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

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

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

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

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

The defender reclaimed.

At advising—

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

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

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

The other Judges concurred.

The Court pronounced the following interlocutor —

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

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

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

Friday, March 19.

FIRST DIVISION.

[Lord Curriehill, Ordinary.

JAMES GALLOWAY *v.* DAVID NICOLSON.

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

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

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

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

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

tenants or occupants of all lands and heritages within the parish, rateably according to the annual value of such lands and heritages: Finds that according to the sound construction of the Act 8 and 9 Vict., cap. 83, entituled 'An Act for the Amendment and better Administration of the Laws relating to the Relief of the Poor in Scotland,' such assessment must be imposed so that one half of the whole assessment for each year shall be imposed upon the owners of the said land and heritages as a class, and the other half upon the tenants or occupiers thereof as a class: Finds that the assessment for the year 1872-73 and for the year 1873-74 respectively were imposed by the Parochial Board of South Leith, so that more than one half of each year's assessment was laid upon the owners of the lands and heritages in the parish, and less than one half upon the tenants or occupants thereof: Finds that this mode of imposing the assessment was illegal, and was *ultra vires* of the said Parochial Board: Finds that in consequence of this illegal mode of imposing the assessment the sums imposed upon the defender as owner of lands and heritages in the said parish were in each of said years overcharged, and the sums imposed upon him as tenant and occupant were undercharged: Finds that, on the whole assessments, when properly adjusted, the defender has been overcharged in each of said years to the extent of 15s. 4d., and that the sum sued for is overcharged in all to the extent of £1, 10s. 8d. sterling: Finds that the sum due by the defender to the pursuer is £84, 12s. 9d.: Ordains him to pay said sum to the pursuer, with interest at the rate of £4 per centum per annum from the 24th day of June 1874, and decerns: And in respect that the defender has always been ready to pay the sum sued for, under deduction of the sums found to be overcharged as aforesaid, finds him entitled to expenses; appoints an account thereof to be lodged in process, and remits the same when lodged to the auditor to tax and to report.

"*Note.*—In the present action a very important question is raised as to the proper construction of the enactments of the Poor Law Act, 8 and 9 Vict., cap. 83, with respect to the mode of distributing the assessment of poor-rates between owners and tenants or occupants of lands and heritages, where, as is now generally the case, the Parochial Board of a parish has resolved, with the sanction of the Board of Supervision, that the funds requisite for relief of the poor shall be raised by assessments imposed upon such owners and tenants or occupiers.

"The sections of the statute which bear upon the present question are the following.—

"(1.) By section 33 it is provided that the Parochial Board of a parish may 'resolve that the funds requisite for relief of the poor persons entitled to relief from the parish or combination, including the expenses connected with the management and administration thereof, shall be raised by assessments.'

"(2.) By section 34 it is provided that 'when the Parochial Board of any parish or combination shall have resolved to raise by assessment the funds requisite, such board shall . . . resolve as to the manner in which the assessment is to be imposed; and it shall be lawful for any such board to resolve that one half of such assessment shall be imposed upon the owners and the other half upon the tenants or occupants of all lands and heritages within the parish or combination rateably according to the annual value of such lands and heritages . . . and when the Parochial Board shall have resolved on the manner in which the assessment is to be imposed, such resolution shall be forthwith reported to the Board of Supervision for approval; and if the manner of assessment so resolved upon shall be approved by the Board of Supervision the same shall be adopted and acted upon in such parish or combination.'

"(3.) By section 36 it is provided that 'where one half of any assessment is imposed on the owners and the other half on the tenants or occupants of lands and heritages, it shall be lawful for the Parochial Board, with the concurrence of the Board of Supervision, to determine and direct that the lands and heritages may be distinguished into two or more separate classes, according to the purpose for which such lands are used and occupied, and to fix such rate of assessment upon the tenants or occupants of each class respectively as to such board may seem just and equitable.'

"(4.) By section 43 it is provided that 'where the one half of any assessment is imposed on the owners and the other half on the tenants or occupants of lands and heritages, it shall be competent for the collector of such assessments to levy the whole thereof from the tenants or occupants, who shall be entitled to recover one half thereof from the owner, or to retain the same out of their rents on production of a receipt granted by the collector of such assessment.'

"The Parochial Board of South Leith resolved that the requisite funds for relief of the poor should be raised by assessment, and, with the sanction of the Board of Supervision, they also resolved that the assessment should be imposed one half upon the owners and the other half upon the tenants or occupants of the lands and heritages in the parish, in terms of that part of section 34 of the Act which is above quoted.

"The annual value of the lands and heritages for the purpose of such parochial assessments is now to be ascertained by the valuation roll, which discloses the names of the owners and of the tenants or occupants of every subject in the parish, in respect of the ownership or tenancy or occupancy of which the assessment is to be imposed. Where subjects are unlet and unoccupied no assessment is imposed in respect of tenancy or occupation, but the owners of all such subjects are assessed in respect of ownership. And in virtue of the powers conferred by section 42 of the statute many tenants and occupants, and it is believed some owners, are exempted by Parochial Boards from payment of the assessment, in whole or in part, on the ground of inability to pay.

"In this way it happens, especially in large burghal parishes, that fewer persons are assessed in respect of tenancy and occupancy than in respect of ownership, in other words, the class consisting of tenants or occupants is less in number than the class consisting of owners.

"For many years it is believed that it was very generally the practice of Parochial Boards not to divide the assessment equally between these two classes, but to apportion the whole among all the ratepayers indiscriminately, whether owners, tenants or occupiers, and to impose upon each individual an equal rate of so much per pound upon the value of the lands and heritages owned, tenanted, or occupied by each. It is plain that by this mode of

distributing the assessment a larger proportion of the whole amount must be borne by the class of owners than by the class of tenants and occupants.

"The Board of Supervision, considering this to have been an illegal mode of imposing the assessments, appear to have repeatedly called the attention of Parochial Boards to the matter, and in particular they issued to the Boards a circular, dated 18th June 1868, in which they pointed out what they conceived to be the proper and legal mode of distributing the assessment. That circular is in the following terms:—'Assuming that the annual value or assessable rental of the parish so ascertained is £9000, and that the sum to be raised by assessment is £500, one half of the sum required (*i.e.* £250) will be raised from the owners by a rate of 6d 8-12ths per pound upon their "annual value," and the other half (£250) will be raised from the occupants by a similar rate per pound upon the same "annual value," or by such higher rate per pound as may be found necessary to produce from occupants the sum of £250, after taking into account subjects which either are unoccupied or are occupied by persons unable to pay poor-rates, and from which no part of the occupant's rate can be collected.' It is believed that several Parochial Boards have adopted this mode of distributing the assessment, but many Boards, and among others the Parochial Board of South Leith, adhere to the former plan, and continue to impose the assessment in the form of an equal rate of so much per pound upon all owners, tenants, and occupants alike, irrespective of the relative numbers composing each class of ratepayers.

"The total assessment required for the relief of the poor in South Leith for the year 1872-73 was £9110, 11s. 4d., of which, in consequence of the Parochial Board having imposed a uniform rate of 1s. 4d. per pound upon all the ratepayers indiscriminately, the sum of £4654, 0s. 8d., or more than one half, was imposed upon the owners, and only £4456, 10s. 8d., or less than one half, was imposed upon tenants and occupants. And if the rule indicated by the Board of Supervision is in accordance with the sound construction of the statute, it is obvious that each owner in the parish was for the year in question assessed at too high, and each tenant and occupant at too low, a rate. The above observations are applicable *mutatis mutandis* to the assessment imposed in 1873-74.

"The defender in this action is both an owner and an occupant of lands and heritages in South Leith, but the subjects of which he is owner are of greater annual value than those of which he is the occupant, and he declines to pay the assessment for either of the years in question until the inequality of which he complains is adjusted. He maintains, and I understand his statement is not disputed by the pursuer, that if the imposition of the assessment as between owners on the one hand, and tenants and occupants on the other hand, is adjusted in the manner pointed out by the Board of Supervision, he has been overcharged to the extent of 15s. 4d. in each of the two years specified, in all to the extent of £1, 10s. 8d.

"The Parochial Board, however, decline to admit that there has been any overcharge. They maintain that the rule of the Board of Supervision is erroneous, and not in accordance with the sound construction of the statute, and they have desired their collector to raise the present action to recover the full amount of the assessment imposed by them on the defender.

"I have felt the present question to be one of great importance, and to be not unattended with difficulty; but after the best consideration which I have been able to give to the case, I have come to be of opinion that the mode of distributing the assessment adopted by the Parochial Board is not in conformity with the statute, and that the rule indicated by the Board of Supervision is that which ought to be adopted. It appears to me that throughout the whole of the sections of the Poor Law Act which deal with the subject of assessment, there is a marked distinction maintained between the class of ratepayers who are owners and the class of ratepayers who are tenants and occupants, and that Parochial Boards must so adjust the imposition of the assessment that one half of the whole amount shall fall upon the one class and the other half upon the other class. This is, I think, the natural necessary meaning of the word 'rateably,' which occurs in section 34 already quoted. The assessment is to be imposed one half 'upon the owners and the other half upon the tenants or occupants of all lands and heritages within the parish or combination rateably according to the annual value of such lands and heritages.' I read these words as meaning that one half of the amount is to be imposed upon the owners of lands and heritages rateably, *i.e.*, upon each in proportion to the annual value of the lands, &c., belonging to him, and the other half upon the tenants and occupants of lands and heritages rateably, *i.e.*, upon each in proportion to the annual value of the lands, &c., of which he is tenant or occupant.

"It further appears to me that if it had been intended that a uniform rate should be imposed upon all the ratepayers alike, *i.e.*, upon owners, tenants, and occupants indiscriminately, the Legislature would have said so. And not only is such intention not expressed, but it would have been inconsistent with the provision of section 36, already quoted, by which Parochial Boards may in certain cases fix different rates to be paid by different classes of tenants. That section assumes that, while one half of the whole assessment is to be paid by a uniform rate imposed upon all owners irrespective of the purposes for which their lands and heritages are used or occupied, the other half of the assessment (*i.e.*, the tenants' or occupants' half) may be imposed upon the members of that class in such a way as to make the rate paid by each vary according to the purpose for which the subjects are used or occupied by him, and to that end the Parochial Board may subdivide the class of tenants and occupants into two or more classes.

"A little difficulty in the way of the construction of the Act, which I am inclined to adopt, may at first sight appear to be created by the language of section 43, already quoted, which authorises the collector to levy the whole assessment made upon owners and tenants or occupants from the tenants or occupants alone, but entitles the latter to recover one half thereof from the owners or to retain the same out of their rents. And it may be argued that this section implies that the assessment upon each owner and each occupant is to be at one uniform rate. I think, however, that this is not the sound construction of the section. It appears to me that in this, as in the other sections referred to, the distinction already noticed between the owners as a class, and the tenants or occupants as a class is kept up; and that, while the whole assessment may be levied, in the first instance from

the latter class, they, as a class, are to have right to recover from the owners, as a class, one half of the whole assessment; but each tenant or occupant will have right to recover only that portion of the owner's half of the whole assessment which has been imposed upon and paid by him for his own landlord.

"If I am right in the foregoing views, it follows that the defender has been throughout right in his contention; that he has been overcharged to the extent of £1, 10s. 8d. during the last two years; and that the pursuer can recover the assessments imposed upon the defender for those years only under deduction of the overcharges.

"As the defender has all along been willing to pay the amount of assessment imposed upon him under deduction of the overcharges, decree is given for the amount due, with interest at only £4 per cent. from the date of citation, and he has been found entitled to expenses."

The pursuer reclaimed.

At advising—

Lord President—The question raised in this case is, whether, in directing one half of the assessment for relief of the poor to be imposed upon the owners, and the other half upon the tenants and occupants of all lands and heritages within a parish, rateably according to the annual value of such lands and heritages, the Legislature meant that one half of the funds required should be laid on the owners as a class, and the other half upon the tenants and occupants as a class, or whether the intention was that the amount of the per centage or rate per pound necessary to produce the required sum should be divided, and one half of the rate be laid on each owner, and the other half on each tenant or occupant in the parish.

It is rather surprising that although the Poor Law Amendment Act 1845 has been in operation for nearly thirty years, this question should never yet have been settled, but that the practice in different parishes should be, as I understand it is, various and inconsistent. The question itself, however, does not appear to be attended with much difficulty. On a consideration of the statute, I have arrived at the same conclusion as the Lord Ordinary, viz., that one half of the whole assessment for the year is to be laid on the owners as a class, and the other half on the tenants or occupants as a class.

In considering the question, it is to be kept in view that the mode of assessment whereby one half is imposed on owners, and the other half upon tenants or occupants of lands and heritages, is now, since the passing of 24 and 25 Vict., c. 37, the only legal mode of assessment. But in the 34th clause of the Act of 1845 two other alternative methods were given besides that now authorised, and it is necessary to consider the whole of these in dealing with the construction of that part of the clause more immediately in question.

An argument which appeared at first sight very plausible, was stated for the pursuer to this effect, that it was impossible to read the word "assessment," when used in relation to the mode of imposition in question, as equivalent to the aggregate amount of funds required. For the result would be to give two different meanings to the word "assessment" in the same clause. Now, in the first of the places where the word "assessment" is used in the 34th clause, it means the act of imposing the tax. In the other places where it occurs—namely, in connection with the different modes of imposing the tax, it means the product or expected produce of the tax, *i.e.*, the fund requisite to be raised. Thus, then, the word has at least two perfectly different meanings in the same section, and so, unfortunately for the pursuer, his argument may be used as well against him as for him. For, assuming, as he contends, that the word assessment, where used in relation to the modes of imposition, is equivalent to rate or percentage per pound, you have still a different meangiven to it in the body of the section from that which you have at the beginning. The one argument may therefore be very well set off against the other.

But in considering the three modes of imposition given by the 34th section, it is important to notice that one mode is distinguished from the other two in an especial manner. I mean the third. By it the assessment may "be imposed as an equal percentage upon the annual value of all lands and heritages within the parish or combination, and upon the estimated annual income of the whole inhabitants from means and substance other than lands and heritages situated in Great Britain or Ireland." Now, if in the first and second modes of imposition an equal rate or percentage had been intended, it is to be presumed that the same language would have been used. And finding a different language used, we may conclude that something different was meant than an equal percentage. By the first mode of imposition—"one-half of such assessment shall be imposed upon the owners, and the other half upon the tenants or occupants of all lands and heritages," &c. According to the pursuer's argument, that means, that if a shilling rate is necessary to raise the required sum, you are to divide it into two halves, and lay sixpence on the owners and sixpence on the tenants or occupants. What is this in practical effect? First that you lay a uniform rate of sixpence on every person interested in land, whether as owner or occupant. That is simply laying an equal percentage upon these persons and nothing else. But when you come to the second mode of imposition, you find that the application of this construction produces a grave anomaly. The same language is used as in reference to the first mode, "one-half of such assessment shall be imposed upon the owners of all lands and heritages," &c., "and the other half upon the whole inhabitants, according to their means and substance other than lands and heritages," &c. Now, if one half of the assessment—that is sixpence out of the shilling—is to be imposed on land, and the other sixpence on income from all other means and substance, the consequence would probably be that in one parish of large area and scattered population, you would have a large produce from land and next to nothing from means and substance; and in another parish of small area and large population you might have a comparatively small return from land, and a very large one from means and substance. That does not look a very likely result for the Legislature to have intended, still it is the result of so construing the words of the statute. But, further, it will be found that this interpretation reduces the second mode of imposition to the very same thing as the third, viz., an equal percentage on land and on other means and

substance. This anomaly is quite sufficient to lead to the construction that the statute did not mean by the term assessment as used in relation to the mode of imposition, a rate or percentage but an aggregate sum required to be raised, and intended under the first mode of imposition that that aggregate sum should be divided, and one half laid upon owners as a class, and the other upon tenants or occupants as a class. That is the only construction of the section which makes it consistent with itself and distinguishes the second mode of imposition from the third. Therefore, upon a consideration of this 34th section alone, I think the argument of the defender is irresistible.

But there is obviously a very good reason why this should be the construction intended by the Legislature. For consider how the assessment will fall on the owners and on the occupants. If owners and occupants necessarily represented the same value and paid the same amount of tax, the result of the pursuer's and defender's contention would be the same. But it is hardly possible that that should be the state of the facts. Occupancy is liable to many vicissitudes. Houses may be unlet and unoccupied. Tenants and occupants may be so poor that their taxes are irrecoverable. In the case of owners the assessment must always be paid in full, for the collector has always the value of the tenement to fall back upon. But in the case of occupants the assessment may be much diminished by unoccupied houses and irrecoverable arrears.

The case of poverty amongst a large class of occupants is particularly provided for. By section 36, parochial boards are allowed to classify the tenements within the parish in two or more separate classes, for the purpose of laying the tax unequally upon the tenants or occupants, according to the classes to which they belong,—so that the result would be, that instead of the sixpence in the shilling being laid on all occupants, sixpence would be laid on none, and perhaps fourpence or threepence on others, and the produce of the assessment so laid upon occupants would be much less than that of the assessment laid upon owners. That would be an odd way of dividing a tax to be laid upon two different classes of persons in the way contemplated by the statute.

The only proper way of providing against the produce of the tax being less than is contemplated is to divide the total amount required, and lay one-half on the owners and the other half upon the tenants or occupants.

It only now remains to notice the 43d section, which gives power to "the collector of such assessment to levy the whole thereof from the tenants or occupants, who shall be entitled to recover one-half thereof from the owners." Now, the pursuer maintains that this clause supports his view, that by assessment is meant equal rate or percentage. That it should do so, it is necessary that it should apply to every case and every property in the parish, and not only to those cases where the amount to be levied on owners and occupants happens to be the same. Otherwise it will not avail him. But how is it possible to make it universally applicable? In one case the collector comes to an occupant, and finds him exempted from poverty, he cannot levy the whole tax on him. In another case he comes to a tenement and finds it unoccupied, then there is no person to levy the whole tax on. In a third case he comes to an occupant who by reason of the classifications provided for by section 36 pays a threepenny or fourpenny rate say, instead of a sixpenny, how can the 43d clause be made to apply to his case? The conclusion therefore is, that the 43d section is not intended to be of universal application, but is meant only for those cases in which the assessment on owners and occupants is an equal rate. I am informed that in point of fact, in parishes where a classification has been made under section 36, no attempt has been made to act upon the 43d section.

On the whole matter I have little difficulty in concurring with the Lord Ordinary.

The other Judges concurred.

The Court pronounced the following interlocutor:—

> "The Lords having heard counsel on the reclaiming note for the pursuer, James Galloway, against Lord Curriehill's interlocutor, dated 28th December 1874, Adhere to the said interlocutor and refuse the reclaiming note; find the defender entitled to additional expenses; allow an account thereof to be given in, and remit the same, when lodged, to the Auditor to tax and report."

Counsel for Pursuer—Solicitor-General (Watson), Monro, and Trayner. Agent—J. C. Irons, S.S.C.

Counsel for Defender—Dean of Faculty (Clark), Q.C., and J. Guthrie Smith. Agents—Crawford & Guthrie, S.S.C.