being in existence before the death of the testator, were themselves at that period vested with the right. For in testamentary deeds *tempus mortis inspiciendum;* and therefore the case was the same as if they had been born prior to the date of the legacy. No 72.

Replied; Such a fiduciary fee is never to be understood to take place, without the clearest evidence. And as to the children being considered as *nati*, and not *nascituri*, that is a circumstance of no moment. Begg *contra* Nicolson, No 44. p. 4251.; Lamington *contra* Moor, No 45. p. 4252.; Porterfield *contra* Graham, No 66. p. 4277.; Cuthbertson *contra* Thomson, No 67. p. 4279.

The cause was reported by the Lord Ordinary; when

The Lords sustained the defence.

Reporter, *Lord Gardenston.* Act. *Rolland.* Alt. *G. Fergusson.* Clerk, *Home.*

S. *Fol. Dic. v. 3. p. 211. Fac. Col. No 283. p. 435.*

1794. *July 9.*

John Newlands and his Tutor *ad litem*, *against* The Creditors of John Newlands.

No 73.
Where heritable subjects are disponed to a father 'in liferent, 'for his life-'rent-use allenarly, and 'to his children *nascituris* in fee,' the fee found not to be attachable for the debts of the father.

Alexander Newlands, on the 10th June 1771, disponed certain heritable subjects to Lieutenant John Newlands, 'during all the days of his lifetime, *for* 'his liferent-use allenarly, and to the heirs lawfully to be procreated of his body, 'in fee;' whom failing, to his nearest lawful heirs whatsoever.

Alexander Newlands having, before the execution of this deed, contracted the disease of which he died on the 17th July 1771, it was reducible on the head of death-bed. Having however left no heirs, the disponee, who was his natural son, obtained from the Barons of Exchequer a gift of *ultimus hæres* of the subjects contained in it.

The gift was granted precisely in the same terms with the disposition, viz. 'Joanni Newlands durant. omnibus suæ vitæ diebus, *pro ejus vitali reddítu so-*'*lummodo*, et hæredibus legitime ex ejus corpore procreand. in feodo; quibus 'deficien. propinquioribus legitimis hæredibus dict. demortui Alexandri New-'lands quibuscunque.'

Lieutenant Newlands afterwards became insolvent, and a process of ranking and sale of his heritable property having been brought, which included the subjects contained in this gift, John Newlands, his eldest son, presented a petion, stating, That his father, under the titles before mentioned, was merely a liferenter, or held only a fiduciary fee for his behoof, and therefore praying the Court, 'to ordain the whole of the said heritable subjects to be struck out of 'the sale of the subjects belonging to Lieutenant Newlands, in so far as con-'cerns the fee of the said subjects.'

No 73. In opposition to this demand, the creditors of Lieutenant Newlands

Pleaded, It is an established maxim of the law, that a fee cannot be *in pendente*. Accordingly, when a right is granted to a father *in liferent*, and to his children, *nascituris* in fee an absolute fee is held to be in the father, although, *ex figura verborum*, he is only vested with the liferent; Clerk Home, 25th November 1736, Creditors of Frog against his Children, No 55. p. 4262.; Kilkerran, p. 190. *v.* Fiar, 4th February 1741, Lillie against Riddel, No 56. p. 4267.; Fac. Col. 29th June 1786, Mure against Mure, No 72. p. 4288.; Bankton, v. 1. p. 658. The Court could not find the father to be merely a liferenter, because then the fee must either have been *in pendente* till the existence of the children, or must have remained with the disponer, which was clearly contrary to his intention; in order, therefore, to reconcile the will of the testator with the principles of our law, they necessarily determined that the fee became vested in the nominal liferenter.

Such being the principle of the decision in cases where the grant is to the father simply *in liferent*, it can make no difference that the subjects are given, as in the present case, to the father, 'for his liferent-use allenarly.' Indeed, the word *allenarly* is a mere redundancy of expression, adding nothing to the import of the destination, as the word liferent has a precise and definite meaning, which can be neither limited nor enlarged by the addition of an adverb.

But, further, even supposing it had been consistent with law, that Lieutenant Newlands should have only a liferent-right, or a fiduciary fee, it cannot reasonably be presumed, that such was the intention of his father by this destination. For, by the settlement in question, it is clear he intended that his son should marry, and it is therefore impossible to suppose, that he meant not only to exclude the terce, but even to deprive him of the power of making the smallest provision for his wife or younger children; yet these are the obvious consequences of reducing him to a liferent.

The effects which must follow from this interpretation, with regard to the subject itself, are equally anomalous. For instance, if a church or manse were to be built, it is not easy to ascertain who should pay the assessment. Not Lieutenant Newlands as liferenter, for in that character he could only be liable for the interest of the sum during his life; and the supposed fiar not being in existence, it could not be got from him. It may be said, that as fiduciary fiar he can grant heritable security on the property; but there is no clause in the deed authorising him to do so; and, besides, were he allowed to borrow money for alleged necessary purposes, there would be an end to the trust-fee, for, on pretence of *one* useful purpose, he might borrow the same sum from many different persons, every one of whom might be in *optima fide* in lending to him, and of course all their debts would be good against the estate. On the other hand, to deprive him of the power of borrowing money for necessary purposes, would in many cases be extremely detrimental to the subject.

No 73.

Farther, supposing the subjects thus settled to have consisted of an heritable or moveable bond, as no act of the disponer could alter the situation of the debtor, he would have been entitled to pay it to Lieutenant Newlands, who might have disposed of it as he thought proper, and thus entirely defeated the *voluntas testatoris*.

In the same way, if the estate consisted of a right to teinds, of a wadset, or of an adjudication, the purposes of the destination might have been entirely frustrated, by the heritor obtaining a sale of his teinds, and the reverser redeeming the wadset, or adjudged lands.

Many difficulties would even result to third parties from the petitioner's plea. For instance, if the former proprietor had contracted debts, his creditors, although their debtor had the unlimited property, could not affect the subjects by the ordinary forms of diligence, such as by charging the heir to enter, &c.; for if the liferenter or fiduciary fiar should renounce his right, it is not easy to discover how matters could be settled between the superior and the fiar in expectancy.

Besides, a fiduciary fee is in no respect more favourable than an entailed one; and, therefore, although old Newlands had intended to create such, as he has not done it in express words, it is not to be inferred by implication; 24th November 1769, Edmonstone against Edmonstone, *voce* FIAR, ABSOLUTE, LIMITED.

The petitioner's construction of his grandfather's settlement, appears therefore in every view to be attended with inextricable difficulties; to avoid all which, it has been held in two very similar cases, that an absolute fee is vested in the nominal liferenter; Fac. Col. 7th July 1761, Douglas against Ainslie, No 58. p. 4269.; 1st March 1781, Cuthbertson against Thomson, No 67. p. 4279.

Answered, The maxim that a fee cannot be *in pendente*, owed its origin to the strict ideas formerly entertained respecting ward-holdings, where it was held that a superior could not be deprived of the personal services of his vassal. Even then, however, it was not without its exceptions, as in the period between the death of the vassal and the entry of the heir, or where the deceased had prohibited the entry of the heir *alioqui successurus*, while there remained a possibility of the existence of one more nearly related to him; Dalrymple, 2d January 1708, M'Kenzie against Lord Mountstewart, *voce* SUCCESSION; its soundness has long been doubted, Dirleton, *voce* FIAR, No 9. 10.; a late writer has said, that it 'has no foundation either in law or in nature;' Erskine, b. 2. tit. 1. § 4. and no bad consequences arise to third parties from disregarding it.

It is sufficient for the interest of the superior, that a mere liferenter is entered; and even if he should have no vassal, he gets the non-entry duties for his indemnification. The vassal suffers no hardship when the fee of the superiority is vacant, as he can get an entry from his next immediate superior; and the creditors of the ancestor may attach the estate, by directing charges against the

No 73. heir *alioqui successurus*. In the case, 12th February 1748, Gordon against the Creditors of Carleton, reported by Kilkerran, p. 512. *voce* Service and Confirmation, it was found, that the fee remained with the disponer, when at his death the institute fiars were *nascituri*, and never afterwards existed. *See* also Select Decisions, 3d August 1756, Forbes against Forbes, *voce* Substitute and Conditional Institute. On the same principle, a charge given to the heir-at-law will be perfectly regular, even where there is a possibility of the existence of the institute fiars, as the fee remains *in hæreditate jacente* of the disponer, and is descendible, according to the ordinary rules of succession, till there is some person entitled to take it up, in virtue of the personal right created in favour of the fiars in expectancy. When such fiars exist, they will indeed be entitled to serve heirs of provision to the fee, or to take it directly under the disposition, or if the heir *alioqui successurus* is entered, to compel him to denude. But still the measures taken by the ancestor's creditors in the mean time will be effectual.

Even if it were admitted that a fee cannot be *in pendente*, it is clear, that in the cases in which it was found that a grant simply in liferent conferred an absolute fee on the father, the judgment did not proceed on this principle, but upon established practice, and the presumed will of the disponer. For although the Court, on account of a *necessitas juris*, had been obliged to find that an absolute fee remained with some person *in existence*, subject merely to a burden of the liferent, surely the heir *alioqui successurus* was the person entitled to it, and not the liferenter, had it not been known that this was the form of expression uniformly used by conveyancers to vest the fee in the latter. If the fee had been given to the liferenter, as the respondents argue, merely because it could not be *in pendente*, it is equally clear, that he must have been bound to denude in favour of the donees *nascituri*, immediately on their birth. In no case however has this right been so restricted.

But, on the other hand, when a subject is granted to a person in liferent *allenarly*, or for his liferent-use allenarly, and to his children *nascituris* in fee, then, in consequence of this taxative word *allenarly*, no further substantial interest than that of a liferent, in the common acceptation of that term, is conferred on the father. Long established practice has given it this technical meaning; and upon the faith of its receiving this effect, many family-settlements have been framed; Stair, 4th February 1681, Thomsons against Lawson, No 51. p. 4258; Fac. Col. 14th June 1781, Gerran against Alexander, *voce* Fiar, Absolute, Limited; 8th March 1791, Ross against Rosses, *See* Appendix.

It is evident, that the petitioner is under no necessity of maintaining that a fiduciary fee was vested in his father for his behoof. But were it even necessary to have recourse to a fiction of this sort, no bad consequences would follow. Such trust fees were very common in the law of Rome, *l. penult. et l. ult. cod.*

commun. de leg; they are often resorted to in our practice, and still more frequently in that of England, in order to accomplish the views of proprietors. No 73.

The Court advised the cause after a hearing in presence.

The whole Bench were clear, that the intention of old Newlands was, that his son should not have the disposal of the fee. They also in general agreed in the principle, that a fee cannot be *in pendente*. There is no subject, it was observed, without a proprietor. An estate descending from ancestor to heir, or conveyed by family deeds, can never be *res nullius*, though it may for a time remain *in hæreditate jacente*; and by the law of Scotland, if it can find no other owner, it will belong to the King.

A majority of the Court were, nevertheless, of opinion, that the *voluntas testatoris* must decide this and every other question of succession, whether the subject be heritable or moveable, provided he expresses his will in a legal manner, which they thought old Newlands had done in the present instance. No abstract principle of law, it was observed, could have the effect of giving an estate to a person, upon whom the donor has declared he did not intend to bestow it. The maxim, that a fee cannot be *in pendente*, never produces any such necessity. In the present case it is to be held *fictione juris*, that a fiduciary fee was vested in Lieutenant Newlands, but which substantially is no more than a liferent, as it excludes the power of disposal, either onerously or gratuitously.

Several Judges, on the other hand, thought, that the word 'allenarly' made no difference on the question. Even without it, it was said, the simple destination to Lieutenant Newlands in liferent, and his children in fee, would have implied a prohibition from alienating the subject *gratuitously*. But the addition of the word 'allenarly,' or of any similar one, cannot prevent his *onerous* debts and deeds from being effectual against it. In the case of moveable rights, the will of the testator ought always to receive full effect. But, when the subject is heritable, and the question comes to be with creditors and onerous purchasers, the will of the donor can be regarded only in so far as it coincides with the principles of our feudal law and the security of the records. In this case, the fee cannot be held to have been *in hæreditate jacente* of old Newlands, because it is not disputed, that in making up titles his grandchildren must have served themselves heirs of provision, not to him, but to their father. As a fee of some sort therefore is vested in Lieutenant Newlands, and as it is not fettered by a strict entail, it must be subject to his onerous debts and deeds, however much he may be personally bound to give effect to the intended limitation. Indeed, the notion of a fiduciary fee, in cases like this, is not only repugnant to feudal principles, but highly inexpedient in itself, as, if once allowed, such fees might be continued through many generations and substitutions, and thus become a worse species of entails than any hitherto known, in so far as they neither would require irritant and resolutive clauses, nor to be recorded in the re-

No 73. gister of tailzies, nor would they be limited by the regulations of the 10th Geo. III. c. 51.

The Court, (7th February 1794,) by a considerable majority, 'ordained the whole heritable subjects specially described in the gift of *ultimus hæres* to be struck out of the sale of the subjects belonging to Lieutenant Newlands, in so far as concerns the fee of the said subjects.'

On advising a reclaiming petition, with answers, the Lords 'adhered.'

For the Petitioner, *G. Fergusson, Hay, Maconochie. C. Hope, Turnbull.* Alt. *Lord Advocate Dundas, M. Ross,* Clerk, *Sinclair.*

R. D. *Fol. Dic. v. 3. p. 211. Fac. Col. No 128. p. 287.*

*** This case was appealed:

1798, *April 26.* The House of Lords ordered and adjudged, That the appeal be dismissed, and that the interlocutors therein complained of, be affirmed.

Although such was the fate of this case, the Lord Chancellor (Loughborough) in delivering his opinion, expressed great doubt. The following was the import of his speech.—

"When I had first occasion to consider this cause, upon the case of the appellants, and a very accurate written Note of the opinions delivered by the Judges, I was very much impressed with the importance of the case, and entertained great doubts as to the grounds upon which the decision had been given. I therefore thought it proper that the hearing should be postponed until the judgement could be supported on the part of the respondent. A case had accordingly been put in for him, and the result of the argument which followed upon it had not been to remove the doubts, which the first consideration of the case had raised in my mind."

"To state this question as distinctly as it is capable of being stated, these propositions have been agreed on in the argument which has been maintained; if a conveyance is granted to a person in liferent, and thereafter to the heirs of his body in fee, then such person must of necessity be fiar. It is also an agreed principal recognized by the law of Scotland, that a fee cannot be *in pendente*, or in abeyance. But the distinction that has been contended for by the respondent is, that if words are used which go beyond a mere declaration of a liferent, if the word 'allenarly' is added after the words 'in liferent, for his life-'rent use,' then a mere liferent takes place in regard to the first disponee, and the fee is to be, I cannot tell, according to the argument, distinctly, where. It is, by implication, a fee in the first taker, which gives him some species of interest, coupled with some species of trust for his children, when they come into existence."

"This distinction, which the counsel admitted could not be maintained in reasoning or on principle, does not add one distinct idea to the limitation; yet the Court of Session thought that such affect had very generally been understood to

be given to that word; and particularly a very learned Judge, of great authority, who had commenced practice at a very early period of life, had declared, that such had been the understanding ever since he remembered any thing, and that individuals had acted upon this supposition, ever since. It was also observed, that though such understanding could not be stated to have been come up to by any express decision upon this particular point, yet it had been a familiar idea upwards of a century ago, that there was such a difference as had been contended for in the present case. In a case reported by Lord Stair, in the year 1681, (No 51. p. 4258.) this distinction was mentioned. I do not take it that it was there stated as the mere argument from the bar; but I conceive, that in this, as in other cases reported by Lord Stair, where a principle, adverse to the decision, was stated, it was an opinion thrown out by the Court." No 73.

"These things considered, and that the judgment gives effect to the intention of the testator, which, in equity, ought always to be supported, as far as it can be done consistently with the rules of law; though I feel no conviction, though my mind incline to doubt exceedingly that the judgment proceeded on safe grounds; yet I have not courage to venture on a reversal, when I am told by a person of high authority, that the effect of such reversal would be to put numerous settlements, made even in the course of his own experience, in a situation in which they were not understood by the makers of them to stand. I would, therefore, have it understood, that this consideration alone restrains me, and I would wish that the Court would, in some future case proper for the purpose, re-consider the principle of their judgment in this case, which, in consequence of this high authority, I think it more safe, for the present, to let remain unaltered, in the hope that the question may afterwards come again before the Court to be maturely settled."

*** It cannot well be conceived how, in any future case, the Court could be at liberty to decide, in opposition both to their former precedents and practice, and to this decision of the House of Lords. The influence of the causes which induced the decision in this case, must remain undiminished in any future instance. *See* No 75. p. 4297.

No 74.
The fee of a subject being vested in one person by the dispositive clause of a charter, and in another by the precept and instrument of sasine, the former was found to be liar.

1797. *January* 27.

MARGARET SHANKS *against* The KIRK-SESSION of CERES and Others.

JOHN HOWIE, mason in Ceres, purchased a few acres of land from Sir Thomas Bruce Hope. In the dispositive clause of the charter obtained by Howie, the lands were conveyed to him and his wife in conjunct-fee and liferent, and their son Thomas in fee; whom failing, to the heirs and assignees of John Howie. But, in the precept of sasine, warrant was given for infefting John and his wife simply in liferent, and their son Thomas in fee.

The instrument of sasine was in terms of the precept.