Judges in *Gellatly's* case there are other considerations referred to, and which perhaps affected the decision, but the real ground of judgment was that the operations there complained of were an invasion of the legal rights of others. So regarded, the decision in *Gellatly's* case does not rule the present. I am not prepared to admit that the proposition set forth in the respondent's first plea is necessarily and in all cases a sound statement of our law. If it were, it would impose a restriction on the rights of property which, so far as I know, has not yet been imposed by our law,—and a restriction which would prevent a proprietor making a use of his property which might be advantageous to himself and yet in no way injurious to his neighbour. If the gable in question had been the common property of the different proprietors in the tenement, the case would have been different, because there can be no interference with common property except of consent of all the proprietors. Such, however, is not now regarded as the character of the right which the several proprietors of a tenement have in the gable walls of their property, although that view found favour with at least one of the learned Judges who decided the case of *Gellatly*. My opinion is that the operations on the gable proposed by the appellant are operations *in suo*, and, not affecting the rights of any others, ought to be allowed. I should therefore be disposed to recal the judgment appealed against, repel the respondent's first plea-in-law, and find that the appellant is entitled to the lining and warrant prayed for, in so far as concerns his proposed alterations on the gable walls.

As the objection raised by the second plea-in-law covers a matter of fact, set forth in the 6th article of the objections for the respondent, with which the Dean of Guild has not dealt, the case, so far as that point is concerned, will require to go back to him.

The LORD JUSTICE-CLERK—That is the opinion of the Court.

LORD YOUNG was absent.

The Court pronounced the following interlocutor:—

> "Sustain the appeal and recal the interlocutor appealed against; repel the first plea-in-law for the objector; and remit the case back to the said Dean of Guild, and decern."

Counsel for the Petitioner—Ure—Craigie. Agents—J. & J. Galletly, S.S.C.

Counsel for the Objector—Asher, Q.C.—Deas. Agents—Dove & Lockhart, S.S.C.

Tuesday, December 4.

FIRST DIVISION.

M'HAFFIE'S TRUSTEES *v.* M'HAFFIE AND OTHERS.

Succession — Fee and Liferent—Fiduciary Fee—Intestacy.

By *mortis causa* conveyance a testator disponed certain heritable estate to and in favour of his two sons, W. and A., "equally between them, and failing either of them without lawful issue, to the survivor of them, the lawful issue of the predeceaser always coming in place of their parent, in liferent and for their liferent use allenarly, and to their lawful children equally among them, share and share alike, in fee."

A. died in 1891 without having had issue. He was predeceased by W. and by W.'s children, but one of W.'s children left issue, who were alive at A.'s death.

Held (*diss.* Lord Kinnear) that each of the liferenters took a fiduciary fee for his own issue exclusively, and that, A. having died without issue, the share liferented by him fell into intestacy at his death, and belonged to the heir-at-law of the testator.

David M'Haffie, hereinafter called David M'Haffie, *primus*, was the proprietor of several landed estates, including the lands of Skeoch and Overton, in Ayrshire.

By *mortis causa* disposition, dated 4th of June 1833, which remained undelivered at the time of his death, he disponed the said lands of Skeoch and Overton "to and in favour of my two sons, William M'Haffie and Alexander M'Haffie, equally between them, and, failing either of them without lawful issue, to the survivor of them, the lawful issue of the predeceaser always coming in place of their parent, in liferent and for their liferent use allenarly, and to their lawful children equally among them, share and share alike, in fee." William and Alexander M'Haffie were respectively the second and third sons of David M'Haffie, *primus*.

David M'Haffie, *primus*, died in 1837, and after his death an instrument of sasine was expede in favour of the liferenters and their children in terms of the destination.

William M'Haffie, the elder of the two liferenters, died on 23rd October 1890, having had seven children, all of whom predeceased him. One of his children, David M'Haffie, *secundus*, left five children, the eldest being William David M'Haffie. None of the other children of William M'Haffie left issue.

Alexander M'Haffie, the younger of the two liferenters, died on 22nd August 1891, without having had any issue. He was thus predeceased by all the immediate issue of his brother, William.

Questions having arisen with regard to the disposal of the fee of the *pro indiviso* half of the lands liferented by Alexander M'Haffie, a special case was presented by

certain testamentary trustees and others who represented certain of William M'Haffie's children, of the first part; the Liverpool Reversionary Company, Limited, as assignees of William David M'Haffie, of the second part; the whole of the children of David M'Haffie, *secundus*, other than Williaam David M'Haffie, of the third part; and Mrs Agnes M'Haffie or Kerr, who represented the heir-at-law of David M'Haffie, *primus*, of the fourth part.

The questions submitted to the Court were—"Did the fee of the one-half *pro indiviso* of the lands in question which was liferented by Alexander M'Haffie vest in the children of William M'Haffie as they were respectively born, subject to defeasance in the event (which did not happen) of Alexander M'Haffie having children of his own? Or (2) was vesting suspended till the death of Alexander M'Haffie? In the event of the second question being answered in the affirmative—"(3) Did the said fee on the death of Alexander M'Haffie pass to the parties of the second part? Or (4) Did it belong to the said five children of David M'Haffie, *secundus*, or their assignees, equally among them? Or (5) Did it belong to the heir-at-law of David M'Haffie, *primus?*"

The first parties maintained "that there was vesting in each of the children of William M'Haffie as he or she was severally born, subject to defeasance in the event of Alexander M'Haffie having children of his own, and that Alexander's share of the lands falls to be divided between the representatives of said immediate issue of William M'Haffie, on the footing either (*a*) that the destination was to the children of both brothers as a group *per capita*, or (*b*) that it was to the children in two groups *per stirpes*."

The second parties maintained "that there was no vesting until Alexander M'Haffie's death, and that, in virtue of the *conditio si sine liberis* the said William David M'Haffie, who was the elder son and heir-at-law of David M'Haffie, *secundus*, became entitled to the said one-half *pro indiviso* of the said lands, and that they are in right thereof as his assignees. Alternatively, they adopt the contention of the parties of the third part."

The third parties maintained "that there was no vesting until Alexander M'Haffie's death, and that the said one-half *pro indiviso* of the said lands now goes in five equal shares to the four parties of the third part and the said William David M'Haffie or his assignees."

The fourth party maintained "that vesting was suspended till Alexander M'Haffie's death, and that, as Alexander M'Haffie left no children, and the grandchildren of William M'Haffie, senior, were not destined to take in the event that has occurred, the result was intestacy, and the share fell to the heir-at-law of David M'Haffie, *primus*, the granter of the foresaid disposition."

Argued for the first parties—As soon as a child came into existence the fiduciary fee which was in the parents flew off, and a beneficial fee vested in the child for itself and any other children to be born to either William or Alexander. The parenthetical words in the destination, "the lawful issue of the predeceaser always coming in place of their parent," were mere surplusage. If they meant anything, it was that, until the death of the surviving liferenter, the children of the predeceaser would enjoy their father's liferent—*Douglas* v. *Thomson* January 7, 1870, 8 Macph. 374; *Otto* v. *Weir*, March 7, 1871, 9 Macph. 660. There was no room for the doctrine *si sine liberis*, for, vesting taking place on the birth of the children, they were entitled to dispose of, and in point of fact did dispose of, their shares by will. (2) The division intended was *per capita* and not *per stirpes*, there being nothing in the destination to take it out of the ordinary rule of presumption —*Macdougall* v. *Macdougall*, February 6, 1866, 4 Macph. 372—*aff.* March 20, 1868, 6 Macph. (H. of L.) 18. In the case quoted against the doctrine of a joint fiduciary fee, viz., *Allen* v. *Flint*, June 15, 1886, 13 R. 975, the point was not seriously considered, and that case was not an authority in the circumstances which existed here.

Argued for the second parties—Vesting being suspended till the death of Alexander, on that event the whole fee was to go to the children of the liferenters. But when Alexander died there was no such class in existence, and accordingly under the *conditio si sine liberis*, the estate being heritage, fell to the heir-at-law, viz., the eldest son of David M'Haffie, *secundus*, —*Grant's Trustees* v. *Grant*, July 2, 1862, 24 D. 1211. The testator dealt first with the liferent, and inserted the parenthetical clause simply to show that the liferent of the predeceaser was not to accresce, but was to go to his children, and then disposed of the fee, as soon as it was free, to the children of both *per capita*. The fiduciary fee was in both of the liferenters for a class to be in existence at the time of division—*Ferguson* v. *Ferguson*, March 19, 1875, 2 R. 627; *Maule*, June 14, 1876, 3 R. 831; *Turner* v. *Gaw*, February 20, 1894, 31 S.L.R. 447. In the last-named case it was questioned whether vesting subject to defeasance could apply to the case of a direct disposition, such as this one. In *Allen* v. *Flint* there were facts and circumstances equivalent to the insertion of the word "respectively" in the dispositive clause, which would be necessary to support the first parties' contention. The case of *Douglas* v. *Thomson* differed from the present, because the conveyance there was to a mother and her children, while here the fiars were to be members of two families; moreover, there the children survived the liferentrix, so without doubt a beneficial fee vested in them.

The third parties adopted the arguments of the second parties as regarded the postponement of vesting, and argued further—(1) The persons entitled to succeed at Alexander's death were his fellow-liferenter's grandchildren, the children all

being dead at that time, and they came in as a class—*Rhind's Trustees* v. *Leith*, December 5, 1866, 5 Macph. 104. The term "children" had been held to include "grandchildren"—M'Laren on Wills (3rd ed.), i. 692; *Ranken*, June 17, 1870, 8 Macph. 878. Failing this, the *conditio si sine liberis* applied and let in the third parties as a class. The case of *Grant's Trustee's* v. *Grant* did not apply here, because in it there was a conveyance of a particular estate to a particular son, while here the conveyance was to a class. Intestacy was to be avoided wherever, as here, effect could be given to the testator's intention.

Argued for the fourth party—There was a complete separation by the testator of the liferent, and the fee of each divided half was then dealt with. The gift to each son was a separate one, and there could be no accretion to the surviving children or their representatives. The words of the disposition which made a direct gift "equally among them" were clearly against such accretion—*Paxton's Trustees* v. *Cowie*, July 16, 1886, 13 R. 1191. The contention of the first parties that there was a joint fiduciary fee in the liferenters was not one which the law would recognise—*Logan's Trustees* v. *Ellis*, February 7, 1890, 17 R. 425; *Allen* v. *Flint*, June 15, 1866, 13 R. 675. The idea of a fiduciary fee was never carried beyond the children of a liferenter; he could not hold also a "sub-fiduciary fee" for the children of another.

At advising—

LORD M'LAREN—The subject of consideration in this special case is the true construction of a disposition of specific heritable estate, which is expressed as follows:—"To and in favour of my two sons, William M'Haffie and Alexander M'Haffie, equally between them, and failing either of them without lawful issue to the survivor of them, the lawful issue of the predeceaser always coming in place of their parent, in liferent and for their liferent use allenarly, and to their lawful children equally among them in fee." Alexander M'Haffie survived his brother, and died on 22nd August 1891 without ever having had issue. William M'Haffie is represented by children and grandchildren, whose names and pedigree are set forth in the case, and in a genealogical table appended thereto. Various alternative views as to the rights of succession to the fee of the share or interest liferented by Alexander M'Haffie are indicated in the questions of law with which the case concludes, but the primary question for consideration is the true construction of the words of destination.

I may begin by observing that no trust is here constituted. The destination occurs in a testamentary conveyance to the parties interested; the fee cannot be in suspense, and the decisions relating to vesting under settlements in trust have no application to the case.

Now, as the property is given to William and Alexander in liferent for their liferent use allenarly, and as the fee is given to children unborn or unnamed, each liferenter would by a well-known rule of construction take a fiduciary fee commensurate with his liferent interest. It is not necessary to consider how this rule would be applied in the case of a liferent given to the grantees jointly, because in the present case the liferent interest is given to William and Alexander "equally between them," and it is quite settled that a gift in such terms is equivalent to a gift to each disponee of one half of the estate or interest *pro indiviso*. When the testator died in the year 1837 William and Alexander accordingly became *pro indiviso* liferenters each to the extent of one-half, and fiduciary fiars in the same proportions.

The question then arises, for whose benefit did William and Alexander M'Haffie hold the fiduciary fee? Did each of the brothers take a fiduciary fee for the children of both, or did each take a fiduciary fee for his own children or issue exclusively?

The second alternative, as I think, is the true interpretation of the clause. For this conclusion two reasons may be given—one theoretical and the other practical. The notion of a fiduciary fee was undoubtedly introduced for the purpose of protecting the interests of the issue of the liferenter under destinations in liferent and fee. It is not necessary to affirm that under no circumstances can a liferenter be also a fiduciary fiar for grantees other than his own issue. But it was pointed out by the late Lord President in the case of *Allen* v. *Flint*, 13 R. 975, that there are serious theoretical difficulties in admitting a construction which would make each liferenter a fiduciary fiar for his own children in conjunction with the children of the other liferenter. In the present case the supposed construction, for example, would make William M'Haffie fiduciary fiar for Alexander's children as well as his own children. On William's death Alexander had no children, but it was possible that children might be born to him. How is it possible that their interests should be safeguarded, seeing that the fiduciary fee in William's half share comes to an end with William's life? The difficulty—I may say the impossibility—of explicating such a destination, is a very strong argument against the supposition that such rights were intended to be created, and in favour of the supposition that each liferenter was a fiduciary fiar for his own children only to the effect that the children should take collectively the fee of the one-half share which was liferented by the parent. This construction is, I think, consistent with the parenthetical words of the destination, "the lawful issue of the predeceaser always coming in place of their parent."

But I am also of opinion that under a destination in this form a division *per stirpes* is most accordant to presumed intention. The intention might of course be made clear by giving the fee to the children of the liferenters "respectively." But it is to be considered that the testator by giving the property in liferent and fee announced his intention of making a family settle-

ment, and in such a settlement the natural and recognised mode of succession is that the children succeed to the property enjoyed by their parents. In the case of *Allen* v. *Flint*, 13 R. 975, this principle of construction was developed in the judgment which I delivered as Lord Ordinary, and while I observe that in the Inner House only a qualified assent was given to the principle, yet the rule of construction here indicated was in substance the ground of judgment both in that case and in the previous case of *Horne's Trustees*, 12 R. 314. Like other rules of construction which are founded on presumed intention, it is not to be taken as an absolute and unbending rule, and of course it is perfectly competent to a testator, who has provided the necessary means for carrying his intention into effect, to declare that, while dividing his estate amongst his children in liferent allenarly, he intends that as each life interest falls in, the fee shall be divided amongst the whole body of his grandchildren *per capita*. But I should not readily accept such an unusual form of destination in the absence of clear expressions of intention. In the present case the words of the will are perfectly consistent with an intention to make a division *per stirpes*, which is the customary mode of division in such cases. To prevent misconception, I may add that, but for the interposition of a system of liferent right in favour of the parents of the disponees, I should not doubt that the fee was divisible *per capita*.

If the construction which I put on the destination is well founded, it follows that the fee of Alexander's share is undisposed of, because Alexander died without issue.

Now, if this were a case of a destination inserted in a title-deed, I should have held without difficulty that the purchaser, although possessing on a restricted title, took a resulting interest in the fee expectant on, or consequent on, the failure of issue of his body, because in the case supposed the purchaser is the author of the destination, and the person who has the radical right subject to the destination. In such a case we must suppose that the liferent expands, otherwise the fee would vanish altogether.

But in the present case the conveyance is gratuitous and testamentary, and I am unable to admit that Alexander M'Haffie could under any circumstances take a higher right under it than the liferent allenarly which is expressly given to him. The fee remained with the granter, and now belongs to his heir, the fourth party. I propose, accordingly, that we answer the fifth question in the affirmative, and find it unnecessary to answer the other questions specifically.

LORD ADAM—The question in this case arises on the construction of the dispositive clause of a disposition of an heritable estate. It is a case of direct conveyance, and it follows that there must be immediate vesting of the fee *a morte*, as a fee cannot be *in pendente*.

The facts which raise the question are very simple. The disponer's sons mentioned in the disposition, William and Alexander M'Haffie, both survived him. They are now dead, William having left issue, Alexander never having had issue.

The question is, who is entitled to the fee of the one-half of the estate liferented by Alexander? Now, upon the death of the disponer the destination which came into effect was a destination to William M'Haffie and Alexander M'Haffie, equally between them, in liferent for their liferent use allenarly, and to their lawful children equally among them, share and share alike, in fee. I think that the effect of this destination was that William and Alexander, who had survived the disponer, each took a liferent allenarly of one *pro indiviso* half of the estate, and a fiduciary fee for their children respectively in the half of the estate so liferented by them. Had there been no other words in the dispositive clause affecting the matter, I do not think there would have been much doubt that this would have been so, but it is said that the substitution therein contained "failing either of them" (William or Alexander) "without lawful issue, to the survivor of them, the lawful issue of the predeceaser always coming in place of their parent" produces a different result. It will be observed, however, that William and Alexander took a liferent only, and it appears to me that the substitution contained in the words "failing either of them without lawful issue, to the survivor," can only refer to and could only take effect as regards the liferent set free by the death of the predeceaser. If, for example, Alexander had predeceased William, William might have claimed a liferent of the half of the estate previously liferented by Alexander, or it may be that if Alexander had predeceased the disponer without issue, William would have taken the whole estate, both liferent and fee, for himself and his children. But I do not see that this substitution, in the event which occurred, could in any way affect the fee which the law had vested in Alexander for his children *nascituri*, even although it might be only a fiduciary fee.

Then, as regards the words "the lawful issue of the predeceaser always coming in place of their parent," it is difficult to put a definite meaning on them. In my opinion they do no more than would have been effected by the words "whom failing," &c., previously used in the clause, and are therefore mere surplusage. But in any view, it appears to me that by these words the children are substituted in place of their parent, and therefore that the children can only take what the parent could himself have taken. What the children now claim is the beneficial fee of the part of the estate liferented by Alexander, but I do not see how on any construction of the deed their parent could have been entitled to a beneficial fee of the estate or any part thereof. I do not think therefore that the words in question assist the children's claim.

On the whole matter, I am of opinion that on the disponer's death a fiduciary fee vested in Alexander for behoof of his chil-

dren *nascituri*, and he having died without children, there is intestacy as regards the half of the estate liferented by him, and that therefore the heir of law of the disponer is entitled to it.

LORD KINNEAR—I am unwilling to differ from your Lordships as to the interpretation of a deed, which, whatever may have been the intention of the granter, is certainly so unskilfully expressed as to render his meaning very doubtful. The probability is that your Lordships' construction is right. But at the some time it can only be reached by denying all distinctive meaning to a parenthetical sentence, which according to the ordinary canon of construction must have been intended to have some distinctive effect, and by reason of denying all meaning to the words of that sentence it renders the conveyance ineffectual in an event which I think was contemplated as possible by the maker of the deed, and for which it must be supposed he intended to provide. Were it not for the clause by which it is provided that the lawful children of a predeceasing son are to take the place of their parent, I should have agreed entirely with your Lordships, but I am unable to suppose that the granter meant nothing by those words, and that the destination which includes them must therefore be read in exactly the same way as if they had found no place in it. I agree with what has been said by both your Lordships that the construction of this deed does not depend upon the rules which have been established as to the vesting of postponed interests in estates held in trust. It is a *de præsenti* conveyance, as every conveyance of heritage must have been in 1837 when this deed was executed; and it follows that the words of the grant are to be read according to the settled rules for construing a destination in a conveyance of land. Now, a direct conveyance of land to a number of persons in succession has a perfectly well-settled and invariable meaning and effect in law. It is not merely a conditional institution, but is also a substitution of the second disponee on the failure of the first, provided the first has left the destination undisturbed, so that on the death of the institute, whether before or after the disponer, the subject passes to the next substitute by virtue of the words of disposition which are provisionally applicable to every one of the persons named in the destination. It follows that the rule laid down in *Young* v. *Robertson*, 3 Macq. 314, as to the construction of words of survivorship can have no application. It appears to me therefore to be clear—and I do not understand that your Lordships differ from me in this respect—that the destination in this deed is in favour of the granter's sons, and failing either of them either before or after the death of the disponer without issue, to the survivor of those sons. Now, but for the words to which I have already referred, I presume there could be no doubt that the effect of the conveyance was to give to William and Alexander equally between them in liferent allenarly and to their issue in fee the entire estate conveyed, and failing either without issue survived by the other, then to give to that other and his issue the share that had originally been destined to issue of the first. But the question is, whether the words "the lawful issue of the predeceaser always coming in place of their parent," do not make a difference, or do not add a further condition to the gift? Now, it appears to me that if the words are susceptible of a reasonable meaning which is consistent with the general scheme of the disposition, they ought to receive that meaning, and that they are quite susceptible of a meaning which is entirely in accordance with the intention disclosed by the deed. It is to be observed that those words are parenthetical, and accordingly, before ascertaining their precise bearing upon the remainder of the sentence, we must read the whole, but omitting these in the meantime from consideration there seems to be no question that the granter conveys the estate to his sons William and Alexander equally, and failing either of them without lawful issue to the survivor, and to their lawful children equally among them, share and share alike, in fee. But the effect is so far to give a liferent allenarly in any case to either of the sons, and to give the fee to the children. Now, when the words of the parenthesis" the lawful issue of the predeceaser always coming in place of their parent" are considered, it is quite clear that that cannot mean that the children are in any case to take such share or interest as has been given to their parent, for the parent is never to have anything but a liferent allenarly, and whatever right is given to the children is a right of fee. Therefore it appears to me to be impossible to interpret those words as meaning that the children are to take their father's interest in the estate. That cannot be the meaning. Nor does it appear to me to be reasonable to say that they are mere surplusage operating to the same effect as the words "failing either without lawful issue," and that for two reasons. In the first place, because they are unnecessary for that purpose; and in the next place, because they do not mean the same thing. The words "failing either without lawful issue" express the condition on which the estate which had been given to the predeceasing son and his issue shall be carried to the survivor. But if those words stood alone, the issue, whose existence would exclude the destination-over, would not stand in their parent's place and take his share, which is merely a liferent, but they would take the fee of the share which he liferented, not in substitution to him, but by virtue of the words of direct disposition of the fee of the estate which their father never held in his own right, but merely as fiduciary for them. But then it does appear to me that if those two meanings be excluded, so that we are still to look for some reasonable meaning which the words will bear, it is not very difficult to construe them quite literally, and at the same time in accordance with the disclosed

intention of the granter of the deed, because what he says is, that he is providing for the case of the death of either of his sons without issue. In that case he says the estate given to the son dying without issue shall go to the survivor of the brothers, but then he adds a new condition by the words "the lawful issue of the predeceaser always coming in place of their parent." Now, that appears to me to mean that the children of the predeceasing brother are to take, not their parent's share, but their parent's place in the destination, so that on the death of a brother, who is the second brother to die, surviving the first—on his death without issue—the first brother not being still alive to take, that brother's children are to take the place in the destination which the brother would have taken if he had lived, the interests of parents and children being always regulated by the concluding words of the clause, which gives in every case the fee to the children, and in every case the liferent allenarly to the parent. It seems to me that what the testator intended was to provide a cross-substitution, so that if one brother died without issue, either before or after the other, the issue of the other should take, and that the disposition should not in that event absolutely fail, as it must according to the construction which your Lordships have put upon it. In short, I think the effect of the clause, which is certainly very difficult to construe, is exactly the same as if he had said that he had disponed his estate, one-half to William in liferent for his liferent use allenarly, and to his children in fee, whom failing to Alexander in liferent for his liferent use allenarly and his children in fee, and the other half to Alexander in liferent, and his children in fee, whom failing to William and his children in the same terms. Now, if that were the meaning of the conveyance, I confess I do not appreciate the difficulty which is supposed to arise from the difficulty of extricating the interests involved in the creation of a fiduciary fee in a liferenter for other heirs besides his own children. There is no reason for denying effect to a conveyance to a son in liferent and his children in fee, whom failing to the children of the granter in fee, or to the children of another son in fee, or to the grandchildren of the granter in fee. The liferenter, who holds for his liferent use allenarly, is fiduciary fiar for disponees who may or may not come into existence, and it is just because their existence is uncertain that a fiduciary fee is supposed to be implied in the gift of liferent. And I confess that I am unable to see why a conveyance to A in liferent for his liferent use allenarly, whom failing to B in liferent for his liferent use allenarly, and to the children of either A or B, or of both of them in fee, should not be a perfectly good and effectual conveyance. The observations of the late Lord President in the case of *Flint* v. *Allen* referred to a totally different condition of things, because what his Lordship thought it difficult to extricate was a fiduciary fee in a number of persons jointly for the children of all of them as a class. But in this case the fiduciary fee is vested in one person at one time, and according to your Lordships' construction, as well as according to that which I prefer, it might have been a fiduciary fee for others than his own children. For, if Alexander, dying without issue, had been survived by William, Alexander's share would have gone to William in liferent and his children in fee; and in that case the fiduciary fee for William's children would have been first in Alexander, and then in William. I see no greater difficulty in supposing that Alexander was fiduciary fiar for William's children, whether William survived to take the liferent or not. Thus it seems to me to be most probable that the granter of this deed intended to benefit his grandchildren by either son, and I should have been disposed to hold that in the event which has happened Alexander M'Haffie held as fiduciary fiar for the children of William, and that they or their representatives are entitled to take at his death. I agree with your Lordships that the questions are not framed so as to raise very accurately the particular questions we have to decide, but, as your Lordships have adopted a different construction of the conveyance, I do not think it necessary to consider further what form of answer should be given to the questions which have been stated. But I should have held that the beneficial fiars of the share are the children of William.

The LORD PRESIDENT concurred with LORD M'LAREN and LORD ADAM.

The Court pronounced the following interlocutor:—

> "Find that Alexander M'Haffie had under his father's *mortis causa* disposition a liferent allenarly in one-half of the subjects thereby conveyed, together with a fiduciary fee thereof for his own children; and that on the death of Alexander without issue the fee of that share was in effect undisposed of, and belongs to the heir-at-law of the testator, David M'Haffie, *primus*, and decerns."

Counsel for the First Parties—Rankine—Craigie. Agents—J. & J. Milligan, W.S.

Counsel for the Second Parties—Ferguson. Agents—Bruce & Kerr, W.S.

Counsel for the Third Parties — Jameson—Aitken. Agents—J. & J. Milligan, W.S.

Counsel for the Fourth Party—Asher, Q.C.—H. Fraser. Agents—Graham, Johnston, & Fleming, W.S.