success upon its management in America, over which the directors could have no efficient control, and especially it is a business altogether distinct from that which the company was established to carry on. I do not think it is any answer to the respondents' objections to say that the original business was also very speculative or even more speculative in its character than the business which the company now propose to embark in, because it was for the persons who became shareholders to consider

whether they would embark their money in the particular speculation disclosed by the company's memorandum of association, and their resolution to embark in that business certainly did not involve an obligation to carry on any other business merely because it was more speculative or less speculative than the business in question. On the whole, therefore, I have come to the conclusion, that whatever may be said in favour of the proposed enterprise as in a question between shareholders, it is not an enterprise which ought to be forced on dissentient shareholders who have stated serious objections to the practical proposal for carrying it on, and who have never undertaken to embark their money in any such enterprise. For these reasons we cannot confirm the resolution.

LORD ADAM, and LORD M'LAREN concurred.

The LORD PRESIDENT was absent.

The Court refused the prayer of the petition, and found the respondents entitled to expenses.

Counsel for the Petitioners—Sol.-Gen. Dickson, Q.C.—Lorimer. Agents—Pringle & Clay, W.S.

Counsel for the Respondents—Guthrie, Q.C.—Grainger Stewart. Agents—Millar, Robson, & M'Lean, W.S.

Friday, March 17.

FIRST DIVISION.

[Lord Low, Ordinary.]

FENTON LIVINGSTONE *v.* WADDELL'S TRUSTEES AND FENTON LIVINGSTONE.

Marriage-Contract — Provisions to Wife and Children—Protected Right of Succession — Fiduciary Fee — Completion of Title.

By antenuptial contract of marriage the wife's father, in consideration of provisions made by the husband, disposed the estate of A, under reservation of his own life interest, to his daughter in life interest and to the heirs-male of the marriage other than the heir-male of the marriage succeeding to the estate of B (the husband's entailed estate) in fee, whom failing to the heir-female of the marriage, whom failing to his (the granter's) own heirs and assignees, whom failing to his daughter's heirs and assignees.

Held that the provision was pactional, and that whether the wife was heir of the estate or not the right of the heir-male of the marriage to whom the destination referred could not be defeated by her gratuitous deed. *Held* further (*dub.* Lord Kinnear), that a conveyance of the estate of A by the wife (with consent of the husband), and

by the wife's father, to trustees, whereby the fee was vested in the trustees for the purposes of the marriage-contract (and in terms substantially the same as those of the marriage-contract) was such gratuitous deed, and fell to be reduced at the instance of the heir-male of the marriage entitled to succeed to the estate of A.

Opinions that the whole terms of the marriage-contract indicated that the wife had at most a fiduciary fee for the heirs and substitutes called, and *observed* (by Lord Kinnear) that the infeftment upon the marriage-contract should have been in her favour in liferent, and in favour of the heirs-male of the marriage specified in the destination, in fee, and that infeftment having been taken in liferent merely in favour of the wife, the feudal fee prior to the trust conveyance remained in the granter.

Opinion (by Lord Kinnear) that the trust was an appropriate method of curing this defect in title, and that denuding of the trust and conveying to the beneficiaries would have been a more convenient method of terminating the trust than by reduction.

Succession—Marriage-Contract—Destination—Heir-Male of Marriage other than Heir-Male Succeeding to Entailed Estate.

By antenuptial marriage-contract the wife's father disposed the estate of A to the wife in liferent and the heir-male of the marriage, other than the heir-male succeeding to the estate of B, in fee, and made certain provisions for the remaining children of the marriage other than those who should succeed to the estates of A and B.

Held that the words "heir succeeding to the estate of B" were a *designatio personarum* descriptive of persons entitled to succeed under the entail of B, and did not imply a condition that such heir should actually take the estate under the destination.

Hence the younger brother *preferred* to the estate of A, although the estate of B had been disentailed and acquired virtually for a full price by the elder brother from the father, the heir in possession.

By antenuptial contract of marriage entered into between the late Mr Thomas Livingstone Fenton Livingstone of West Quarter and Miss Christian Margaret Waddell with consent of her father Mr William Waddell of Easter Moffat, and dated 4th April 1855, certain provisions were made by Mr Thomas Livingstone on the one hand, and Mr William Waddell on the other hand. The provisions settled by Mr Thomas Livingstone proceeded on a narrative of the entail of the estate of West Quarter, of which he was then heir of entail in possession, the destination being in favour of "the heirs-male of his body," and under which he had power to provide his wife, in the event of her survivance, with an annuity of £200, and to secure his younger

children in a sum of £1000 out of the estate. He bound himself and his heirs of tailzie to infeft his wife in such annuity, and to pay such sum to the children of the marriage "other than the heir who shall succeed to the said estate of West Quarter, or to the estates of Bedlormie and Easter Moffat, or either of them." On the further narrative of the failure of heirs under an entail of the estate of Bedlormie, and of a certain agreement whereby in the event of Mr Livingstone's grandmother establishing a legal title to the estate it was to be conveyed to him and his heirs, he bound himself to settle it on the heirs-male of his body "so as the heir-male of his body may reunite in his person the said estate of Bedlormie with the said entailed estate of West Quarter." The wife in the event of her survivance was to be secured in an annuity of £150 out of this estate. Lastly, Mr Livingstone assigned to the children of the marriage "other than the heir or heirs succeeding to the estates of West Quarter, Bedlormie, and Easter Moffat, the sum of £4850."

Mr Waddell on the other part made the following provision:—"For which causes, and on the other part, the said William Waddell hereby disposes and conveys to the said Christian Margaret Waddell in liferent, and to the heirs-male of this present marriage, other than the heir-male succeeding to the said estates of West Quarter and Bedlormie, in fee, whom failing to the heirs-female of the marriage, whom failing to the said William Waddell's heirs or assignees, whom failing to the said Christian Margaret Waddell, her nearest lawful heirs and assignees whomsoever, the eldest heir-female throughout the whole course of succession excluding heirs-portioners, and succeeding always without division, the husbands of such heirs-female being bound to bear, use, and retain the name and designation of Waddell of Easter Moffat in addition to the name of Livingstone, except in the event of the same heiress-female succeeding to both the estates of Bedlormie and Easter Moffat, in which case the husband of such heiress shall be bound to quarter the arms of Waddell of Easter Moffat with those of Livingstone of Bedlormie, and to bear, use, and retain the name and designation of Waddell Livingstone of Bedlormie and Easter Moffat, heritably and irredeemably, all and whole" the lands of Easter Moffat and others. There was reserved to Mr Waddell his own liferent of the estate, with power to work minerals and grant leases and feus, the infeftment in his favour being reserved to that extent.

It was further provided that Mr Livingstone "shall have no further concern with the rents and annual profits of the above-mentioned lands," and he renounced and made over to Miss Waddell, and the heirs above mentioned, his *jus mariti* and courtesy. There was a provision that "It shall not be in the power of the said Christian Margaret Waddell to convey, assign, renounce, or restrict the provisions hereby settled on her; and the said William Waddell obliges himself to infeft the said

Christian Margaret Waddell in liferent, and the other heirs before mentioned in fee, under the reservations and burdens foresaid." Lastly, Mr Waddell provided to Miss Waddell an annuity of £400 during his lifetime, "or until she shall be entitled to succeed to the liferent of the lands and estate of Easter Moffat and others before conveyed."

By notarial instrument recorded on 16th August 1864 Mrs Christian Fenton Livingstone was infeft in the liferent of the lands and estate of Easter Moffat. Mr William Waddell and Mrs Fenton Livingstone, with consent of her husband, executed a disposition and conveyance in trust dated 9th October 1868 on the narrative of the provisions made by Mr Waddell in the antenuptial marriage-contract, and on the further narrative that "in order to provide more effectually for the management of the said lands and estate during the lifetime of" Mrs Livingstone, "and for securing the fee of the said lands and estate to the heirs of the marriage, . . . it has been deemed expedient and advisable that we should grant the conveyance in trust after mentioned:" Therefore they, "the said William Waddell, as heritable proprietor in fee, and I, the said Christian Margaret Waddell or Fenton Livingstone, for all right of liferent or fee or otherwise competent to me, with the special advice and consent of my said husband," disposed to certain trustees, under reservation of Mr Waddell's liferent, the estate of Easter Moffat. The trustees were directed to hold the estate for behoof of Mrs Livingstone in liferent, and to account and pay over to her the profits thereof, and on her death "to hold the said lands, estate, and others for behoof of the heir-male of my said marriage, . . . other than the heir-male succeeding to the estates of West Quarter in Stirlingshire, and Bedlormie in Linlithgowshire," and so on in terms identical with those of the marriage-contract. The trustees were further directed to "dispose, convey, and make over the said lands, estate, and others to the party entitled thereto under and in terms of the foresaid destination above written."

Mr Waddell died in 1876 and Mr Thomas Livingstone on December 18th 1891. He was survived by his widow and two sons—John Nigel Fenton Livingstone, who was the elder, and George Frederick Fenton Livingstone. The litigation upon which Mr Thomas Livingstone's right to the estate of Bedlormie depended resulted in his acquiring the estate. It was, however, heavily burdened with debt, and having been conveyed by him to trustees, was in 1873 sold by them under the powers in the conveyance.

In 1883 an agreement was entered into between Mr Livingstone and his two sons, by which the estate of West Quarter was disentailed and conveyed to John Livingstone in consideration of certain payments made and obligations undertaken by him. The details of this agreement will be found referred to *infra*.

An action was raised by George Fenton Livingstone and by his mother Mrs Living-

stone against the trustees acting under the trust-disposition of 1868, concluding for declarator that the pursuer George Livingstone, on the date of his father's death, became vested in the fee of Easter Moffat subject to his mother's liferent in the estate, and for reduction of the trust-disposition of 1868.

The Lord Ordinary having appointed intimation of the action to be made to John Livingstone, he craved to be sisted as a defender.

The pursuers averred that the defender John Livingstone had uniformly acknowledged George Livingstone as the owner of Easter Moffat, and specified several onerous transactions to which they maintained his consent had been obtained on that foot. They pleaded accordingly that he was barred from disputing this right.

They pleaded further—" (2) The disposition and conveyance in trust of 1868 being a variation of the terms of the said antenuptial contract of marriage, was *ultra vires* of the granters, and the pursuers are therefore entitled to decree of reduction as concluded for. (4) The defences stated for the defender Mr John Livingstone should be repelled in respect—(1st) That on a sound construction of the said antenuptial contract of marriage the pursuer was ascertained as at the date of his father's death to be the heir-male of the marriage, other than the heir-male succeeding to the estates of West Quarter and Bedlormie, within the meaning of said contract; (2nd) that a transaction between the heir entitled to West Quarter under said contract and Mr Thomas Livingstone cannot affect the rights under said contract of other beneficiaries without their consent; (3rd) that by the propulsion of the fee of West Quarter to Mr John Livingstone, the latter has succeeded thereto within the meaning of said contract; (4th) that the inclusion of the lands of Bedlormie among the estate settled by said contract was contingent only on their being successfully vindicated for Mr Thomas Livingstone, and that the said lands when acquired were so burdened by the expense of vindicating the same and otherwise as to necessitate their being sold."

The trustees maintained that the deed of 1868 was a valid deed, and that they were bound by its terms to hold the estate until the death of Mrs Livingstone.

The defender John Livingstone maintained that he had not succeeded to the estates of West Quarter and Bedlormie, or to either of them, within the meaning of the destination in the marriage-contract, and that accordingly he was entitled to the estate of Easter Moffat; that Mr Thomas Livingstone had never fulfilled the obligation to convey to him the estate of Bedlormie, but had sold it and applied the proceeds in paying the debts secured on it, and to his own purposes; and that the agreement as to the purchase by him of West Quarter had only been extracted from him by severe pressure from his father, the consideration given by him representing the full value of the estate

without reference to his right of succession.

The Lord Ordinary (Low) on the 13th July 1895 pronounced the following interlocutor:—“Finds that upon a sound construction of the marriage-contract entered into between the deceased Thomas Livingstone Fenton Livingstone on the one part, and the deceased William Waddell and the pursuer Mrs Christian Margaret Waddell or Fenton Livingstone on the other part, the pursuer George Frederick James Fenton Livingstone became entitled upon the death of the said Thomas Livingstone Fenton Livingstone to the fee of the estates of Easter Moffat, subject to the liferent of the said estate conferred upon the said pursuer Mrs Thomas Livingstone Fenton Livingstone by the said marriage-contract: Therefore finds, decerns, and declares in terms of the declaratory conclusions of the summons: Finds that the fee of said estate of Easter Moffat having by the said marriage-contract been disposed to the heir-male of the marriage other than the heir-male succeeding to the estate of West Quarter and Bedlormie, it was *ultra vires* of the said Thomas Livingstone Fenton Livingstone, Mrs Christian Margaret Waddell or Fenton Livingstone, and William Waddell, subsequently to the marriage, and after children had been born, to dispose the fee of said estate to trustees, to the effect of putting the same under the trust after the ascertainment of the heir-male of the marriage entitled to the said fee, by the dissolution of the marriage: Finds that the pursuer George Frederick James Fenton Livingstone having, in the event which has happened, become entitled to the fee of said estate upon his father's death, has a title to sue for reduction of the disposition in trust of said estate of 9th October 1868, in so far as the fee of said estate is thereby vested in trustees after the said pursuer became entitled thereto: . . . Finds that it was not *ultra vires* of the granters of the trust-disposition of 1868 to dispose the said estate to trustees for the purpose of holding the same during the subsistence of the marriage and for the purpose of holding and administering the liferent thereof for behoof of the said Mrs Christian Margaret Waddell or Fenton Livingstone after the dissolution of the marriage and during the lifetime of the said Mrs Christian Margaret Waddell or Fenton Livingstone: Therefore, as regards the liferent right of the said Mrs Christian Margaret Waddell or Fenton Livingstone in said estates, dismisses the reductive conclusions of the summons, and decerns: Reserves in the meantime the question of expenses.”

Opinion.—“The summons in this case concludes in the first place for declarator that the pursuer George Livingstone became at the date of his father's death vested, in terms of the antenuptial contract between his father and his mother (Mrs Livingstone, the other pursuer), in the fee of the lands of Easter Moffat, subject to the liferent of the lands conferred upon Mrs Livingstone by the marriage-contract. The summons then concludes for reduction of a

conveyance granted subsequently to the marriage of Mrs Livingstone and her deceased husband, whereby the lands of Easter Moffat were disposed to trustees for the purpose of holding the estate for Mrs Livingstone in liferent, and upon her death for the heir-male of the marriage other than the heir succeeding to the estates of West Quarter and Bedlormie.

“The summons therefore is framed as if the sole object of the action was to vindicate the right of George Livingstone to the fee of Easter Moffat. It was argued, however, that under the marriage-contract the fee of the estate was given to Mrs Livingstone, and that therefore the trust-conveyance fell to be reduced as being *ultra vires* of the granters. Of course if the fee is in Mrs Livingstone, declarator cannot be granted in terms of the leading conclusion of the summons, but apparently the main object of the pursuers is to have the trust set aside and to obtain possession of the estate.

“The question as to whether Mrs Livingstone is in right of the fee of the estate depends upon the construction of the antenuptial marriage-contract between her and her late husband Thomas Livingstone.

“The marriage contract was entered into in 1853, and the parties to it were Thomas Livingstone on the one part, and the pursuer Mrs Livingstone and her father Mr Waddell of Easter Moffat on the other part.

“Thomas Livingstone was heir of entail in possession of the estate of West Quarter, under a destination to him and the heirs-male of his body. He had also the prospect of succeeding to the estate of Bedlormie (which at the date of the marriage-contract was the subject of a litigation), and in the event of the estate coming to him he bound himself to settle it upon the heirs-male of his body, ‘so as the heir-male of his body may re-unite in his person the said estate of Bedlormie with the said entailed estate of West Quarter.’

“Mr Waddell on the other part disposed and conveyed his estate of Easter Moffat to Mrs Livingstone, ‘in liferent and to the heirs-male of this present marriage, other than the heir-male succeeding to the said estates of West Quarter and Bedlormie in fee, whom failing to the heirs-female of the marriage, whom failing to the said William Waddell's heirs or assignees, whom failing to the said Christian Margaret Waddell, her nearest lawful heirs and assignees whomsoever.’

“Mrs Livingstone contends that under that destination she took the fee of Easter Moffat, because the conveyance was to her in liferent, and to her children *nascituri* in fee, without restriction of the liferent by the word ‘allenary,’ or any similar expression.

“Whether that argument is or is not well founded depends upon the construction of the contract as a whole.

“It is evident that the intention was to keep the Livingstone and Waddell estates separate, and to prevent the Waddell estate from being merged in and swamped by the

Livingstone estate. If Mrs Livingstone was given only a liferent, and the fee was given to the heir-male of the marriage other than the heir who should take the Livingstone estates, that object was secured in the event of there being more than one son. If on the other hand a fee was given to Mrs Livingstone the object was not secured at all. Again, failing heirs-male of the marriage, there is a further destination of the fee, the third branch of which is to Mrs Livingstone, her heirs and assignees whomsoever. That destination is inconsistent with the idea that a fee had already been given to her. Again, Mr Waddell bound himself to infest Mrs Livingstone in life-rent, 'and the other heirs before mentioned in fee,' and certain persons are named at whose instance execution is to pass for implement of the whole provisions of the marriage-contract. Finally, it was provided that it should not be in the power of Mrs Livingstone to convey, assign, renounce, and restrict the provisions thereby settled upon her, and Mr Waddell bound himself to pay to Mrs Livingstone during his life, 'or until she shall be entitled to succeed to the liferent of the lands and estate of Easter Moffat,' an annuity of £400. I think that the word liferent is there clearly used in its natural sense.

"Taking all these passages of the marriage-contract together, I am of opinion that they show that the intention was that Mrs Livingstone should have no more than a liferent.

"The next question, is whether George Livingstone became entitled to the fee of Easter Moffat upon the death of his father, which occurred in 1891?

"The circumstances under which the question arises are as follows:—The estate of Bedlormie actually came into possession of Thomas Livingstone, the father, but it was heavily burdened with debt and was sold in 1873, apparently by trustees to whom he had conveyed with power to sell.

"In 1883 Thomas Livingstone had made contracts for building a new mansion-house on West Quarter, but he had not the means to carry out the contracts. Accordingly he entered into an agreement with his sons, the pursuer George Livingstone and the defender John Livingstone, whereby they provided, or became bond for, the funds necessary to complete the house, and came under other obligations to their father; and he, on the other hand, conveyed West Quarter to his eldest son John Livingstone.

"The latter, therefore, never succeeded to Bedlormie, and although he is in possession of West Quarter, he is so by virtue of a transaction with his father, and not as his father's successor under the entail. John Livingstone therefore contends that he, and not his brother George, became entitled to the fee of Easter Moffat upon the death of their father, in terms of the destination in the marriage-contract.

"The words in the marriage-contract upon which John Livingstone relies are—'and to the heirs-male of this present marriage, other than the heir-male suc-

ceeding to the said estates of West Quarter and Bedlormie.' He argued that under that destination the heir-male of the marriage took Easter Moffat if he did not succeed both to West Quarter and Bedlormie. As his father had sold Bedlormie, he was not in that position, and was therefore entitled to Easter Moffat. But even if it should be held that succession to West Quarter alone would have barred him from taking Easter Moffat, he was still entitled to the latter estate, because he acquired West Quarter by purchase, and what the marriage-contract contemplated and provided for was taking by succession and by succession only.

"In considering that argument I think that the object (to which I have already referred) which the parties to the marriage-contract, and especially Mr Waddell, had in view in regard to Easter Moffat is of importance.

"As I have already said, Mr Waddell's object was to keep his estate separate from the Livingstone estate, and accordingly he provided that it should pass to a son other than the son taking the Livingstone estate; and that the son who should become entitled to Easter Moffat should take the name of Waddell.

"Now, the narrative of the marriage-contract shows that it was possible that Bedlormie might never come into the possession of Thomas Livingstone. Whether it would do so or not depended upon the result of pending litigation. If Bedlormie had never come into the possession of Thomas Livingstone, and John Livingstone had succeeded to West Quarter only, could he have claimed Easter Moffat? I think that it is almost certain that Mr Waddell did not intend that he should do so, but of course whatever Mr Waddell's intention was, the words of disposition used in the marriage-contract must receive effect. It seems to me, however, that the words used are, when read with the context, capable of being construed in a sense consistent with what I take to be Mr Waddell's intention. The words are—'Other than the heir-male succeeding to the said estates of West Quarter and Bedlormie.' The 'said estates' had formed the subject-matter of the previous part of the contract, and had been destined to the heirs-male of the body of Thomas Livingstone 'so as the heir-male of his body may reunite in his own person' the two estates. The object therefore was to unite in the same heir these two estates, which I have called the Livingstone estate. I therefore think that the words 'the said estates of West Quarter and Bedlormie,' are just a description of the Livingstone estate which the heir-male of the body of Thomas Livingstone was to take, and that the meaning of the destination of Easter Moffat is that the heir-male of the marriage who is to take Easter Moffat is not to be the heir who takes the Livingstone estate. Therefore if Bedlormie had never come into the family it seems to me that West Quarter would have gone to John and Easter Moffat to George, and I do not think that the fact that Bedlormie came into the family and was afterwards sold makes any difference, because a sale

by Thomas Livingstone—in breach it may be of his contract—cannot affect the rights of George under Mr Waddell's disposition.

"Then as regards the argument that John has not succeeded to West Quarter, I think that the answer is that he did not succeed to it simply because he chose to enter into a transaction under which the fee was propelled to him during his father's lifetime. Such a voluntary transaction could not in any case alter George's rights under the marriage-contract, and it is somewhat remarkable that George was made a party to the transaction, and undertook heavy liabilities under it, upon the footing that Easter Moffat was secured to him.

"I am therefore of opinion that George, and not John, became entitled to the fee of Easter Moffat, and I do not think that it can be disputed that vesting took place at the date of Thomas Livingstone's death, because it was then that the heir-male of his body and of the marriage was ascertained. I shall therefore give decree in terms of the declaratory conclusions of the summons.

"The remaining question is as to the right of the pursuer to have the conveyance in trust of Easter Moffat reduced, as having been *ultra vires* of the granters. The conveyance was granted in 1868 by Mr Waddell, Mrs Livingstone with consent of her husband, and the latter for himself, and proceeded upon the narrative of the marriage-contract, and that it was expedient that the trust should be granted in order to provide more effectually for the management of the estate during the lifetime of Mrs Livingstone, and for securing the fee to the children of the marriage.

"I think that it was quite competent for the parties to constitute a trust for management of the estate during the subsistence of the marriage, and for the protection of Mrs Livingstone's liferent, but they could not, in my judgment, limit or curtail the rights given by the marriage-contract to the heirs-male of the marriage.

"Now, George Livingstone was—if the construction which I have put on the marriage-contract is sound—entitled from the date of his father's death to the enjoyment of the fee of Easter Moffat, limited only by his mother's liferent of the estate. It was not, in my opinion, in the power of Mr and Mrs Livingstone and Mr Waddell, after the marriage, and after the children of the marriage had come into existence, to interpose a trust which would prevent George Livingstone exercising all the rights of a fiar of an estate burdened with a liferent,—such rights, for example, as opening up and working minerals. The parties to the trust-deed were entitled to put the estate in trust during the subsistence of the marriage, and as Mrs Livingstone was a party to the deed, it was also competent to create a trust to protect her liferent. But beyond that I think that the trust was *ultra vires*. Standing the trust, George Livingstone is restrained in the exercise of rights which would be available to

him as a fiar if no trust had been interposed, and under the marriage-contract he is, in my opinion, entitled to the rights of a fiar without any interposed trust.

"The natural result of that view would, I think, be that George Livingstone would be entitled to have the disposition of 1868 reduced in so far as it puts the fee of the estate in trust during his mother's lifetime. . . .

"The question of the reduction of the trust at the instance of Mrs Livingstone is a different matter. As I have said, I think that it was competent to constitute a trust for the protection of Mrs Livingstone's liferent. Whether she can recal the trust now that the marriage is dissolved is a different question, upon which I offer no opinion. That question has not been argued, and it is not within the present action, which seeks for reduction of the trust solely on the ground that it was *ultra vires* of the granters."

On the 24th October 1895 the Lord Ordinary (Low) pronounced this further interlocutor—" . . . Finds of new that the said pursuer is entitled to have the trust-disposition of the estate of Easter Moffat, mentioned in the summons, reduced and set aside, in so far as the fee of the said estate was vested in trustees after the death of the said pursuer's father Thomas Livingstone Fenton Livingstone, to the effect that the said pursuer may have and exercise the rights and powers in regard to the said estate of an absolute fiar whose right is burdened by a liferent; to that extent, but to no greater extent, reduces, decerns, and declares in terms of the reductive conclusions of the summons: Finds the pursuer entitled to expenses against the compearing defender John Nigel Edensor Fenton Livingstone since 22nd January 1895: Allows an account thereof to be given in," &c.

The defender John Livingstone reclaimed.

After sundry procedure the Court allowed the parties a proof, which was directed to the facts and circumstances of the sale of West Quarter. These appear, so far as necessary, in the opinion of Lord M'Laren, *infra*.

Argued for the pursuers—1. The terms of the marriage-contract showed plainly that the liferent given to Mrs Livingstone did not carry with it a right of fee. Reading the contract as a whole, it was evident that "liferent" was used in its natural meaning, and the rule in *Frog's* case, upon which the trustees relied, would not be extended to cover such a case as this, where the effect of the various clauses in the contract was that "allenary" was implied though the word was not actually used—*Maule*, June 14, 1876, 3 R. 831; *Mackellar v. Marquis*, Dec. 4, 1840, 3 D. 172; *Ramsay v. Beveridge*, March 3, 1854, 16 D. 764; *Miller v. Miller*, Nov. 14, 1833, 12 S. 31; *Newlands v. Newlands' Executor*, April 26, 1798, 4 Paton App. Ca. 43. Even if there were a fee in Mrs Livingstone, there was a protected succession, and nothing she could do would deprive George of his right. The trustees had no right to raise the question, since all the parties interested came and asked them to

put an end to the trust. 2. The words in the marriage-contract, "other than the heir succeeding to West Quarter and Bedlormie," were merely descriptive, and were not conditional. The meaning of the clause was the heir succeeding to the Livingstone estates—that is, the heir who was regarded by the framers of the marriage-contract as entitled to succeed to these estates—*Inglis v. Gillanders*, Jan. 19, 1895, 22 R. 266. If Mrs Livingstone had predeceased her husband, could it be said that John could claim the estate of Easter Moffat, because he had not yet succeeded to West Quarter and Bedlormie? The scheme of the contract was to reunite Bedlormie and West Quarter if possible in the heir-male of the present marriage, and Easter Moffat was to go to the heir-male other than the heir who was regarded by the framers of the contract as being the natural successor to the former estates. According to the argument used in favour of John's claim, "succeeding" must be interpreted as "who shall actually succeed to," which was a strained and unnatural meaning. It was clear that it could not have been intended to apply to Bedlormie, for that estate might never have come into the possession of Thomas Livingstone at all had the pending litigation resulted unfavourably. But though his father did come into possession of Bedlormie, and it was sold to pay his debts, that could not affect George's rights. John might have had a remedy against his father for breach of the contract, and at his death claimed compensation in lieu of the estate, or possibly he might have prevented the sale—*Cunningham v. Hathorn*, Dec. 20, 1810, F.C.; Ersk. iii. 8, 38. 3. The transaction entered into about West Quarter amounted, as the Lord Ordinary said, to a case of propulsion. It was not relevant to inquire whether John made a good or a bad bargain. He chose to give up what may have been a valuable right of succession, and signed the agreement voluntarily, and that being so his action could not affect George's right—*Pirie v. Pirie*, July 19, 1873, 11 Macph. 941.

Argued for defender John Livingstone—1. It was clear that the parties to the marriage-contract contemplated that the children would actually take different estates. But the argument of the pursuer was based on the assumption that "succeeding" might in certain events be equivalent to "not succeeding," and that "and" was equivalent to "or." That was an unnatural and forced construction, which would result in John being the only person not benefited by the marriage-contract, and it would only be given effect to if it was clearly and indubitably shown to be the meaning of the clause, either from the deed itself or from extrinsic evidence showing that the natural meaning of the words was not the true one. It was not enough for the pursuer to say that "succeeding" was equivalent to "entitled to succeed," for at the dissolution of the marriage both the estates of Bedlormie and West Quarter had passed out of the family, and so John was not "entitled to succeed" to them. Accordingly for their argument it would be neces-

sary to make "succeeding" mean "who would be entitled to succeed if the estates remained in the family." The true meaning of the clause was that if he did not actually succeed to either estate then John was entitled to take Easter Moffat. There was nothing in the deed to support the Lord Ordinary's interpretation of the expression as meaning only "the Livingstone estates," and his view that the object of the settlement was to keep the Livingstone and the Waddell estates separate. On the contrary, there was a provision as to the quartering of arms by the husband of an heiress succeeding to both Bedlormie and Easter Moffat. But in any view, the Court had not to consider the motive, but to interpret this clause—*Inglis v. Gillanders, supra*. 2. As to John having by his own act prevented his succession, in the case of Bedlormie, he had no power to prevent the sale, and no right to the proceeds of the sale as *surrogatum*—*Cunninghame v. Hathorn, supra*. As regards West Quarter, it was not, as the Lord Ordinary said, a case of propulsion, but it was proved that there had been a transaction for an adequate consideration, John having paid the full value of the estate, which made the question quite different. Nor was it a voluntary purchase by John; he knew it was a very bad bargain for him, and was induced to make it to relieve his father's embarrassments. Moreover, it would have been in his father's power, or in that of creditors, to force a disentail on paying him out. Accordingly, the pursuer could not found on it as a voluntary transaction—*Paterson v. M'Ewan's Trustees*, March 18, 1881, 8 R. 646.

Argued for the trustees—The effect of the marriage-contract provision was to confer a fee upon Mrs Livingstone, and accordingly she had a right to grant the trust-deed. The rule in *Frog's Creditors v. His Children* 1735, M. 4262, 3 Ross' L.C., Land Rights, 602, that estate destined in general terms to children *nascituri* in fee was held to vest in the parent to whom there was nominally given an estate of liferent, would be applied unless there was something equivalent to "allenary" in the gift of liferent—*Dewar v. M'Kinnon*, May 5, 1825, 1 W. & S. 161; *Mackintosh v. Gordon*, April 17, 1845, 4 Bell's App. 105. The only point against this contention was the clause in the marriage-contract as to infesting Mrs Livingstone in liferent and the heirs in fee, but once having conferred the fee the granter had no power to whittle it down—*Douglas' Trustees v. Kay's Trustees*, December 2, 1879, 7 R. 205; *Clouston's Trustees v. Bullock*, July 5, 1889, 10 R. 937; *Gibson's Trustees v. Ross*, July 12, 1877, 4 R. 1038. The case of *Maule* founded upon by the pursuer was decided on the ground that it was expressly declared that the beneficiaries were "merely" liferenters, which was equivalent to a liferent allenary. Accordingly, the trust-deed was within the powers of Mrs Livingstone, its object being to carry out and secure what was incomplete in the marriage-contract. It was not a revocable deed but an irrevocable post-nuptial provision. The date of ascertaining

the heir was postponed till Mrs Livingstone's death, and the trust must subsist till then.

At advising—

LORD M'LAREN—The action as laid was directed only against a body of trustees to whom the estate of Easter Moffat was conveyed in trust by Mr George Fenton Livingstone's parents in prejudice, as he says, of his rights as an heir of the marriage.

The pursuer's case is that Easter Moffat, which belonged to his maternal grandfather, was destined to him by one of the provisions of his parents' contract of marriage. He accordingly, with the concurrence of Mrs Fenton Livingstone, his mother, concludes for a declaration of his rights and reduction of the conveyance in trust.

At an early stage of the proceedings the Lord Ordinary ordered intimation of the action to be made to the pursuer's elder brother John Fenton Livingstone, who put in defences, and claimed Easter Moffat, and thus the scope of the action was extended.

The Lord Ordinary, on a consideration of the record and the various deeds and correspondence relating to the affairs of the family, came to a decision substantially affirming the right of the pursuer to Easter Moffat, but on a reclaiming-note to this Division of the Court it appeared to your Lordships that the parties were at issue on matters of fact which might have a bearing on the question in dispute, and particularly that the parties were at issue as to the nature of the family arrangement under which the defender John Fenton Livingstone acquired the family estate of West Quarter from his father. Passing over various interlocutory orders, I find that on 19th May 1898 the record was of new closed on amended summons and defences, and a proof allowed to the parties, which was afterwards taken before Lord Adam. We are now to consider the case on review of Lord Low's two interlocutors of 13th July and 24th October 1895, with the proof and productions subsequently admitted.

The decision of the case depends on three questions—(1) Under the marriage-contract of Mr and Mrs Fenton Livingstone was a fee or protected right of succession secured to the heirs-male of the marriage other than the heir-male succeeding to the estates of West Quarter and Bedlormie? (2) In what sense are we to understand the expression "heir-male succeeding to the estates of West Quarter and Bedlormie?" Is this a *designatio personarum* descriptive of heirs entitled to succeed under the settlements of these estates, or is it equivalent to a condition? (3) What is the effect of the agreement and consequent conveyance under which the defender John Fenton Livingstone took over West Quarter from his father?

1. The contract of marriage is dated 4th April 1855, and Mr William Waddell, the wife's father, is a party to it. After setting forth the provisions made by the husband for his intended spouse and the heir and other children of the marriage, the deed proceeds—"For which causes and on the

other part the said William Waddell hereby disposes and conveys to the said Christian Margaret Waddell (his daughter) in life-rent," and to the heirs-male of the marriage other than the heir-male succeeding to the said estates of West Quarter and Bedlormie, whom failing to the heirs-female of the marriage, whom failing to Mr Waddell's heirs or assignees, whom failing to his daughter's heirs and assignees (under certain conditions) the lands of Easter Moffat therein described, subject to certain burdens to which I shall presently refer. The deed proceeds—"But reserving always to the said William Waddell his own free and full life-rent use and enjoyment of the foresaid lands and others, the infeftment in his favour in said estate being reserved to this effect," with power to him to work minerals, to grant leases and feus, and to cut woods, &c. The conveyance is declared to be exclusive of the *jus mariti* of Mr Fenton Livingstone, and Miss Waddell is given the usual powers of a life-renter. In the event of the decease of the wife without issue the husband is to be entitled to a life-rent of one-half of the free rental of the estate.

The trust-conveyance sought to be reduced was executed in 1868 by Mr Waddell and the spouses, and its purposes are substantially these of the marriage-contract with reference to Easter Moffat; but the pursuers object to having a trust interposed, and desire to have the estate in their own hands.

The trustees not only maintain their right and duty to hold the estate until the death of Mrs Livingstone, but, founding on the rule of construction established by *Frog's* case (M. 4262), contend that under the marriage-contract Mrs Fenton Livingstone is *fiar*, and that she was *in titulo* to grant the trust-deed in question. It is hard to see how the trustees can qualify an interest to maintain a construction of the deed which all the parties interested, viz., Mrs Fenton Livingstone and her sons John and George, concur in repudiating. But the argument really proves too much, because under the marriage-contract Mr Waddell is the first life-renter, and to that extent his infeftment is reserved together with the fullest powers that any life-renter can have. Now, when Mr Waddell became a party to his daughter's marriage-contract, and, subject to his own life-rent, settled his estate on his daughter and her issue, granting absolute warrandice of the conveyance, it is plain that he could not found on the rule of *Frog's* case to defeat the contract rights of his daughter and her family. Either Mr Waddell was a fiduciary *fiar*, in which case no question can arise, because his grandsons John and George had been born in his lifetime, or he was bound by his warrandice to grant such deeds as might be necessary to make effectual the settlement of Easter Moffat in favour of his daughter's family.

But if the argument be that Mrs Fenton Livingstone was *fiar* subject to her father's life-rent (which would be an extension of the principle of *Frog's* case) the answer already given would apply. It results

from the case of *Newlands* (4 Pat. 43) and a long train of subsequent decisions that any collateral expressions in the deed showing an intention to limit the right of the nominal fiar to a usufructuary interest, or to set up a trust in favour of the children, are sufficient to exclude the construction of the word "liferent" in the sense of fee. The clauses which are said to impress a fiduciary meaning on the destination are these:—First, the scheme of the deed is to provide heritable estates to the two elder sons, and money provisions to the other children, and therefore if Mrs Fenton Livingstone has the fee of Easter Moffat, the second son is unprovided for. Next, this is not the case of a simple gift to a parent in liferent, and the child or heir in fee; it is an extended destination, beginning with heirs-male and heirs-female in their order, and ending with a clause of reversion to Mrs Fenton Livingstone herself, whence it is argued that she could only take a fee subject to defeasance in the event of children coming into existence. Third, the estate is conveyed under the real burden of £1000 "as a provision in favour of the younger children of the marriage, exclusive of those succeeding to landed estates through their parents," words which imply that the second son had a protected right of succession to his mother. Fourth, the powers usually given to liferenters are conferred on Mrs Fenton Livingstone, which would not be necessary if she had the fee. Fifth, Mr Waddell binds himself to pay an annuity of £400 to his daughter until she shall become entitled to the "liferent" of Easter Moffat. Now, as this is not a destination, the word liferent must be used in its ordinary acceptation, and this is equivalent to a declaration that the right he has given is only a liferent. Lastly, the precept of sasine directs the notary to give to the lady sasine in liferent, and to the heirs of the marriage, as aforesaid, sasine in fee. But to my mind the determining consideration is that this is a provision in a contract of marriage in favour of issue of the marriage, and is therefore pactional. I do not propose to discuss this point, because I could not hope to say anything new after Lord Herschell's exposition of the law in the case of *Macdonald v. Hall* (20 R., H.L., 89), to which I refer. Suffice it to say, that even if it were held that Mrs Fenton Livingstone is fiar *ex facie* of the deed, yet the heirs of the marriage called in this destination have a right which their mother could not defeat by her gratuitous deed, and therefore a right preferable to the defendant trustees. This I think is the true ground of decision; but even if this were not a pactional provision, I think that the points I have specified would suffice to impress a fiduciary character on the right of the first taker and to exclude the application of *Frog's* case. It follows that the trustees have no good defence to this action of declarator and reduction in so far as instituted by Mr George Fenton Livingstone.

2. I pass to the question between John and George Fenton Livingstone. George is the

second son, and he claims to be the heir-male of the marriage "other than the heir-male succeeding to the said estates of West Quarter and Bedlormie." Now, it is not disputed that according to the investitures existing at the date of the marriage of Thomas Fenton Livingstone and Christian Waddell the eldest born son of that marriage would, if he survived his father, be entitled to take up the estate of West Quarter as heir of entail and provision.

The entail of West Quarter was executed by Sir Thomas Livingstone in June 1849, and was subsequent in date to Lord Rutherford's Act, from which it follows, first, that a son of Thomas Fenton Livingstone and Christian Waddell succeeding to West Quarter might disentail the estate without consents; and secondly, that Thomas Fenton Livingstone (who was born before the date of the settlement) could not disentail until he had a son and heir-apparent who should attain the age of twenty-five, and then only with that son's consent. John Fenton Livingstone survived his father, and so far as West Quarter is concerned, if the expression heir-male of the marriage other than the heir-male succeeding to West Quarter is a descriptive expression, there can be no doubt that George Fenton Livingstone is the person designated. According to the subsisting investiture, John was the heir whose right of succession if he survived, must take effect, and George is the next heir-male. But the argument for the defender is that the words in question are to be read as a condition, covering the case of John's failure to succeed to West Quarter in consequence of the entail being barred with his consent. Now, keeping in view that this is a marriage-provision in favour of a second surviving son, it does appear to be the most unlikely thing in the world that the parents and the wife's father should contract to the effect that if their eldest son should consent to a disentail and receive compensation for his expectant interest in West Quarter, he should thereby become the disponent in the conveyance of Easter Moffat, and by his own act oust his younger brother from the succession. If such were the intention of the parties, I should expect to find it expressed in clear and unambiguous language. But the words used do not obviously suggest that any condition depending on the will of the heir-male of the marriage was in the minds of the parties to this deed. They are just the words which a conveyancer would use to describe the person next in the order of succession to West Quarter after the heir-male, and in the absence of any explanatory context, I am of opinion that they are descriptive words having relation to the destination in the subsisting entail, and that George Fenton Livingstone, in the events which have happened, is the person designated.

This construction is, as I think, further confirmed by considerations arising out of the reference to Bedlormie in the expression descriptive of the heir who is to succeed to Easter Moffat. At the time of Mr Thomas Fenton Livingstone's marriage

the succession to Bedlormie depended on the result of a legitimacy suit, under which, in case a certain marriage should be found to be null, Mr Thomas Fenton Livingstone and his heirs-male would be heirs of provision under the entail of Bedlormie. It is not necessary that I should refer to the deeds of agreement under which the litigation was carried on, because we are only concerned with the essential fact that Mr Fenton Livingstone's expectation of succeeding to this estate depended on the results of litigation directed against parties claiming to represent an elder branch of the family.

Now, the destination of Easter Moffat, which I must for the sake of clearness quote once more, is "to the heir-male of this present marriage other than the heir-male succeeding to the said estates of West Quarter and Bedlormie in fee," whom failing, &c.

According to the defender's argument this means that it is a condition of the second son's right to Easter Moffat that the eldest son shall succeed to Bedlormie as well as West Quarter. If this was the intention of the parties, it would have been easy to express it in plain terms. But again, I say that, if the reference was to the heir who according to the destination would succeed, then the language chosen is intelligible, because assuming success in the pending suit, the heir of entail of West Quarter and the heir of entail of Bedlormie were the same person. As it happened, Mr Thomas Fenton Livingstone did succeed to Bedlormie, because the question in the litigation was decided in his favour by the House of Lords. But the estate was sold to pay debts, and his son did not in fact succeed. This, in my view, does not prevent Easter Moffat from going to George, because John was the heir entitled to succeed to Bedlormie as well as to West Quarter, and who must have succeeded but for the operation of the powers of the Entail Amendment Act under which Bedlormie was sold.

The consideration of the rights which would arise in the event of the wife's predecease offers a very convincing argument in favour of the construction of "succeeding" in the sense of "entitled to succeed." Mrs Fenton Livingstone is only a liferenter, and on her death the fee of Easter Moffat must vest either in John or George. As the father, by the hypothesis, survives, John has not in fact succeeded to West Quarter, but has only the rights of an heir-apparent. So if actual succession is the condition, George is not the heir-male other than the heir succeeding to West Quarter, and Easter Moffat would go to John, although it is certain that he will succeed to West Quarter if he is in existence when the succession opens. A construction which leads to a result so contrary to the general intention appearing on the face of the deed cannot in my opinion be sound.

3. The third and only remaining question in the case relates to the effect of the sale of West Quarter by Mr Thomas Fenton Livingstone to his son John. When the case came originally before this Division of the Court, we were of opinion, having regard

to the averments, that a proof should be allowed of the facts and circumstances relating to this sale. It is perhaps to be regretted that the parties have been put to further expense in connection with this proof, because the facts elicited do not, in my opinion, in any way displace the conclusion to which the Lord Ordinary came, viewing the matter as an ordinary sale by an heir in possession to an heir-apparent having a protected right of succession under the entail.

The immediate occasion of the sale was that Mr Thomas Livingstone had entered into a contract for building a mansion-house on the estate, but was unable with the means at his disposal to complete his undertaking. In these circumstances he applied to his sons for assistance. There is nothing in the evidence suggesting that Mr John Fenton Livingstone was desirous of taking over the estate with the heavy burden of debt which the new mansion-house had put upon it. Still less is it to be supposed that in taking over West Quarter the defender contemplated the depriving his brother of the succession to Easter Moffat by bringing about the fulfilment of a condition under which he himself would succeed to the last-mentioned estate. On the contrary, it is clearly proved that the defender entered very unwillingly into the arrangement, and only agreed to it as a matter of duty to his father in order to relieve him from pressing obligations. I think it is also proved that the defender paid in money and money's worth in the shape of heritable bonds and an annuity to his father the full value of his estate. It is proper to notice that the pursuer George Fenton Livingstone at the time made a contribution of £5000 towards liquidation of his father's obligations. I do not suppose that he would have been asked to make this payment if it had been supposed that the effect of the arrangement was to deprive him of his right of succession to Easter Moffat, but in the view I take this consideration has no direct bearing on the question before us, which is, strictly speaking, a question of the construction of the destination in the marriage-contract. The point now considered is this—seeing that West Quarter was in fact sold in the father's lifetime, are we to hold that John was not the heir succeeding to West Quarter in the sense of the marriage-contract? As a necessary step in the negotiation for a sale West Quarter was disentailed. Now, setting aside all considerations of parental influence on the one hand and filial duty on the other, which cannot affect the legal question, John Fenton Livingstone was in a position to make his own terms with respect to his consent to a disentail. I will put two cases, neither of them identical with the real case, but which, I think, threw light upon it. The estate might have been sold to a stranger, John giving his consent to the disentail on payment of the actuarial value of his expectancy. On the death of the father, could John have claimed Easter Moffat on the ground that he was not the heir succeeding to West Quarter? The answer would be, that he had succeeded

to an equivalent interest in money, and that the conversion from land to money was his own act. The sum received in the case I am supposing would be less than the value of the estate, but that is only because it is an anticipated sale, and because the chance of John dying in his father's lifetime and not succeeding to the estate is, of course, discounted in estimating the value of his interest as heir-apparent. I think the answer would be conclusive that the father and son could not by an arrangement between themselves to convert West Quarter into money defeat the right of the younger son to Easter Moffat, secured as it was by a contract to which the father was a party.

But I will put another case. West Quarter might have been sold to a third party, and the defender out of regard to his father might have waived his right to compensation, and have given his consent unconditionally. Would this make any difference in the result? I think not. In the case supposed the defender really makes a gift to his father of the compensation-money or consideration for his consent to the disentail, but this leaves his brother's right precisely in the same position as if the defender had taken the benefit to which he was entitled.

Now, the real case, though not identical as to the facts, is identical in principle with the case last supposed, because the defender's case is that he paid the full value of the estate without any allowance being made for the value of his expectancy. But he knew very well that he had a valuable expectancy in the estate which could not be taken from him except with his own consent, and if he chose, from motives no doubt highly honourable to himself, to renounce his expectancy, and to take over the estate at a full price, he is just in the same position as if he had consented to a sale of the estate to a stranger without receiving a money consideration for his consent.

I have not thought it necessary to discuss the somewhat complicated terms of the actual arrangement, because the legal question, in my opinion, is independent of the question of terms of sale. The defender has not in fact succeeded either to West Quarter or to Bedlormie. As to Bedlormie, I think it is only named in the marriage-contract in connection with West Quarter, because the heirs were the same, and as to West Quarter I think the defender was in the position contemplated by the marriage-contract—that is, he would have succeeded to West Quarter if he had stood upon his rights, and the pursuer's expectations under the marriage-contract are not affected by the arrangement under which West Quarter was disentailed, and the defender was put into the possession of the estate as a purchaser. I am therefore of opinion that the reclaiming-note should be refused and that the Lord Ordinary's interlocutor should be adhered to.

LORD ADAM—I concur.

LORD KINNEAR—I am of the same opinion, and for substantially the same reasons. I agree entirely with Lord M'Laren, for the

reasons he has stated, in his construction of the destination in the marriage-contract of the estate of Easter Moffat. Without repeating what his Lordship has said, I think it enough to say that is my view, and for the reasons already given, the words "the heir-male of the marriage other than the heir-male succeeding to the estates of West Quarter and Bedlormie" mean an heir of the marriage other than the heir contemplated by this marriage-contract as succeeding to those two estates. The contract begins by reciting the entail of West Quarter, which estate upon the terms of that entail must necessarily go to the eldest son of the marriage, and upon that recital the intended husband makes certain other provisions upon the entailed estate of West Quarter which he is entitled to make, and undertakes to give Bedlormie to the same heirs as West Quarter; and then, in consideration of all that the husband has done and recited, the father of the intended wife settles his estate of Easter Moffat upon the heir of the marriage other than the heir succeeding to West Quarter and Bedlormie. That seems to me to mean nothing more nor less than the heir succeeding as hereinbefore set forth to these two estates, and therefore I cannot say I have much difficulty in construing the whole settlement as meaning, that in the event which has happened, the marriage-contract intended that West Quarter and Bedlormie should go to the eldest son of the marriage, John, and that Easter Moffat should go to the second son George, who is the pursuer of this action. If that be the meaning of it, I further agree with Lord M'Laren, and for the grounds he has stated in detail, that nothing in the events which have happened since the execution of the marriage-contract can serve to divest George of his right to the estate of Easter Moffat or to convey that estate to the eldest son John in compensation for anything he has lost in the value of the succession intended for him. Now, those two questions appear to me to be the only material questions for consideration in this case, and on these I agree entirely with Lord M'Laren. Taking that view of the rights of the pursuer, I should have thought it of very little importance to determine whether, according to a true conception of the marriage-contract, a fee was given to Mrs Fenton Livingstone, the mother, and a protected succession only to the children who were to succeed to Easter Moffat, because there can be no doubt that there was at least a protected succession secured to the children to whom Easter Moffat was destined, and there is no question between George, who is now ascertained to be the heir entitled to that estate, and any creditors of Mrs Fenton Livingstone or anybody else founding upon deeds of hers. Therefore it would not seem to me very material to inquire where the fee was in the true conception of the marriage-contract had it not been that the pursuer desires to reduce the trust-conveyance of 1868, and in the way that question has been argued it has become necessary to consider whether Mrs Fenton Livingstone had a

right of fee absolute or a fiduciary fee only, or whether any fee was vested in her at all. Now, of the various alternative views which Lord M'Laren has suggested on that question, I confess I should prefer to hold that according to the conception of the marriage-contract a fiduciary fee was given to Mrs Fenton Livingstone for the children of the marriage who should answer the description of heirs not succeeding to West Quarter and Bedlormie, and for the heirs-substitute following them in the destination. I cannot say I see any sufficient ground for holding that so far as the dispositions in the marriage-contract are concerned there was any fee reserved to Mr Waddell the granter, because this conveyance, which is a conveyance in a perfectly well-known form, is to the daughter in liferent and certain heirs to be born, and that is coupled with a reservation to the granter, not of any right of fee but of his right of liferent, which certainly goes to confirm the natural inference from the conveyance of the fee. And then it is a conveyance which is to be carried into effect by the ordinary executory clauses authorising infeftment in the terms of the dispositive clause—infeftment to be given to the daughter in liferent and the heirs of the marriage in fee. That appears to me to be a deed that was intended to divest the granter immediately, and to leave nothing in him except the liferent which was expressly reserved. But then, as it was a deed divesting him and conveying the fee, it must have the effect of carrying the fee to somebody, and carrying the immediate fee to somebody in existence who could have taken it, and therefore upon the rule of the case of *Newlands* (4 Pat. 43) and many others I should have held that this was a conveyance to the mother in liferent and her unborn children in fee, conceived in such terms as to give her a fiduciary fee for them. I entirely agree with Lord M'Laren that it gave her no more than a fiduciary right, and that the various considerations which he has recited show that the granter of the deed intended to impress upon that nominal fee given to her a fiduciary meaning. Now, that would probably have been sufficient for the disposal of the case were it not that it appears that Mrs Fenton Livingstone did not take infeftment in terms of the conveyance, but took infeftment in liferent only. That is set forth in the record, and I understand there is no question as to the correctness of the statement. Now, the rule is that to complete the right of fee constituted by a conveyance of this kind there must be, in form at least, an infeftment in the fee. In the case of the liferent in the parent being unqualified, an infeftment in favour of the parent in liferent and her children or her heirs in fee will give an absolute fee to the parent. If the conveyance to the parent is qualified either by the term "allenary" or by equivalent expressions, so as to show that she was intended to have really a liferent merely, then an infeftment to the parent in liferent and the children in fee infefts the parent in the fiduciary fee. But then if the parent takes

infeftment in liferent only without any mention either of the children or of the fee, it is settled that no fee is effectually taken from the granter but remains in him on the old investiture. Whatever may be thought of the principle upon which these rules are founded, I take it there can be no doubt as to the practice, and they are established rules in feudal conveyancing. And therefore the result of Mrs Fenton Livingstone's infeftment in the particular manner in which it was taken, on the construction of the marriage-contract, would be to leave a formal fee in Mr Waddell upon his original investiture, not because the conveyance in the marriage-contract intended to reserve anything of the kind to him, but simply because his daughter had not completed her right in such a way as fully to divest him of his original fee. But then of course that was merely a formal feudal fee. It was no substantial right of property, and would not enable Mr Waddell to do anything which could defeat or prejudice in the slightest degree the settlement of this estate of Easter Moffat upon his daughter's children. Now, that being the state of the title, I must say it appears to me that the trust-conveyance which was executed by Mr Waddell and his daughter was an exceedingly effectual method of clearing away all difficulties that might arise upon the construction of his daughter's title. It was a conveyance by him and her to trustees expressly for the purpose of securing the rights created by the marriage-contract, and not in the slightest degree for the purpose of defeating them, and I cannot help thinking that one motive which led to the execution of this trust-conveyance was simply that the state of the title was seen to be likely to raise questions which it was very desirable to settle so as to have them taken out of the way once for all. Mr Waddell, who was a conveyancer by profession, and knew perfectly well what kind of questions would arise upon a conveyance to a parent in liferent and unborn children in fee, was exceedingly competent to consider how these questions might be solved, and the terms of this conveyance do seem to show that there was in the minds of the granters, or at least of Mr Waddell himself, an apprehension that questions might be raised as to where the fee really was, because Mr Waddell professes to convey his fee, and then Mrs Fenton Livingstone in conjunction with him conveys all the fee that is in her. I do not assent to the criticism which is made upon this trust-conveyance, that it imports any alteration of the period of vesting of the right conceived by the marriage-contract in favour of the children of the marriage. It is an immediate and out-and-out conveyance of the fee, and I think that from the first the trustees held the fee for the children of the marriage, to whom the marriage contract gives it, and the liferent only for Mrs Fenton Livingstone; and therefore it appears to me that the existence of this trust-conveyance could interpose no obstacle whatever to

the vindication of the right which this action is brought to vindicate. The trustees hold for Mrs Fenton Livingstone in liferent, and for George Fenton Livingstone in fee, and for nobody else, and therefore I should have thought that the most convenient and appropriate method of winding-up the trust—of determining the trust, since I think it is the right of the beneficiaries to determine it if they like—was to call upon the trustees to denude and convey. Whether George Fenton Livingstone would have been entitled to demand an immediate conveyance of the fee, subject to his mother's liferent, in opposition to a demand by his mother that the estate should still be held by the trustees for security of her liferent, I do not think it is necessary to consider, because the mother and the son are agreed that the trust is to be brought to an end, and as the whole interests in the estate are combined by those two persons, I think their agreement is quite enough to justify their calling upon the trustees to denude. And therefore I must say for myself that I think it very doubtful whether there was any necessity for a reduction in this case, or whether a reduction is really an apposite or appropriate remedy at all, because a reduction sweeps away the trust-deed from the first, and of course upon the ground that it was invalid from the first, whereas in my opinion it was quite good from the first, and I think that if the pursuer had been content to let it stand he would have obtained an advantage which the granter of the trust-deed, Mr Waddell, designed for him when he devised what I think would have been an exceedingly serviceable link in the progress of the pursuer's titles. But while I doubt, therefore, whether this is at all an appropriate remedy, I am not disposed to press that doubt so far as to dissent from the judgment proposed by Lord M'Laren, and in which Lord Adam has concurred, because the practical result of the reduction will be in substance to give George Fenton Livingstone and his mother the rights which I think they possess of having the estate conveyed to them in liferent and fee respectively; and if there be any question, which the Lord Ordinary thinks there is, and I understand Lord M'Laren thinks there is, as to whether this trust-conveyance did not go beyond the powers of the granters, that would no doubt be a perfectly appropriate decree. I think for myself it did not go beyond their powers, and that it would have been better to keep it standing, but for the reasons I have given I do not on that ground dissent from the judgment. It makes no difference at all between Lord M'Laren's opinion and mine as to the substantial rights of the various parties. I think with him that Mrs Fenton Livingstone has the liferent and George Fenton Livingstone has the fee of the estate of Easter Moffat, and that the defender John Fenton Livingstone has no right in this estate. I only add that I think the trustees were quite entitled to insist upon a judicial discharge and to raise any question as to the construc-

tion or validity of the trust-deed for the purpose of procuring such a discharge, and so long as there might be any doubt whether the beneficial interest in the estate was vested in George or John Fenton Livingstone it was undoubtedly their duty to hold the estate for whichever of the two should ultimately be found entitled to it. But now that it is found that the right and interest is in George, I see no further reason for their withholding the estate from its true owner.

LORD PRESIDENT—I agree with Lord M'Laren.

MR CAMPBELL—There is just one question. I do not know whether your Lordships would propose to limit the decree of reduction in the same way as the Lord Ordinary has done, because he has limited it so as not to affect the liferent of the lady. If I rightly apprehend your Lordships' judgment, I hardly see any necessity for that.

LORD M'LAREN—In the view which I have taken of the case I was a good deal influenced by the fact that the Lord Ordinary had reduced the trust-deed, and that no objection was taken to reduction as a mode of getting rid of the trust. But then his Lordship has held that Mrs Fenton Livingstone and her husband, for their respective rights in liferent, were entitled to create a trust which would only be effectual for administrative purposes, and that seems to me to be perfectly sound. If it is desired to get rid of that trust, the proper means of doing so would be, not an action of reduction, which attacks the right of the granter, but an action of denuding, and I apprehend that if we adhere to the interlocutors there will be no difficulty on the part of the trustees in divesting themselves of the liferent interest if they intend to act upon the judgment which has been given.

The Court pronounced this interlocutor:—

“Adhere to the said interlocutors [of 13th July and 24th October 1895]: Refuse the reclaiming-note: Of new find, dismiss, reduce, decern, and declare in terms of the interlocutors of the Lord Ordinary, dated 13th July 1895 and 24th October 1895, and decern: Find the appearing defender, the said John Nigel Edensor Fenton Livingstone, liable to the pursuers in their expenses of the proof, also in two-thirds of their other expenses from the date of the Lord Ordinary's interlocutor of 24th October 1895: Find the defenders the trustees entitled to expenses from said last-mentioned date out of the trust estate, and remit,” &c.

Counsel for the Pursuers—W. Campbell, Q.C.—Clyde. Agents—Drummond & Reid, S.S.C.

Counsel for the Defender J. Fenton Livingstone—Salvesen. Agents—J. K. & W. P. Lindsay, W.S.

Counsel for the Trustees—C. K. Mackenzie, Q.C. — Dundas, Q.C. Agents—Waddell & M'Intosh, W.S.

Tuesday, March 14.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.]

FEARN v. COWPAR.

Process — Proof — Proof or Jury Trial — Reduction of Will on Ground of Incapacity, Essential Error, Fraud and Facility, and Circumvention, and Undue Influence.

In an action for the reduction of a will on the ground of (1) incapacity, (2) essential error as to the nature of the deed executed induced by misrepresentations on the part of the residuary legatee, a bank-agent, who was the testator's confidential business adviser but not his law-agent, (3) fraud and facility and circumvention, and (4) undue influence exercised by the residuary legatee, the Lord Ordinary (Kyllachy) having allowed a proof before answer and refused issues, the Court on reclaiming-note *adhered*, refusing to interfere with what the Lord Ordinary had done in the exercise of his discretion as to the mode of inquiry to be adopted.

Weir v. Grace, March 10, 1898, 25 R. 739, followed.

Opinions (per Lord Young, Lord Trayner, and Lord Moncreiff) that the Lord Ordinary was right in thinking such a case unsuited for trial by jury.

This was an action for the reduction of a trust-disposition and settlement bearing to be made by the deceased Donald Ogilvy, retired farmer, Hill Road, North Muir, Kirriemuir, brought at the instance of Mrs Charlotte Whyte or Fearn, wife of James Fearn, Alyth, with consent and concurrence of her husband, and her husband for his interest, against James Cowpar, bank-agent, Kirriemuir, as trustee and executor, and as an individual and residuary legatee, under the said trust-disposition and settlement, and against the other legatees benefited thereby.

Defences were lodged by the defender James Cowpar.

The pursuer was a first cousin on the father's side, and one of the next-of-kin and heirs *in mobilibus ab intestato* of Donald Ogilvy, and also one of his heirs-portioners.

By the trust-disposition and settlement under reduction, which was dated 12th December 1893, Donald Ogilvy conveyed his whole moveable estate to the said James Cowpar, as sole trustee and executor, whom failing to his brother David Tosh Cowpar, and the trust purposes were (1) payment of debts, deathbed and funeral expenses, and the expense of realising the personal estate, (2), (3), and (4) payment of legacies amounting in all to the sum of £7500 for charitable and religious purposes, (5) a provision of £2000 to be set aside and held in trust for behoof of James Cowpar's mother for her liferent use allenerly, and on her death to be divided equally among

her four daughters *nominatim*, and (6) payment of a legacy of £1000 to James Cowpar's brother David Tosh Cowpar. The testator also bequeathed, assigned, and disposed a small heritable property of eight acres to David Tosh Cowpar, and lastly, left, bequeathed, assigned, and disposed the whole residue of his means, estate, and effects, heritable and moveable, to James Cowpar, and his heirs, successors, and assignees whomsoever.

Donald Ogilvy died on 3rd May 1898. The defender stated that he was then sixty-five years of age.

The pursuer averred, *inter alia*, that Donald Ogilvy had been imperfectly educated, and could read and write but little; that from his earliest days he had been eccentric, simple, and weak minded; that he lived with his brother and sister, who never married, and to whose property he succeeded on their deaths in January and November 1893; that he lived in a miserly and sordid fashion; that after the deaths of his brother and sister he was seriously broken down in health and in mind, and that James Cowpar then became his confidential adviser and manager of his business affairs, and that having acquired an ascendancy over him he induced him to execute the will under reduction. “(Cond. 14) The said pretended trust-disposition and settlement is not the deed of the said Donald Ogilvy, but was impetrated and obtained from him by the said James Cowpar by the exercise of undue influence and by fraud and circumvention while the said Donald Ogilvy was weak and facile, and not of sound disposing mind. At the date on which the said pretended trust-disposition and settlement was executed, and for long previously as well as subsequently, the deceased was not mentally capable of appreciating or understanding such a deed or its import and effect, especially as its provisions are involved and difficult. The said James Cowpar obtained it from him by taking advantage of his weakness and facility, aggravated as these were at the time by the recent death of the deceased's said brother Walter, and with the object of securing for himself (Cowpar) and the members of his family the large benefits conferred upon him and them in the said pretended deed to the lesion of the said Donald Ogilvy and his next-of-kin and heirs-at-law. The said Donald Ogilvy was incapable, not only of originating and conceiving, but of giving directions for carrying out and of adjusting such a disposition of his affairs as the said pretended deed bears to carry out and contain. The said James Cowpar conceived and arranged the pretended trust-disposition and settlement in its whole heads, and the pretended charitable bequests which it purports to make were only adopted by the said James Cowpar as a blind for diverting public attention from the great benefits conferred upon himself and the members of his family. The agent by whom the deed was prepared was not the agent of the said Donald Ogilvy, who was unacquainted with him and never gave him any instruc-