(Clark), Q.C. and Johnstone. Agents—Hope, Mackay, & Mann, W.S.

Counsel for Jarvie—Macdonald and Millie. Agent—T. Lawson, S.S.C.

*Friday, March* 19.

## SECOND DIVISION.

[Lord Craighill, Ordinary.

### JOHN FERGUSON & OTHERS *v.* CHARLES FERGUSON & OTHERS.

*Fee and Liferent—Heir-male of the Body.*

*Held* that under a destination to A in liferent, and the heirs-male of his body in fee, the liferenter and his eldest son were not entitled to dispose of the estate, the father's heir-male of the body not being ascertainable till the father's death.

This action was rised by John Ferguson and his son John Maxwell Ferguson, as liferenter and fiar respectively of the lands of Easter Dalnabreck, for the purpose of having it declared that they were "entitled to sell and dispose of the same either gratuitously or for onerous considerations, as they may think fit, and to grant valid and irredeemable dispositions and conveyances thereof to purchasers or others." The action was defended by Charles Ferguson, the elder pursuer's only other son. The disposition under which the property was held was as follows:—"I, the Reverend James Ferguson, of Easter Dalnabreck, presently residing at Bridge of Allan, do hereby, with and under the reservations after mentioned, give, grant, and dispone to and in favour of John Ferguson, colonial surgeon at Perth, Western Australia, my brother, and the heirs-male of his body, whom failing, to the Reverend Donald Ferguson, minister of the Free Church, my brother, in liferent, for his liferent use allenarly (and which liferent shall be strictly alimentary, and exclusive of his debts and deeds and the diligence of his creditors), and the heirs of his body in fee, whom all failing, my own nearest heirs whomsoever, heritably and irredeemably, All and Whole the town and lands of Easter Dalnabreck."

The following codicil was appended to the disposition:—"I, the Reverend James Ferguson, within designed, in virtue of the powers reserved to me by the foregoing disposition and settlement, do hereby restrict the interest of John Ferguson, within designed, my brother, in the lands and others within disponed to an alimentary liferent in the same manner, and to the same effect as if the said lands and others had been disponed to the said John Ferguson in liferent, for his liferent use allenarly (such liferent being strictly alimentary, and exclusive of his debts and deeds, and the diligence of his creditors), and to the heirs-male of his body in fee, whom failing, to the substitutes within mentioned, and subject to the burdens and declarations within specified: Moreover (in lieu of the precept of sasine contained in the foregoing disposition, which I hereby recall), I desire any notary public to whom these presents may be presented to give to the said John Ferguson, and the heirs-male of his body, in liferent and fee respectively, whom failing, to the within designed Donald Ferguson, and the heirs-male of his body in liferent and fee respectively, whom all failing, to my own nearest heirs whomsoever, sasine of the lands and others within disponed, but always with and under the burdens, declarations, and restrictions specified in the foregoing disposition and in these presents."

The Lord Ordinary (CRAIGHILL) pronounced the following interlocutor:—

"*Edinburgh, 26th November* 1874.—The Lord Ordinary having heard parties' procurators on the closed record and productions, and considered the debate and whole process—Repels the defences, and finds, decerns, and declares in terms of the conclusions of the summons: Finds no expenses due to or by either party, and decerns.

"*Note.*—This action has been raised to have it found that the pursuer John Ferguson, and his eldest son, John Maxwell Ferguson, representing themselves to be respectively liferenter and fiar of the lands of Easter Dalnabreck, are entitled to dispose of that property at their pleasure. Of course, if both possessed the characters to which they severally lay claim, their right is undeniable. That the pursuer John Ferguson is liferenter the defenders admit, but they deny that the pursuer John Maxwell Ferguson is fiar, and contend that neither he nor any brother of his can be fiar till their father's death. This is the dispute now presented for the decision of the Court.

"The question is raised upon the dispositive clause of a testamentary disposition of the late Reverend John Ferguson, read in connection with a codicil endorsed upon the principal deed. By the principal deed the disponer disponed to the pursuer John Ferguson his brother, and the heirs-male of his body, whom failing, to the defender the Reverend Donald Ferguson, another brother, in liferent, for his liferent use allenarly (and which liferent was declared to be strictly alimentary and exclusive of his debts and deeds and the diligence of his creditors), and the heirs-male of his body in fee, whom all failing, to the disponer's own nearest heirs whomsoever, heritably and irredeemably, All and Whole the town and lands of Easter Dalnabreck. By the codicil the disponer restricted the interest of the pursuer John Ferguson, 'in the lands and others within disponed, to an alimentary liferent, in the same manner and to the same effect as if the said lands and others had been disponed to the said John Ferguson in liferent, for his liferent use allenarly (such liferent being strictly alimentary, and exclusive of his debts and deeds and the diligence of his creditors), and to the heirs-male of his body in fee, whom failing, to the substitutes within mentioned.' The effect of the clause in the disposition, and of the clause in the codicil, which have now been presented, when these are read, as they must be read, together, is, in the opinion of the Lord Ordinary the same as it would have been if in the principal deed the disposition to the pursuer John Ferguson and the heirs-male of his body had been engrossed in the very words employed in the codicil. The pursuers' counsel at the debate demurred to this result, though rather faintly; but upon this point the Lord Ordinary's opinion has been formed without any hesitation, and is now expressed without any doubt. The other question debated, which is truly the question in this case, is far more difficult, and the Lord Ordinary has felt some anxiety as to the decision which ought to be pronounced. His reasons for the judgment he has given will now be explained.

"The question upon which parties are at issue

is, as already mentioned, whether, by virtue of the destination to the pursuer John Ferguson for his liferent use allenarly, and to the heirs-male of his body in fee, his eldest son, the other pursuer John Maxwell Ferguson, has become fiar of, or in other words has acquired a vested right in the lands of Easter Dalnabreck, his father not being dead. The pursuers maintain the affirmative, and seek to have this declared. The defenders urge the contrary, and ask to be assoilzied from the action. Upon this controversy the Lord Ordinary observes, in the *first* place, that there is no doubt that by the clause, the effect of which is in dispute, the pursuer John Ferguson was constituted fiduciary fiar for behoof of the heirs-male of his body. This was settled once for all in the case of *Newlands* v. *Newlands' Creditors*, Ross' L. C. vol. 3 (Her. Rights), p. 634. In the *second* place, the reasons for which the pursuer John Ferguson is regarded as fiduciary fiar are material in this inquiry. Two things had to be provided for. The first was the rule of feudal conveyancing that a fee cannot be *in pendente*; and the other, that the will of the disponer must, so far as legal principles will allow, receive effect. Both requirements were thought to be fulfilled by ascribing to the liferenter allenarly under such a clause the character of fiduciary fiar. Possessed of that, he represents his children unnamed, and it may be unborn; and this is the only function, the Lord Ordinary thinks, which, as fiduciary fiar, he performs. In the *third* place, the duration of the fiduciary fee is not a thing which is defined by the disposition. It may be long, or it may be short; that depends on circumstances, and especially on the time when the true fiar appears. Certainly there is nothing in the constitution of such a trust which suggests that however soon there may be a son to take, the father is not bound, nay, is not entitled, to make over the fee, but may or must retain it so long as he lives. In the *fourth* place, as there is a trust, the presumption is that it shall not be kept up after the purpose for which it was constituted has been served. Has the purpose for which the pursuer John Ferguson was made fiduciary fiar been accomplished? This must be the result, if the reason for his getting the character of trustee was that he might represent the true fiar till the latter appear. In the *fifth* place, the use of the words "heirs-male of the body," in the clause in question, does not necessitate the result for which the defenders contend. No doubt we do not usually seek for a man's heirs before he is dead, but when we put off the search till that time we look for them in the end that they may inherit property which he has left. Here the fee does not belong to John Ferguson. All he can do by dying is to disburden the fee of his liferent. The fiar, take the fee when he will, takes that which had belonged to none but him since the death of the disponer. And why, the trust not being created to postpone a vesting, or to protect for a time the contingent interests of ulterior beneficiaries, is there to be no fiar, no vesting of the fee till the death of the liferenter? The Lord Ordinary is at a loss to imagine a reason for such an anomaly. In the *sixth* place, it seems to have been assumed in the case of *Newlands* v. *Newlands' Creditors* that there was a vesting of the fee in the true fiar in the lifetime of the liferenter and fiduciary fiar. The eldest son, as heir-male of the body of his father—for he had no other character in which he could sue—was the litigant with his father's creditors, and his title was not objected to; but if the contention of the defenders be sound, all that the son had was a *spes successionis*. This is not the view taken by any one in that case, and the words now to be quoted express the opinion of Lord Braxfield upon the point:—'It is said, where is the fee after the father's death, and during the son's life before the son has children? I have no difficulty in answering that. There was here a fiduciary or trust fee in the son for behoof of the children of the son when they should exist. This is a mere trust, no more than a name, as a fee cannot be *in pendente*; but the moment children of the son exist the fee is in them.' This passage will be found at page 644 of vol. 3 of Ross' L. C. (Her. Right). The Lord Ordinary will only add that the destination or clause of disposition in *Newland's* case was similar to that which we have here to do, being to 'the said John Newlands in liferent for his liferent use allenarly, and to the heirs lawfully to be procreated of his body in fee.'

"*Lastly*, the view of the case to which effect has been given is supported so far by the decisions and the opinions delivered in the case of *Douglas* v. *Thomson*, 7th January 1870, 8 Macph., p. 374. The destination of the fee no doubt in that case was to children, and not to heirs or heirs-male of the body of the liferenter; but this, in so far as the application of a principle is concerned, is a distinction without a difference.

"These, briefly stated, are the grounds upon which the Lord Ordinary has pronounced the decision contained in the prefixed interlocutor."

The defender reclaimed, and pleaded—"(1) The destination in the disposition and settlement of the deceased James Ferguson, and codicil thereto, being to the pursuer John Ferguson in liferent for his liferent use allenarly, the said John Ferguson has only a liferent interest in the lands and others thereby disponed, and holds a fiduciary fee for behoof of those to whom the succession may open at his death, and he has no right or title to execute a conveyance of the fee of said lands and others, and any such conveyance by him is inept. (2) The liferent interest of the said John Ferguson in said lands and others being declared in said codicil to be strictly alimentary and exclusive of his debts and deeds, he is not entitled to make a conveyance of the same, and any such conveyance is inept. (3) The pursuer John Ferguson being still alive, and it being as yet undetermined who may be the persons entitled to succeed to the fee of said lands and others under said disposition and settlement, the pursuer, John Maxwell Ferguson, has no right or title to obtain a conveyance of said lands and others, or to grant a conveyance thereof to a third party, and any such conveyances are inept."

Argued for him—The question was, whether under such a destination the fee vested in the eldest son as soon as he was born?—in other words, can the words "heirs-male of the body" be held to be synonymous with "eldest son"? The latter was the wider term of the two. It might mean the son who was eldest born, or who became eldest by the death of one older, or who was eldest at the time the deed was made, or when the succession opened. "Heir-male of the body" on the other hand, meant the one person who was entitled to a service in that capacity, and him only. An

eldest son would by survivance acquire the character of heir-male of the body, but the two were quite distinct. The words "heir-male of the body" of the liferenter pointed to the heir taking his right of fee only at the death of the liferenter or fiduciary fiar, and till that occurred the heir-male of his body could not be ascertained.

Authorities—*Todd* v. *Mackenzie*, July 18, 1874, 1 Rettie 1203; *Maxwell* v. *Logan*, July 1, 1839, 15 S. 291; Ersk. Inst., iii, 8, 38; *Allardice* v. *Allardice*, Ross' L. C. 655.

The pursuers pleaded—"The pursuers being duly infeft in the lands described in the libel for their respective rights and interests of liferent and fee, as above set forth, are entitled to sell the same, and grant a valid disposition to a purchaser."

Argued for them—On the deeds produced, and the precept of sasine following thereon, the father was fiar and might dispose of the estate as he would, without reference to his son at all. The testator's intention was to confer a liferent on A and a fee on B; but it might not be possible to do that at once from the fact of B not yet being in existence, and so the fiction of a fiduciary fee was engrafted on the liferent in order to prevent the fee being *in pendente*, but that fiction was not to be kept up longer than necessary, and as soon as B came into existence the testator's intention took effect and the fee vested in him at once.

Authorities—*Martin's Trs.* v. *Milligan*, Dec. 24, 1864, 3 Macph. 330; *Pearson* v. *Corrie*, June 28, 1825, 4 S. 119; *Beattie's Trs.* v. *Cooper's Trs.*, Feb. 14, 1862, 24 D. 519; *Ewart* v. *Cottam*, Dec. 6, 1870, 9 Macph. 232; *M'Kinnon* v. *M'Donald*, M. 5279.

The defender reclaimed.

At advising—

LORD PRESIDENT—The conveyance which we have to construe is "to the said John Ferguson in liferent for his liferent use allenarly, such liferent being strictly alimentary, and exclusive of his debts and deeds, and the diligence of his creditors, and to the heirs-male of his body in fee, whom failing," to certain substitutes mentioned. Now one thing is beyond dispute, that while there is no person in existence who takes the fee, there is a fiduciary fee in the liferenter, even although he has a liferent of a limited kind. But the question here is whether under this destination a person who is entitled to take the fee can come into existence during the lifetime of John Ferguson. I agree with all your Lordships that no such person can come into existence, and I do not think the case is attended with any difficulty. There is no other part of the deeds referred to as explaining the dispositive clause, and so the intention of the granter must be gathered from the dispositive clause alone. The words are of common use and well ascertained meaning. "Heir male of the body" is a person who cannot be ascertained until the death of the liferenter. One can quite understand that when words such as "children," which have a flexible meaning, are used, the granter's intention may be gathered from other parts of the deeds. But here there is no reason why we should give to the words used any meaning but the ordinary one. The destination is to a father in liferent, and to his heir-male of the body in fee. There must be a fiduciary fee for some heir, and there is no reason why it should not subsist till it has been ascertained who the heir-male of the body of John Ferguson is, and that cannot be ascertained till John Ferguson's death.

The Lord Ordinary has been misled by the case of *Newlands*. He thinks that according to the view of the defender the heir-male of the body would have had no title to sue in the case of *Newlands*. But that case was a ranking and sale, and the estate, which the father only liferented, was subject to a destination which gave the eldest son an interest to object although he was not fiar. I must say that I have some doubts whether the observations attributed to Lord Braxfield are authentic. They have been collected by Mr Ross from MS. notes on Lord Elphinstone's session papers. It would be strange if on such observations so recorded we were to found our judgment. Therefore I cast the *dicta* altogether aside.

I am of opinion that the Lord Ordinary's interlocutor should be recalled.

The other Judges concurred.

The Court pronounced the following interlocutor —

"The Lords having heard counsel on the reclaiming-note for the defenders Charles Ferguson and Others, against Lord Craighill's interlocutor, dated 26th November 1874, Recal the said interlocutor; sustain the defences; and assoilzie the defenders from the conclusion of the libel, and decern."

Pursuers Counsel—Dean of Faculty (Clark), Q.C. and Asher. Agents—M'Ewen & Carment, W.S.

Defender's Counsel—Solicitor-General (Watson), and Keir. Agents—Pearson, Robertson & Finlay, W.S.

---

*Friday, March* 19.

## FIRST DIVISION.

[Lord Curriehill, Ordinary.

### JAMES GALLOWAY *v.* DAVID NICOLSON.

*Poor Law Amendment Act, 8 and 9 Vict., c, 83, sec. 34—Assessment—Owner and Occupant.*

*Held* that when an assessment is imposed under sec. 34 of this Act, the aggregate sum required is to be divided, and one half laid upon owners as a class, and one half upon occupants as a class.

This action was raised by the collector of the parish of South Leith in order to recover certain alleged arrears of assessment from Mr Nicolson, the defender, who was an owner and occupier of lands and heritages within the parish. His defence was that the amount sued for was overcharged, and that the assessment had not been imposed in terms of the Poor Law Act, 8 and 9 Vict. cap. 83, sec. 34.

The Lord Ordinary (CURRIEHILL) pronounced the following interlocutor:—

"*Edinburgh, 28th December* 1874.—The Lord Ordinary having heard the Counsel for the parties and considered the closed record and whole proceedings—Finds that by resolution of the Parochial Board of the parish of South Leith, sanctioned by the Board of Supervision, the funds requisite for the relief of the poor in that parish are to be raised by assessment, one half of which is to be imposed upon the owners, and the other half upon the