ation, I am for adhering to the interlocutor of the Lord Ordinary.

The other Judges concurred.

Adhere.

Agents for pursuer—Hill, Reid, & Drummond, W.S.

Agents for defenders—Lindsay & Paterson, W.S.

Friday, November 22.

HEWAT *v.* GRANT AND OTHERS.

Trust—Vesting—Fee—Liferent. Terms of trust-deed under which *held* that the right to the fee and rents of certain estates had vested in a pupil, although he was not to obtain a conveyance until he attained majority.

This was an action of declarator, count, and reckoning, raised by Richard Hewat, solicitor, Castle-Douglas, factor *loco tutoris* to James Welsh, only son of the late James Welsh junior, lately residing at Meikle Furth-head, in the parish of Urr and stewartry of Kirkcudbright, against the testamentary trustees of the late James M'Michan, Meikle Furth-head.

Mr M'Michan died in 1836. By trust-disposition and settlement, dated 1831, he conveyed his whole estate, heritable and moveable, to trustees. By the fourth purpose of the trust, the trustees were directed in the event of the death of James Clark, the first party favoured in the deed, "to pay over yearly to James Welsh junior, second lawful son of the said James Welsh, in Meikle Furth-head, on his attaining the age of twenty years complete, upon his own receipt, the free rents and produce of my said three merk lands of Furth-head, lands of Dalmonyside, and lands of Netheryett, under the burden aftermentioned; and, after the decease of the said James Welsh junior, they shall be bound to denude themselves and convey and dispone the same to the lawful heirs of his body, on his or her attaining majority, heritably and irredeemably, by executing in favour of him or her, and his or her heirs and disponees whomsoever, a disposition of the same, containing procuratory of resignation, precept of sasine, assignation to the rents, maills, and duties, writts and evidents, and clause of absolute warrandice herein contained, and all other usual and necessary clauses; and failing the said James Welsh junior, without leaving lawful issue of his body, my said trustees and their foresaids shall in like manner be bound and obliged to pay over yearly to James Muirhead, lawful son of the said John Muirhead of Logan, on his attaining the said age of twenty years complete, during all the years of his life, upon his own receipt, the free rents and produce of the said lands of Furth-head, Dalmonyside, and Netheryett; and after his decease, to denude themselves and dispone and convey the same to the lawful heirs of his the said James Muirhead's body, on his or her attaining majority, heritably and irredeemably, by executing in favour of him or her, and his or her heirs and disponees whomsoever, a similar disposition thereof; and failing the said James Muirhead without leaving lawful issue of his body, my said trustees and their foresaids shall in like manner be bound and obliged to pay over yearly to James Hannay, eldest lawful son of the said David Hannay of Auchenfranco, on his attaining the said age of twenty years complete, during all the days of his life, upon his own receipt, the free rents and produce of the said lands of Furth-head, Dalmonyside, and Netheryett; and after his the said James Hannay's decease, to denude themselves and dispone and convey the same to the lawful heirs of his body on his or her attaining majority, heritably and irredeemably, by executing in favour of him or her, and his or her heirs and disponees whomsoever, a similar disposition thereof; and failing the said James Hannay, without leaving lawful issue of his body, my said trustees and their foresaids shall be bound in like manner to pay over yearly to William Lidderdale, eldest lawful son of the said James Lidderdale, writer in Castle-Douglas, on his attaining the said age of twenty years complete, during all the years of his life, on his own receipt, the free rents and produce of the said lands of Furth-head, Dalmonyside, and Netheryett; and after his decease, to denude themselves and dispone and convey the same to the lawful heirs of his body, on his or her attaining majority, heritably and irredeemably, by executing in favour of him or her, and his or her heirs and disponees whomsoever, a similar disposition thereof; whom all failing, my said trustees and their foresaids shall be bound to convey the same to my own nearest heirs whomsoever; declaring, that on the succession opening to the heirs of the said James Clark, or to the heirs of any of the other persons before-named, in the order above mentioned, in case such heirs are females, the eldest heir female, and the descendants of her body shall always exclude heirs-portioners, and succeed without division through the whole course of succession; and further declaring, that the said James Clark and the other persons above named, in their order foresaid, shall have it in their option either to draw the rents and produce of the said lands of Furth-head, Dalmonyside, and Netheryett through the hands of my said trustees or to enter to the natural possession and occupation of the same with the pertinents on their attaining the foresaid age of twenty years complete, and in the event of their making choice of the latter alternative, my said trustees and their foresaids shall be bound to give them possession accordingly: Declaring, that the foresaid lands of Furth-head, Dalmonyside, and Netheryett shall be burdened with a free yearly annuity of £10 stg. to John M'Michan, presently residing at Meikle Furth-head, son of my deceased brother Thomas M'Michan, during all the years of his life, for alimentary purposes only and to the exclusion of his debts and deeds, payable at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment at the first of these terms that shall happen after my death; but which annuity shall not be upliftable by the said John M'Michan, but shall be applied by my said trustees and their foresaids for his use and benefit at such times, and in such portions, as they may consider best; and declaring, that the overplus of the rents and produce of the said lands of Furth-head, Dalmonyside, and Netheryett shall, during the minority of the person entitled to receive the same in terms of the foregoing destination, be accumulated by my said trustees, and be payable to such person on his attaining the said age of twenty years complete."

James Clark survived the truster, but died without issue. James Welsh junior survived James Clark and enjoyed the liferent provision in his favour. He died in February 1863, leaving a son, James Welsh, and a daughter, both in pupilarity. James Welsh's factor *loco tutoris* now sought declarator

of that pupil's right, through his factor, to draw the whole rents of the lands of Furth-head, &c., from and after the date of the death of the pupil's father, James Welsh junior, until he should attain majority, and also that the beneficial interest in these lands was now vested in the pupil, and that, on his attaining majority, he would be entitled, or his heirs and disponees would be entitled, to a disposition of the lands. There was a conclusion also for count and reckoning of the rents from 15th May 1863.

The defenders pleaded, that, according to the terms of the said trust-deed the pursuer's ward, James Welsh, has no vested interest in the lands in question in this process, and is not entitled to any present beneficial interest therein, nor are the defenders entitled to denude in his favour, except on the contingency of his attaining majority; and until that contingency emerges, or at all events, till he has reached the age of twenty years complete, the defenders are not entitled to pay over the rents, or any portion thereof, or in any way to apply the same for his behoof.

The Lord Ordinary (KINLOCH) pronounced this interlocutor:—

"The Lord Ordinary having heard parties' procurators, and made avizandum, and considered the process, Finds that according to the sound construction of the trust-disposition libelled, the right of fee in the three merk lands of Furth-head, the lands of Dalmonyside, and lands of Netheryett, is now vested in the pupil James Welsh, for whom the pursuer Richard Hewat is factor *loco tutoris*, and that the annual proceeds of the said lands fall to be accounted for to the said pursuer during his term of office on behalf of the said pupil; but under this declaration always, that the said James Welsh is not entitled to a conveyance of the said lands till he attain majority, and decerns; and appoints the cause to be enrolled, that any further interlocutor necessary or proper may be pronounced therein."

His Lordship, in his note, quoted the fourth purpose of the deed, and continued:—

"James Clark, mentioned in this trust-direction, died without issue; James Welsh junior, thereon succeeded to a liferent of the lands, and is now also dead. He left a son and heir, James Welsh the pupil, on whose behalf the present action is prosecuted, and a daughter named Margaret, also in pupilarity. The question raised is, Whether the fee of these lands is now vested in the pupil, James Welsh, or whether on any other ground he is entitled to their annual proceeds?

"The Lord Ordinary is of opinion that a fee has vested, though under the settlement a conveyance is not to be granted till James Welsh attain majority. The question must be determined by a sound consideration of the terms of the deed, and in such a case there is not much aid to be obtained from decisions pronounced in reference to deeds expressed differently.

"The instruction to the trustees is, that on the liferenter's death, they 'convey and dispone the same to the lawful heirs of his body, on his or her attaining majority, heritably and irredeemably, by executing in favour of him or her, and his or her heirs and disponees whomsoever, a disposition of the same.' The construction suggested by the defenders is, that the right here given is conditional on the attainment of majority, and that if the first heir of the body of James Welsh junior do not attain majority, the whole right passes to the next who does. But, in the view of the Lord Ordinary, the words of the deed do not support this construction. The right is not declared to be conditional on the attainment of majority. It does not embody any successive destination. There is no substitution expressed, no clause of survivorship. The right is simply given to the heirs of the body of James Welsh junior, and their heirs and disponees whomsoever. This appears to the Lord Ordinary to be substantially the constitution of a liferent in James Welsh junior, and a fee in the heirs of his body, the fee taking effect by the bare existence of these heirs, or at all events by the fact of their existence, coupled with that of their survivance of their father. Unless this is held, the result of all these heirs failing before majority, would be to throw the subjects into intestacy, which cannot fairly be presumed. There is in the next clause to that above quoted a destination over in favour of a variety of persons, 'failing the said James Welsh junior, without leaving lawful issue of his body;' but it is not added, 'or in the event of the same failing before they attain majority;' and the want of this addition confines the destination over to the case where no heirs are left at all, and so confirms the implication of the lands vesting in these heirs by the fact of their existing and surviving. It is true that the trustees are not to convey till the heir of the body attains majority. The effect of this clause is to continue the administration of the lands with the trustees until this event arrives. But it appears to the Lord Ordinary that this is its only effect.

"The defenders referred to a clause in a posterior part of the deed, in which, after burdening the right to these lands with an annuity of £10 to a John M'Michan, it is declared 'that the overplus of the rents and produce of the said lands of Furthhead, Dalmonyside, and Netheryett, shall, during the minority of the person entitled to receive the same, in terms of the foregoing destination, be accumulated by my said trustees, to be payable to such person, on his attaining the said age of twenty years complete.' The Lord Ordinary thinks it clear from the context, that this clause only relates to the case of the liferenter (whose right was declared to commence at twenty), and not at all to that of the fiars.

"The right to the annual proceeds necessarily follows on the right of fee found by the Lord Ordinary. The Lord Ordinary would have had great difficulty in giving to the pupil these annual proceeds, on the supposition of no fee existing, or, which is the same thing, of the right of fee being contingent on the pupil's attainment of majority."

The trustees reclaimed.

SOLICITOR-GENERAL (MILLAR) and FORMAN for them.

MONRO and BLACK in reply.

LORD PRESIDENT—The interlocutor under review in this case has put a construction on a clause in the settlement of the late Mr M'Michan, to the effect that, in the circumstances which have occurred, the heir of the body of James Welsh junior, a pupil, has vested in him the fee and rents of certain lands, and the question is, whether the Lord Ordinary is right? The object of the action is to vindicate for this minor, through his guardian, a right to the rents of these lands in the meantime, and during his minority; and the Lord Ordinary holds that that question depends entirely on whether the fee is vested in him, for, as he says in the end of his note, he would have had great difficulty in giving to the

pupil these annual proceeds on the supposition of no fee existing, or, which is the same thing, of the right of fee being contingent on the pupil's attainment of majority. I sympathise with the Lord Ordinary in that respect. I do not see my way to find the pupil entitled to the rents except on that footing; and, therefore, I confine myself to that consideration of vesting. And it is necessary, in the first instance, to have a complete view of the nature and design of the trust-settlement. It would appear that the testator left a considerable quantity of heritable property, and that forms the chief subject of this deed of settlement. There was one person for whom he had a special favour. That was James Clark; and accordingly, the leading provision of the trust-deed is conceived in favour of James Clark and the heirs of his body. [His Lordship then read part of the second purpose of the deed relating to James Clark, William Clark and others, and continued] By the fourth purpose of the deed, the trustees are directed, and they are bound and obliged, in the event of the death of James Clark without leaving lawful issue, to pay over yearly to James Welsh junior, &c. [reads from fourth purpose, *ut supra*]. Then follows an ulterior destination of these lands, as to which I shall have something to say bye-and-bye. In the meantime, on the words now read, by which the truster directs his trustees to denude themselves on the death of James Welsh junior of these lands, and convey them to the heirs of his body on his or her attaining majority, the question arises, What is *prima facie* the true meaning of that clause? Is it intended to vest in the heir of the body of James Welsh junior, at any time before attaining majority, a right to the fee of these lands? I am not disposed to think that a right to the fee vested in James Welsh either on the death of the testator or on his coming into existence, if he came into existence during the life of his father. The next question is, Whether the fee vests in him before he attains majority? On the words of the clause, the question is difficult of solution. There are two points of time in the contemplation of the maker of the deed, one the death of the liferenter, the other when his heir attained majority; but which is to be the period of vesting does not clearly appear. One consideration, arising not so much from this clause as from the whole deed, is of considerable force, namely, that after the death of the liferenter, there is nobody to take the rents, unless a right to the fee has vested in the heir of his body. These rents are not disposed of expressly, unless this clause gives them to the heir of his body as having right to the property. That is a consideration of some weight in favour of vesting when the liferent comes to an end. It may be observed also, that in expressing the destination in favour of the heir of his body, these words are added, "his or her heirs and disponees whomsoever." But I confess I am not inclined to give much weight to these words, in consequence of their position in the clause where they occur. The trustees are to convey to the heir of the body on attaining majority. There is no mention of heirs or disponees. But the deed goes on, "by executing in favour of him or her, and his or her heirs and disponees whomsoever, a disposition," &c. It may be represented that this part of the clause is nothing more than a description of the terms of the disposition to be executed in favour of the heir on attaining majority. The effect of such is to give him an absolute right to the fee. It is a disposition in common form to him, his heirs and disponees whomsoever, *i.e.*, in fee simple. I cannot extract from this part of the clause any support to the contention in favour of vesting at the death of the liferenter. But when we consider the other parts of the deed, considerable light is thrown on the question. In the first place, following this clause, there is an ulterior destination in favour of a person named Muirhead. It is needless to follow out that. And the purpose winds up with "whom all failing, my said trustees and their foresaids shall be bound to convey the same to my own nearest heirs whomsoever." Then follows a declaration about the exclusion of heirs-portioners. It is obvious that the testator intended that, on the failure of James Clark and his family, and James Welsh junior and his family, the Muirheads should take the succession to these lands of Furth-head, &c. But then, what is the condition on which this ulterior destination is to receive effect? It is "failing James Welsh junior without leaving lawful issue." Except on that event there can be no ulterior destination at all. The Muirheads cannot take the succession, nor can any of the substitutes. But say that James Welsh junior leaves lawful issue that die before attaining majority, What then becomes of the succession? It cannot go to the Muirheads. It becomes intestacy; and so one of the objects of the testator is frustrated. On the other hand, if you hold that the fee has vested in the heir of the body of James Welsh junior, in the event of his surviving his father, whether he attains majority or no, the favour of the testator is then continued in the family of James Welsh junior, and receives full effect, while the destination to the Muirheads does not come into operation, because there is some one before them. That influences me much in favour of the vesting of the fee before the heir of James Welsh junior attaining majority.

There are other clauses also worth considering. There is a clause very near the end of the deed "farther, I hereby declare that in the event of the decease of the said James Clark before attaining twenty years without leaving lawful issue, the burden of maintaining, clothing, and educating the younger children of the said John Clark and Margaret White, not exceeding £30 yearly as aforesaid, together with the special legacies of £50 sterling, made payable out of my trust funds generally, shall devolve upon the person entitled to my lands of Furth-head, Dalmonyside, and Netheryett under the foregoing deed, and be payable by such person accordingly." The person who is to pay the annuity is the person entitled to the lands under the foregoing deed. Now the annuities required for maintenance and clothing of the children of John Clark and Margaret White were a continuing burden, and the right to the estates might be in various hands during that time. This clause is not to come into operation till the death of James Clark. What is the effect of that? It is to throw the burden, in the first instance, upon James Welsh junior, and if he dies, upon the person answering the description of one "entitled to my lands of Furth-head," &c. If James Welsh junior leaves a child in minority, and that child is not entitled to the rents of the estate, it would be singular to make this annuity a burden on him. But who else is there who, in that event, can pay the annuity? Nobody, on the footing of no vesting. It is not said that the trustees are in any case to pay this annuity. On the contrary, the burden is laid on the person in right of the estate. That clause also gives aid to

the construction that the fee must have been meant to vest under the circumstances which occurred.

But it has been contended that there is another clause of this deed which operates adversely to the idea of vesting, *i.e.*, the clause which provides for the overplus of the rents and produce of these lands during the minority of the person entitled to receive the same. Now, if that clause applied to the case of fiars, I should think there was great force in that argument, though even then there would be a difficulty in reconciling it with other clauses. But I am satisfied that that clause is applied exclusively to liferenters under this deed, and this is clear if you take in connection with this particular clause that which precedes it; "and farther declaring that the said James Clark, and the other persons named in their order shall have it in their option either to draw the rents and produce of the said lands of Furth-head, Dalmonyside and Netheryett, through the hands of my said trustees, or to enter to the natural possession and occupation of the same on their attaining the foresaid age of twenty years complete." It is clear that the only persons contemplated under that clause are life-renters. They are the only persons subject to the disability which is to be removed by the attainment of the age of twenty years. These are also the only persons who shall benefit by this option. It is immediately following on this that the deed declares that the lands shall be burdened with an annuity to John M'Michan, and declares that the overplus of the rents and produce of the said lands shall, during the minority of the person entitled to receive the same, be accumulated by the trustees, and be payable to such person on his attaining the age of twenty years complete. The same idea runs throughout. That being so, I think that clause does not interfere with the construction in favour of vesting.

I shall only say, in conclusion, that this is a pure case of construction of the words of a settlement according to their natural and ordinary meaning. There are no technical meanings, no authoritative rules of construction to guide us. My simple ground of judgment is, that I believe from the words of the testator that he intended that vesting should take place.

Lord Curriehill concurred.

Lord Deas—I agree that if the pupil has no right to the fee, he has no right to the rents; and also that that clause commented on by your Lordship applies to liferenters only. On the question whether the fee has vested in the pupil, I differ. There is nothing in the deed to give the fee to the pupil, unless that is done by the direction to pay to him and his heirs and disponees when he attains majority. There is no direction to hold for him, and no right given to him at all, except such right as may be supposed to be implied in the direction to convey to him on attaining the age of twenty-one. But the direction is not to convey to him on majority, but to convey to the lawful heir of James Welsh junior on his or her attaining majority. It is clear, therefore, that unless this pupil attains majority there can be no conveyance of the estate to him. The estate still remains with the trustees. There may be found in other parts of the deed such indications of intention that the fee shall vest in the pupil, as to lead to the result that the fee has vested. But the natural construction of such a clause is, that the period of granting the conveyance is the period when vesting shall take place, unless there is some clause to show otherwise. In the recent case of *Campbell* we held that the fee had vested, but that was with difficulty, and only because in other parts of the deed there were such strong and conclusive indications of intention. That case we held to be an exception to the general rule. I don't say that here there is nothing indicative of intention in the mind of the maker of the deed in favour of vesting, but there is nothing strong enough to overturn the general rule. Your Lordship has stated several reasons in support of vesting; but they are not sufficient to my mind. One of these reasons is that if this fee has not vested there will be intestacy, because the destination to the Muirheads has been evacuated by James Welsh having heirs of his body, I agree with this construction, but I don't see that the consequence is that, because the estate has not vested in the pupil, there must be intestacy. The direction is to convey to the heir of James Welsh junior on his or her attaining majority. If this heir dies there might have been a number of other children. There is here another child, a daughter, who would be entitled to get the estate if not already vested. Another reason is that the rents would be given to nobody if the fee were not vested. If that were so it would not be conclusive, but I am not prepared to hold that it is so. The party on attaining majority is to get a conveyance of the lands with the rents. It may be that the fair result of that would be to carry the rents from the date of the death as well as the estate. A third reason is, that there would be nobody to pay the annuities if the fee were not vested. That is not of much force to my mind. The £30 was only to be paid if James Clark died before attaining twenty years of age. But that event has not happened and cannot happen. James Clark did not die before twenty. The result is that we have here no right given to the issue of James Welsh junior, but what may be implied in the direction to convey the estate to that one who shall attain majority.

Lord Ardmillan concurred with the Lord President.

Agents for pursuer—Ronald & Ritchie, S.S.C.
Agent for defenders—Wm. Kennedy, W.S.

Saturday, November 23.

STEPHEN *v.* ANDERSON AND ANOTHER.

Suspension—Caution—Decree for Expenses—Sheriff-court Act. A suspension of a Sheriff-court decree for expenses, on the ground of incompetency in the procedure, *refused*, the note being presented without caution, and the grounds of suspension not being *prima facie* sufficient to move the Court in the exercise of its discretion to pass the note.

This was a note of suspension and interdict, presented by James Stephen, shipmaster, Fraserburgh, against Robert Anderson, writer, and A. B. Henderson, shoemaker, in Fraserburgh, craving suspension of a decree for expenses obtained by the respondents against the complainer in the Sheriff-court of Aberdeenshire, and also craving interdict against a poinding and sale of his furniture and other effects. The note was presented without caution.