in the year. This leaves 65 vacant days; 52 of these are Sundays; 13 still remain: and the plaintiffs asked in triumph, how these were to be accounted for? but the answer was obvious. The stills required cleaning, and these 13 days are a necessary allowance for cleaning and repairing the stills. Such was the meaning of the legislature, and such has been the case in other acts; as, for example, the duties on soap, where the 13 days are allowed for cleaning.

After hearing counsel, it was

Ordered and adjudged, that the judgment given in the Court of Exchequer in Scotland be, and the same is hereby affirmed. And that the record be remitted, to the end, that such proceeding may be had thereupon as if no such Writ of Error had been brought into this House.

For the Plaintiffs, *Henry Erskine, Wm. Adam, James Montgomery, Wm. Dundas.*

For the Defendants, *Sir J. Scott, R. Dundas, John Mitford, Charles Hope.*

NOTE.—This case does not appear to be reported in any collection. The statutes against the profanation of the Sabbath are:—1503, c. 83; 1579, c. 70 1592, c. 124; 1593, c. 163; 1594, c. 201; 1661, c. 18; 1663, c. 19; 1672, c. 22; 1695, c. 13; 1696, c. 31; and 1701, c. 11.

ADAM SMITH, and Others, Creditors of LIEUT. JOHN NEWLANDS, ... } *Appellants;*

JOHN NEWLANDS, Eldest lawful Son of the said Lieut. John Newlands, and DAVID M'LAREN, Writer in Edinburgh, . } *Respondents.*

House of Lords, 26th April 1798.

LIFERENT AND FEE.—Deeds were conceived by the granter, conveying heritable estates to his natural son "in liferent, for his life-"rent use only, (in another deed for his liferent use allenarly,) "and to the heirs lawfully to be procreated of his body in fee." Held, in a question with creditors, that the substantial fee was in the children, and not in the father.

Alexander Newlands had no heirs but a natural son; and, of this date, he executed a disposition, whereby he conveyed and disponed a house in Edinburgh, "to and in favour of June 10, 1771.

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" Mrs. Grizel Mercer, sister-german of the deceased dame " Janet Mercer, spouse of Sir David Wardlaw, bart., during " all the days of her lifetime, for her liferent use only, and " after her deccase, to and in favour of John Newlands, my " apprentice, *in liferent, for his liferent use only;* and to " the heirs lawfully to be procreated of his body in fee ; " whom failing, to the nearest lawful heirs whatsoever of " the granter."

By the same deed Alexander Newlands conveyed certain other heritable subjects at Silvermills, in these terms, " To " and in favour of the said John Newlands, my apprentice, " during all the days of his lifetime, *for his liferent use al-* " *lenarly;* and to the heirs lawfully to be procreated of his " body in fee; whom failing, to my nearest lawful heirs " whatsoever."

The party thus favoured under the description of my apprentice, was the natural son of the testator. He afterwards left his apprenticeship, entered into the army, and became Lieutenant Newlands.

Infeftment was taken on these deeds in the precise terms of the above destination.

June 11, 1771. On the very next day he executed a trust deed, conveying his whole real and personal estate to trustees, for certain purposes specified. After these were satisfied, the trustees were directed to dispone the heritable subjects, when he should arrive at the years of majority, " 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; " whom failing, to my nearest lawful heirs whatsoever."

The truster died on 17th July 1771 thereafter, of a disease under which he laboured at the date of the deeds executed by him, and these were consequently reducible on deathbed, at the instance of the heir at law; but as there was no heir at law, it was deemed proper by John Newlands and the trustees, to apply to the crown, on whom these estates devolved as *ultimus hæres*, for a gift of the estate. A gift was applied for and obtained accordingly.

The trustees had denuded in favour of John Newlands in exact terms as above. And he having contracted considerable debts, the present question was raised by his creditors in a ranking and sale—that question being, Whether the right of John Newlands was a right of fee in the estate, so as to entitle his creditors to attach the same? The son of Lieutenant Newlands appeared by his tutor at law, contending

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that his father had only a liferent, and that the fee was in him. The appellants, Lieut. Newland's creditors, on the other hand, contended that it was a fee in Lieutenant Newlands. That in all cases where a grant has been made to a person in liferent, and to his children or other persons *nascituri* in fee, the Court have uniformly decided *ex necessitate juris*, that the fee must be understood to be in the liferenter: That although, when a grant is made to a person in liferent, and to another existing nominatim in fee, the right of the former is a bare liferent, and the latter a substantial fee, yet where the disposition in liferent is accompanied with a grant in fee to persons *unborn*, the law rears up *ex necessitate*, and by construction an absolute fee in the liferenter, whereby he and his creditors are enabled effectually to disappoint the fiars.

The respondents maintained, that in the established practice and understanding of conveyancers, a grant of an heritable subject to a person in liferent, for his liferent use allenarly, and to his children, or to other persons, *nascituri* in fee, imported no more than a bare liferent in the grantee, excluding him entirely from any right or interest in the fee for his own benefit. 2. That there did not exist in the law of Scotland any principle or any authority, which could authorize, far less compel courts of law to defeat the will of the testator. And that accordingly the will of the testator, where that is so unequivocally expressed as in this instance, must govern and have full effect. That there was no *necessitas leges* for any fee being in the liferenter, because, from the nature and form of conveyance, the case of a fee being in *pendente* could not apply. The superior can suffer no injury—the property can suffer no injury by reverting to the superior—for in the one case the superior has a vassal, in the other the property is vested and protected by trustees.

The Court ordained "the whole heritable subjects spe- Feb. 7, 1794.
"cially described in the two gifts of *ultimus hæres* to be
"struck out of the sale of the subjects belonging to Lieu-
"tenant Newlands, in so far as concerns the fee of said sub-
"jects, and decern."*

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* Opinions of the Judges.—

LORD PRESIDENT CAMPBELL said:—"This is a question of a liferent and fee. The two gifts seem to be in different terms. As to the house in Edinburgh, it seems clear that an absolute fee is in

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On reclaiming petition the Court adhered.

Against these interlocutors the present appeal was brought to the House of Lords.

Lieutenant Newlands. As to the other subjects, the question turns upon the general point, so often agitated, What is the legal import and effect of "*Liferent allenarly?*"

"One point to be considered is, what is the nature and legal import of what is called a *fiduciary* or trust fee in the nominal liferenter, and what particular form of words is necessary to constitute such a fee? If the words are, to such a person in liferent, for his liferent use, and to the heirs of his body in fee, does this mean something different from the same words with the addition of allenarly, or only, or merely, or any such expression adjected to the words liferent use?

"In arguing the case of Frog (Frog's Creditors *v.* His Children, Nov. 1735; M. 4262), Mr. Ferguson of Pitfour seems to have been at a loss about this, and gave it a go-bye, by saying that 'the idea of a fiduciary 'fee in that settlement was an imagination, as it contained no re-'striction in words other than that of *liferent*, which meant *fee*. 'Trusts must be plainly expressed, and not left to be gathered from 'remote circumstances,' &c. All this may be true, but it does not go directly to the point, nor explain with sufficient precision how the line is to be drawn between one form of expression and another. The case of Forbes *v.* Forbes, observed by Lord Kames (Select Dec. 3d Aug. 1756), goes nearer to the point, and seems pretty plainly to establish that there may be cases where the word allenarly ought not to be considered as making any difference one way or other.

"In the case of Frog, it was ultimately found that there was a fee in Robert Frog, and that his onerous debts and deeds were effectual to carry that fee, yet he was *ex figura verborum* no more than a liferenter, and the fee was nominally in the heirs to be procreated of his body, whom failing, &c. But the Court thought that the fee could not be in heirs unborn, and uncertain. It was, on the one hand, given away from the granter, and, on the other hand, could not be in *future* heirs. It could rest no where but in Robert Frog. The question was well considered, and solemnly determined, and ought for ever to be at rest.

"But two inferences have been raised upon that decision, neither of which are found in the express terms of it, and both of which are attended with difficulty.

"1. It is supposed on one side of the argument, that the fee, in such a case, where we have no other words of restriction except liferent and fee, is equally absolute, and equally unlimited in the person of the institute, as if he had been called to the fee in express terms,

Pleaded for the Appellants.—In a deed regarding real estate, even though made *mortis causa*, it is not sufficient that the intention of the granter appear. The conveyance must be construed agreeably to feudal principles; and feu-

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without any mention of liferent; in so much that even his gratuitous deeds of settlement must be effectual to carry it away.

" 2. On the other side, it is maintained, that if to the word *liferent* we add a few superfluous terms of the same import, such as the word *only*,—the word *merely*,—the word *allenarly*, though we neither add to, nor take away a syllable from the subsequent clause of fee, we produce so wonderful a change, that instead of a pure and unqualified fee in the person of the institute, subject even to gratuitous deeds, we divest him of every right, title, or interest, except that of a bare usufruct, and exclude his most onerous creditors, or disponees, from any access to attach the subject. This is the more extraordinary, as we still leave a fee in him, i. e. we leave the estate in him; but, to reconcile this inconsistency, we call it a *fiduciary fee*; meaning to assimilate it, by the use of this word, to the case of an estate conveyed to a stranger for certain ends and purposes, and where it is certain that no more than a trust estate vests; but where it is equally certain that there is a co-existing *substantial* fee, which can no more be *in pendente* than a trust fee, but must rest somewhere, as indeed all property must; for, independent of feudal ideas, it is a contradiction in terms, to suppose property without a proprietor. An estate descending from the ancestor to the heir, or conveyed by family settlements, can never be a *res nullius*; for by the law of Scotland, if it can find no other owner, it would belong to the king.

" The Court, in the case of Frog, having found the fee to be in Robert Frog, and not in the heirs unborn, it was a necessary consequence that his onerous debts and deeds were found also to attach upon it. But the Court had no occasion to decide in a question with *heirs*, whether the restricting words, short and simple as they were, did or did not lay him under an obligation in their favour. Had his grandmother given him expressly the fee, but only said, 'I mean, that failing you, it shall go to the other heirs and persons named in the deed, and I desire that you shall not defeat their hope of succession;' even this, though a weaker expression of her intention, would have barred him from altering gratuitously. She did the same thing more emphatically, by restricting him in words to a liferent, which was the strongest possible signification of a will that he should not dilapidate or defeat, but allow the succession to take place as devised by her. But the Court justly thought that no such form of expression could bar onerous creditors or purchasers from attaching the fee in his person.

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dal forms, and apt terms of conveyance must be used; and whatever be the known and recognized construction of these terms of destination, they must have effect; and it is clear by them, that the granter never meant to restrain the inte-

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"Suppose then she had added to the word liferent a few of those anxious synonymes above noticed, would this have made *his* right, or that of subsequent heirs, or of any one concerned, either stronger or weaker? It is thought not. In the case of Newlands we have different modes of speech used in the two different gifts, which, however, both parties seem to think, and with reason, mean one and the same thing. But, let the form of the words be what it will, if the fee be in the institute heir, or first person called in the settlement, or in any other person called after him, the onerous debts and deeds of that person must attach upon the subject, although it may be very true that, by contracting such debts, and doing such deeds, he counteracts the will of the granter; and an action may lie against him to purge incumbrances, as in the case of an entail which is defective in one or other of its clauses, or left out in the investitures, or not recorded in the register of tailzies.

"The words liferent allenarly, &c. are not *verba significata*, which by their force and effect exclude the vesting of the fee. It is admitted that the fee vests; but they are strong and anxious expressions of *will*, which are entitled to every effect and operation that *will* can have in such a case; but the effect of *will* to qualify a fee in an institute or substitute heir has already been exemplified.

"It is said he was a *fiduciary fiar*. This is a term which has been invented to obviate a difficulty, but it just leaves the matter where it was. For whom is he fiduciary? For himself in liferent, and the heirs of his body in fee, i. e. *for himself in fee*. A *fiduciary fee* implies a *substantial* fee. Where then is the substantial fee? Is it in heirs unborn, and who never may exist, and failing them in the king? Such a proposition cannot be maintained. The substantial fee, in the case of such a settlement, is, and must be in the fiduciary fiar, because it can exist no where else.

"There are cases of *nominal* fees, which are distinct from the actual or substantial fee, e. g. if I have sold my estate and granted a disposition with procuratory and precept, and the purchaser is infeft upon the precept, but has not yet taken the necessary steps to make his base infeftment public, I still have in me a naked nominal fee in consequence of the anterior feudal investiture in my person, but which will vanish as soon as complete feudal titles are made up in the new proprietor, and in the meantime the substantial fee is in him.

"In like manner, if I dispone my estate in trust to a stranger, for ends and purposes, *e. g.* to pay my debts, or to raise a fund for family provisions, &c., and the trustee is infeft, here are two distinct fees,—the trust fee is in him till the ends of it are accomplished, but

rest of John Newlands, his infant son, and only child, to a naked liferent, or a fiduciary fee; and therefore, in effect and in law, the destination to him in liferent, and to his children unborn in fee, gave a substantial fee to the father; the substantial fee remains with myself, and from me will descend to my heirs. If I am a freeholder, I will continue to vote in right of my substantial fee. My heir apparent, after my death, will do the same, as happened in the case of Sir Alexander Campbell of Ardkinlas. The trustee in that or in any other case of the kind, has no right to the estate, directly or indirectly, except what the trust gives him. He cannot vote as a freeholder—he cannot bring a shilling of his own debt upon it. The estate is not his but mine. He is a mere name for me, and for my creditors, &c. in terms of the trust. Yet the fee in him is far from being *nominal* in the sense of the preceding case, neither is it a liferent *allenarly*. It is an actual fee; but it is consistent with the substantial fee being in the truster, or the heirs of the truster.

Ante, vol. iii. p. 201.

"In this case of Newlands we have a trust of this kind, which, by the settlement, was to last a certain number of years. Now, for whom did these trustees hold the substantial fee of the subjects in question? They held it for the heirs in the settlement, i. e. for the granter's son, who is called the fiduciary fiar, and for the heirs of his body, &c. Ergo, the trust fee was held for the fiduciary fiar, and the heirs of his body; and why were the trustees only to hold it till his age of 21, and then to denude in his favour, if they were to give him nothing? This is a strange jumble, if we hold this fiduciary fiar to be neither more nor less than another trust fiar, holding the fee again in trust; the difference being that these first trustees did not hold the estate for themselves at all, but young Newlands holds it for himself in the first instance; and perhaps there neither does, nor ever will exist, another person for whom he will hold it, the king excepted.

"If the subjects were sufficient for a freehold qualification, would he not be entitled to be enrolled and to vote? Who is entitled to hinder him? If he had only a trust fee in the proper sense, or a merely nominal fee, or a liferent of no fee which exists in any person, it is thought this would be a very new sort of qualification. But it is admitted that the liferent which he has in words is a liferent upon a fee which *is in himself*, and therefore he would claim to be enrolled in virtue of his own fee, or the liferent of his own fee, and if this be not a substantial fee, it would not be a good title; but it is enough to say, that if he has not the substantial fee, there is no other person existing who can have it.

"Besides, the argument on the other side would be establishing a new kind of tailzied fee, not yet acknowledged in the law of Scotland. A trust in a man's person for the heirs of his own body, who

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To this effect it makes no difference whether the phrase be in liferent, or in liferent allenarly. As to the doctrine of fiduciary fees, these, if established, would be attended with much inconvenience, and so prejudicial to commerce, as to

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may never exist, cannot in its nature receive execution. If a trust or fiduciary fee may take place in the first institute, the same form may go through all the substitutes; and accordingly, in the case of Thomson, we have various substitutions, all in the same terms. Every heir may be declared a fiduciary fiar, or a liferenter allenarly for the succeeding heirs. If this alone be sufficient to qualify the right, what use is there for the act 1685? and for clauses prohibitory, &c.? We at once introduce the statute De Donis Conditionalibus (13 Ed. I.) into the law of Scotland, and the record of tailzies becomes useless.

"The case of M'Nair (M. 16,210) was an alarming example. The Court, 28th June 1791, refused *in hoc statu* to reduce at the instance of the institute heir himself; but if ever it comes back on a question with a creditor, it will deserve the most serious attention.

"With respect to legacies and personal provisions there is much less difficulty, because we have no feudal rules, nor security of records to stand in the way of giving full effect to the will of the granter. The chief thing to be attended to there is to avoid nice and subtile distinctions as much as possible, and to give as little room to arbitrary decision in construing the deed upon which the question arises.

"In all cases where the granter provides for his own issue or heirs, whatever be the form of words he uses, it ought to be understood that he does not mean to divest himself of the fee, and put it in them, but that they must take as representing him, or as heirs of provision to him, subject to his debts and deeds; though if it be a provision by contract of marriage, the children will also be *quodammodo* creditors to the effect of setting aside gratuitous deeds, and perhaps of competing with other creditors. Vide Dict. *voce* 'Provision."

"Where the provision or bequest arises from a third party, e. g. to A. B. in liferent, and the heirs of his body in fee, or to A. B. in liferent allenarly, or any such form of words, no gratuitous deed of A. B. ought to interfere with the plain intention of the granter, that the succession may take place in the manner devised by him; and it is idle to talk of a distinction between one form of words and another. Liferent allenarly owed its introduction to the case of conjunct fee and liferent, for it is natural there to use the expression to A. B. and his wife in conjunct fee and liferent, for her liferent use allenarly, which is no more than saying, 'Although I give her in words a conjunct fee, I mean truly to restrict her to a liferent only. This is all

entitle them to no countenance from law. Where real estate is conveyed to one in liferent, and to his children *nascituri* in fee, as in this case, the absolute and unlimited fee vests in the father, by the principles of the law of Scot-

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that is meant in the case of Thomson *v.* Lawson, 4th Feb. 1681, (M. 4258), observed by Lord Stair; and all that Mr. Ferguson of Pitfour meant in his argument in the case of Frog.

"As to onerous deeds. If there be a power of uplifting, there must of course be a power of squandering; if not, the assignment of a personal right, such as a bond, will not put the assignee in a better situation than his author. Gibson *v.* Arbuthnot, 4th February 1726; (Mor. 12885); Marjoribanks' Creditors *v.* Marjoribanks, Feb. 1682, (Mor. 12891); Mure *v.* Mure, 29th June 1786, (Mor. 4288); were wrong decided.

"As to feudal rights. In the case of Douglas *v.* Ainslie, 9th July 1761, (Mor. 4269), the words were, to Ainslie *in liferent* during all the days of his life, and to his children in fee. This was found a fee, and that he could sell. In Cuthbertson *v.* Thomson, March 1, 1781, (M. 279), the destination was to Ann Cassels *in liferent during all the days of her lifetime*, and her children in fee. The fee was found to be in her. In Ross *v.* Rosses, March 8, 1791, (*Voce* Fiar, *Vide* App. to Mor. Dict.), the question was among heirs; and the words of restriction were very strong."

Lord Eskgrove.—"I think it dangerous to depart from the received construction of such destinations—conjunct fee and liferent. If the case of Frog were entire, I would doubt about finding a fee in Robert Frog. Why should the interest of the superior have any effect on the settlement of the vassal? I would rather hold the estate to be in the granter. In the case of Graham in 1759, the father was infeft in liferent only, and it was found that an heritable bond granted by him was not good. I see no harm in a succession of liferents. Creditors are out of the question; for why should they contract with a liferenter. The words allenarly, &c. have received a certain construction, and we ought to adhere to it."

Lord Justice Clerk (M'Queen).—"I am of the same opinion. When I first came to the bar, a disposition to one in liferent for his liferent *use allenarly*, was universally understood to vest merely a liferent, with a fiduciary fee in the liferenter, in compliance with the rule, that a fee cannot be *in pendente;* and it would be most unjust to alter this now, for there are a thousand estates in this country settled in this way, in perfect confidence in this rule, which, had there been a doubt upon the subject, would have been settled on trustees. The will of the granter must be the governing rule as to his succession. No principle will give the estate to one to whom the granter has not given it. When he gives an estate to his son in liferent, and the heirs of his body in fee, the natural construction is, that he

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land, and by the solemn decisions of the Court of Session, which have been considered now for sixty years to settle the point.

Pleaded for the Respondents.—The intention of Alexander Newlands to bestow on his natural son only a bare liferent in his real property is incontestible, from the different deeds above recited, wherein he uses the terms liferent only as allenarly. This being the plain language of these deeds, and there being no *necessitatis legis* in this case, to give the fee to the liferenter to satisfy the feudal maxim, that a fee cannot be *in pendente*, it is incompetent for courts to create

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really means a fee in the son. If the words allenarly be added, he means that his son shall not spend the estate, and the son's interest is confined to a liferent. Suppose he says, my son shall have no fee in him, *fiduciary* or *otherwise*, Is he still to have a fee? I cannot assent to such a proposition."

LORD SWINTON.—"It is of the nature of a *fictio juris* to assume a proposition *contra veritatem* from conveniency. The trust here is for the sake of the superior."

LORD DREGHORN.—"There is no charm in the word allenarly. If tantamount (equivalent) words are used, it is enough."

LORD METHVEN.—"The restrictions on property are to be strictly interpreted. I think the words of restriction not sufficient in heritable rights."

LORD PRESIDENT.—"I am for finding, for the reasons above stated by me, that the word allenarly makes no difference, and that creditors and purchasers may attach in such a case."

LORD HENDERLAND.—"Of the same opinion."

LORD METHVEN.—"Of the same opinion."

LORD JUSTICE CLERK.—"In the case of Sir Alexander Campbell alluded to, the estate was not *wholly* made over to the trustee, but only partially; viz. for certain purposes, and a substantial estate remained. But here the whole estate is made over."

Vide ante, vol. iii. p. 201.

LORD PRESIDENT.—"If that be the case, then the *whole* is in Lieut. Newlands. The whole must be in him, either in one character or another, or rather, we may say, the whole fee is vested in him, both fiduciary and substantial, without any destination or separation, other than an ideal one, consisting in words merely, not in fact. The argument therefore, with submission, runs into a metaphysical nicety which we find it impossible to extricate. The estate being in Lieut. Newlands, must, at his death, be taken out of him by a service, or perhaps by a charge to enter, given to his son, as next heir, which is equivalent to a service."

"The Lords ordain the whole subjects to be struck out of the sale."—President Campbell's Session Papers.

by construction an unlimited fee in the person of the life-renter.

After hearing counsel,

The LORD CHANCELLOR LOUGHBOROUGH said :—

" My LORDS,

" 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 below, in addition to the printed report of the case, 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, till the judgment could be supported on the part of the respondents. 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. But I am happy, notwithstanding, that the discussion which the case had received has taken place, because it marks the attention of the House to the business which comes before them, and their anxiety not to be rash in forming an opinion, where questions turn upon points peculiar to the law of Scotland.

" To state the question, as distinctly as it is capable of being stated. These propositions have been agreed upon in the argument which has been maintained :—That 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 principle, recognized by the law of Scotland, that a fee cannot be *in pendente* or in *abeyance*. But the distinction which has been contended for by the respondents is, that if words are used which go beyond a mere declaration of liferent. If the word *allenarly* is added after the words, *in liferent for his liferent 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 effect had very generally been understood to be given to that word, and in particular, a very learned judge of great authority, who 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

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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, 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.

"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 rules of law, though I feel no conviction,—though my mind inclines to doubt exceedingly, whether the judgment proceeded on safe grounds, yet I own I have not courage to venture upon a reversal, when I am told by a person of such 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, reconsider 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 more maturely settled."

It was therefore

Ordered and adjudged that the interlocutors be affirmed.

For Appellants, *W. Grant, J. Anstruther, Chas. Hope.*

For Respondents, *Wm. Adam, Ad. Gillies, A. Fletcher.*

JAMES ROBERTSON of Lude, Esq., . . *Appellant;*
HIS GRACE THE DUKE OF ATHOLL, . . *Respondent.*

House of Lords, 2d May, 1798.

PROPERTY—PART AND PERTINENT—SERVITUDE OF PASTURAGE—SUBMISSION.—In a dispute as to the property of certain grazing grounds on the confines of Atholl Forest. Held, (1.) That the property of these grazing grounds belonged to the Duke of Atholl, as part and pertinent of Atholl Forest; but that the servitude of pasturing and grazing sheep, cattle, &c., belonged exclusively to the appellant, (whose barony marched with the Duke's), but subject to the Duke's right of deer hunting thereon. (2.) That when the Duke gave notice of his intention to hunt, the appellant was bound to remove his cattle in order to leave the grounds clear for that purpose. (3.) That the decree arbitral settling these disputes must have effect, and be final.