Johnston v. *Pettigrew*, June 16, 1865, 3 Macph. 954; (2) that the description was insufficient to identify the subjects—*Belches and Murray* v. *Stewart*, January 21, 1815, F.C.; *Cattanach's Trustee* v. *Jamieson*, June 25, 1884, 11 R. 973. The description was really the short description which the statute allowed, but which was not sufficient unless the reference was good.

The objectors were not called upon.

At advising—

LORD PRESIDENT—I cannot see any grounds for differing from the Lord Ordinary on the first question in this case, and that being so, it is unnecessary to consider the second. The reference is made in a bond dated 13th November 1882, and the feu-contract referred to is dated the 6th and 7th November 1882. It is clear therefore that at that date the feu-charter had been obtained, and the money for which the bond had been granted. In these circumstances both the feu-charter and the bond required to be recorded in order to render the transaction effectual. They were taken to the register, and received there on the same day, the feu-charter being presented first in order to preserve the proper order between the deed making the reference and the deed referred to. Now, all that is quite regular and in terms of the statute. The only omission is that the precise day on which the feu-charter was recorded was not mentioned in the bond. The question is whether that omission is fatal to the validity of the deed.

Now, it is quite clear that the reference gives the information that the deed referred to must have been recorded in the Register of Sasines, and that that registration must have been effected somewhere between the date of the charter and the date of recording the bond, that is, within an interval of about fourteen days. And, accordingly, the facility for finding the deed is ample. Had there been a difficulty as to finding the deed referred to, that would have been a substantial and important objection. But if there is no difficulty, then the objection resolves itself into a merely technical objection as to whether the statute has or has not been literally complied with. No doubt Schedule O contemplates the date being set out. But I can find nothing in the statute which makes it necessary, and a statutory requisite to state the precise day—the month and the year being given. Section 61 makes no provision to that effect. It merely refers to Schedule O. I do not say that the blank should not have been filled in, but I cannot think that the omission is fatal.

LORDS MURE, SHAND, and ADAM concurred.

The Court adhered.

Counsel for the Reclaimer—J. C. Thomson—Glegg. Agent—Thomas M'Naught, S.S.C.

Counsel for the Respondent—D.-F. Mackintosh—Craigie. Agents—Philip, Laing, & Traill, S.S.C.

Saturday, July 2.

SECOND DIVISION.

BROUGH *v.* BROUGH OR ADAMSON AND OTHERS.

Succession—Conjunct Fee and Liferent—Husband and Wife.

The destination in a conveyance of heritage by a father to his married daughter and her husband, "for love, favour, and affection . . . and for certain other good causes," was in these terms—"I hereby give, grant, alienate, and dispone from me, my heirs and successors, to myself in liferent, for my liferent use allenarly, and to the saids Lilias Greig or Brough and William Brough, in conjunct fee and liferent, and to the children procreated or to be procreated of the marriage betwixt them, equally share and share alike, whom all failing, to the heirs and assignees whomsoever, of the longest liver of the saids Lilias Greig or Brough and William Brough in fee." There were children of the marriage, and the husband survived the wife. *Held* that the fee was vested in the wife.

This was a Special Case which raised, *inter alia*, the question of the construction of the following clause contained in a disposition of heritage dated 9th January 1834, viz.—"I, William Greig, . . . for the love, favour, and affection which I have and bear to Lilias Greig or Brough my daughter, spouse of William Brough, . . . and to the said William Brough, as well as to the children procreated or to be procreated of the marriage betwixt them, and for certain other good causes and considerations, have alienated and disponed, as I hereby give, grant, alienate, and dispone from me, my heirs and successors, to myself in liferent for my liferent use allenarly, and to the saids Lilias Greig or Brough and William Brough, in conjunct fee and liferent, and to the children procreated or to be procreated of the marriage betwixt them, equally share and share alike, whom all failing, to the heirs and assignees whomsoever, of the longest liver of the saids Lilias Greig or Brough and William Brough in fee," certain heritable subjects, consisting of the eastmost half of a tenement in Morrison Street, Edinburgh. Infeftment was taken on the disposition in favour of "the said William Greig, Lilias Greig or Brough, and William Brough, for their respective rights of liferent and fee aforesaid."

William Brough *Primus*, designed in the disposition, survived his wife, and died leaving a *mortis causa* disposition and settlement with a codicil, by which he disponed to his son William Brough *Secundus*, and his heirs and assignees, the subjects in question. There were also four daughters of the marriage who survived. William Brough *Secundus* died, leaving a son, William Brough *Tertius*, his heir-at-law.

The parties to the case were, of the *first* part, William Brough *Tertius*, and of the *second* part, the surviving children of the marriage between William Brough *Primus* and Lilias Greig.

The first party maintained that William Brough *Primus* was fiar of the subjects in question under the disposition by William Greig,

and that he was entitled to these as successor of his grandfather.

The second parties contended that the fee of the subjects conveyed by the disposition was vested in their mother, Lilias Greig or Brough, and that they were entitled to the same to the extent of four-fifths *pro indiviso* shares, as, along with the first party, heirs of provision in special of their mother, under the disposition.

The following question of law was, *inter alia*, submitted for the opinion of the Court—"(1) Whether, under the said disposition by William Greig, dated 9th January 1834, the fee of the eastmost half of the tenement in Morrison Street was vested in the said William Brough *Primus*, or in the said Lilias Greig or Brough?

Argued for the first party, William Brough *Tertius*—The fee of this property was in William Brough *Primus*. When a heritable subject was disponed to husband and wife in conjunct fee and liferent, the presumption was that the fee was in the husband. Here there was a joint-liferent during the subsistence of the marriage, and the survivor became fiar by accretion of the fee. If the heritable property had been conveyed to the spouses *nomine dotis*, then it could not be disputed that the fee would have been in the husband, and under the circumstances the conveyance here was of that nature—*Fead* v. *Maxwell*, February 4, 1709, M. 4240; *Muirhead* v. *Paterson and Others*, January 16, 1824, 2 S. 617; *Myles* v. *Calman and Others*, February 12, 1857, 19 D. 408; *Blair* v. *Henderson*, June 16, 1757, 5 Br. Supp. 335; *Forrester* v. *Trustees of M'Gregor*, April 13, 1835, 1 S. & M'L. 441; Ersk. Inst. iii. 8, 36.

Argued for the second parties—The fee was in Lilias Greig. No doubt there was in the general case a presumption that the fee was in the husband, but that presumption did not exist when the property came from the wife's side of the house. In that case the presumption was that the fee was in the wife. The heirs and assignees of the longest liver of the spouses did not take the fee here if there were any children of the marriage; there were children of the marriage, and they must take as their mother's representatives—*Myles* v. *Calman* (*supra cit.*); *Blair* v. *Henderson* (*supra cit.*); *Thom* v. *Thom and Others*, June 11, 1852, 14 D. 861; *Paterson and Others* v. *Balfour*, December 6, 1780, M. 4212; Fraser on Husband and Wife, ii. 1428.

At advising—

Lord Justice-Clerk—This case raises questions which I have found to be of some difficulty, but the only question I intend to address myself to at present is that one raised by the first question in law presented to us by this case. That question is thus worded—"Whether, under the said disposition by William Greig, dated 9th January 1834, the fee of the eastmost half of the tenement in Morrison Street was vested in the said William Brough *Primus*, or in the said Lilias Greig or Brough?"

The case relates to a branch of law in which there has been a great deal of decision, viz., the law of conjunct fee and liferent. The facts are simply these. There seems to have been a descent of three persons all named William Brough; and William Brough *Tertius*, the first party to this case, was the grandson of William Brough, here called *Primus*. William Brough *Primus* married Lilias Greig, and on 9th January 1834 her father William Greig executed the disposition the construction of which is here in question. In that deed he conveyed to his daughter and her husband certain heritable subjects in Edinburgh, and the destination was in the following terms—"I hereby give, grant, alienate, and dispone from me, my heirs and successors, to myself in liferent for my liferent use allenarly, and to the saids Lilias Greig or Brough and William Brough, in conjunct fee and liferent, and to the children procreated or to be procreated of the marriage betwixt them, equally share and share alike, whom all failing, to the heirs and assignees whomsoever, of the longest liver of the saids Lilias Greig or Brough and William Brough in fee." Now, the question arises whether the daughter or her husband took the fee of these subjects under that destination.

The theory of conjunct fee and liferent in Scotland was at one time supposed to be analogous to that of joint tenancy in England. That is to say, that there was a joint fee in both spouses during their life, and an accretion of the fee to the survivor of them. But that view has been for a long time discarded, and it is now held that a destination to the spouses in conjunct fee and liferent, gives the fee to one or other of them, and only a liferent to the other. The only question then is, who has the fee. There have been a variety of tests applied to discover this, some of them inconsistent with others. In the first place, the presumption is that the fee is in the husband, unless there is a clear implication to the contrary, and much depends upon the side of the house from which the property so left comes, whether from the side of the wife, or of the husband. Certainly if the deed giving the fee of the property to the spouses has been granted by a stranger, then the presumption is that the fee is in the husband. But the circumstances may show that the fee was not meant to be in the husband, and then the presumption shifts, and the fee is held to be vested in the wife. A good deal may rest on what is the ultimate destination of the subjects as in the deed. Now, that is a most important element here. In this particular case the deed conveying the property came from the wife's side—her father conveying the property to the spouses—and the ultimate destination was to the children born or to be born of the marriage, and it is only in the case of there being no children of the marriage surviving that the destination is to the heirs and assignees whomsoever of the longest liver of the spouses.

I must say the question is not unattended with difficulty, because the husband was the survivor in this case, and it was said for him that if there had been no children, then, according to the deed, his heirs and assignees would have taken the fee, and that is undoubtedly true. But I think the question is concluded for us by the case of *Myles* v. *Calman*, February 12, 1857, 19 D. 408, quoted at the bar, and the case of *Blair* v. *Henderson*, 5 Br. Supp. 335, referred to there, because if these cases were well decided there can be no question on the subject. The case of *Myles* was perhaps even a stronger one than this, because the disposition of the property there in question was

executed by two sisters, who held the property *pro indiviso*. They resolved to separate the property, and the disposition was granted by the wife herself, and the destination was in these terms—"To and in favour of the said Ann Ritchie and John Calman, and longest liver of them two, in conjunct fee and liferent, and to the child or children procreate or to be procreate betwixt them, which failing to the said longest liver of them two, and the said longest liver, her or his heirs and assignees whomsoever in fee, heritably and irredeemably." So that was as nearly as possible the same case as we have here. Lord Benholme in that case delivered a most able and exhaustive opinion, in which all the cases were carefully considered—a complete repertory of law upon the whole subject—and he came to the conclusion that the wife was the fiar. In regard to the matter that the ultimate destination was to her husband, Lord Benholme says this—"For, upon this clause it is obvious to remark, that the survivor is here called to the fee only upon the failure of children, which is inconsistent with the notion that the fee was vested in the survivor by the earlier part of the clause. According to the pursuer's argument, the surviving husband takes the fee, both as institute and afterwards as substituted to the children. Whereas the sounder view seems to be that in the earlier part of the clause the survivor, *qua* survivor, takes merely a liferent, whilst in the latter part, where he is called along with his heirs and assignees, he takes a fee as substitute to the children. The children being thus in the destination preferred to the survivor *qua* survivor, the primary fee must be held to remain with the mother, the true proprietrix, to whom the children are heirs of provision."

The truth is, that the matter was only dealt with as a special destination on survivorship in the event of there being no children of the marriage. I do not think that the destination clause here carries the fee to the heirs of the husband at all. The fee was in Lilias Greig.

Lord Young concurred.

Lord Craighill—Apart from authority, the first of the questions presented in this case would be difficult of decision, but fortunately, as I think, there is authority by which it is governed. There is first the case of *Blair* v. *Henderson*, June 16, 1757, 5 Br. Supp. 335, and also the case of *Myles* v. *Calman, &c.*, February 12, 1857, 19 D. 408. It may no doubt be said—and indeed at the debate was said—that the latter of these cases was distinguishable from the present because there the subjects conveyed were conveyed by the wife. These were her own property, and consequently there was room for the contention that there was a stronger presumption that, according to presumed intention, the fee was to go to her heirs than in the present case where the property conveyed was not the wife's, but was the property of her father. This argument, however, is met and is displaced by the former case which I have cited, where the property conveyed was the property not of the wife, but of her father. Taken together, these decisions seem to me decisive of the present controversy, and consequently in my opinion the answer to the first question must be that the fee vested in the wife.

Lord Rutherfurd Clark concurred.

The Court answered the first question by finding that the fee of the subjects vested in Lilias Greig or Brough, and the case was thereafter settled as regarded the other points raised.

Counsel for the First Party—D.-F. Mackintosh, —Kennedy. Agent—Gregor Macgregor, S.S.C.

Counsel for the Second Party—Cheyne—Low. Agent—A. P. Purves, W.S.

Tuesday, July 5.

SECOND DIVISION.

[Lord Trayner, Ordinary.

MACKILL AND OTHERS *v.* WRIGHT BROTHERS & COMPANY.

Shipping Law—Charter-Party—Construction—Shipowner's Duty on Stowage of a Cargo of Coals and Machinery.

A charter-party contained these provisions—"Owners guarantee that the vessel shall carry not less than 2000 tons dead-weight of cargo" for a lump sum of £2200. "Should the vessel not carry the guaranteed dead-weight as above, any expense incurred from this cause to be borne by the owners, and a *pro rata* reduction per ton to be made from the first payment of freight." A cargo of 2000 tons, consisting of coals and locomotive machinery, &c., was tendered for stowage to the shipowners by the charterers. The former stowed the coals and machinery separately, and were thus only able to stow 1691 tons, whereas if they had stowed the coals and machinery together there would have been room for the 2000 tons stipulated in the charter-party.

In an action by the owners against the charterers for full payment of the freight, the Lord Ordinary *held* that the defenders were entitled to a deduction from the lump freight of the freight effeiring to 309 tons, and the expenses caused by the non-shipment of that amount of cargo, upon these grounds—(1) that the shipowners guaranteed that the ship would carry 2000 tons on the voyage in question, subject to the implied obligation of the charterers to furnish cargo of a description that could be stowed up to that weight; (2) that the cargo tendered could have been stowed up to that weight if the coals and machinery had been stowed together; (3) that this was a customary method of stowage, with consent of the shippers; (4) that the shipowners should have obtained these consents, and stowed the cargo accordingly; and (5) that the short shipment not being due to the fault of the charterers, they were entitled to the *pro rata* deduction stipulated in the charter-party. The Second Division *adhered* (*diss.* Lord Rutherfurd Clark). The Lord Justice-Clerk and Lord Young were of opinion (1) that the guarantee in the charter-party was