

no action can lie against either at the instance of the pursuers.

LORD KINNEAR—I concur with your Lordships that Mr Fulton had no authority from the defenders to employ the pursuers' firm, and it follows that the pursuers have no action against the defenders.

LORD PEARSON was absent.

The Court recalled the Lord Ordinary's interlocutor and assoilzied the defenders.

Counsel for Pursuers (Respondents)—Wark—T. G. Robertson. Agents—J. & J. Galletly, S.S.C.

Counsel for Defenders (Reclaimers)—Morison, K.C.—Mair. Agent—James Ayton, S.S.C.

Saturday, June 6.

### FIRST DIVISION.

[Lord Dundas, Ordinary.]

#### BLACK AND OTHERS (COLVILLE'S TRUSTEES) v. MARINDIN AND OTHERS.

*Right in Security—Confusio—Heritable Bond over Entailed Estate—Succession by Heir of Entail in Possession to Creditor in Bond—Acquisition of Personal Right by Conveyancing Act 1874—Subsequent Declarator of Invalidity of Entail by Succeeding Heir.*

In 1842, A, the heir in possession of certain entailed estates succeeded *ab intestato* to the creditor in a bond affecting part of the entailed estates. A died in 1856 without having made up a title to the bond, and was succeeded by his son B, who also acquired *ab intestato* the right to make up a title to the bond but failed to do so. He, however, acquired a personal right to the bond in virtue of the Conveyancing Act 1874 (37 and 38 Vict. cap. 94), section 9. B died in 1880 leaving a trust-disposition and settlement. In 1881 the succeeding heir of entail obtained decree of declarator that the deeds of entail affecting the lands were invalid in virtue of the provisions of the Entail Amendment Act 1848 (11 and 12 Vict. cap. 36), section 43.

*Held* that the bond was not extinguished *confusio* in the person of B, but was carried to his trustees by his trust-disposition and settlement.

*Succession—Destination—Fee and Liferent—Fiduciary Fee.*

A party in right of a heritable bond conveyed the same by a disposition assignation and settlement to certain persons in liferent, and to the heir of entail who might be in possession of certain estates at the expiry of the liferent in fee.

*Opinion (per the Lord President) that*

such a destination could not be effectual without the interposition of a trust.

*Succession—Destination—Fee and Liferent—Destination to Heir of Entail who might be in Possession of Certain Estates at Expiry of Liferent in Fee—Disentail before Expiry of Liferent.*

A, the creditor in a heritable bond granted in 1833, executed in 1841 a disposition assignation and settlement, whereby she conveyed the bond to certain parties in liferent and the heir of entail who might be in possession of certain entailed estates at the expiry of the liferent in fee. A died in 1842. In 1881 decree of declarator of invalidity of the entail was obtained by the heir then in possession, and the destination evacuated by his trust-disposition and settlement. The last liferenter died in 1905. *Held* (by the Lord Ordinary and acquiesced in) that the destination in the disposition assignation and settlement had failed, that the bond became intestate succession of A, and that the party who would have been heir of entail in possession in 1905, had the entail subsisted then, had no claim to the bond.

*Succession—Intestate—Heritable or Moveable—Heritable Bond—Titles to Land Consolidation (Scotland) Act 1868, sec. 117—Bond Granted before 1868—Death of Intestate before 1868—Intestacy Ascertained after 1868.*

The creditor in a heritable bond died in 1842 leaving a disposition assignation and settlement conveying the bond to certain parties in liferent, and to the heir of entail who might be in possession of certain entailed estates on the expiry of the liferent in fee. In 1881 decree of declarator of invalidity of the entail was obtained. The last liferenter died in 1905. *Held* (by the Lord Ordinary and acquiesced in) that the destination having failed, the bond was intestate heritable succession of the creditor in it, and did not become moveable in virtue of the Titles to Land Consolidation (Scotland) Act 1868 (31 and 32 Vict. cap. 101), section 117.

By bond and disposition in security dated 17th May 1830, the late Andrew Colville, otherwise Andrew Wedderburn Colville of Ochiltree, conveyed the lands of Muirside (now forming part of the estate of Crombie and Craigflower in the county of Fife) to the late John Blackburn of Killearn, in security of the sum of £4500 borrowed from him. Mr Blackburn was duly infert, and in 1834 conveyed the lands and assigned the bond and disposition in security to Miss Margaret Blackburn, who was duly infert. By a disposition assignation and settlement, dated 24th August 1841, Miss Margaret Blackburn, on the narrative that she had resolved to settle the destination and right of succession of the foresaid sum of money, and heritable security for the same, in the event of her death, disposed and conveyed the lands of Muirside, and her whole right and interest to and under the said bond and

disposition in security, to and in favour of her grandnieces, daughters of the said Andrew Colville, her nephew, equally among them, or such of them as should survive her and be unmarried, and to the survivors or survivor of them in liferent, during all the days of their lifetime and remaining unmarried, and the lifetime of the survivors or survivor and remaining unmarried as might be, for their liferent use only, and after the marriage or deaths of all of them, then to and in favour of the heir of entail who might be in possession of the said estate of Crombie and Craighflower in fee. The disposition assignation and settlement contained an obligation to infest.

Miss Margaret Blackburn died in 1842, and the last of the liferentices died unmarried on 2nd August 1905.

At the date of Miss Margaret Blackburn's death in 1842, Andrew Colville was her heir-at-law, and was heir of entail in possession of the lands of Crombie and Craighflower, now including Muirside, which had been entailed by him in 1833 upon the same series of heirs. He died in 1856, and was succeeded in the said lands by his son Sir James William Colville, who died in 1880 leaving a trust-disposition and settlement. Sir James was succeeded in the lands by his brother Eden Colville. In 1881 Eden Colville obtained decree in an action of declarator that the entail under which he held the said lands of Crombie and Craighflower, including Muirside, was invalid and ineffectual in terms of the provisions of the Entail Amendment Act 1848 (11 and 12 Vict. cap. 36), section 43. (See *Colville v. Marindin*, July 12, 1881, 8 R. 937, 18 S.L.R. 674). Eden Colville died in 1893 leaving a trust-disposition conveying his whole estate, heritable and moveable (including the said lands), in favour of trustees for the purpose, *inter alia*, of making payment of the whole free annual income to a series of persons therein named including Miss Kathleen Mary Isabel Marindin.

On June 16, 1906, Eden Colville's trustees raised an action of multiplepounding and exoneration with regard to the sum of £4500 contained in the bond granted by Andrew Colville. Claims were lodged for (1) Captain Arthur Henry Marindin, who would have been heir of entail in possession of the lands of Crombie and Craighflower in August 1905 had the entail still subsisted; (2) Dame Frances Elinor Colville and others, the trustees of Sir James William Colville; and (3) Miss Edith Mary Marindin and others, the next-of-kin of Miss Margaret Blackburn.

The claimant Captain Marindin maintained that at the date of Miss Margaret Blackburn's death in 1842 it was not possible for any heir of entail under the deeds affecting the estates of Crombie and Craighflower, to bring the entail to an end; that the action of declarator by Eden Colville was only rendered competent by subsequent legislation (the Entail Amendment Act 1848); that but for such legislation he (the claimant) would have been heir of entail in possession of the estates of Crombie and Craighflower in August 1905,

and as such entitled to the bond of £4500; that said legislation in no way rendered unintelligible the words employed by Miss Margaret Blackburn to designate the person who should be entitled to the fee of the bond.

The claimants Sir James William Colville's trustees maintained that in view of the decree in the said action of declarator the destination in the disposition assignation and settlement by Miss Margaret Blackburn as to the fee of the bond for £4500 had failed; that the bond had become intestate succession of Miss Margaret Blackburn; that her heir in heritage at the time of her decease was Andrew Colville, who died in 1856 without having made up a title to the bond; that on his death the right to make up a title passed to his son Sir James William Colville, who died in 1880; that in virtue of the Conveyancing Act 1874 (37 and 38 Vict. cap. 94), section 9, a personal right to the bond vested in Sir James and passed on his death to the claimants his trustees in virtue of his trust-disposition and settlement.

The claimants Miss Edith Mary Marindin and others, the next-of-kin of Miss Margaret Blackburn, maintained that on the failure of the destination in the disposition assignation and settlement the bond and disposition in security became intestate succession of Miss Margaret Blackburn, and was moveable in virtue of the provisions of the Titles to Land Consolidation (Scotland) Act 1868 (31 and 32 Vict. cap. 101), section 117, and therefore belonged to her next-of-kin.

Objections to the condescence of the fund *in medio* were lodged by Miss Kathleen Mary Isabel Marindin, who was presently entitled under the trust-disposition and settlement of Eden Colville to the free annual income of his whole estate including the aforesaid lands.

The objector, after setting forth the failure of the destination in the disposition assignation and settlement by Miss Margaret Blackburn, averred—" (Cond. 3) The right to the fee of the said principal sum of £4500, being undisposed of, vested as at Miss Blackburn's death in 1842 in Andrew Wedderburn Colville, her heir-at-law; but as he died in 1856 without making up a title thereto, the right to the said fee then vested in Sir James William Colville, her next heir-at-law. Sir James William Colville being alive at the passing of the Conveyancing Act of 1874, a personal right to the said fee vested in him at that date in virtue of the provisions of that statute, and in particular of section 9 thereof. (Cond. 4) In 1874 Sir James William Colville was in possession of the lands of Muirside, over which the said bond was secured, his right thereto being *ex facie* as heir of entail in possession. Owing to the defects in the deed of entail of the said lands, all the prohibitions contained in the said deed of entail were invalid as from and after the date of the Act 11 and 12 Vict. cap. 36, and were not binding on the said Sir James William Colville. Sir James William Colville was, therefore, from the date of his

succession to the said lands in 1856 until his death, *de facto* proprietor in fee-simple of the said lands. (Cond. 5) Sir James William Colville being in 1874 proprietor in fee-simple of the lands of Muirside, and being at the same time vested in the fee of the heritable debt for £4500 affecting the said lands, the said debt, *quoad* the fee thereof, was extinguished *confusione* in his person. On the death of the last holder of a liferent interest in the said debt on 2nd August 1905 the said heritable debt was extinguished *quoad* the liferent also. This defender therefore objects to the condescendence of the fund *in medio* in respect that it sets forth that the right to the fee of the principal sum of £4500 has emerged by the death of the last survivor of the liferenters interested therein. No such right to the fee has emerged, the said heritable debt having been totally extinguished."

The objector pleaded—" (3) The liferent interest in the bond for £4500 condescended on having been extinguished by the death of the last liferent, and the fee thereof having been extinguished *confusione* in the person of the late Sir James William Colville, there is no fund in the hands of the pursuers and real raisers with regard to which any questions have arisen as to the person or persons entitled thereto. (4) There being no fund in the hands of the real raisers as to which competition has arisen, the claims lodged or to be lodged by parties claiming right thereto should be repelled."

On 25th May 1907 the Lord Ordinary (DUNDAS) pronounced the following interlocutor:—"Ranks and prefers the claimants Dame Frances Elinor Colville and others, as trustees for the deceased Sir James William Colville, to the whole fund *in medio*, in terms of their claim, and ordains them to make up and complete *habili modo* a title to, and thereafter execute and deliver to the pursuers a valid and proper discharge of, the bond and disposition in security libelled, as concluded for in the summons, and decerns: Repels the claims of the whole other competing claimants, and decerns."

*Opinion.*—[After narrating the facts]—"It will be convenient to consider first the claim for Captain Arthur Henry Marindin, the person who, but for the disentail of the estates of Crombie and Craigflower, and the subsequent evacuation of the tailzied destination, would have been the heir of entail in possession at the date of the death of the last liferentrix. I am of opinion that this claim is ill-founded and must be repelled. It seems to me impossible, as matter of construction, to hold that Captain Marindin was or is, 'after the marriage or death of all of them' (*i.e.*, the liferentrices) '... the heir of entail ... in possession of the estate of Crombie and Craigflower ...' I think that possession of the entailed estate was a condition of the succession. I should have reached this conclusion apart from authority, but such aid as may be derived from reported cases seems to me to strengthen the view which I take. Thus in *Inglis v. Gillanders*, 1894, 22 R. 266, *aff.* 1895, *ibid.* (H.L.) 51, the portion of the

destination specially considered was 'to the heir in possession of Highfield under the entail thereof for the time, and' (*i.e.*, whom failing) 'to the other heirs-substitute in said entail in the order set down in said entail successively.' Highfield had been disentailed, and the tailzied destination evacuated. It was held, in regard to the 'first branch' above quoted, that (in the words of Lord Watson, 22 R. (H.L.) at p. 55, 'it is obvious that since the disentail of Highfield the substitution has become void, because there can be no heir answering the description.' The 'second branch,' however, was held to import no condition of possession; all that was requisite being the character of an heir-substitute designated in the deed of entail. The first branch of the destination in that case appears to me to bear a very strong resemblance to that now under consideration. In the immediately succeeding case of *Schank* (1895, 22 R. 845) the words were 'the heirs of entail who may in succession and for the time be in possession or have right to be in possession of the entailed estate of X under and in virtue of the deed of entail.' The ground of judgment was thus summarised by Lord Trayner—"It is the essential quality of the person claiming the liferent that he shall be in possession or be entitled to the possession of the entailed lands. The defender does not, and no other person now can, possess that quality, for the entail is no longer in existence." The recent decision in *Mackenzie's Trustees* (1907 S.C. 139), a complicated case, involving scrutiny of a variety of documents, seems to have turned ultimately upon a differentiation of the phrase, 'the heir entitled to succeed under the said deed of entail'—occurring in a codicil—from the language of the testator's principal deed, which was 'the heir succeeding to said estates under the said deed of entail.' I was also referred to, but need not comment upon, the cases of *Fenton Livingstone* (1899, 1 F. 831), and *Davidson* (1906, 14 S.L.T. 337). For the reasons which I have stated I am of opinion that the claim for Captain Marindin must be repelled. At the date of the death of the last surviving liferentrix neither he nor anyone else could fulfil the condition—upon which, in my judgment, the right of succession depended—of being heir of entail in possession of Crombie and Craigflower.

"If this view is correct, it seems to follow intestacy resulted. But a controversy is raised between the parties who claim to represent, on the one hand, Miss Blackburn's heir-at-law, and on the other hand, her heirs *in mobilibus*. The first of these claims is made by the trustees of Sir James William Colville. They state that Miss Blackburn's heir-in-heritage at her decease was her nephew Andrew Wedderburn Colville, who died in 1856 without having made up a title to the bond. On his death the right to make up title thereto passed to his son Sir James William Colville, who survived until 1880. His trustees maintain that in virtue of the Conveyancing (Scotland) Act 1874 (37 & 38 Vict. c. 94), section 9, a personal right to the bond vested in Sir

James and passes upon his death to them under and in terms of his trust-disposition and settlement. On the other hand, the fund *in medio* is claimed by the next-of-kin and representatives *in mobilibus* of Miss Blackburn. Their plea-in-law is that 'the testatrix having postponed vesting of the fund *in medio* until the termination of the liferent, and the destination having then failed, the claimants, as her next-of-kin and heirs *in mobilibus*, are entitled to be ranked and preferred to said fund in terms of their claim.' Of the opposing contentions thus raised I prefer the former. It is, I apprehend, settled law—at all events since the decision in *Lord v. Colvin* (1865, 3 Macph. 1083)—that in a case, as this is, of resulting intestacy the heir must be looked for as at the time of the testator's death, and not as at the date when it became certain that none of the contingencies could happen by the occurrence of which intestacy would have been prevented. Nor do I see any reason to doubt that the quality and character of the succession must be ascertained as at the date of the death of the testatrix. This view appears to me to be in accordance with the language of section 117 of the Titles to Land Consolidation (Scotland) Act 1868 (31 and 32 Vict. c. 101), and the cases of *Brown*, 1870, 8 Macph. 439, and *Cunningham*, 1889, 17 R. 218. If that is so, I take it that the right to make up title to the bond, which was heritable at Miss Blackburn's death, passed to her heir-at-law; and that, unless the argument for Miss Kathleen Marindin, which I must presently notice, is well founded, the fee of the money is now vested in Sir James Colville's trustees. Counsel for the next-of-kin referred me to a great number of authorities, amongst the best known of which are *Ferguson* (1875, 2 R. 627), *Maule* (1876, 3 R. 831), *Cumstie* (1876, 3 R. 921), and *Tristram* (1894, 22 R. 121). It is perhaps sufficient to say that none of these cases, nor the doctrine of fiduciary fee with which they are mainly concerned, appears to me to have any application to the present case, and that, even upon a contrary assumption, I do not understand how these claimants could take benefit from the application of the doctrine referred to. Subject, therefore, to the argument next to be considered, Sir James Colville's trustees are, in my opinion, entitled to prevail in the competition.

"I must now deal with the views submitted on behalf of Miss Kathleen Marindin. These are, as I shall afterwards point out, introduced into the case in a very singular manner, but they were made the subject of an able and earnest debate, which deserves attention and is not unattended with difficulty. Miss Marindin is the person presently entitled to the free annual income of the estate of the late Eden Colville, held by his trustees, the pursuers and real raisers, which includes the lands of Muirside. She has, therefore, an interest to maintain, as she does, that the bond in question has been extinguished *confusione*. The theory of her contention is that, on the death of the last liferentrix and the

failure of a far, the bequest fell into intestacy of Miss Blackburn; that in 1874, when the Conveyancing Act above referred to became law, the rights of debtor and creditor respectively in the said bond concurred in the person of Sir James Colville; and that confusion accordingly operated, at all events so as to extinguish the fee of the £4500 debt. As regards the 'debtor' side of the matter, it is pointed out (I think fairly enough) that although in 1874 the entail of Muirside subsisted and was not known to be invalid, it was truly so from the passing and under the operation of the Rutherford Act, particularly section 43 thereof, and that Sir James was therefore from his succession in 1856 onwards *de facto* proprietor in fee-simple of the lands. When, however, one comes to consider Sir James Colville's position as creditor in the bond, the matter becomes more difficult. It is not easy to affirm that he was in the full right of credit, looking to the active subsistence of the liferents and to the fact that at their termination there might have been an heir of entail in possession of Crombie and Craighflower other than Sir James himself. I know of no authority which governs this rather perplexing state of matters. It seems to me to be by no means clear that a right of credit of so contingent a kind is sufficient to invest its temporary holder with the character of creditor in a question of confusion. But, however that may be, I do not think, regarding the matter upon principle, that it would be possible to hold that the fee of this debt could be extinguished *confusione* in 1874, consistently with the right of the liferentices to draw interest upon it, as they in fact did, for thirty years thereafter. It was maintained that Miss Blackburn could not legally or effectually make her bequest in the way she did; and that the liferentices, in spite of their infetment, had really no right to the interest of the money, at all events after 1874, when the fee was, according to the argument, extinguished by confusion. But these views, which were not supported by reference to authority, appear to me to be unsound. Miss Blackburn's mode of destination was unusual and inconvenient; but I do not think that it was illegal or ineffectual. I was referred to the case of *Love* (1863, 2 Macph. 22), and especially to certain *dicta* therein. Lord Neaves said—'When any one is *pleno jure* the ultimate debtor and creditor in the same debt without relief, that situation in general amounts to confusion and extinguishes the debt. It may be that other parties are interested in the debt, as where an heir-portioner being the joint creditor in an heritable debt succeeds as heir to the debtor, or *vice versa*. The result in that case is that the right is *pro rata* extinguished. It is difficult to see why a similar rule should not apply to a case of liferent and fee.' The Lord Justice-Clerk (Inglis) added—'I participate strongly in the doubts suggested by Lord Neaves whether the right to this third' (of the bond) 'was not extinguished *confusione*.' I fully acknowledge the great weight

which must attach to any words which fell from these eminent judges. The *dicta*, however, were purely *obiter*, and were doubted by Lords Cowan and Benholme. Further, it is permissible to observe that the illustration of joint interest suggested by Lord Neaves appears to be very different in its nature from that of *liferent* and *fee*, and that his Lordship does not explain the effect of the application of the doctrine of *confusio* to the right of the *liferenter*. If the obligation for the payment of the principal has been finally extinguished, it is hard to see how the right of the *liferenter* duly infert could possibly continue to subsist. It may also be noted that, though the facts in *Love v. Storie* are not very clear from the report, there was in that case an existing *fiar*, definitely named, which so far distinguishes it from the present case. Upon the best consideration which I am able to give to the argument for Miss Marindin, I am of opinion that it fails, because it appears to me that her counsel cannot successfully maintain that Sir James Colville was, in Lord Neaves' words, '*pleno jure* the ultimate debtor and creditor' in the debt in question. In my judgment, therefore, the claim of Sir James Colville's trustees must be sustained, subject, of course, to their granting a valid discharge in favour of the real raisers."

The objector (Miss Kathleen Mary Isabel Marindin) reclaimed, and argued—The disposition assignation and settlement was ineffectual to dispose of the fee of the heritable bond, and the bond belonged to the heir *ab intestato* all the time, for the fee could not be *in pendente*, and in the absence of a trust there could be no fiduciary fee in the *liferenters*. Further, the doctrine of fiduciary fee had never been extended to such a case. On Miss Blackburn's death, therefore, the bond passed to her heir-at-law Andrew Colville. He died in 1856 without having made up a title, and the right to make up a title passed to his son Sir James William Colville. In 1874 Sir James acquired a personal right to the bond in virtue of the Conveyancing Act 1874 (37 and 38 Vict. cap. 94), section 9. At that time Sir James was also debtor in the bond as he was in possession of the lands of Muirside, and though he possessed nominally as heir of entail, he was in reality fee-simple proprietor, in virtue of the retrospective effect of the subsequent declarator of invalidity in terms of the Entail Amendment Act 1848 (11 and 12 Vict. cap. 36), section 43—*Urquhart v. Urquhart*, February 20, 1851, 13 D. 742, per Lord Fullerton at p. 751; *Russell v. Russell*, December 7, 1852, 15 D. 192, per Lord President M'Neill at p. 195; *Scott v. Scott*, December 6, 1855, 18 D. 168. The bond was therefore extinguished *confusione* in 1874 in the person of Sir James William Colville—*Murray v. Parlame's Trustees*, December 18, 1890, 18 R. 287, 28 S.L.R. 223, and cases there cited. There was nothing to prevent partial extinction of the bond, *i.e.* *quoad* the fee, while it subsisted as to the *liferent*—*Love v. Storie*, November 6, 1863, 2 Macph. 22, per Lord Cowan at p. 30, Lord Neaves at p.

31, and Lord Justice-Clerk Inglis at p. 32. Counsel also referred to *Johnston v. Johnston*, July 2, 1697, M. 3042.

Argued for Sir James William Colville's trustees, claimants and respondents—Sir James Colville never was during his lifetime the full creditor in the bond. He had not the right to receive payment of the principal and periodical interest. (1) There was a fiduciary fee in the *liferenter*. Though it was true that there was no case where the doctrine of fiduciary fee had received effect, in which the *liferenter* did not occupy a fiduciary relation to the *fiar* (*e.g.*, parent and child), still there was no authority against the extension of that doctrine to a case like the present—*Newlands v. Newlands' Creditors*, 1798, 3 Ross' L.C. 634; *Allardyce v. Allardyce*, 3 Ross' L.C. 655. In *Ferguson v. Ferguson*, March 19, 1875, 2 R. 627, 12 S.L.R. 435, the destination was to a party in *liferent* and the heirs-male of his body and other substitutes in fee, while in *Cumstie v. Cumstie's Trustees*, June 30, 1876, 3 R. 921, 13 S.L.R. 594, the destination was to a party in *liferent* and his heirs whomsoever in fee, and in both these cases the Court held that there was a fiduciary fee in the *liferenter*. (2) Whether there was a fiduciary fee in the *liferenter* or not, there was during Sir James' lifetime a contingent interest in the fee of the bond in some other party. This was supported by the obligation to infert, contained in the disposition assignation and settlement, and also by the fact that if the entail had subsisted till 1905, there would have been no answer to the claim of Captain Marindin as heir of entail in possession. If there was either a fiduciary fee in the *liferenters*, or if there was a contingent interest in some other party in the fee of the bond, during the life of Sir James Colville, there never was that *concursum debiti et crediti* in Sir James, required for the operation of *confusio*—*Fleming v. Imrie and Others*, February 11, 1868, 6 Macph. 363, 5 S.L.R. 242. Further, there was no case where the doctrine of *confusio* had been applied in circumstances like those of this case.

At advising—

LORD PRESIDENT—In 1830 John Blackburn of Killearn lent a sum of £4500 to Andrew Colville of Ochiltree, who in security of that sum conveyed to John Blackburn certain lands called Muirside. Subsequently John Blackburn assigned that bond and disposition in security to Miss Margaret Blackburn. In 1833 Andrew Colville executed an entail of the lands of Muirside on the same series of heirs as those called in the destination of certain other lands of Crombie and Craighflower, which had already been entailed. In 1841 Miss Margaret Blackburn, by disposition assignation and settlement, disposed the said bond and disposition in security in favour of her grandnieces, nine in number, all being daughters of Andrew Colville, in *liferent* equally among them, and to the survivors of them in *liferent* during all the days of their lifetime and remaining unmarried for their *liferent* use, and after

the marriage or death of all of them, then to and in favour of the heir of entail who might be in possession of the estate of Crombie and Craigflower in fee. These nine ladies lived for a considerable time, and the last of them all died unmarried in 1905, and thereby for the first time the fee of the bond opened for behoof of whomever it might concern. Miss Margaret Blackburn herself had died in 1842, and Andrew Colville, who executed the entail of the lands of Muirside, died in 1856. He was succeeded in the entailed lands by Sir James Colville, who died in 1880. Sir James Colville was succeeded by Eden Colville, and in 1881 Eden Colville disentailed these lands, having discovered that there was no proper irritant clause. Having done so he vacated the destination of the entailed lands by means of a settlement, and he himself dying in 1893 his trustees took up the lands under the disposition contained in his settlement. By his settlement Miss Kathleen Marindin is entitled to the whole produce of the lands. The competition that has arisen is as to who is in right of the fee of this bond which was set free by the death of the liferentrix in 1905. Up to that time, of course, interest on the bond had been duly paid by the proprietor of the lands for the time being to the various liferentrics in succession. One claimant in the multiplepounding originally was the person alleging himself to be the person to whom the fee was primarily destined—namely, the heir of entail, who might be in possession of the estate of Crombie and Craigflower at the expiry of the liferent. The Lord Ordinary has found that there was in truth no such person, and that part of his judgment has not been reclaimed against.

But the competition before us is between the trustees of Sir James Colville and Miss Marindin, who does not directly compete for the bond, because she does not say it belongs to her, but, I think logically enough, objects to the condescence of the fund *in medio*, because she says that the bond is not an existing burden upon the estates. Of course it is her interest to say so, because, as she has the whole produce of the estates under the trust-disposition and settlement of Eden Colville, she would in that case get the whole produce unburdened by an existing bond.

In order to solve this matter it is necessary now to consider exactly what happened when Miss Margaret Blackburn made this settlement of the bond. I am bound to say that I think Miss Margaret Blackburn attempted an impossibility in conveyancing. She, being in right of the bond and disposition in security, disposed that bond and disposition in security in favour of a certain number of unmarried liferentrics who were alive. That, of course, was quite good. But then she proceeded to dispose of the fee to a person unknown, who might or might not be in existence—namely, the person who at the expiry of these liferents would possess the character of heir of entail under a certain entail; and she did that by means of a direct conveyance

without the interposition of a trust. As I say, I think that is a conveyancing impossibility. We are all familiar with the case of *Frog's Creditors*, M. 4262, and it has again and again been said that the principle of *Frog's Creditors* would not be extended. *Frog's Creditors* decided that a disposition to a parent in liferent and children in fee will be constituted as a fee in the parent, and in the subsequent case of *Newlands*, M. 4289, there is introduced a fiduciary fee in the parent where the liferent is a liferent alienarily. There was a difference of judicial opinion with very high authorities on both sides in *Cumstie's Trustees*, 3 R. 921, but I will be content to take the result of what was arrived at in *Cumstie's Trustees*, namely, that you could have a fiduciary fee for heirs whomsoever; but I have never yet heard—and I do not think we ought to extend the doctrine—of the doctrine of a fiduciary fee for somebody who is neither a child nor an heir in any sense of the person in whom the fiduciary fee is created. Accordingly, I think that what Miss Blackburn wanted to do, if it could be done effectually, could only have been done by the interposition of a trust.

But, although I have thought it necessary to say so, it really does not matter whether this view is correct or not, because the same practical result is reached in another way—and is indeed a direct corollary of the finding of the Lord Ordinary that the destination to the heir who shall be in possession of the estate of Crombie and Craigflower, taking effect as it does when there is no longer an entailed estate of Crombie and Craigflower is equivalent to no destination—the result, namely, that the fee of this bond was not effectually given to anybody, and, accordingly, it remained in the *hereditas jacens* of, or went to the heirs of, Miss Blackburn. Who were the heirs of Miss Blackburn in 1842? Her heir at that time was Andrew Colville. Andrew Colville as a matter of fact never made up a title for the amount of this bond, and, accordingly, as the law then stood, no right ever vested in him because he did not connect himself by service. He was succeeded by Sir James Colville, who in the same way would have had right to make up a title to the bond. But the same effect in law as had happened with Andrew Colville did not exactly happen with Sir James Colville, because Sir James Colville survived the Conveyancing Act of 1874. As your Lordships very well know the Conveyancing Act of 1874 altered the old law in this particular, and gave persons in the position of Sir James a good personal right without service. Accordingly, by the fact that he had the character of heir to Miss Blackburn and the operation of the Conveyancing Act of 1874, Sir James had a good personal right to the bond for the £4500.

That personal right, if it continued to exist, was necessarily transferred by his trust-disposition and settlement to his trustees. But then Miss Marindin makes this answer. She says—“Yes, it would have been transferred; but in the mean-

time as you, Sir James, were heir of entail in possession, and as such were debtor in the bond, because you possessed the lands of Muirside, confusion took place and the fee of the bond was once and for all wiped out." I do not think that that took place, and I think the matter is quite clearly explained by Mr Erskine, and really settled by a couple of authorities. Mr Erskine, treating of confusion in section 27, book 3, title 4, says—"Confusio hath not always the effect of a total and perpetual extinction of a debt or right. Sometimes it produces only a temporary suspension of it, while the debtor and creditor continue one and the same person, or while the same person is entitled to the succession of the two several rights from the different destinations of which the *confusio* flows. But when the succession of these rights happens again to divide in two the obligation or right which lay for a while sunk or dormant *confusione* revives and recovers its first force." In support of these propositions he quotes two cases both of which seem to me satisfactorily to determine this matter. The first is the case of *Gordon v. Maitland*, Dec. 1, 1757, M. 11,161 at p.11,164. The rubric of that case is—"A creditor in debts affecting an entailed estate succeeding as heir of entail in that estate, the debts are not extinguished *confusione*." The circumstances of that case are rather involved, and I do not take up your Lordship's time by going through them, because I can do so more clearly in the other case which he quotes. The case is that of *Cuming v. Irvine*, Jan. 4, 1726, M. 3042—"In the year 1683 Alexander Irvine of Drum made a tailzie of his estate in favour of himself and the heirs-male of his body, which failing to certain other heirs-male named. In the year 1687 the said Alexander Irvine executed a bond of provision for the sum of £80,000 Scots to his 2nd son Charles and the heirs-male of his body; which failing to the other heirs-male of the persons nominated and designed by him to succeed in his lands and heritages. The heirs-male of the entailer's body having failed, the succession, both of the entailed estate and of the bond, devolved upon Alexander Irvine of Murthill, who was accordingly served heir of tailzie to the said estate, but did not expedite any service to the said bond of provision. After his decease his son and apparent heir granted a bond for £10,000 sterling to a trustee, who thereupon charged him to enter heir of provision to Charles in order to make up a title by adjudication to the £80,000 bond, and having thus established the bond in his person, he again charged the apparent heir of tailzie in the estate of Drum, and obtained an adjudication against the estate for the said debt of £80,000. In a process at the trustee's instance against the heirs of entail concluding that the bond of £80,000 Scots was a subsisting debt and did effectually burden the entailed estate of Drum, the Lords found that the heir-male of Murthill being served heir to the estate of Drum, his service did not state him in the right to the £80,000 bond so as

to operate a confusion in his person, and that this Drum being charged to enter heir in special to Charles, and adjudication having thereon followed, did not operate a confusion of debtor and creditor in Drum's person; and therefore found that the said bond of provision is not extinguished, but is still a subsisting debt upon the estate of Drum."

That I think brings out perfectly clearly that Mr Erskine's doctrine is quite right; whether confusion will take place or not depends upon the identity of the destination. For if *confusio* took place automatically the moment that there was a *concursum debiti et crediti* in the same person, then there must have been *confusio* the moment that the heir of entail entered as heir of provision to the £80,000 bond. Here obviously there was no identity of destination, because on the creditor's side of the bond the destination was to a series of heirs of Miss Margaret Blackburn, while on the debtor's side of the bond the destination was to a series of heirs of tailzie in a certain estate of land. Although it is quite true, as we now know, that these lands were held in fee-simple, yet it is trite law that until the destination is evacuated the destination goes on. It seems to me, therefore, there never was *ipso jure* confusion, which alone would be useful for Miss Marindin's argument, because there is the necessary splitting again by the operation of Sir James's disposition and settlement. Although on a somewhat different kind of reasoning, I have come to the conclusion that the Lord Ordinary's judgment is quite right and ought to be affirmed.

LORD M'LAREN—I am of the same opinion on the same grounds.

LORD KINNEAR—I also agree with your Lordship for the same reasons.

LORD PEARSON was absent.

The Court adhered.

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