his terms, and that the persons playing were quite aware of them. It is further stated that there was no evidence of previous conviction, or of the accused being habit and repute a swindler. I think therefore that the prosecutor has failed to make out the charge he has stated.

LORD KINCAIRNEY—I concur. If it were enough to say that this man induced the public to gamble, we would have required to sustain the conviction. But the statute requires it to be shown that he is or was a swindler. I think it is clear he was not a swindler. I think there cannot be a swindle without fraud or falsehood, express or implied, concealed, or overt. There was here no misrepresentation and no deceit.

The Court quashed the conviction.

Counsel for the Appellant—J. C. Watt. Agents—Wishart & Macnaughton, W.S.

Counsel for the Respondent — Salvesen. Agent. Alex. Morison, S.S.C.

COURT OF SESSION.

Thursday, October 30.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

JAMIESON AND ANOTHER (CHAPLIN'S TRUSTEES) *v.* HOILE AND OTHERS.

Trust—Fee and Liferent—Liferent Right Terminated by Sale or Mortgage—Trust for Creditors—Power of Sale—Relevancy.

A truster disponed two heritable properties respectively to A and B in liferent and the heirs of their bodies in fee, whom failing to certain other parties, and provided—"All parties who shall at my death, or at any time thereafter, have any beneficial interest contingent or otherwise under this settlement are thereby prohibited from selling, mortgaging, or otherwise disposing of such interest, excepting always sales or mortgages by parties who are absolute fiars of any of the said estates, and it is thereby stipulated and provided that such sales or mortgages, if made, shall be void, and all deeds or instruments purporting to be a sale or mortgage of such interest, or any part thereof, shall be null and void, and all parties signing such deeds or instruments shall thereby forfeit and lose all right and benefit under this settlement, and shall give place to the next in succession who shall be entitled to come in the right and place of the party signing such deeds or instruments." A and B after succeeding to these rights of liferent each granted trust-deeds for behoof of their creditors by which they conveyed to trustees their whole estates, heritable and moveable, with powers of sale. Their trustees having entered into possession of the estates, sought declarator that they were entitled to sell the liferents assigned to them, and give a good title to purchasers.

Held that the testator had effectually provided that the rights of liferent should be terminated by an attempt at sale or mortgage thereof, and the action *dismissed* as irrelevant.

George Robertson Chaplin of Colliston died on 8th May 1869, leaving a trust-disposition and settlement dated 29th September 1864, and codicils. By these deeds he disponed, first, to David Souter Robertson of Lawhead, now deceased, in liferent for his liferent use allenarly, and after his death to George Robertson Chaplin, now of Murlingden, in the county of Forfar (therein named and designed George Souter Robertson, youngest son of David Souter Robertson), also in liferent for his liferent use allenarly, and to the heirs of the body of George Robertson Chaplin of Murlingden in fee, whom failing to Thomas Robertson Chaplin, now of Lawhead, in the county of Lanark (therein named and designed Thomas Chaplin Souter Robertson, third son of David Souter Robertson), in liferent for his liferent use allenarly, and to the heirs of his body in fee, whom failing to Katharine Robertson Kirkland or Hoile for her liferent use allenarly, and to the heirs of her body in fee, whom failing to the heirs of the body of David Souter Robertson of Lawhead, now deceased, whom failing to the heirs of the body of Mrs Margaret Souter or Kirkland in fee, the lands and estate of Cookston and Unthank. He further disponed to David Souter Robertson in liferent for his liferent use allenarly, and after his death to Thomas Robertson Chaplin in liferent for his liferent use allenarly, and to the heirs of his body in fee, whom failing to George Robertson Chaplin in liferent for his liferent use allenarly, and the heirs of his body in fee, whom failing to the heirs of the body of David Souter Robertson of Lawhead in fee, whom failing to the heirs of the body of Mrs Margaret Souter or Kirkland in fee, the lands and estate of Bowhouse. He further disponed to David Souter Robertson in liferent for his liferent use allenarly, and after his death to George Robertson Chaplin, his son, in liferent for his liferent use allenarly, and to the heirs of his body in fee, whom failing to Stewart Souter Robertson, his brother, in liferent for his liferent use allenarly, and to the heirs of his body in fee, whom failing to David Souter Robertson, the younger brother of Stewart Souter Robertson, in liferent for his liferent use allenarly, and to the heirs of his body in fee, whom failing to the heirs of the body of David Souter Robertson of Lawhead in fee, whom failing to the heirs of the body of Mrs Margaret Souter Robertson or Kirkland in fee, the lands of Auchingray.

The disposition was granted under certain conditions, which were declared to be inherent qualities of the conveyance, and, *inter alia*, under the conditions that "all

parties who shall at my death, or at any time thereafter, have any beneficial interest contingent or otherwise under this settlement, are thereby prohibited from selling, mortgaging, or otherwise disposing of such interest, excepting always sales or mortgages by parties who are absolute fiars of any of the said estates, and it is thereby stipulated and provided that such sales or mortgages, if made, shall be void, and all deeds or instruments purporting to be a sale or mortgage of such interest, or any part thereof, shall be null and void, and all parties signing such deeds or instruments shall thereby forfeit and lose all right and benefit under this settlement, and shall give place to the next in succession who shall be entitled to come in the right and place of the party signing such deeds or instruments."

On the testator's death David Souter Robertson entered into the possession of the several lands, and enjoyed the liferent thereof till his death on 10th November 1878.

George Robertson Chaplin of Murlingden then succeeded to the lands of Cookston and Unthank and Auchingray in liferent, and Thomas Robertson Chaplin succeeded to the lands of Bowhouse in liferent. They were both unmarried. Their affairs having become embarrassed, they each granted a trust-disposition and settlement for behoof of their creditors, by which they conveyed to the pursuers, as trustees for behoof of their creditors, their whole means, estate, and effects, heritable and moveable, real and personal, including their rights of liferent of the above-mentioned lands, declaring that the trustees should have power, *inter alia*, to sell and dispose of the lands and estate falling under the trust.

The trustees entered into possession and management of the estates, and proposed to sell and dispose of the liferent right and interest of George Robertson Chaplin and Thomas Robertson Chaplin in the lands of Cookston and Unthank and Bowhouse, and of George Robertson Chaplin of Murlingden in the lands of Auchingray.

This proposal was challenged by Mrs Hoile and her children and Stewart Souter Robertson and his eldest son, and the trustees raised this action against these parties to have it declared that the pursuers were entitled to sell these liferent rights without incurring any irritancy thereof in consequence of the terms of the trust-disposition of the late George Robertson Chaplin above quoted.

The pursuers pleaded—"(1) The said liferent rights not being protected against creditors, the pursuers, as trustees for behoof of creditors, are entitled to sell and dispose of the same. (2) The pursuers are entitled to decree as libelled, in respect that the conveyance of the said liferent rights to them did not fall, and a sale thereof by them would not fall, within the conditions and restrictions of the trust-disposition and settlement of the said George Robertson Chaplin."

The defenders Mrs Hoile and children pleaded—"(1) The averments of the pursuers are irrelevant. (2) The action is incompetent. (3) The said George Robertson Chaplin of Murlingden and Thomas Robertson Chaplin of Lawhead having no title to sell the respective lands above mentioned, and the pursuers being their assignees, and having no higher right than themselves respectively, the pursuers are not entitled to declarator as concluded for. (4) On a sound construction of the said disposition and settlement of the said George Robertson Chaplin of Colliston, the liferent interests thereby respectively conveyed to the said George Robertson Chaplin of Murlingden and the said Thomas Robertson Chaplin of Lawhead in the respective lands above mentioned are alimentary rights not attachable by creditors, and cannot be sold, mortgaged, or otherwise disposed of without incurring the irritancy provided for in the said disposition and settlement."

The defenders Stewart Souter Robertson and his son pleaded in similar terms.

Upon 20th March 1890 the Lord Ordinary (KYLLACHY) dismissed the action as irrelevant.

"*Opinion.*—The pursuers in this case are the trustees under a trust-deed for creditors granted by George and Thomas Robertson Chaplin, and they bring this action to have it declared that as such trustees they are entitled to sell (1) certain liferents presently possessed by the two trusters over certain landed estates in Scotland; and (2) certain prospective liferent interests which the two trusters have in succession to each other over the same estates. The liferents in question were all created under the testamentary disposition of the late Mr Robertson Chaplin, and there being no express trust, the fee is in each case held by the liferenter in possession as a fiduciary fee for his children, and failing them for certain other persons named, including the defenders, who are parties to this record.

"The question arises upon the terms of a clause contained in the disposition and settlement by which the liferents in question were constituted, which clause declares that the disposition was granted under certain conditions declared to be inherent qualities of the conveyance, and, *inter alia*, under the condition 'that all parties who shall at my death, or at any time thereafter, have any beneficial interest, contingent or otherwise, under this settlement, are hereby prohibited from selling, mortgaging, or otherwise disposing of such interest, excepting always sales or mortgages by parties who are absolute fiars of any of the said estates, and it is hereby stipulated and provided that such sales or mortgages if made shall be void, and all deeds or instruments purporting to be a sale or mortgage of such interest, or any part thereof, shall be null and void, and all parties signing such deeds or instruments shall thereby forfeit and lose all right and benefit under this settlement, and shall give place to the next in succession, who shall be entitled to come in the right and place of the party signing such deeds or instruments.'

"The pursuers contend that this clause of irritancy and forfeiture is wholly inef-

fectual (1) because it is not supported by trust, and (2) because it does not strike at gratuitous alienations or the diligence of creditors, but only at sales and mortgages. They refer to the case of *White*, 4 R. 786, and *Kirkland*, 13 R. 798, as authorities in their favour, and they maintain that there is no distinction in this matter between a right of fee and a right of liferent, it being, as they contend, equally impossible in both cases to restrict the owner's power of disposal.

"The defenders, on the other hand, contend that there is nothing incompetent in the creation of a temporary interest in land which shall in certain events last for life, and in certain other events last for a shorter period, and that it is of no moment whether the event which brings the temporary right to a close is some outside event or some act of the party concerned. They say, for example, that a liferent may be constituted terminable on the succession to some estate, or upon marriage, or upon second marriage, and that it can make no difference in principle that it should be terminable upon, *e.g.*, the execution of some deed, whether a deed dealing with the liferent itself or any other deed. They admit, indeed, that if a right of fee is once given, it is impossible to fetter the fiar's power of disposal, because a fee necessarily involves the power of disposal, but they say that that doctrine has no application to limited interests, which must stand or fall according to their own limitations, and, in particular, that it has no application to liferents which are truly of the nature of burdens, and the subsistence of which may be made to depend on any conditions which the donor may choose to attach.

"The defenders further argue that in any case the forfeiture here must take effect as regards the liferents to which the trusters have only a prospective right—that is to say, a right on the failure of the issue of each other. And with respect to the cases of *White* and *Kirkland*, they point out that those cases did not, so far as decision went, touch the present question, and that any *dicta* in either which may be thought to favour the pursuers' view did not really contemplate the case (which is for the first time presented here) where there is not only a prohibition against alienation and a declaration that such alienation shall be null, but where it is an inherent quality of the liferent right that it shall terminate upon a sale or mortgage being attempted.

"The defenders maintain finally that the action is incompetent, in respect that it asks the Court to declare hypothetically the rights of the pursuers with respect to a course of action which they have not taken, and which they may never actually take, and they found upon the doctrine expressed in Mr Mackay's book, vol. ii. p. 93, and the case of the *Earl of Galloway*, 16 S. 1213, there referred to.

"I have felt the questions thus raised to be attended with some difficulty, especially in view of the *dicta* expressed in the case of *Kirkland*, where this very deed was before the Court. But I have come to be satisfied that the question which is now presented for decision was not really considered by the Court in that case, and did not require to be considered, and therefore that I am bound to deal with it as one of principle, and one which is still open. In that view I have come to the conclusion that the defenders are right, and substantially upon the grounds which I have endeavoured to express as their grounds of argument.

"I do not think it necessary to proceed upon the incompetency of the action, although I have, I confess, grave doubts whether the present case does not fall within the principle of that of *Galloway*. But on the merits I accept the defenders' distinction between an attempt to fetter the powers of disposal inherent in the owner of a fee, and a declaration such as we have here, that a right of liferent shall terminate if a sale or mortgage of the liferent (that is to say, of the future fruits which are the subject of the liferent) shall be attempted. I only desire to guard myself by saying that I by no means regard this as implying that if a grant of liferent or of an annuity be conceived in absolute terms, the right can be effectually restricted by a mere declaration that it shall be alimentary or incapable of alienation. Such a condition, I incline to agree with the pursuers, would be ineffectual, at least without the interposition of a trust, for the liferent or annuity would in that case have a fixed duration, and for its duration must be as much at the disposal of the owner as a right of fee is at the disposal of the fiar.

"With respect to the pursuers' argument that gratuitous conveyance is not struck at by the clause, and that adjudication is competent to creditors, I reserve my opinion. I do not at present, I confess, see any good answer to the pursuers' point, at least as regards the liferents in possession. But it is not necessary to decide any question of that kind here, because I see no reason in principle why a testator should not be at liberty to terminate a liferent or annuity on an attempt at sale or mortgage, and yet to leave it open to the liferenter or annuitant to alienate gratuitously, or to the creditors of the liferenter or annuitant to adjudge for debt. The testator in the present case may possibly have considered that gratuitous alienation *inter vivos* was not a very probable event, and may not have desired or may not have seen his way to exclude the diligence of creditors.

"On the whole, I dismiss the action as irrelevant, and I find the defenders entitled to expenses."

The pursuers reclaimed, and argued—The action was competent. The pursuers desired to know the extent of their powers. The case of *Earl of Galloway*, 16 S. 1213, did not apply. The clause did not prevent the liferenter from alienating his liferent right. A creditor could adjudge the liferent right, and finally sell it. This was all that the trustees intended to do here, and it was not for the interest of the defenders to retard payment of the liferenter's debts. The clause could not prevent a fiar from selling,

and it did not prevent the liferenter from exercising the full rights of property upon his more limited estate. A liferent was no doubt a limited estate, but so far as it went it was complete. The analogy of an heir of entail applied. The heir of entail could sell his liferent interest in the entailed estate for behoof of his creditors, and there was no reason why a liferenter even under a clause such as this should not have the same power. There was no trust or prohibition of gratuitous alienation or diligence of creditors, and therefore the clause did not prevent the creditors from taking the liferent nor the liferenters from selling them—*Kirkland* v. *Kirkland's Trustees*, March 18, 1886, 13 R. 798; *Whyte's Trustees* v. *White*, June 1, 1877, 4 R. 787; Jarman on Wills, ii. 23; *Simson's Trustees* v. *Brown*, March 11, 1890, 17 R. 531.

The respondents argued—The action was not competent. The trustees ought to know their duty, and the Court would not advise them upon it—*Earl of Galloway* v. *Earl of Garlies*, cited *supra*. The clause was quite imperative. There was no repugnancy. The disponer could attach to a right of liferent the conditions of its subsistence. A liferent was equivalent to a grant for a term of years, and it had been held that in various circumstances a grant for a term of years could be burdened with conditions upon its use—*William Elliot* v. *Duke of Buccleuch*, December 4, 1747, M. 10,329; *Pirie* v. *Murray*, January 14, 1766, M. 8248. The Juridical Styles in forms of deeds for the conveyance of liferents contained a clause against alienations, which shows that the practice has been to introduce limitations into these deeds—*Fleeming* v. *Howden*, July 16, 1868, 6 Macph. (H. of L.) 113. In the case of a conjunct fiar limitations had been introduced—*Mason* v. *Mason*, April 5, 1557, M. 7180. This estate would not have been covered by sequestration. This was an attempt to attach estate which even under section 102 of the Bankruptcy Act would not vest in a trustee—*Kirkland* v. *Kirkland's Trustees*, March 18, 1886, 13 R. 798; *Trappes* v. *Meredith*, November 3, 1871, 10 Macph. 38. Finally, by the Roman law a usufruct might be granted *sub conditione*—Pothier, 2 de Vente, part 6, ch. 3, art. 3.

At advising—

LORD YOUNG—This is an action of declarator by trustees for behoof of creditors acting under a voluntary trust-deed. The trusters are entitled to certain liferents from various properties granted to them under the trust-disposition and settlement of a relative. The conveyance in the settlement is to the trusters in liferent, and to the heirs of their bodies in fee, whom failing to certain other persons named in the settlement.

The deed which grants these liferents contains this clause with conditions—"All parties who shall at my death, or at any time thereafter, have any beneficial interest contingent or otherwise under this settlement are thereby prohibited from selling, mortgaging, or otherwise disposing of such interest, excepting always sales or mortgages by parties who are absolute fiars of any of the said estates, and it is thereby stipulated and provided that such sales or mortgages, if made, shall be void, and all deeds or instruments purporting to be a sale or mortgage of such interest, or any part thereof, shall be null and void, and all parties signing such deeds or instruments shall thereby forfeit and lose all right and benefit under this settlement, and shall give place to the next in succession who shall be entitled to come in the right and place of the party signing such deeds or instruments." Now, the declaratory conclusion of the action is that the trustees are entitled, notwithstanding this clause, to realise these liferents by a sale in order to pay the trusters' debts.

The competency of the action is objected to by the defenders, and I shall deal with that after I have expressed my opinions upon the merits of the action, because they may illustrate my opinion upon the competency of the action.

And first, I think the action is in the same position and falls to be dealt with in the same way as if it was at the instance of the liferenters themselves. I cannot distinguish between the position of the principals and of the trustees whom they have voluntarily appointed, and every argument addressed to us on behalf of the trustees would, I think, have been equally available and effective if used for the principals. I do not dwell upon this as I think the point is obvious. For instance, one of the principal arguments addressed to us by the pursuers was that these liferents might be attached by creditors who might realise them for their debts. It might be more expedient for all parties that the liferents should be realised, and it did not matter whether the realisation took place at the instance of the creditor or of a trustee deriving his right from the liferenter. I can see no argument which is good for the trustees which would not be equally good for the principals, and I shall therefore consider the case as if it was the principals themselves who were seeking to sell the liferents.

The chief argument which was urged in support of the pursuer's contention was that there was a repugnancy between giving any person an estate of property and not giving him full liberty to deal as he pleased therewith. I think that it is quite settled, both here and in England, that when the whole estate has been bestowed upon a person the imposition of any limit upon his right to use the property as he pleases is void from repugnancy. That is true with regard to any subject of property; it is founded upon common law and upon principles which commend themselves to common sense.

But the same rule is not applicable to the case of the gift of a partial or particular estate—that is to say, when the subject of property is not the whole estate, but there is left a residue or remainder or expectancy to others. I think that that observation is as true of a sum of money as of any other estate. A common case is that of a lease.

There are two estates in a lease; one of the estates is given off for a number of years, and the lease which is endurable for a certain number of years may often be a more valuable estate than the freehold. Even if a lease is given for a certain number of years, you may still condition that it shall come to an end at an earlier period, and that the right of some other person shall emerge; the lease is not void from repugnancy in that case. Now, a liferent is just a limited estate; it is a limited estate because it does not exhaust the whole property; there is a residue or remainder which is the property of other persons, and there is no statute or rule of the common law to prevent the person who gives the estate attaching a condition to it that the estate shall terminate on the occurrence of certain events.

One instance of such a matter is the granting of a liferent to a wife on condition that she shall not enter into a second marriage. Such a condition as that is not void from repugnancy. The manner in which it is worked out is this. There is another estate existing, through the medium of which this can be enforced. If the condition is that the liferent shall terminate on the occasion of the second marriage, if that event takes place the fee then comes into existence, and the holder of that estate will enforce the condition. Again, if you give a person a sum of money with no other estate in it, it is then his property, and any condition attached to it would go for nothing; but if you do not give him the property, but only the interest for a limited period, there may be a condition attached to it which will bring the payment of the interest to an end at a period earlier than was stipulated for at first.

Now, the case here is a case of that kind. By this settlement there are two estates created in the land, and given to different people; the liferent is given to the trustees, and the fee to different people. By the conditions attached the reversion is brought sooner into operation, and possession of the fee given to the fiars sooner on the occurrence of certain events. It is plain that the testator's purpose, to speak only in a popular manner, was to secure the life income of the lands to the liferenter, and prevent him from anticipating by sale or otherwise the yearly produce of the subjects which had been left for the liferenter's behoof; to prevent him in fact from capitalising the sum which the testator thought it would not be for his interest to have capitalised. The mode which the testator here took of doing that was to insert a clause by which he prohibited the liferenter from capitalising his liferent either by a sale or by what is called a mortgage in the deed, and by creating another interest in the estate by the medium of which this clause might be carried out, arranging that this later interest should come into existence earlier than it would otherwise do if there was a violation of the clause prohibiting that capitalisation of the yearly interest. The question before us is, whether the testator could competently do that?

It is no part of my duty to consider whether the design of the testator might not be defeated by some contrivance on the part of the liferenters or others. What we are asked to declare is, whether the liferenters are entitled to sell their liferents notwithstanding the clause of prohibition. Now, I cannot declare that. I think that it was a legitimate purpose of the testator to prevent the liferenters, whom he intended to benefit and protect, from anticipating their liferents by capitalising them and spending the money so obtained. Of course a party can never be completely protected against his own acts. So soon as he draws the yearly or half-yearly produce of the subjects of which he possesses the liferent, that becomes his own property, and there can be no valid prohibition laid upon him how he is to deal with that produce, and therefore his creditors or others may come forward and claim the produce of the subjects as it becomes due under the terms of the settlement. There is, however, a great protection in what was done here. If he cannot sell his liferent or pledge it to his creditor, money-lenders would be much slower to meet his demands. Now, when this declarator is brought that the liferenter is entitled to sell his liferent rights, the other parties who have an interest in the estate created by the testator in his settlement come forward and say, "If this thing is done then our rights come to the front and we take possession of the subjects." Indeed, it was contended that even by the granting of this trust-deed for behoof of creditors a forfeiture of the liferent had occurred, and that the rights of the other persons, the fiars had come into existence so that they might take possession of the estate. I do not think that the defenders really claimed the property under that argument; it was used merely as an argument in the case. It is not necessary for me to express any opinion upon that matter, but if I had to give an opinion it would be to the effect that no forfeiture of the liferent had been incurred by the granting of the trust-disposition, but I think that the forfeiture would be incurred by a sale of the subjects. Not that there would be a sale of the subjects at all, for the tenor of the forfeiture would prevent a sale, because no one would buy a subject which by the mere act of selling would be at once forfeited by the seller. I think, therefore, that this clause is valid and effectual to prevent a sale.

This brings me at once to the question of the competency of the action. I think that the question of the validity of this clause and of its operation in the occurrence of a specified event was a fitting subject for a declarator. The liferenters themselves were excusably uncertain whether this clause of prohibition was sufficient to prevent them selling their liferents, and I see no reason why they should not find that out, and the suggestion that they should try it experimentally by making a sale of the liferents with the result of forfeiting them by that act I look upon as an idle proposition. The case of the trustees, as

I said before, is the same as that of the liferenters. Of course the trustees would not be entitled to sell if the result was to incur forfeiture of the liferents, but I think that they were entitled to know for their own guidance whether they were at liberty to sell or not. In my opinion, therefore, this action is competent.

With regard to the creditors, I am not called upon in this action to determine what diligence they might use against the estate. I have, however, great doubts whether the creditors who only take their rights through the liferenter, and who can have no higher right than his, could sell the estate. In the same way I am not called upon to state if in my opinion a liferenter who held his estate under a clause like this could defeat it in any way.

I do not know whether any of the arguments addressed to us would not have been equally available or equally useless if there had been a trust. I do not think that a trust would have made much difference. A trust might have been constituted for paying the produce of these lands to the liferenters, but if they broke some condition of the trust, then for paying the income to some other person. I have no doubt as to the validity of that direction, nor do I doubt the validity of the condition in this case.

LORD RUTHERFURD CLARK—The question is, whether the pursuers can sell the liferents into which they have been assigned and give a good title to a purchaser, or whether the sale will be void by reason of the prohibition to sell and the resolution of the liferents in the event of a sale?

It was conceded that these conditions would be ineffectual to prevent a fiar from selling. And the pursuers contended that conditions which were of no force in the case of a fee must be ineffectual in the case of a liferent. They urged that though the rights are different in their nature they are both equally absolute and equally transferable.

There is a very obvious reason why a prohibition to sell though fenced by resolutive clause cannot prevent a fiar from selling. The seller transfers the estate to the buyer so that the former is entirely divested, and the latter is fully vested in the fee without being affected by any of the conditions which are personal to the seller. For we are dealing with a case where there is no irritant clause, and I have not to enter on the vexed question whether the occurrence of such a clause would make any difference at common law. The result is that after his infeftment the buyer is the owner, and uses not the rights of the seller, which have been extinguished, but his own.

A liferent is no doubt transferable, but the rights resulting from the transference are very different from those resulting from the transference of a fee. I shall avail myself of the language and authority of Pothier to explain the effect of selling a liferent. He says—"A liferenter can sell his right of liferent; but this sale comprehends rather the emolument which the right of liferent can produce than the right itself, for this right being a right attached to the person of the liferenter cannot be transferred. Consequently the right of liferent subsists in the person of the liferenter notwithstanding that he has sold. The buyer only acquires the emolument of this right, and the power of reaping the fruits in the place of the liferenter so long as the liferent endures"—Pothier, 2 de Vente, Part 6, ch. 3, art. 3. By the sale of the fee the right of the seller is extinguished. The sale of a liferent produces no such result. The liferent continues to exist in order that the buyer may obtain the benefit of his purchase, and in order to do so he uses the rights of the liferenter, so that whenever the liferent ceases the right of the buyer is necessarily at an end.

It is a quality of the liferents which we are considering that the liferenters are forbidden to sell, and that if they do sell the liferents are resolved. But the resolution of the right of the liferenter at once determines the right of the buyer, which can only exist so long as the liferent subsists. The qualities and conditions inherent in the liferent necessarily affect the buyer because they are inseparable from it.

There remains, however, the argument that the prohibition is of no force as being repugnant to the nature of the right conferred on the liferenter. The pursuers say that the disposition of Mr Robertson Chaplin conveyed a full and absolute liferent, and that the limitation effected by the prohibition against sale and consequent forfeiture is repugnant to such a right.

I do not see why the granter of a liferent is not entitled to fix the conditions on which it shall continue to subsist. He can undoubtedly make it terminate on the occurrence of certain events, as, for instance, on the liferenter entering into a second marriage or succeeding to a particular estate. Why shall he not be able to make it terminate on a sale? If he is entitled to give a liferent which will determine on the occurrence of a certain event, I think that he may make it to determine on the occurrence of any.

Nor is this a matter without interest to the granter in connection with the rights of the fiars. For though it may be said that the powers of the original liferenter and the purchaser are necessarily the same, it does not follow that they will be exercised in the same way. The only interest which a purchaser could have would be to make as much out of the liferent as he possibly could. Probably the full purpose of the granter has not been attained because gratuitous alienation is not prohibited. But that is no reason for not giving effect to the conditions which he has imposed so far as they go.

It was not maintained on the part of the pursuers that the defenders had no title to enforce the forfeiture of the liferents. Nor do I think that there is any room for such a plea. For by declaring that the persons so forfeiting their liferent shall give place to the next in succession the testator has raised a title to enforce the forfeiture,

though probably no such express declaration was necessary. The pursuers further contended that the diligence of creditors was not excluded, and that therefore they should be allowed to do directly what the creditors might do indirectly. I think it very doubtful if the diligence of creditors is excluded. That is, however, a question which I cannot decide in this case. But assuming that the diligence of creditors is not excluded, and that they can proceed with it in ordinary form, I do not think that we can pronounce in favour of a power of sale. For creditors could not sell. They could only adjudge, and acquire the liferent as their own by obtaining a decree of expiry of the legal. If they afterwards sold, they would be selling in their own right and not in the right of the liferenters, although no doubt the right of the liferenters would be the subject of sale. It is obvious that the rights of creditors are in no degree commensurate with the power which the pursuers claim.

Nor can the pursuers obtain any aid by referring to the possibility of sequestration. There is no sequestration, and we cannot determine in this action what the powers of a trustee may be.

For these reasons I am of opinion that the interlocutor of the Lord Ordinary should be adhered to.

LORD JUSTICE-CLERK—I am of the same opinion, and after the clear and elaborate judgments your Lordships have pronounced, it is not necessary for me to say much more. The proprietor of any subject can make another person the proprietor of that which he holds in fee, but a liferenter cannot make another liferenter; all that he can do is to entitle another person to demand that the produce of certain subjects, which was originally destined to be paid to the liferenter, should now be paid over to that other. In my opinion he cannot transfer his rights.

I have no hesitation in holding that the trustees cannot be in a better position than the trusters from whom they derive their right, and in this case if the trusters had desired to anticipate the liferent and capitalise their rights by means of a sale they would have been in the position foreseen by the deed, and prohibited by the clause quoted in the condescendence. On these grounds I agree with your Lordships and think that we ought to adhere to the Lord Ordinary's interlocutor.

The Court adhered.

Counsel for the Reclaimer—Low—C. K. Mackenzie. Agents — Tods, Murray, & Jamieson, W.S.

Counsel for the Defenders Mrs Hoile and Children—Law. Agent—John Rhind, S.S.C.

Counsel for the Defender Souter Robertson—MacWatt. Agents—Alexander Morison, S.S.C.

Friday, October 31.

FIRST DIVISION.

COMMISSIONERS OF POLICE OF KIRKINTILLOCH *v.* M'DONALD AND OTHERS.

Police — Sewage Works — Whether Assessment to be Levied on Owners or Occupiers —Public Health (Scotland) Act 1867 (31 *and* 32 *Vict. c.* 101), *sec.* 94.

Section 94 of the Public Health Act of 1867 provides, with respect to burghs having a population of less than 10,000 according to the census last taken, and not having a local Act for police purposes, that all expenses incurred by the local authority in executing the Act, for whose recovery provision is not otherwise made, may be defrayed "out of an assessment to be levied by the local authority along with but as a separate assessment from any one of the assessments" mentioned in the section—"that is to say, the said assessment shall be assessed, levied, and recovered in like manner and under like powers . . . as the prison assessment or police assessment, as the local authority shall resolve, where the local authority is . . . the police commissioners," and such assessments are levied.

In 1870 a burgh having a population of 8029 adopted the General Police and Improvement Act 1862, and elected commissioners of police, who became, in terms of the Public Health Act 1867, the local authority of the burgh for the purposes of that Act. In consequence of legal proceedings taken against them the commissioners of police were obliged to undertake the construction of sewage purification works, and in order to obtain the land necessary for these works they had to apply for compulsory powers under the Public Health Act of 1867. These powers having been obtained, the land was acquired and the works constructed.

There was no prison assessment leviable in the burgh, but the police commissioners levied on all occupiers of lands or premises within the burgh the police assessment provided for by sec. 84 of the Police Act of 1862.

Held that the assessment necessary to defray the expense of acquiring the lands and executing the sewage purification works was to be levied "along with" and "in like manner" as the said "police assessment," and was therefore to be imposed upon occupiers of heritable property within the burgh.

In 1870 the burgh of Kirkintilloch adopted the General Police and Improvement (Scotland) Act 1862, and elected Commissioners of Police under said Act. By the Public Health (Scotland) Act 1867 the Commissioners of Police so elected are constituted the "local authority" for the purposes of