taken in the case of hydropathic establishments, where there are large baths, and where the water may be very little polluted; but in the ordinary case it is that which flows from a house into its drain for carrying off polluted matters, and which contains the whole polluted matter created in the house. Now, I think it is proved here that the polluted matter comes from the village of Auchinsterry, and is sent down or flows down a pipe, cess-pools, or filtering-ponds, and ultimately into a discharge pipe, all the property of, and all constructed and maintained and upheld by, the respondents. Now, what is the law in a case of this kind. I think the law may be laid down—and I am disposed to lay it down in very broad terms—that an upper proprietor is not entitled in any circumstances, or by any means whatever, to pollute a pure and potable stream which passes through his property, and to send it down an impure and unwholesome stream into his neighbour's property. I cannot go along with the argument so ably maintained by Mr Balfour, that in this case it is practically inevitable, and therefore that he has a right to do it. I think he has no right to do it. If he cannot erect a village without polluting this stream, then he must not erect it. I do not see that he has any right to interfere with the property of another man by building a village for his own behoof. I do not think it necessary to go into the questions about agricultural drainage, and how far agricultural drainage tainted with manure might or might not be stopped, but I find that a proprietor cannot in any circumstances send sewage water into a pure stream to the effect of destroying that stream for its primary uses. I think that is the result of the cases referred to. One of these cases was a very strong case. There were hundreds of thousands of inhabitants, and it was asked, where are they to send their sewage? The answer was—anywhere except into their neighbour's property; and that was the judgment of the Court. A stronger case than that could hardly be, and it is an *a fortiori* case to the present. The only other point is—Is this pollution substantially caused by the defenders, and is the remedy rightly asked for? I think it is. If they had demised all their property, including this system of drainage, to somebody else; and if they had feued the property generally, and the vassal had erected villas or houses, the case would have been quite different. But the proprietors of this village are the Messrs Baird; they draw the rents, and they let the property; the system of drainage is exclusively their property, devised and upheld by them alone, and it is by means of that system of drainage that the injurious substance which destroys the defenders' pure stream is sent into it. I cannot hold that any remedy lies at the instance of the pursuers against the tenants. One tenant might be interdicted from doing a particular thing, but the sewage will still come down that stream, and it is very conclusive against the respondents that they intended it to come down. They made provision for sewage water coming down in that way, making the ordinary arrangements for stopping the solid sewage by means of cesspools, and ultimately by means of a filtering tank, but having the fluid sewage, which is the thing which does the mischief, to flow from the cesspools into the filtering tank, and from the filtering tank direct into the stream, which it absolutely destroys. I cannot doubt that the defenders are doing that. It is said, What will happen if nothing is done, and the case comes up for breach of interdict? I quite agree that the Court is bound to take care that they do not give such an interdict as it is impossible to enforce, or such an interdict as the parties against whom it is directed cannot obey. But I do not see that there can be any difficulty as to that here. I have a little doubt as to the words of the Lord Ordinary's interlocutor, for he finds "that unless the evil complained of shall be forthwith remedied, the complainers are entitled to the interdict asked." I hesitate about affirming that, because it defines what we are going to interdict. The complainers are entitled to a remedy to have the pollution stopped, and when we come to frame the terms of the interdict I think there will be no difficulty in doing it. The thing to be prevented is the discharging of polluted water from the village of Auchinsterry into this pure burn, by means of any apparatus belonging to the defenders for that purpose. I do not think we could prevent a miner running out at night with his pots—that might not be a thing for which Messrs Baird would be answerable; but they must not have this drain and these pipes and filtering tanks to overflow and pollute the burn. That is what I am prepared to interdict if Messrs Baird do not adopt some remedy. In the meantime I do not doubt that a remedy is possible, and if it is said that this matter may be worse than ever if the present system is put a stop to, there will be another remedy for that, namely, a proceeding under the Sanitary Acts, or a prohibition with reference to inhabiting these houses. I take a pretty strong view of this case. I think this burn must at all hazards be kept pure, and the canal company, as proprietors, are entitled to assert their right to it by interdict against any one who makes it unfit for primary uses.

Lord Neaves concurred.

The Court adhered to the interlocutor of the Lord Ordinary, and allowed the respondents a month from the date of this judgment to consider what steps should be taken to obviate the nuisance.

Counsel for Respondents and Reclaimers—Balfour—Mackintosh. Agents—Webster & Will, S.S.C.

Counsel for Complainers and Respondents—Dean of Faculty (Watson)—Johnstone. Agents—Hope, Mackay, & Mann, W.S.

Wednesday, June 14.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

PETITION—THE HONOURABLE MRS ELIZABETH BINNY OR MAULE, AND MISS PATRICIA MAULE.

Entail—Rutherfurd Act (11 *and* 12 *Vict. cap.* 36, *sec.* 3)—*Disentail—Fee and Liferent—Heir of Marriage—Marriage-Contract—Fiduciary Fee.*

An entail contained in a contract of marriage, dated 9th April 1844, was executed by

the lady's father, with a destination to the entailer himself in liferent during all the days of his lifetime, and after his death in favour of the intended spouses and the longest liver of them, also in liferent, but subject to the restrictions, limitations, provisions, and declarations expressed in the said contract, and in favour of the heirs-male of the said intended marriage in fee, whom failing, in favour of the heirs-female of the said intended marriage, whom failing, in favour of the other heirs of entail therein specified, the eldest heir-female, and the descendants of her body, excluding heirs-portioners. The deed contained various other expressions and provisions as to the liferent interest of the spouses. On the dissolution of the marriage by the death of the husband there were three daughters surviving, of whom the eldest was born prior to August 1848.—*Held* that the mother was a mere liferenter, that the eldest daughter became institute of tailzie at the moment of the dissolution of the marriage, and that she was entitled to disentail in terms of 11 and 12 Vict. cap. 36, sec. 3.

This was a petition presented to the Court under the Rutherfurd Act, for authority to disentail the estate of Fearn.

The Lord Ordinary remitted to Mr W. R. Kermack, W.S., to "inquire into the circumstances set forth in the petition, to examine whether the provisions of the statutes and Acts of Sederunt have been complied with, and to report."

Mr Kermack reported as follows:—"The petitioners in this application apply for authority to disentail the estate of Fearn, under the provisions of the Rutherfurd Act, with the necessary consents, under somewhat peculiar circumstances. The former proprietor of the estate, Thomas Binny, Esquire of Maulesden and Fearn, settled the property under a contract of marriage, which was entered into between his daughter (the first petitioner) and the late Honourable William Maule Maule in terms of the destination therein set forth. The destination which was contained in this contract was granted to the said Thomas Binny himself in liferent during all the days of his lifetime, and after his death in favour of the said Mrs Elizabeth Binny or Maule and the said William Maule Maule, then intended spouses, and the longest liver of them, also in liferent, but subject to the restrictions, limitations, provisions, and declarations expressed in the said contract, and in favour of the heirs-male of the said intended marriage in fee, whom failing, in favour of the heirs female of the said intended marriage, whom failing in favour of the other heirs of entail therein specified, the eldest heir-female and the descendants of her body excluding heirs-portioners and succeeding always without division through the whole course of the female succession. The said Thomas Binny and the said William Maule Maule are both now dead, and in consequence of the failure of male issue of the said marriage, the petitioner Miss Elizabeth Patricia Maule, as the eldest daughter of the marriage, has come to occupy the position of the heir of the marriage entitled to succeed to the said estate. The question, however, appears to have been raised, whether the mother or she is the person who is entitled at present to be considered as the heir of entail in possession of the said estate under the terms of the said deed of entail. This doubt, the reporter understands, is founded on the circumstance that the destination to Mrs Maule in liferent and her children in fee is not restricted by the word "allenarly," and that thus, under the numerous decisions following on the case of *Frog's Creditors* v. *His Children* (Nov. 25, 1735, Mor. 4262) it may be held that the fee of the estate is vested in the parent and not in the children. If this were so, the Honourable Mrs Maule would be the heir of entail in possession; and, in that view, the consent of the three next heirs of entail, being her three daughters, including the petitioner Miss Elizabeth Patricia Maule, is all that is required for the purpose of effecting the disentail. The reporter does not consider himself called on to consider whether such a construction of the destination in favour of Mrs Maule would be well founded or not; but in perusing the contract of marriage which contains the entailed settlement, it has occurred to him that it comprehends many clauses which might be held as limiting Mrs Maule's right to that of a liferent as distinctly as if the word 'allenarly' had been employed in connection with the constitution of her right.

"This being the one view on which the disentail is sought to be accomplished, the other is, that the right of Mrs Maule being dealt with as a liferent only, the fee should be held as vested in her eldest daughter, the petitioner, as entitled thereto under the terms of the destination in the deed of entail. Under the view now suggested there can be no doubt that the said Elizabeth Patricia Maule is the person entitled to the fee of the estate, but there may be some question whether she is the heir of entail in possession thereof in the sense of the Rutherfurd Act, to the effect of enabling her to disentail the estate. So long as her mother is alive it is clear that Miss Maule can have no beneficial interest in the estate; but under the decisions which have been pronounced on this subject, that circumstance alone would not be deemed sufficient to deprive her of the character of heir of entail in possession, as it has been expressly decided that the existence of a liferent which exhausts the rental of an entailed estate will not prevent the party in the right of the fee from exercising all the powers conferred by statute on an heir of entail in possession. The doubt, however, which presents itself in the present case is, that assuming the liferent of the Honourable Mrs Maule to be restricted in the same way as if it had been a conveyance to her in liferent for her liferent use allenarly and to her children in fee, a fiduciary fee would then have been vested in her for behoof of such children; and this fiduciary fee may be held still to subsist in her notwithstanding the existence of a child or children entitled to take up the fee of the estate provided to them by the settlement. This position of matters raises the somewhat difficult question, whether Miss Elizabeth Patricia Maule holds such a right of fee as entitles her to be regarded as an heir of entail in possession. There is considerable authority for holding that under a destination in liferent for liferent allenarly and to children *nascituri* in fee,

the fee is in the parent until children exist, and then the fee is with them. The case of *Maxwell* v. *Logan*, 20th December 1836, 15 S. 291, affirmed M'L. and Robn's. Appeals, 790, is a strong authority to the same effect. The question in that case was, whether, under a destination in a deed of entail to a mother in liferent only, and to her second son and the heirs of his body, the son was to be dealt with as institute under the entail, so as to be free from fetters imposed on the mother 'and the heirs of entail.' The Lord Ordinary (Corehouse), whose judgment was adhered to, held that the son was clearly institute under the entail; and he stated in his note that 'the fee vested in him *ipso jure* as soon as he came into existence as institute." On the other hand, the practice in such cases, following the judgment in the case of *Dundas*, 23d January 1823, 2 S. 145, is for the party taking up the fee to make up his title by serving as heir of provision to the fiduciary fiar under the destination in the deed of conveyance; and Professor Bell, in remarking on the case of *Maxwell* v. *Logan*, says—'I do not hold that case as settling for feudal purposes. There was no fiduciary fee in the liferenter. It settled that, with respect to the operation of the fetters of an entail, the party first called as the real fiar was not an heir; but I do not think it did more. I believe the practice in similar cases is to serve the real fiar heir of tailzie and provision to the fiduciary fiar. In the case of *Ferguson* v. *Ferguson*, 19th March 1875, S. C. ii. 633, it was observed by Lord Deas that 'a question of feudal rights can never be safely determined without considering how, according to established practice, a feudal title would fall to be made up;' and according to ordinary practice it would rather appear that Miss Maule would require to make up her title by serving herself heir of tailzie and provision to her mother. It is stated in the petition that there were two sons of the marriage, who are now dead, and if the view should be adopted that the fee vested immediately on the birth of a child capable of taking it under the destination, the fee of the estate of Fearn must be held to have vested in the eldest of these sons, and the title of Miss Maule would be completed by service to her eldest brother. There is much difficulty in coming to the conclusion that this would be a proper or satisfactory method of completing the title. In this position of matters, it appears to be a question of considerable difficulty whether Miss Maule can be regarded as heir of entail in possession of the estate. It is on the footing that, in the view of her mother's right being restricted to a liferent, she is entitled to deal with the estate as heir of entail in possession, that the petition is presented; and if there is any serious doubt upon this point, the Court may not be disposed to proceed with the petition without having the rights of parties ascertained in proper judicial proceedings instituted for that purpose. The theory of the application is, as has been stated, that either the one or the other of the petitioners is to be deemed heir of entail in possession, and to be entitled, with the necessary consents, to disentail the estate; and upon that theory it is proposed that a joint instrument of disentail should be executed by the said parties, following on a deed of consent executed by Miss Maule and her three sisters. In this way, in the event of the Honourable Mrs Maule being held to be heir in possession, Miss Maule and her two eldest sisters would supply the necessary consents; while in the case of Miss Maule being held to be heir in possession, the consents of her three sisters would be applicable to that position of matters. The reporter is not aware of any case of a similar description, but he is not able to see any objection to the course proposed to be followed. If the supposition be correct that Mrs Maule is the party entitled to the character of heir of entail in possession, the instrument of disentail will be well executed by her; while, if that character is possessed by Miss Maule, the instrument will be equally effectual as a disentailing deed. On either assumption, the instrument of disentail must necessarily be executed by the proper party, and the necessary consents must have been interponed thereto. The circumstance that it is uncertain which of the two petitioners is to be held as having effectually executed the instrument of disentail seems to be immaterial so long as it can be assumed that one or other of them must necessarily have done so."

The Lord Ordinary reported the case to the First Division of the Court, with the following note:—

"This case is important and difficult. If there had been opposition, the Lord Ordinary would have decided it. But as no person has appeared to oppose it, he thinks it right to report.

"The estate of Fearn belonged to Mr Binny, and in the contract of marriage between his daughter and Mr Maule it was settled by a strict entail. The destination is in favour of Mr Binny in liferent and Mr and Mrs Maule and the survivor in liferent (but subject to the restrictions specified in the deed of entail) and to the heirs-male of the marriage of Mr and Mrs Maule in fee, whom failing, to the heirs-female of that marriage, whom failing, to the heirs-male of any subsequent marriage of Mrs Maule, whom failing, to the heirs-female of such subsequent marriage; whom failing, to a series of other heirs.

"The marriage was dissolved by the death of Mr Maule. He was survived by four daughters. The petition is presented by Mrs Maule and her eldest daughter. It proceeds on the footing that one or other of the petitioners is the heir of entail in possession, and prays that the petitioners may be authorised to record an instrument of disentail executed by both.

"It was not maintained that Mrs Maule was fiar. It is true that in the dispositive clause neither the word 'allenarly' nor any equivalent occurs. But the subsequent clauses of the deed seem conclusively to shew that her right is limited to a liferent.

"It was urged, however, that Miss Maule was the fiar, and that she was entitled to disentail. Her right of fee, if it exist, is of course subject to her mother's liferent, and her title is not made up; but in the opinion of the Lord Ordinary neither of these circumstances prevent her from proceeding with the petition if it is otherwise well founded.—See 11 and 12 Vict. c. 36, sec. 42. It is possible that she may be required to complete her title before she is allowed to record the instrument of disentail.

"The question is, whether a right of fee emerged in favour of Miss Maule on the dissolution of the marriage, or whether Mrs Maule is

fiduciary fiar for such of her children as shall on her death be the heir under the destination. The Lord Ordinary is inclined to adopt the former view. He thinks that Miss Maule is, in the sense of the deed, the heir of the marriage, and that her right as such was ascertained on the death of her father.

"In the case of *Ferguson* v. *Ferguson*, 2 Rettie 633, it was decided that under a destination to A in liferent, for his liferent use allenarly, and the heirs-male of his body in fee, no right of fee could vest during the lifetime of A. The *ratio decidendi* is, that until the death of A it could not be ascertained who was to be his heir, and that he was necessarily fiduciary fiar for the uncertain heir.

"But in *Maxwell* v. *Logan*, 15 Sh. 291, and Maclean and Robinson's App. Cases, 790, it was held that when an estate was disponed to a woman in liferent only, and to her second son in fee, the son became fiar as soon as born. Accordingly he obtained during his mother's lifetime a decree of declarator that the fetters of the entail did not apply to him, and that he was entitled to sell and dispose of the estate at pleasure.

"Here the disposition is not in favour of a child, but of the heir of the marriage. So long as the marriage subsisted such an heir could not have existed any more than an heir-male of the body. But on the dissolution of the marriage the heir is ascertained just as much as a second or other son, and when this is so the Lord Ordinary thinks a right of fee at once vests in such an heir.

"Some difficulties have been suggested as to the mode of making up the title. It is said that it may be necessary to serve to the fiduciary fiar, and that no such service can be expede until the death of the mother. But if the Lord Ordinary is right, a service was not necessary under the former law to take up or transmit the fee. The heir, when he is ascertained, is in truth a disponee.—See the note of Lord Corehouse in *Maxwell*, above cited; *Douglas*, 8 Macph. 374."

Argued in support of the petition—(1) The destination would certainly in a fee-simple destination make Mrs Maule fiar. The clauses irritant and resolutive, and the prohibitions of the entail, are all directed against her: but in that view the restrictive clause limiting her to a liferent must be ignored; in favour of such a course compare M. *voce* Provisions of Heirs and Children, App. No. 6—*Pollock* v. *Pollock*. (2) If she be merely a fiduciary fiar, her right as such comes to an end so soon as such a fee becomes unnecessary, *i.e.*, so soon as the heir of the marriage can be ascertained. Compare the cases of *Ferguson* and *Maxwell*, quoted in Mr Kermack's report. (3) Whether the mother or daughter be fiar, if a joint deed be granted by them it will be sufficient to disentail the estate.

At advising—

Lord President—This is a petition for authority to disentail the estate of Fearn, presented in the name of two persons—Mrs Elizabeth Binny or Maule, who was daughter of the entailer and wife of the Honourable Mr Maule, and their eldest daughter Miss Elizabeth Patricia Maule.

This is a somewhat singular example of a petition for disentail, because the only person who is entitled to present such a petition is the heir of entail in possession, and it is clear that there can only be one heir of entail in possession at a time; if one of these parties has the title, the other therefore has none. I am not inclined to think that it will be a proper course for these parties to execute an instrument of disentail together, as if jointly they constitute an heir of entail in possession.

The heir of entail in possession, if he fulfils the conditions of either the first, second, or third sections of the Entail Amendment Act, is entitled to execute an instrument of disentail, and put it on record, and we have no power to prevent him; our jurisdiction only extends to seeing that he comes under these sections.

Now, the question we have to answer here is, Who is the heir of entail in possession? The answer to that depends on the terms of the entail itself. Now, it is in the form of a procuratory of resignation, and is contained in a contract of marriage between the Honourable William Maule Maule and Miss Elisabeth Binny, the petitioner here, dated 9th April 1844. The destination is in the following terms—resignation to be made in favour of "Thomas Binny, in liferent, during all the days of his lifetime, and after his death to the said Elizabeth Binny and William Maule Maule, the said intended spouses, and to the longest liver of them, also in liferent; but subject to the restrictions and limitations, provisions, and declarations thereanent, all as after expressed, and to the heirs-male of said intended marriage between the said William Maule Maule and Elizabeth Binny in fee; whom failing, to the heirs-female of the said intended marriage; whom failing, to the heirs-male of any subsequent marriage to be entered into by the said Elizabeth Binny; whom failing to the heirs-female of any such subsequent marriage;" and then there are other substitutes whom it is not necessary to note. Under the procuratory of resignation, if it stood alone, it might be contended that the spouses after the death of the lady's father became joint fiars of the estate, and after the decease of William Maule, the petitioner Mrs Maule became sole fiar, because the estate is given to them in liferent, without any restraining words, and particularly without the word "allenarly." But there are other parts of the deed which indicate a strong intention in the entailer to give his daughter and her husband a mere liferent, just as if he had used the words "liferent allenarly" in the procuratory of resignation.

In the first place, when the fetters of the entail are directed against the persons who are to take under it, a distinction is made between "the liferenters and the other heirs of entail," the liferenters Mr and Mrs Maule not being dealt with as heirs of entail at all; permission too is given to the liferenters to make provisions for younger children. This is done in these words:—"That it shall be lawful to and in the power of the said William Maule Maule, and in case of his failing to do so, and of his being survived by the said Elizabeth Binny, to her, the said Elizabeth Binny, notwithstanding that they are liferenters, to provide for their children who shall not succeed to the said entailed lands, barony, and estate of Fearn, in such manner and to such extent as proprietors of entailed estates are by law authorised to do in terms of the statute 5th

George the Fourth, chapter 87." There the word liferenters is contrasted with the word proprietors, which shows that the word liferenter is meant to be taken in its limited sense of liferenter for liferent use only. Then there is another clause, permitting the lady to make provision for her husband in the event of a second marriage, the same distinction being made here also between the words liferenter and proprietor: then there is a provision in a later part of the deed, "in case the said Elizabeth Binny shall predecease the said William Maule Maule, with or without leaving issue, and that the said William Maule Maule shall enter into a second marriage, then and in that case his life interest in the said estate shall be restricted, as the same is hereby restricted, to £1000 sterling yearly, payable out of the rents of the said estate, at two terms in the year, Whitsunday and Martinmas, in equal portions, and to commence at the first of these terms happening after his entering into such second marriage:" then if Elizabeth Binny enters into a second marriage "then her life interest in the said estate shall be restricted to the sum of £1000 stg. yearly, payable out of the rents of the said estate, at two terms in the year, Whitsunday and Martinmas, in equal portions, and to commence at the first of these terms happening after her entering into such second marriage; without prejudice, however, to the right of the said Elizabeth Binny to recur to the entire liferent of the estate on the failure of the heirs of this present marriage, and that notwithstanding she may have married a second husband;" and then comes a provision as to the disposal of the surplus rents in the event of the liferent right of either of the spouses being so restricted; then there is this further clause—"And in regard it is the said Thomas Binny's special wish and desire that the said Elizabeth Binny shall in every event enjoy a liferent interest to a certain extent in the liferent of the said lands and estate of Fearn hereby provided for her and the said William Maule Maule, and the survivor of them as aforesaid, alimentary and unaffected and unaffectable by the debts or deeds of them, or either of them, or of herself if she be the survivor of them, therefore the said Thomas Binny hereby declares that the foresaid conveyance of the foresaid lands and estate of Fearn to the said Elizabeth Binny and William Maule Maule, and the survivor of them, in liferent, is granted under the provisions and declarations following;" then he provides that one-third part of the rents falling due during the subsistence of the intended marriage shall be payable and upliftable by Elizabeth Binny herself, exclusive of the *jus mariti* and right of administration of William Maule Maule, her husband, and shall not be affectable by his or her own debts or deeds, legal or voluntary, nor by the diligence of his or her own creditors; and it is further declared,—"as regards the rights of the said Eiizabeth Binny provided to her as aforesaid, both during the subsistence and after the dissolution of the said marriage, if she be the survivor the same shall not be saleable or assignable, either in whole or in part, by the said Elizabeth Binny and William Maule Maule, or either of them, to any extent or effect, or upon any pretence whatever, the said liferent interest in favour of the said Elizabeth Binny, as well during the subsistence as after the dissolution of the said marriage, being hereby declared strictly alimentary on the said Elizabeth Binny." There follows that, again, a declaration "that it shall be in the power of the said Thomas Binny, Elizabeth Binny, and William Maule Maule to enter into leases of the foresaid estate, or any part thereof, for the like duration, and in all respects as fully and freely as is permitted to the heirs of tailzie foresaid, and that notwithstanding that they, the said Thomas Binny, Elizabeth Binny, and William Maule Maule, are merely liferenters, but not otherwise, or to any greater extent or effect than is permitted to the foresaid heirs of tailzie." That last expression seems to me to come as near to the words "liferent allenarly" as any words in the English language could do; but taking the whole deed, and considering its general intention, I think there can be no doubt that the liferent of Mrs Maule during the subsistence of the marriage or after its dissolution, was meant to be nothing but a bare liferent, ordinarily expressed by the words "liferent allenarly," and I do not think that at this time of day it can be said that these words are absolutely indispensable; on the contrary, it has been expressly decided that there are equivalent words. The only authority to the contrary is the interlocutor of my brother Lord Deas in the case of *Ramsay* v. *Beveridge,* and as that was recalled by the Second Division of the Court, its weight is, I am afraid, lost. If, then, Mrs Maule has a bare liferent, she can have no title or part of a title to present this petition.

Is Miss Maule, then, the heir of entail in possession? Under the destination in the procuratory of resignation there was no one to take the proper fee when Mr Binny the entailer died and the joint liferent of the spouses came into existence. That destination was first to the heirs-male of the marriage, and secondly to the heirs-female of the marriage. There were at that date no children of the marriage born, I think, and certainly no one could tell who was to be the heir of the marriage. The legal consequence of that was that the liferenters must sustain a fiduciary fee for the heirs of the marriage, and therefore during the subsistence of the marriage there was such a fee in the spouses. At the moment of the dissolution of the marriage, the heir of marriage was ascertained; the right of the real fiar at that moment emerged, and the fiduciary fee came to an end. The survivor of the spouses had therefore no fiduciary fee, for that is created by necessity of the law; the fee must be somewhere, and a fiduciary fee is an ingenious contrivance of the law to meet that necessity so long as it is impossible to discover who is the real fiar. But there is now no doubt as to who the heir of the marriage is, and that ingenious contrivance is no longer needed. When the marriage was dissolved the heir of the marriage was ascertained, just as the heir of the body is ascertained on the decease of the party of whose body he is the heir. Miss Maule therefore became the party entitled to take up the fee as disponee under this deed. She was at the dissolution of the marriage ascertained to be the party entitled to take as institute of tailzie.

This entail was made before August 1848, and Miss Maule was born also before that date, and therefore must come under the category of the third section of the Act, and obtain the consent

of the three nearest heirs of tailzie, and that she seems to have done.

It only remains to add that Miss Maule's title is not made up, but that is part of the procedure that must be attended to by Lord Rutherfurd Clark when the petition is remitted again to him.

LORD DEAS—There are many peculiarities in this deed; but I am of opinion that one of these, the omission of the word allenarly, is unimportant—in the first place, because this is the case of a strict entail, and I think those technical rules as to the effect of the words "liferent allenarly" are not applicable in the case of a strict entail, and for this reason, the fact that the conditions, prohibitions, and fetters of the entail are applied to all parties forms a stronger restraint than can be determined by the use of these words. I am not aware that in any case of this kind the want of that word has been held to affect the question. In the second place, I think that the presence or absence of these words is of no consequence here, for the destination is in a contract of marriage, and it proceeds on the narrative of the intended marriage, and of the undertaking by the father of the lady to execute the entail. This case is exactly similar to that of *Hunter* v. *Hunter's Trustees*, to be found in Bell's Folio Cases, p. 73. In that case the question decided was whether certain heritable subjects conveyed by the pursuer's mother in her contract of marriage were conveyed to her husband so as to give him the fee or only the liferent of them. The contract of marriage proceeds upon a narrative of an agreement between the parties that the first deceaser of them should make over to the survivor in liferent, and the child or children to be procreated betwixt them in fee. The heritable estate of the husband was conveyed to the wife in these terms —"to and in favour of his said spouse, for her liferent during all the days she shall survive him, and the children of the marriage procreate between them in fee." The conveyance to the husband was in these terms—"to and in favour of her said husband, and the children procreated betwixt him and her," and on that conveyance there followed infeftment. In 1793 a company in which the husband was a partner failed, and the pursuer of the action, who was the only child of the marriage, brought this action to have it declared that the right of his father was only that of a liferenter. Lord Monboddo was of opinion that the father's right was a right of fee, but the Court, after consideration of the cases of *Allardice* and others, held that he was merely a liferenter. I am not aware of any authority to impugn that case.

There is a third reason for thinking that the omission of these words is immaterial, viz., that the liferent of the wife is declared to be alimentary. In the dispositive clause that would be conclusive, for it has been decided that that expression imports a bare liferent. These then are the three reasons I have for thinking that the omission of the word "allenarly" is immaterial, and these are to my mind more satisfactory than gathering the intention of the entailer from different clauses in his deed. After it was fixed that the proper method of constituting such a liferent was to use these words, that was a plain and safe course pointed out. When once conveyancers came to know that that was the right and proper mode they could easily have adhered to it; if they depart from it they are plunged in a sea of uncertainty. The only case in which that rule was departed from was the case quoted by your Lordship, but it is unnecessary to go into questions of that kind here.

LORD ARDMILLAN—I have very little to add to what has already been said, but I think it right to mention a few dates. The marriage took place in 1844, Mr Binny died in 1845, Mr Maule died in 1859, and Miss Maule was born in May 1846—that is, before 1848. It is important to keep those dates in view, for this lady's right of fee emerged at the date of her father's death. Before that there was no person who could be said to be heir of the marriage, but on his death she became, and could be known to be, the heir of the marriage If her mother was not the fiar she became fiar on her father's death, and, in my view, the mother was clearly only a liferenter. I do not think that "allenarly" is a word *sina quo non.* I agree with Lord Deas that it would be well and prudent to bear in mind that it is a word that will ensure a certain purpose; but it is not the only word that will do so, and its absence will not defeat that purpose. Here we have several words making it plain that a liferent and nothing more was given to Mrs Maule. There was, no doubt, a fiduciary fee in the spouses, but that fiduciary fee is only needed till the heir of the marriage be ascertained. As soon as that is ascertained by the dissolution of the marriage the fiduciary fee disappears. If Mrs Maule was not the fiar, Miss Maule was, and I am of opinion that Mrs Maule had never more than a fiduciary fee, which disappeared at that moment; but it may be highly important to have her consent. The true heir of entail in possession entitled to prosecute this petition is Miss Maule; if she has no right, she cannot do so, or even aid in any way the person who has that right. We must therefore choose who is the person who has it, and in my humble opinion that person is Miss Maule.

LORD MURE—I concur with your Lordship that we are bound to consider which of the petitioners here is the party entitled to disentail, for I do not think it is possible for us to authorise the execution of a joint instrument on the footing that one or other of them has the right. I have no difficulty in concurring with your Lordship in holding that Miss Maule is the person entitled to make the application. Looking at the whole deed, I am confident that the spouses were mere liferenters. On the dissolution of the marriage the eldest heir-female, if there was no heir-male, became the heir of the marriage, and therefore I am of opinion that we should grant the prayer of the petition, and authorise Miss Maule to execute an instrument of disentail.

The following interlocutor was pronounced:—

> "Find that the petitioner Elizabeth Patricia Maule is the heir of the marriage between the now deceased Honourable William Maule Maule and the other petitioner Mrs Elizabeth Binny or Maule, and that on the dissolution of the said marriage by the decease of the said Honourable William Maule Maule the fee of the estate of Fearn be-

came vested in the said Elizabeth Patricia Maule, subject to the fetters of the entail, and subject also to her mother's liferent: Find that when the title of the said Elizabeth Patricia Maule shall have been duly completed she will be entitled, as heir of entail in possession of the said entailed estate, to execute and record an instrument of disentail on complying with the conditions of the third section of the Entail Amendment Act: Remit to the Lord Ordinary to proceed further in accordance with the above findings."

Counsel—Dean of Faculty (Watson)—Johnston. Agents—Lindsay, Howe, Tytler & Co., W.S.

Wednesday, June 14.

FIRST DIVISION.

[Lord Curriehill, Ordinary.

SUSPENSION — HADDEN AND OTHERS (EXRS. OF DAVID SCOTT) *v.* HEPBURN, AND HADDEN AND OTHERS (EXRS. OF DAVID SCOTT) *v.* HEPBURN.

Suspension — Reasons of Suspension — Relevancy— Landlord and Tenant—Lease.

The executors of an agricultural tenant, under a lease excluding them, brought a suspension of a decree *in foro* pronounced in the Sheriff Court after a proof in a petition at the landlord's instance for payment of the expenses of repairing the houses, fences, &c., on the farm, the lease stipulating that these were to be left at its expiry "in the like order and repair" as at its commencement. It was alleged, *inter alia*, that the facts had not been properly inquired into, and that irregularities had occurred in the proof. *Held*—because there was no such specific averment as, for instance, that executors were not liable, or that the fences, &c., were in good order, or that the sum decerned for was excessive—that the reasons of suspension were irrelevant, and that the suspension should be dismissed.

Lease—Landlord and Tenant—Meliorations—Right of a Tenant's Executors to Compensation for Meliorations.

The executors of a deceased tenant under an agricultural lease which has come to a premature termination have no right to compensation for meliorations by which the landlord is *lucratus*.

Observations (*per curiam*) on the case of *Morton* v. *Montgomerie*, February 22, 1822, 1 S. 322.

Observations (*per* Lord President) on the case of *Pendreigh's Trustee* v. *Dewar*, July 1871, 9 Macph. 1037.

Process—Suspension—Bill Chamber—Act 13 *and* 14 *Vict. c.* 36, *secs.* 9 *and* 32—*Act* 31 *and* 32 *Vict. c.* 100, *sec.* 90.

A suspension was brought in the Bill Chamber of a decree *in foro* pronounced in the Sheriff Court after proof. Consignation was made, and the note was passed, with reasons and answers annexed. In a question whether the record then fell to be made up as in ordinary actions, or, seeing it had already been made up and proof led in the inferior Court, whether the cause should not be at once reported to the Inner House—*held* (*per* Lord Curriehill, the Lord President expressing a similar opinion *obiter dictum*) that upon a construction of the statutes the record fell to be closed and proceeded with in the Outer House.

These were two processes, both at the instance of Isabel Scott or Hadden, wife of George Hadden, gardener, Longniddry, and of Christina Scott or Liddell, wife of James Liddell, Gateside, Haddington, disponees and executors of David Scott, tenant of Spittalrigg and Ugstonrigg, on the estate of Smeaton-Hepburn, and of their husbands, for their interests, against Sir Thomas Buchan Hepburn of Smeaton-Hepburn and Letham, Bart. The two processes, although not conjoined, were considered together.

I. The first was a suspension of a decree *in foro* for £202, 3s. 8d., with £56, 5s. 6½d. of expenses, pronounced against the complainers, the parties mentioned above, as disponees and executors of David Scott, by the Sheriff of Haddington and Berwick, in a petition presented against them by Sir T. B. Hepburn, the respondent in this process.

David Scott became tenant in 1866 of the farms of Spittalrigg and Ugstonrigg, upon a lease from Sir T. B. Hepburn, for nineteen and a-half years from Whitsunday of that year as to the houses and grass, and for nineteen years from the separation of the crop 1866 as to the remainder. The lease was dated 24th and 27th February 1866; the farms were let to Scott and his heirs, but expressly excluding assignees and subtenants. It provided as follows, with reference to the buildings and fences on the farms:—"The said Sir Thomas Buchan Hepburn assigns to the said David Scott the obligations on David and William Scott, the present tenants of Ugstonrigg, and on Alexander Henderson, the present tenant of Spittalrigg, contained in their respective leases, to leave the houses, offices, and fences, and in the case of Ugstonrigg, the thrashing-mill and machinery, dams and aqueducts, in the order and condition therein stipulated; and in respect thereof the said David Scott accepts of the whole houses, buildings, and fences on the lands hereby let, and the thrashing-mill and machinery, dams, and aqueducts on the farm of Ugstonrigg in good and sufficient order and repair, and binds himself during the currency hereof to keep, and at the expiry to leave, the whole houses and buildings erected or to be erected, and the whole fences except plantation fences, as after provided for, gates and ditches, and the thrashing-mill and machinery, dams, and aqueducts at Ugstonrigg, in the like order and repair. The tenant binds himself and his foresaids to prune the hedges and dig their roots once a-year, in proper season, and also once a-year to scour the ditches and water-courses; and if he fail to do so, or to repair the fences generally, within ten days after being required, the proprietor shall have power, and is hereby empowered, to do these operations at