July 28. 1828. must be heard on the other point. The case stood over for your Lordships to consider this point, Whether the cause should go on? If it turned out that the parties were not properly described as defendants, that would have put an end to the cause. If your Lordships concur in the opinion I have expressed, the cause will of course proceed.*

Ordered accordingly.

No. 21. LEITCH and Others, Appellants.—*Adam—Stuart.* LEITCH'S Trustees, Respondents.—*Sugden—John Campbell.*

Fee, Conditional or Absolute.—A party having, by his deed of settlement, conveyed his lands to trustees, to hold them in trust for his widow's liferent during her life and viduity; and, on her death or second marriage, for two substitutes successively, and their heirs and assignees in fee; whom failing, another substitute, but without calling his heirs or assigns; whom failing, other substitutes; and the two first substitutes having predeceased the widow, who never married a second time, and the third substitute having executed a general disposition, and also predeceased the widow;—Held, (affirming the judgment of the Court of Session),—1. That the fee had vested in the third substitute; and, 2. That the general disposition was effectual to evacuate the subsequent destinations.

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2D DIVISION. Lord Cringletie.

JOHN LEITCH, proprietor of Kilmardinny, was married to Elizabeth Ironside, but had no family. He had a brother George, two nephews, James Frisby Leitch, and Andrew Leitch (the son of George),—two sisters, Christian and Mary,—and two nieces, Agnes and Jean Trokes. In 1804 he executed a mortis causa trust-disposition of his estate in favour of trustees, declaring, 'that these presents are granted, and to be accepted by 'my said trustees, in trust, for the ends, uses, and purposes after 'specified; viz. that they may and shall hold the foresaid lands 'in trust for the behoof of the said Elizabeth Ironside, my wife, 'in case of her surviving me, in liferent, for her liferent alimentary use allenarly, during the time of her life, and of her continuing my widow; and after her death, or in case of her entering into another marriage after my death, then for behoof of 'the said George Leitch, my brother, and his heirs and assignees 'whomsoever, in fee, in case he shall survive me, and shall be in 'life at the time of the death or second marriage of the said 'Elizabeth Ironside; and failing the said George Leitch by decease before me, or prior to the death or second marriage of 'the said Elizabeth Ironside, then I appoint the said trustees to 'hold the foresaid lands and others in trust for behoof of the

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* See post, No. 29.

'said James Frisby Leitch, my nephew, and his heirs and assig- Feb. 17. 1829.
'nees whomsoever, in fee, in case he shall be in life at the time
'of the death or second marriage of the said Elizabeth Ironside;
'and failing the said James Frisby Leitch by decease before me,
'or prior to the death or second marriage of the said Elizabeth
'Ironside, then I appoint the said trustees to hold the foresaid
'lands and others in trust for behoof of Andrew Leitch, my
'nephew, son of the said George Leitch; whom failing, for be-
'hoof of my sisters, Christian and Mary Leitch, and my nieces,
'Agnes and Jean Trokes, equally among them, and their heirs
'and assignees: And I appoint my said trustees, immediately
'after the death or second marriage of the said Elizabeth Iron-
'side, to grant, execute, and deliver a valid, ample, and formal
'disposition of the said lands and others in favour of the said
'George Leitch, and his heirs and assigns whomsoever, in case
'he should survive me, and be living at the time of the death or
'second marriage of the said Elizabeth Ironside: But in case of
'the said George Leitch predeceasing me, or in case of his death
'previous to the death or second marriage of the said Elizabeth
'Ironside, then I appoint the said trustees to grant, execute,
'and deliver a valid, ample, and formal disposition of the fore-
'said lands in favour of the said James Frisby Leitch, and his
'heirs and assignees whomsoever, in case he shall survive me,
'and shall be living at the time of the death or second marriage
'of the said Elizabeth Ironside: But in case of the death of the
'said James Frisby Leitch before me, or before the death or
'second marriage of the said Elizabeth Ironside, then I appoint
'the said trustees to dispone the said lands to and in favour of
'Andrew Leitch, my nephew; whom failing, to my sisters,
'Christian and Mary Leitch, and my nieces, Agnes and Jean
'Trokes, equally among them, and their respective heirs and
'assignees.'

His brother George died a short time afterwards. His nephew, James Frisby Leitch, died in May 1820; and in October of that year, Andrew executed a mortis causa general disposition of all his estates and effects, in favour of the respondents in trust. He died in February 1821, being survived by the widow till November 1823, when she died without having entered into a second marriage. The two sisters and the two nieces, (who were the appellants), survived all these parties.

The respondents, as trustees of Andrew Leitch, having raised an action before the Court of Session against the trustees of John, to denude of the lands of Kilmardinny in their favour,

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on the footing that the right had vested in Andrew prior to his death; and the sisters and nieces having made a similar claim, the trustees of John brought a process of multiplepoinding. Claims having been lodged, and the processes conjoined, three points were argued:—1. Whether the right of liferent constituted by John Leitch's trust-deed in favour of his widow, was conceived in such a way as to be not merely the primary right conveyed, but suspensive of the existence of any right or interest in the fee in the person of any of the conditional institutes till her death or second marriage took place, whatever might be the difference in the terms of the respective destinations in their favour? 2. Whether the destination in favour of Andrew Leitch was so conceived, as (independently of the supposed difficulty regarding the co-existence of the rights of liferent and fee,) to be dependent on the condition of his surviving the death or second marriage of the widow, in the same way with the previous destinations in favour of the two first conditional institutes, George, and James Frisby Leitch? And, 3. Whether the personal right in the fee, and corresponding jus crediti against John's trustees, (supposing these to have been vested in Andrew Leitch, by his survivance of George and James Frisby Leitch only), were effectually conveyed to Andrew's trustees by the general disposition in their favour?

Lord Cringletie repelled the claim of Andrew's trustees, preferred the sisters and nieces, and assoilzied John's trustees from the action of denuding. His Lordship explained the grounds of his judgment in the subjoined note.*

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* 'The first purpose of the trust granted by the deceased John Leitch was, that his 'trustees should hold his estate for behoof of his wife during her life or widowhood. 'It is in these words. (His Lordship then read the clause, ante, p. 366-7). From 'this it appears to the Lord Ordinary, that John Leitch's primary object was to 'give his widow a liferent of his lands; and the gift of the fee of the subject was of course 'only after her death, or ceasing to be his widow by becoming the wife of another man. 'This must controul the remaining parts of the deed, so as that the fee could not open 'to any one till after her death or second marriage. 2*d*, The trustees are to hold the 'subject for behoof of Andrew Leitch, without mention of his heirs or assignees; whom 'failing, for behoof of the testator's sisters and nieces, the Trokes, equally among them, 'and their heirs and assignees. And as the heirs and assignees of every substitute are 'called, except those of Andrew Leitch, it seems to be quite plain that the testator 'meant to give him the fee of the subject, provided he should be alive at the death of 'Elizabeth Ironside, leaving him to do with it what he pleased; but if he should not 'be alive, or should not dispose of the subject, then it should devolve to Christian and 'Mary Leitch and the Trokes. In short, it appears to the Lord Ordinary to be the 'enixa voluntas of the testator, that if the testator's own brother, and the first substitute, 'and his nephew the second substitute, should not be in life at the death or second mar-

He refused a representation, for reasons which he also stated in a note.* The respondents then reclaimed to the Inner-House, Feb. 17. 1829.

'riage of Elizabeth Ironside, they should not succeed to his estate; and although this 'condition be not repeated in the substitution of Andrew Leitch, yet the fact, that the 'trustees were to hold for behoof of the widow in liferent, and the omission of Andrew's 'heirs and assignees, effects the same object, viz. that if he should not be in life at her 'death or second marriage, the estate was to devolve to the testator's sisters and nieces, 'equally among them. After the destination of succession follows an injunction to the 'trustees to denude, which will be found to be in exact conformity to the preceding 'part; viz. It appoints his trustees, immediately after the death or second marriage of 'Elizabeth Ironside, to denude in favour of George Leitch, and his heirs and assignees 'whatsoever, provided he should be in life at that time; and so on, in conformity to the 'destination of succession. From which it is quite clear, that the denudation was not to 'take place till after the death or second marriage of Elizabeth Ironside; and as the 'trustees were to hold it for behoof of her in liferent, and were called on to denude 'in favour of Andrew Leitch, without mention of his heirs and assignees, such denuda-'tion could be demanded by himself only, and not by his heirs or assignees after his 'death before that of Elizabeth Ironside. As, therefore, he died before Elizabeth Iron-'side, the Lord Ordinary thinks that the general disposition by him, even if it had spe-'cially mentioned this subject, would not have been effectual. But further, the trust-'disposition founded on does not bear the most distant allusion to this subject. It only 'dispones all and sundry teinds, heritages, houses, tenements, and other hereditaments, 'heritable bonds, adjudications, and sums therein contained, and in general all other 'real or heritable subjects whatsoever, which shall be pertaining and belonging to me 'at the time of my death. The subject in question did not pertain to him at the time 'of his death—it was also under a destination to others, failing him; and it appears to 'the Lord Ordinary, that, according to the rules governing general dispositions, it 'would have been necessary for him specially to mention the subject, in order to eva-'cuate the destination in John Leitch's settlement. See the case of the Duke of Ha-'milton and the Honourable Mrs Westenra, then Miss Hamilton, relative to the teinds 'of the parish of Cambusnethan, precisely in point. These teinds were destinated to 'heirs-male; and although they were held in fee-simple by the Duke, and teinds were 'conveyed in general by a general disposition, the general conveyance was not held to 'evacuate the substitution to heirs-male.'

* 'The representer assumes, that after the death of George Leitch and James Frisby 'Leitch, Andrew Leitch was entitled to insist that the trustees should denude in 'his favour; and upon this assumption his whole reasoning is founded, that the trus-'tees held the subject absolutely and unconditionally for him, whereby he was entitled 'to convey it away. But the assumption is a great mistake. By Mr Leitch's deed, his 'trustees were to hold the subject during Mrs Leitch's life, or until her second mar-'riage; and it was after her death only, or second marriage, that they were desired to 'denude. Andrew Leitch could not therefore insist that they should denude in his 'favour during Mrs Leitch's life, or until she made a second marriage. They were 'therefore, during Mrs Leitch's life, and widowity to Mr Leitch, to hold the subject; 'and for whom, is just the question. This the Lord Ordinary explained in his former 'Note—viz. For George Leitch and his heirs, provided he survived Mrs Leitch; 2*d*, 'James Frisby Leitch and his heirs, under the same condition; and, 3*d*, For Andrew 'Leitch; and there is no condition of his surviving Mrs Leitch. But the self-same 'effect is produced by leaving out his heirs. The trustees are to hold the subject for 'Andrew Leitch; whom failing, for behoof of my sisters, Christian and Mary Leitch, 'and my nieces, Agnes and Jean Trokes. He never had right to the subject. He

Feb. 17. 1829. when the subjoined opinions were delivered.* The case having

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'had a spes successionis only. As soon, therefore, as Andrew Leitch died, during the 'life of Mrs Leitch the trustees held the subject for behoof of these ladies; and after 'Mrs Leitch's death, they alone could call on the trustees to denude in their favour. 'This distinguishes the present case from those quoted by the representer. In the case 'of Gordon, it appears quite clear to the Lord Ordinary that the judgment is right. 'The trustees were bound to denude in Robert Gordon's favour, and must have done 'so if he had required them. They must have been held after that to have been trus-'tees for him, his heirs and assigns, whereby he had a right to convey away the proper-'ty which they held in trust for him. Besides he actually conveyed the very lands, 'and shewed his intention to evacuate the substitution; whereas, in this view, Andrew 'Leitch takes no notice of the subject.'

* *Lord Glenlee.*—I can see but two sentences in the deed. It consists of two parts, and these are just two sentences. Now, in the first part the words are, that the trustees should hold the 'lands in trust for behoof of the said Elizabeth Ironside, my 'wife, in case of her surviving me, in liferent, for her liferent alimentary use allenarly, 'during the time of her life, and of her continuing my widow; and after her death, or 'in case of her entering into another marriage,' then comes in so and so. All is to take place after her death; and it appears to me, that the constitution of the right is not, by the structure of the sentence, to take place till after her death. This is just the thing, the event, upon which it is to take place.

Although we have no idea in our law of a fee being in pendente, yet I do not see why the beneficial interest may not be suspended—why the contingent interest may not depend upon something which may be stated in a deed. Then it goes on, 'for behoof 'of the said George Leitch, my brother, &c.; whom failing, &c. James Frisby Leitch, 'in case he should survive me, and shall be in life at the time.' It was quite an unnecessary and useless repetition to put this in here; because it was clear from the beginning of the sentence that the beneficial interest could not accrue till the death of the said Elizabeth Ironside, or her ceasing to be his widow. Then it comes to Andrew; and here it is quite true that it does not contain the clause 'in case he shall survive,' &c. just because this was perfectly unnecessary; for the constitution of the beneficial interest in favour of Andrew is not to take place till after her death, or second marriage. This is the first sentence. Then it goes on to the second, and provides, 'I provide my 'said trustees to denude,' &c. But this denuding, by the same structure of the sentence, is not to take place till after the death, &c. of the said Elizabeth Ironside. Take the sentence as you will, it is quite clear that no beneficial interest could possibly arise till after the death or second marriage of this lady. It may happen that the widow's right to bygone rents may be in the same situation as if she had been the liferenter, &c. I am therefore clear, that the circumstance, that the beneficial interest did not take place till after the death of the widow, is conclusive of the case.

Lord Pitmilly.—The opinion I have formed on reading these papers, or rather the deed, coincides entirely with that which has been delivered, and on the same grounds as his Lordship has stated. There are, no doubt, words omitted in the conveyance to Andrew, which occur in the other clauses in favour of the prior persons. But when I take the whole deed, or rather the whole clauses of it, I do not think that these words are at all of importance. This is a trust-deed or conveyance of certain lands or subjects to trustees; and the structure of the deed is, 1st, To direct the trustees as to the constitution of a beneficial interest in favour of certain persons there named; and, 2dly, To direct them as to the time when, and the mode in which, they are to denude in favour of these persons. In looking to the deed, your Lordships will find that it begins with a clause by which a liferent right is conveyed in favour of the widow. It then

been continued, and having again come before their Lordships, Feb. 17. 1829.

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proceeds to direct the trustees as to the constitution of the beneficial interest. [His Lordship then read this part of the clause.] But the previous part of the clause, which was read by Lord Glenlee, and to which he directed your Lordships' attention, appears to me to apply to all these different cases. It rides over the whole of them, and controuls them. It is only after the death of the said Elizabeth Ironside, or her ceasing to be his widow upon that event, that the subjects are to be held for behoof of George, and failing him, for behoof of James Frisby Leitch, and failing him, for behoof of Andrew. But in all of these provisions, I apprehend, it is only in the event of the death of the widow that they are to convey these properties to the persons named, or to any of them. It appears to me, not merely that it was the intention, but it is expressed in words, that only after the death or second marriage of the widow shall they be held for behoof of any of these persons. Then we have this confirmed, when we come to the other part of the deed which refers to the time when the trustees are to denude; and there the clause begins with words which clearly apply to the whole cases provided for: 'And I appoint my said trustees, immediately after 'the death or second marriage of the said Elizabeth Ironside, to grant, execute, and 'deliver,' &c. They are not entitled to grant a valid, ample, and formal disposition till after the death of the said Elizabeth Ironside. It is only in this event that they can do so. I think, therefore, in both of these important parts of the deed,—the constitution of the beneficial interest, and in the clause directing the trustees to denude,—that it is only after the death or second marriage that this interest can arise. It pervades the whole of the deed, and, as I said before, rides over all the different provisions.

Lord Alloway.—My Lords, I must say that I stand in a very unfortunate predicament, in differing from the opinion which your Lordships have delivered; and considering that we are now reduced to that situation in which your Lordships' judgment is final, and cannot be called in question, I think at least that we should pause before we pronounce judgment; and with all the weight to be given to the opinions which have been expressed—and certainly they are entitled to great weight—yet, my Lords, I consider it my duty, as I have the misfortune to differ from your Lordships, to state the reasons upon which my opinion has been founded. Now, my Lords, I apprehend, that in all cases with regard to the settlement of estates, it is your Lordships' bounden duty to look to the words made use of by the person disposing of his estate. You must look to the words; and I conceive that you cannot apply construction or interpretation to give a different interpretation to those words from that which the words made use of bear. It is a remark of Lord Stair, and one which ought always to be kept in mind, 'that Judges may not arbi-'trarily interpret writs, or give them a sense inconsistent with their clear words.' My Lords, whatever may be my idea of the intention or views of the party, I conceive that I cannot enter into that at all, but that I must look to what are the conditions and the words this man has made use of when he imposed these conditions. I cannot supply one word in addition to what he has used, but must take the words themselves, and give them the effect to which in law they are entitled. Now, my Lords, I beg to call your Lordships' attention to the terms of this deed. It is, I confess, the most singular deed that I ever saw. I agree with my Lord Glenlee, that I never saw the like of it; and if I were to state my conjectures, (which however cannot enter, and I am not entitled to allow to enter, into the view which I entertain of the case), I might say that it must have arisen from the ignorance of the man of business who prepared it. I do not know who he was; but I am sure, that suppose this question were put to any experienced conveyancer—'I wish to convey this liferent to my widow, and the fee to these heirs in their

Feb. 17. 1829. they appointed parties to lodge notes of authorities, and to be

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'natural succession;'—for the singular thing is, that he calls the heirs in their natural succession: he first calls George, in the event of his surviving the widow or her marriage, &c.; then he calls James, and then he calls Andrew, and in different terms altogether:—I say, my Lords, if the question had been put to any conveyancer, he would have had no difficulty about the matter. It would have been effectually done by taking the conveyance to be held by the trustees simply for the parties respectively, in liferent and fee. If the deed had been framed in this way, every thing would have been carried into effect with perfect ease. But he has done this in a different way, and we must just look to what he has done. Certainly this is a trust for behoof of the liferenter, in the first place, and then he conveys the fee. But is it not plain that the liferent and the fee are two different things, and may exist in two different persons? Now, what are the words of the destination? There is first the liferent of the widow, and 'then for behoof of the said George Leitch, my brother, and his heirs, &c. in fee;' and here the condition 'in case he shall survive me' is introduced. Failing that event, it is to James Frisby Leitch; and here the condition is also added. Now, suppose that neither one nor other of them had survived the testator, who would have succeeded in the event of their dying before both the testator and the widow? Why, in that case, the testator appoints the trustees to hold the lands for behoof of Andrew Leitch; and there is no condition adjected, as in the other instances, in case he shall survive the widow, &c. The two former are under that condition; but as to Andrew, he is called to the fee without any condition whatever; and if these persons had died before the testator himself, there cannot be a doubt that Andrew was entitled to call upon the trustees to denude in his favour, not the liferent, but the fee; and, my Lords, I apprehend that his creditors could have attached it, and made it responsible for his debts; and you will find a number of decisions where it has been again and again held, that if the personal right vested, it is liable to be attached and made effectual by the creditors of him in whom the right vests. I am clear, that if George and James had died before the testator, he (Andrew) would have succeeded. No doubt, after having gone over the second part of the deed, it proceeds, 'to and in favour of Andrew Leitch, 'my nephew,' &c. They could not convey the fee to the parties first mentioned, while the widow was alive, and remained unmarried: This may be true under the deed; but why withhold the fee from them, if it was intended they should have it? which plainly they could not have, if they died before the death or second marriage of the widow. But no such thing is provided as to Andrew; and, my Lords, this being the case, I must say that I cannot but hold that the fee vested in Andrew. On the second point, it is perhaps not necessary to say any thing; for, my Lords, I think, if the right vested, as it appears to me it did, I hold that it was clearly and effectually transmitted. I think the case of Gordon quite decisive on this point; and, on the whole, I differ from the Lord Ordinary.

Lord Robertson.—My Lords, I coincide entirely with the views and opinions just delivered by Lord Alloway.

Lord Justice-Clerk.—My Lords, I am sorry that on the question of construction we should entertain different opinions. I am now, my Lords, to state to your Lordships the opinion which I have formed, and the grounds upon which I have come to be of that opinion. And, in the *first* place, my Lords, I am clearly of opinion, that if the right vested in this person, he had a clear right to transmit; and it appears he actually did transmit it. I have no doubt about that at all, and I suppose none of your Lordships have any doubt; but I do not think that that is at all the important question which we are called upon to consider. It is the other point which is the most important in the present case. Now, my Lords, I do conceive, that when we come to look narrowly

heard thereon; and after delivering the subjoined opinions, or- Feb. 17. 1829.

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at this deed,—when we look at all the provisions which it contains, and take them all together,—and particularly that which I consider to be the most important part of the deed—that part which provides the way and manner in which it is to be carried into effect,—when I look at all these, there appears to me to be no difficulty whatever in the case. I agree entirely with my brother, Lord Alloway, that we are not entitled to go into conjectures and suppositions of what may have been the intention of this party, as, my Lords, I am to take the deed according to its true meaning and import, and give effect to the words which show the will of the maker, so far as I possibly can. Now, my Lords, I think that this must be obvious to every one, that the primary object of the deed was to secure the liferent to this widow during her life, and continuing to be the widow of this man; for, the moment she ceases to be his widow, the whole of it is at an end; but so long as she continues his widow, it is for her benefit. The discontinuance of her widowity, or her death, is that upon which the whole beneficial interest of those called depends; it is only then that the trustees are to hold it for behoof of the persons therein mentioned. It is true, no doubt, that as to two of the individuals mentioned, the maker of the deed has put in a clause, that it is in case they shall be alive at the period of the death, or the widowity ceasing of this lady, that the trustees are to hold for their behoof. This is the clause as to them; and it is true that, as to Andrew Leitch, these words are not mentioned, and do not occur. But the question which we have to consider is, whether there appears in the deed, from the words there made use of, a clear intention that he was to make an alteration in the situation of this person, from what he had provided in the case of George and James Frisby Leitch? And, my Lords, although undoubtedly there does exist the omission I have alluded to, yet I for one am of opinion, that the words omitted are not at all material, when I come to apply the rest of the conditions of this deed. I say, my Lords, when I proceed to the further consideration of the other clauses and conditions, I must fairly confess that it appears to me, that there is not only no indication of a purpose in reference to Andrew, contrary to what is provided in the case of the others; but there are words used, which, I think, admit of no other construction or interpretation, except that the conditions precedent, as to the trustees holding for behoof of George and James Frisby Leitch, were also to be applied to Andrew and the nieces. The words of importance, as it appears to me, are, 'And I appoint my said trustees, im- 'mediately after the death or second marriage of the said Elizabeth Ironside, to grant, 'execute, and deliver a valid, ample, and formal disposition of the said lands and others 'in favour of the said George Leitch, and his heirs and assignees whatsoever, in case he 'shall survive me, and shall be living at the time of the death or second marriage of 'the said Elizabeth Ironside.' Then it proceeds in similar terms in the case of James Frisby Leitch, and goes on,—'But in case of the death of the said James Frisby Leitch 'before me, or before the death or second marriage of the said Elizabeth Ironside, then 'I appoint the said trustees to dispone the said lands to and in favour of Andrew 'Leitch, my nephew; whom failing,' &c. Now, my Lords, what I beg of your Lordships to attend to is this, that the death of the widow on the one hand, or ceasing to be in a state of widowity on the other, is the condition precedent to the conveyance in favour of George Leitch, and also of James Frisby Leitch. She must be dead, or must have ceased to be the widow of this man, before either of these can take place. This is perfectly clear; and if so, how can your Lordships put on that which is so emphatically coupled, a construction which, it is perfectly clear, will be in direct contradiction to the condition there expressed?—Your Lordships see, that, all along, the death or widowity ceasing is a pre-existing condition, and expressly stated to be so by the testator; and, having done so, he makes use of the emphatic word 'then,' showing clearly that it is

Feb. 17. 1829. dered Cases.* Thereafter, on advising the Cases, the Court (2d June 1826) altered the interlocutor; preferred the respondents; decerned in the action against John's trustees; and repelled the claim of the appellants.†

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only on that precedent condition of the death, &c. of the widow, that the trustees are to make any disposition at all. This, my Lords, I apprehend to be perfectly manifest; and how, then, is it possible to make a different application as to Andrew? And when he just adds these words, that they shall execute and deliver valid dispositions, &c. I hold it to be clear, nay, the enixa voluntas of this man, and expressed in words which are just as clear as they can be, that it was only after the death of this lady, or her ceasing to be his widow, that any beneficial interest could ever arise. That is the way I conceive we are to construe the clause; and with respect to the words in regard to George and James, in case they shall survive me and be in life, &c. these it appears to me to be quite unnecessary and superfluous; for I am not entitled to stop there—I must read on, and I find the words are connected by the word *then*. In my opinion, it is declared in the clearest manner, that no denuding whatever was to take place in favour of either of these parties mentioned in this deed, unless they survived the widow, or her discontinuing to be the widow of this person; and as Andrew did not survive, I am decidedly of opinion that the interlocutor of the Lord Ordinary is quite well-founded; and I beg to be distinctly understood as giving my opinion on the words of this deed as used by the testator, and not as proceeding on conjecture as to what may have been his intention. I proceed upon the words themselves, which seem to me perfectly explicit.

* *Lord Robertson.*—The widow had a liferent for her liferent alimentary use allenarly, and the trustees were to hold the estate for her behoof during the time of her life, and of her continuing a widow. At the same time they held it for behoof of George Leitch in fee; only, it is added, 'in case he shall survive me, and shall be in life at the time 'of the death or second marriage of the said Elizabeth Ironside.' George's right therefore depended on his surviving the widow, or her entering into another marriage. The same is the condition of the right of James Frisby Leitch; and both of them predeceased the widow. Who, then, is called in the third place? It is Andrew Leitch; but there is no such condition in his right as was attached to the case of George and James; and though he also predeceased, yet his right being unconditional, the trustees held the fee for him; and he had a good personal right, though not formally vested.

Lord Glenlee.—The fee was in the trustees from the beginning. It is only in the event of the widow's death, or second marriage, that any other person has any right. There is no fee in any of the persons named, their right being altogether contingent. In ordinary trust-deeds there is an interest in somebody, but here there is none.

Lord Pitmilly.—I wish to hear something further on this case, as I must confess I have in a great degree altered my opinion since the case was formerly before us.

† *Lord Glenlee* still maintained, that the fee did not exist in the parties named till the death of the liferentrix.

Lord Pitmilly.—This trust-deed is drawn in rather an unusual style, and there are some expressions in it which lead to considerable doubt; and therefore I do not wonder that a difference of opinion should exist. When this case was formerly before us, I concurred in the opinion which has now been expressed by Lord Glenlee. But I now confess, that, after giving all the attention in my power to this case, I have come to a different conclusion.

There can be no doubt, in the *first* place, that all that was given to the widow was a liferent right. Of this there can be no doubt. She could have no claim beyond the

The sisters and nieces then appealed. Feb. 17. 1829.

Appellants.—1. By the terms of the trust-disposition of John Leitch, the trustees were to hold the lands until after the de-

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liferent. It is equally clear that the trust-deed granted the right of fee to certain of the relations of the truster, in the order in which they are mentioned in the trust-deed, although this right of fee could not be exercised till the death of the liferenter. Yet it is contrary to all principle to say, that this right of fee could not exist at the same time with the liferent. I think that both existed together. They were separate and independent estates:—the one was the liferent belonging to the widow; the other was the fee which was granted to certain relations of the truster, and which must have existed in some party during the whole time the liferent existed, although it could not be exercised during that time.

It is said, that the fee was vested in the trustees, and that the relations had nothing more than a mere spes successionis. I do confess that this appears to me to be mere words, which do not solve the question. There is no doubt the trustees were feudally vested in the estate; but then it was in trust, both for the liferenter and the fiars. The trustees can no more be said to be the fiars, than they can be said to be the liferenters. The fee was, from the beginning, in one or other of the parties named; it could not be otherwise. It was not in the liferenter; neither was it in the trustees, except merely in trust for some of the parties.

The question then is, Who was this fiar? The whole argument of the parties depends on the words in the clause: 'And after her death, or in case of her entering into another 'marriage after my death, then for behoof of the said George Leitch, my brother, and his 'heirs and assignees in fee,' &c. This is the whole case. It depends on these words, 'after her death.' It is said, that in consequence of these words no fee began till after the death of the liferentrix. But I apprehend that the purpose of the clause was merely declaring that none of the fiars should exercise the right during the subsistence of the liferent. It was only after the death of the widow that the beneficial interest in the fee was to commence; but the fee existed at a much earlier period. Accordingly, much stronger words than these have had the same interpretation given to them. Thus, in the case of Wellwood, the words there were,—'Failing of me by decease, to Mr Robert Wellwood, 'advocate, my nephew, and the heirs-male of his body; whom failing, to Robert Wellwood, 'my brother-german,' &c.; which words were considered as merely having the effect of preventing the fiar from exercising the right of fee during the subsistence of the liferent. [His Lordship then alluded to the opinion given in that case by Lord Justice-Clerk Braxfield.] The case of Crawford appears to me very important. There also was a trust-deed there; and that deed, as in the present, declared, 'but upon her death, or second 'marriage, if she survive me, or at my death, if I survive her,' &c. The construction that was put upon the words of that deed was, that the fiars should not have any beneficial interest till after the death of the liferenter. I cannot possibly get over the marked distinction between the provisions in favour of George and James, and those in favour of Andrew. These are totally different. The words in favour of George are, 'in case 'he shall survive me,' &c. They are the same with regard to James Frisby. But when you come to Andrew, there is no such restriction; the words 'in case he shall survive 'me,' &c. are altogether omitted. I do not know what right the party has to say that these words are to go for nothing. Why were they inserted with regard to George and James, and omitted with regard to Andrew? What explanation can be given of the clause? How are we entitled to say that the one is exactly the same as the other? that the provisions in favour of George have just the same meaning as those in favour of Andrew? I am not prepared to go into that. It appears to me that these are very important words; and when I see them omitted in the case of Andrew, I must hold

Feb. 17. 1829. cease or second marriage of the widow. Until that period, no absolute indefeasible right vested in either George, James, or

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that there is something different in the two cases. Take the case of George Leitch, and suppose that the words to which I have alluded had been omitted with regard to him,—can it be seriously maintained that George would not have been fiar from the beginning? I think he would have been the fiar, at the same time the widow was liferenter, although he would not have had the beneficial interest till the death of the liferenter. Andrew is just in that situation. He is the fiar, according to the fair construction of the deed, from the commencement. I cannot put a different construction upon it, after giving it all the attention in my power. The case of Crawford is a very express authority. You have a full account of that case in these papers. You have there almost the identical words that you have in this case. The fact there was, that he executed a conveyance of his right during the life of the widow, and effect was given to that conveyance; holding clearly, therefore, that he was the fiar—that the fee was in him—and that he was entitled to make it over to his creditors. It is true that the creditors could not enter into the beneficial use of the conveyance during the life of the liferenter, and could not get possession till the death of the widow. But still, notwithstanding the widow was in existence when it was granted, the deed was sustained. Therefore, although this is a question of difficulty, yet, after giving it all the consideration in my power, I am clearly of opinion that the fee of this property was in Andrew Leitch.

Lord Robertson.—I am entirely of the same opinion with Lord Pitmilly.

Lord Alloway.—When I first gave my opinion in this case, I was almost single, and therefore went into the particulars at some length; but now it is different, and I am unwilling to detain your Lordships. Lord Pitmilly has in great measure stated the grounds of my opinion; and notwithstanding the different opinions which I have heard, and the well-drawn papers on both sides which I have read, I continue of the same opinion as before. The case for Andrew's trustees is remarkably well stated, and lays down precisely the grounds of my opinion. There seems to have been a great blunder in the view taken of this case in the Outer House, where the rights of liferent and fee are quite confounded, though they are separate and distinct. There cannot be a liferent without a fee. It may be fiduciary; but still it is held, not for the trustee, but for the party who has the right of the fee; and it is the same as if it were directly vested in that party. It is ingeniously argued by the defenders, that it was the intention of the deed to give no right of fee during the life of the widow; but this is contrary to the words of the deed itself, and inconsistent with what was found in the case of Crawford. [His Lordship here read the words of the trust-deed in the case of Crawford.] The words in that and in the present case are the same. I cannot, for my life, see the smallest difference. Indeed there was one difference, that the person having the right as fiar in the case of Crawford, granted the conveyance of his right, not only during the lifetime of the widow, but nearly twenty years before he was entitled to compel the trustees to denude in terms of the trust-deed. It is of no consequence whether the fiar survived the liferenter or not. [His Lordship mentioned the case of Mirrlees against Mathie, 17th May 1826; 4. Shaw and Dunlop, p. 591. decided by the Court in the same way.] In the present case there were three parties in the destination. As to the two first, viz. George and James, there is a suspensive condition. [His Lordship read the words.] Still the widow had nothing more than a liferent, nor could she claim more. As to the third party, viz. Andrew Leitch, there is no condition; and I wish to know upon what ground this Court, or any Court, can insert such a condition. [His Lordship read the words.] There is no grammatical construction which can authorize carrying the condition from one clause to another. Suppose it were a question of presumption, I cannot conjecture what could be the reason of making such a distinc-

Andrew. Therefore, Andrew could not, during the life or vi- Feb. 17. 1829.
duity of the widow, have required the trustees to denude of the

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tion, if it was not the intention to give Andrew a preferable right. But there are many reasons for supposing this to be the testator's intention, though intention does not affect my opinion. Andrew was his eldest brother's son, and the persons after him are strangers and half-blood relations. It cannot be presumed that he meant to favour strangers before his heir-at-law. I deny that presumptions can apply here against the words, or that it is in the power of the Court to adopt them. The words of Lord Stair, as to the interpretation of writs, are quite correct: 'That Judges may not arbitrarily interpret writs, or give them a sense inconsistent with their clear words.' If constructions were allowed, every man would construe deeds according to his own interest. The case of Tennant, and the later case of Richardson, show that both your Lordships and the House of Lords have found that you cannot go upon intention against words. The appointment to denude is still stronger than the destination. [His Lordship read the words appointing the trustees to denude in the two first destinations, as contrasted with the appointment in the third destination.] I ask if these words are to have no meaning? In the third destination there is no condition, which could never happen by chance. None of the Court entertained any doubt upon the other points which are argued in the papers, and therefore I need say nothing upon them. In every such case you must give effect to the right, as at the time when it is constituted by the deed. In the case for the defenders it is asked, 'Could Andrew Leitch's creditors have adjudged his right?' I answer decidedly that they could. The puzzle which is attempted on this point, is no puzzle at all. I am quite clear that Andrew Leitch had the power of conveying his right; and his creditors might have adjudged it, as they could any other right which belonged to him.

Lord Justice-Clerk.—I do not consider myself as precluded by what passed on a former occasion. The Court have not yet given any judgment. We first ordered notes of authorities, and then Cases; but none of us is fettered by what was then done. Notwithstanding all I have heard, I am of opinion that the interlocutor ought to be adhered to. I was one of those who gave an opinion in the case of Richardson; but I consider myself free to give my opinion now on the deed which is before me. The first question is, 'Whether, by the construction of the deed, Andrew Leitch was entitled to demand a conveyance of the fee?' I think he was not entitled. In construing this deed, you must judge of the whole deed at once. You are not to conjecture what he ought to have done, but what he has done. As to the question, what was reasonable and proper, we have nothing to do with that; nor will any authority beat me out of my opinion. The deed is of a very peculiar nature. The plain meaning is, that the trustees are vested in the whole subject, and are to hold it for behoof of the widow during her lifetime, and continuing unmarried. [His Lordship read the words.] George Leitch must be alive after the widow; the same is the case as to James; and though, in the third case of Andrew, the words are omitted, which can neither be denied, nor can your Lordships supply the omission, yet it appears to me, that on a fair, grammatical, reasonable, and legal construction, you are not to stop at the death of James, but you must go on to the death of the widow. The other clauses show that the testator had in view that the trustees should hold the property during the whole time of the widow's life. The word 'then' applies to her death, or ceasing to be a widow. [His Lordship read the clause.] This is to be taken in close connexion with the preceding parts of the deed, where it is clear that no disposition was to be granted during the lifetime of the widow. This is putting a fair and rational construction upon the deed, which I consider it incumbent on every Judge to do. The phraseology as to Andrew is confined in extent; but the

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fee in his favour. No doubt, in the substitution to Andrew, the words 'in case he shall be in life,' &c. are omitted; but they were unnecessary, since 'his heirs and assignees' are not called; there are no words of inheritance used. The meaning of the testator was, that the trustees should, after the death or on the second marriage of the widow, inquire which of George, James, and Andrew, was alive, and denude to that survivor. Suppose that Andrew, outliving the testator, had predeceased George and James, dying before the widow, it could not be maintained that the fee had vested in Andrew. The beneficial interests of all the parties remained suspended, until the death or second marriage of the widow; and the fee being thus eventual,—to begin to exist after the liferent ceased,—and Andrew having died before that period, the trustees held for the next substitutes, the appellants.

2. Andrew's general conveyance, not referring specifically to the lands of Kilmardinny, cannot exclude the subsequent substitutes in John's disposition of that estate.

Respondents.—1. It is undoubted law, that a right of fee may coexist with the right of liferent. In the present case, the right of liferent was merely coexistent with the conditional right of fee in the two persons first called, and in the unconditional right of fee in Andrew Leitch, next called, and not suspensive. To say that the trustees were the fiduciary fiars, does not advance the appellants' case; for still the question remains, for whom were the trustees fiduciary fiars? In relation to this point it will be observed, that no condition of survivance of the widow, or of her second marriage, is annexed to the fee conveyed to Andrew through the trustees; and these words are not supplied by the want of words of inheritance. Such words were not necessary to enable Andrew to direct the destination of the fee, or to vest

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words do not give him any right till the death of the widow. I like better to take the deed as it is, than to go into other considerations. In the cases which have been brought forward, I do not find any thing to warrant our putting a different construction from what I have put upon this deed. I do not care for the case of Crawford. The question there was between an assignee and an adjudger. There were not two sequestrations and adjudications. I can extract nothing from it applicable to this case. Different opinions may be entertained at different times. It is said that great doubts have been entertained of the decision in the case of Duntreath. This case must be decided upon the deed itself. The right of Andrew Leitch depended upon his surviving the widow. As Andrew was not in a situation to convey, it is needless to consider any other point of the cause. 4. Shaw & Dunlop, No. 405. p. 659.—N. B. The clause is there inaccurately quoted.

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in others his *jus crediti* to require the trustees to denude. The clause applicable to Andrew being distinct and explicit, cannot be controlled by mere inference of intention deduced from other parts of the deed. If he survived George and James, the fee vested in him whether he survived or predeceased the widow and her second marriage. Their predecease was the only condition on which the vesting of the right in Andrew depended; and as they did predecease him, the clause must be read as if that condition were expunged.

2. The disposition executed by him was sufficient to transfer his right to the respondents, and ~~in~~excludes the sisters and nieces as substitutes.

The House of Lords ordered and adjudged, that the interlocutor complained of be affirmed.

Lord Chancellor.—There was a case argued at your Lordships' Bar, depending upon the construction of a deed executed in the year 1804 by Mr John Leitch. When the case was argued, I stated to your Lordships what was the impression upon my mind at the conclusion of that argument; but in consequence of what was stated respecting the learned Judges in the Court below having felt it to be a question of considerable difficulty, I was desirous of looking into the papers before I finally pronounced my opinion upon the case. Upon looking into the papers, I am confirmed in my original impression, and I am satisfied, according to the construction of that trust, that Mr Andrew Leitch had a vested interest during the lifetime of the widow. I think it is impossible to put a reasonably different construction upon that instrument, without inserting in the instrument words which I don't find in it; and I think there is nothing in this case that can justify your Lordships in inserting such words. I put this construction, therefore, upon the instrument upon principle, upon my notion of the free and proper construction of that instrument, and also upon the authority of the case of Crawford, which was cited at the Bar, and which appears to me on principle to govern the present case. There were two other points made in the course of the arguments, and in the papers. One was as to whether it was competent to Andrew Leitch to dispose of this property during the lifetime of the widow; and if it were so competent to him, in the next place, whether the disposition he made of it was a valid and substantial disposition? Upon these points no doubt was entertained by the Judges in the Court below. Indeed they are too clear for argument. I am satisfied, in the first place, that Andrew Leitch did make a disposition of the property; and I am satisfied that the property passed by the instrument by which he disposed of it. Under these circumstances, I shall recommend to your Lordships that the judgment of the Court below be affirmed.

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Appellants' Authorities.—(1.) Duncan, June 27. 1809, (F. C.); Omey, Nov. 19. 1788, (6340.); M'Culloch, December 18. 1760, (6349.); Henry, Feb. 19. 1824, (2. Shaw and Dunlop, No. 668. p. 725.)—(2.) Farquharson, March 2. 1756, (2290.); Duke of Hamilton *v.* Westenra, (not reported).

Respondents' Authorities.—(1.) Kames's Law Tracts, No. 4. p. 145.; Trustees of Wellwood, Feb. 24. 1791, (Bell's Reports, and 15,463.); M'Dowal and Selkrig *v.* Crawford, Feb. 6. 1824, (2. Shaw and Dunlop, No. 640. p. 682.); 4. Stair, 42. 21.; Ersk. 1. 50.; Baillie, June 17. 1766, (14,941.); Campbell, Nov. 28. 1770, (14,949.); Murray, June 22. 1774, (14,952.); Hay, July 24. 1788, (3215.); Dykes, June 3. 1813, and Note, (F. C.); Richardson, July 5. 1821; affirmed, April 8. 1824, (1. Shaw and Dunlop, No. 131. p. 185. and 2. Shaw's Ap. Cases.)—(2.) Gordon's Trustees, Dec. 4. 1821, (1. Shaw and Dunlop, No. 221. p. 185.); Laing Weir, Dec. 6. 1821, (1. Shaw and Dunlop, No. 226. p. 192.); 3. Ersk. 8. 20.; Weir *v.* Drummond, Nov. 28. 1752, (4314.); Robson, Feb. 18. 1794, (14,958.); Drummond, July 17. 1782, (2313.)

J. FRASER—RICHARDSON and CONNELL,—Solicitors.

No. 22.

WILLIAM SPENCE, Appellant.

ALEXANDER ROSS, Respondent.—*Lushington—Ivory.*

Locus Pœnitentiæ—Absolute or Revocable—Fiar.—A father having, by missive letter, sold a piece of land, taking the purchaser bound to grant a bond in favour of himself in liferent, for his liferent use allenarly, and of his sons nominatim in fee; and having caused his sons to sign a postscript to the missive, agreeing to allow the money to lie in the purchaser's hands for eight years certain;—Held, (affirming the judgment of the Court of Session), in a question between the father and the creditors of the sons, that although no bond had been delivered, and no disposition prepared, the fee had irrevocably vested in the sons.

March 25. 1829.

2D DIVISION. Lord Mackenzie.

WILLIAM SPENCE, the appellant, was proprietor of a piece of ground near Musselburgh. He had two sons, William and George. On the 18th October 1814 he agreed to sell the property to Sir John Hope of Pinkie, by the following missive:—'I agree 'to sell you the ground near Musselburgh belonging to me, and 'presently occupied by Government as barracks, for the price of 'L. 2000 sterling; your entry to be Martinmas old style; from 'which term the price is to bear interest. The said sum of L. 2000 'is to be declared by the disposition a burden on the subject, and to 'remain in your hands at interest, on a bond granted to me in life-'rent, for my liferent use allenarly, and to my sons William and 'George, equally between them, and their heirs, in fee, the interest 'being payable to me during my life, and, after my death, the same 'to be payable to my sons, equally between them, for two years 'thereafter; and the principal to be paid them at the elapse of 'two years after my decease. You are to rest satisfied with the