APPENDIX.

PART I.

FIAR.

1807. *December* 9.

CHILDREN and GRANDCHILDREN of DAVID LINDSAY, *against* ROBERT DOTT.

No. 1.

An heritable subject being disponed, to a grandfather in liferent, and on his death to his daughter in liferent, and to her children by a certain marriage in fee, with an express reservation in favour of the grandfather of power to alter the destination and dispose of the subject, and no such reservation in favour of the mother, yet, on his death, the fee is in her not in the children.

JANET LAMBERTON, having received money from her father William Lamberton, in trust for that purpose, purchased a tenement of houses, and took the disposition, "To and in favour of the said William Lamberton, during all the "days of his life, and after his decease to the said Janet Lamberton, also in "liferent during all the days of her life, and to the children already procre-"ated or to be procreated of the marriage between her and David Lindsay, "equally among them in fee." A clause was added, in these words: "As "also providing and declaring, that it shall be in the power of the said William "Lamberton by himself alone, without consent of the said Janet Lamberton, "or his said spouse, or their foresaids, to alter or innovate the destination "contained in this present disposition, and to sell, burden, or dispone of the "foresaid subjects, either in whole or in part, to any other person or persons "by deed under his hand, at any time during his life, as fully and effectually "as if the names of his said wife and daughter had not been herein mentioned."

William Lamberton died.—Janet took possession of the tenement; and after some years, her husband being then dead, she disponed it to Robert Somerville, who disponed it to Robert Dott. On the death of Janet Lamberton, her children and grandchildren (one child being dead and represented by grand-children,) brought an action of declarator and reduction to establish their own right to this tenement, and set aside that of Robert Dott.

The interlocutor of the Lord Ordinary was, "Repels the reasons of reduc-"tion, and assoilzies the defender."

The cause came before the Inner-house by petition and answers.

Argument for pursuers.

No. 1.

1st, It is admitted, that in competitions between the rights of parents and children, a parent, though *ex figura verborum*, only a liferenter, yet is often found to be fiar. But this has not been found where the parent liferenter is only an interjected person between the original party and the ultimate fiar. 2dly, In this case, the meaning of the term *liferent*, in the conception of William Lamberton the testator, is quite clear and unequivocal from the clause which he has added in relation to his own right. He reserves to himself, *per expressum*, the right of disposal, plainly understanding, that if not so reserved, it would not have been retained under the term liferent. But he uses the very same term in the same way in bestowing the right given to his daughter, so that it must have the same meaning; and as there is no reservation in her favour, she can have nothing more than a liferent, without any power of disposal. This clause, therefore, is just equivalent to the use of the term *allenarly*, which it was decided in the case of Newlands, 9th July 1794, No. 73. p. 4289. did restrict the right of a parent to a liferent, in circumstances similar to the present in all other respects. The principle of that case was just this, that the *voluntas testatoris*, where clearly expressed, must be effectual to restrict the right of the parent to a liferent, even though the children be *nascituri*; and that the principle, that a fee cannot be *in pendente*, must give way to the will of the donor, where that will is quite unambiguous.

But in this case the children were not *nascituri*. All of them but one were born before the deed was executed, so that there was no legal difficulty in vesting the fee in them *.

Argument for defender.

The interpretation of a clause devising heritage to a parent in liferent, and his or her children in fee, is perfectly established. It is past all question that it gives the fee to the parent. For an example of this rule, it is sufficient to quote the case of Lillie against Riddle, 4th December 1741, No. 56. p. 4267.

This legal interpretation was originally adopted in contradiction to the meaning of the testator, and it would be so still if his meaning could be supposed different from it. But in truth this cannot now be supposed. The legal meaning of these words has been so long fixed, that it has become notorious and technical, and it cannot now be supposed that a testator has any other meaning. In framing a deed, it must be presumed that these terms are used in the technical sense, as the language of deeds, not that of common conversation.

It makes no difference that some of the children were already born at the date of the disposition. This is just the common case, where the clause is "to the children procreated or to be procreated," and it never was held to change the interpretation of that clause.

* There were some specialties also insisted on, but the Court did not pay any regard to them.

No. 1.

Nor can the reservation of the full right to this subject to William Lamberton himself, or to the particular form of this reservation, make any difference in the effect of the disposition to his daughter in liferent, and her children in fee. Whether this disposition took effect in his favour immediately, or at his death, was of no consequence; the form and meaning of it remained the same.

The idea, that the right of the parent being interjected between that of the original party and of the children, must be, on that account, confined to a liferent, is totally unwarranted by any reason or authority. On the contrary, this circumstance occurred, and no such effect was given to it, in the cases of Thomson against Lawson, 4th February 1681, No. 51. p. 4258; that of Frog's Children, 25th November, 1735, No. 55. p. 4262; and that of Campbell against M'Neil, 14th January 1766, No. 70. p. 4287.

One Judge expressed his opinion, that the words used here were just as clearly expressive of the testator's will, that the fee should absolutely *not* be in the parent, as the word *allenarly* in the case of Newlands, No. 73. p. 4289;—that the clause of revocation, and the use of the words, "during all the days "of her life," decidedly shewed this. And, therefore, that a decision similar to that of Newlands should be given in this case.

The rest of the Judges thought, that though the decision in the case of Newlands must now be adhered to, yet that, on the principles of that decision, the fee must in this case be found to be in the parent, since there were not here clear taxative words excluding her from it.

The Court "Adhered to the interlocutor of the Lord Ordinary."

Lord Ordinary, *Glenlee.* Act. *John Dickson.* Alt. *Will. Erskine.*
Agents, *John Ross* and *Will. Howieson.* *Buchanan,* Clerk.

M. *Fac. Coll. No.* 14. *p.* 40.