indeed it was almost admitted, that no special cause has been shown for granting it.

The question primarily depends upon the 147th section of the Companies Act 1862, which is in the following terms:—[*His Lordship read the section*].

It is to be noted that the Act does not here give a right to the creditor to have his application granted; it only confers a power upon the Court to grant it if the Court thinks fit. Accordingly, in all the cases in which the Court has granted a supervision order some cause has been shown for it, such as the danger of preferences being created, or some impropriety, actual or threatened, in the conduct of the liquidation. But I find nothing of that kind here. The only statements made are that complicated questions as to the respective rights of secured creditors and the ordinary and trade creditors are likely to arise. The petitioner does not say that they have arisen, nor does he state what they are. It is also said that preferences might be secured, but that statement might be made in every liquidation. It is evident that this is a blind petition, not presented under any real apprehension of any known danger. Unless the statute had provided that without any cause being shown any creditor should be entitled as a matter of right to obtain a supervision order, such an application could not be granted, as no attempt has been made here to show any cause, and I think that the application should be refused.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court refused the petition.

Counsel for the Petitioner — Graham Stewart—Macaulay Smith. Agents—Clark & Macdonald, S.S.C.

Counsel for the Respondents—Constable. Agents—Mill, Bonar, & Hunter, W.S.

Friday, June 13.

FIRST DIVISION.

POTTIE AND ANOTHER, PETITIONERS.

Trust—Liferent or Fee—Fiduciary Fee—Application for Special Powers—Destination in Liferent Allenarly with Fee to Heirs and Assignees — Application for Power to Charge and Feu — Nobile Officium—Trusts (*Scotland*) *Act* 1867 (30 *and* 31 *Vict. c.* 97), *sec.* 3.

Heritable subjects were conveyed to A and B "in liferent for their or any of their liferent use allenarly, and to their heirs and assignees in fee." A and B presented a petition for authority to borrow money on the security of the subjects, and to feu a certain part of them. The money to be borrowed was to meet outlays they had been obliged to make in carrying out certain improvements on the subjects required by the municipal authorities. The petition was presented under section 3 of the Trusts (Scotland) Act 1867, and alternatively at common law. The Court, without deciding whether the right of A and B under the destination was one of liferent or of fee, *granted* the prayer of the petition.

William Kinghorn, who died in 1874, left a trust-disposition and settlement, with relative codicils, by one of which codicils dated in 1864 he disponed certain heritable subjects in Leith to Hugh Kinghorn, builder in Leith, as trustee. The trustee was directed to dispone and make over the said subjects to the children of the truster's nephew, Alexander Kinghorn, upon the youngest of them attaining the age of twenty-five. By a second codicil dated in 1869 the testator directed as follows:—"And further, I direct and appoint the said Hugh Kinghorn . . . in disponing and making over the said subjects . . . to the children or any of them of my said deceased nephew Alexander Kinghorn . . . to dispone and make over the same to such children or any of them in liferent for their or any of their liferent use allenarly, and to their heirs and assignees in fee, and so as that the *jus mariti* and right of administration of their or any of their husbands shall be effectually excluded, and the said subjects shall not be liable to the deeds or subjected to the legal diligence of the creditors of their or any of their husbands for payment of debts contracted by their or any of their husbands."

Hugh Kinghorn died in 1886, leaving among his papers a disposition, by which he conveyed the said subjects to Catherine Murphy Kinghorn and Alexander Kinghorn, the only surviving children of the Alexander Kinghorn mentioned in the trust-deed. By this disposition the said subjects were conveyed, on the narrative of the provisions contained in the trust-deed, to Catherine and Alexander Kinghorn "equally between them, share and share alike, in liferent for their liferent use allenarly, and to their heirs and assignees in fee." This disposition was recorded in the Register of Sasines.

Catherine Kinghorn (by marriage Mrs George Pottie) and Alexander Kinghorn presented this petition, in which, after narrating the deeds above referred to, they stated that they had been obliged to expend sums amounting to £497 in extraordinary expenses on the subjects conveyed for paving, drainage, and repairs which were necessary in order to keep them in repair and to meet the requirements of the authorities, and that further expenditure on drainage estimated at £72 had been ordered by the sanitary authorities. They also stated that it was desirable that a certain portion of the subjects should be feued.

After these statements the petition proceeded as follows—"The petitioners are advised that under the title on which they hold the said subjects there is some doubt as to their power to deal with the fee of the

property, and in particular as to their power to charge the estate with extraordinary expenditure and to feu. The petitioners accordingly present this application to the Court (1) for power to charge the said past extraordinary expenditure, amounting to £497, 14s. 10s., against the capital of the estate; (2) for power to make the said estimated expenditure of £72, and to charge the same against the capital of the estate; (3) for power to borrow on the security of the subjects held by the petitioners a sum not exceeding £750 to meet the said expenditure and the expenses of and incidental to this application, and exercising the borrowing power herein sought; (4) for power to grant feus of the said piece of ground in such lots and on such terms as may be found suitable. This petition is presented under and in terms of section 3 of the Trusts (Scotland) Act 1867, and alternatively at common law."

At the date of presenting the petition both petitioners were married, and had several children in minority or pupillarity. To these children Mr George Moncreiff, advocate, was appointed curator *ad litem*.

On 1st February 1902 the Court remitted the petition to Mr J. A. Dalmahoy, W.S., to inquire and report as to the regularity of the proceedings and the facts and circumstances set forth in the petition.

Mr Dalmahoy lodged a report, from which the following is an excerpt—"The destination in Mr William Kinghorn's second codicil and in the subsequent disposition by his trustee is in unusual terms. In the special case *Williamson and Others (Rattray's Trustees)*, February 1, 1899, 1 Fraser 510, a testator directed that on the death of himself and his wife his trustees should realise his estate as they thought proper, and invest the proceeds for the benefit of the trust, but should they consider it more advantageous not to realise it or part of it, they should act accordingly, and that they should divide and set apart the residue into three shares for his daughter and grandchildren as therein mentioned, and should pay to them or for their behoof during their respective lives the annual income of said shares, and on their respective deaths should pay over their respective shares to their respective heirs or assignees. In a question raised after the death of the testator's widow it was held that the direction to the trustees to pay to the assignees of the liferenters was equivalent to an unqualified power of disposal given to the liferenters, and that the fee of the residue vested in them on the death of the testator's widow. It will be observed that the destination in that case was similar to that in Mr William Kinghorn's settlement and the conveyance to the petitioners, except that in that case there were no restrictive words as to a 'liferent use allenarly.' But the principle on which *Rattray's* case was decided, viz., that a destination to heirs and assignees implied a general power of disposal or assignment, and therefore that the fee vested in the liferenters might, it appears to me, be applicable to the present case in spite of the restrictive words. If this view is correct, then I am respectfully of opinion that the fee of the said subjects vested in the petitioners on the youngest of them attaining the age of twenty-five, and that the petition may accordingly be unnecessary, but it will at all events be the means of determining the legal rights of the petitioners. Should, however, this view be incorrect, it does not appear to me that the expenditure proposed by the petitioners is properly chargeable by them as liferenters against the fee of the estate. The leading cases bearing on the rights of a liferenter to charge the fee of the estate liferented by him with expenditure for rebuilding or repairs are considered to be *Halliday* v. *Gardine*, 1706, M. 13,419, and *Scot* v. *Forbes*, 1755, M. 8278. In the first of these cases a liferenter's assignee rebuilt a tenement of houses demolished by fire and it was found that the fee of the tenement was affected with the sum employed in reparation thereof, but that the interest of the reparation could not burden the fee during the liferenter's tenure while he or his assignee enjoyed the rent of the tenement. In the other case the roof of a mansionhouse, destined in liferent to a widow, was at the commencement of the liferent in an entirely ruinous condition. The Court found neither fiar nor liferenter obliged to repair, but that the liferenter was entitled to do so provided it were done at the sight of the Sheriff at a cost not exceeding a fixed maximum, and that at the expiry of the liferent the fiar would be liable to repay the whole expense, conform to accounts to be made up. But there is nothing in the reports of these cases showing that the expenditure was made a charge upon the property, and I have not been able to find any authority for charging a heritable subject for the benefit of a liferenter with such expenditure. In the case of *Morrison and Others* v. *Allan (Gerrard's Trustee)*, July 14, 1886, 13 R. 1156, it was held that where the liferenter expends money in improving the subject of his liferent, he is presumed to do so with a view to enhancing his own benefit as liferenter of his estate, but that the presumption may be rebutted by facts and circumstances. In that case the presumption was held to be overcome, as it was proved that the liferenter had expended money on improving the subject of the liferent in the erroneous belief that he was fiar. It appears to me that the expenditure which has been incurred in the present case is necessary for the full enjoyment of the property by the liferenters, and therefore that they are not entitled as liferenters to charge the cost of it against the fee of the property. There does not appear to be any authority which would warrant the petitioners as liferenters in granting feus of the portion of the heritable property referred to in the petition. The petitioners, however, are applying, and the petition is presented, under and in terms of section 3 of the Trusts (Scotland) Act 1867, as well as alternatively at common law. This, presumably, is on the footing that under the destination in Mr William Kinghorn's

codicil before mentioned, and the said disposition in their favour, the petitioners, if not fiars, are at any rate fiduciary fiars for their heirs and assignees, and that they are therefore entitled to the benefits of the Trusts Acts. It is provided by section 3 of the Trusts (Scotland) Act 1867 that it shall be competent to the Court of Session on the petition of the trustees under any trust deed to grant authority to the trustees to do any of the following acts, on being satisfied that the same is expedient for the execution of the trust, and not inconsistent with the intention thereof; and the Court shall determine all questions of expenses in relation to such applications, and where it shall be of opinion that the expense of any such application should not be charged against the trust estate, it shall so find in disposing of the application—(1) To sell the trust estate or any part of it. (2) To grant feus or long leases of the heritable estate, or any part of it. (3) To borrow money on the security of the trust estate or any part of it. (4) To excamb any part of the trust estate which is heritable. If the petitioners are fiduciary fiars under the codicil and disposition before mentioned, and as such entitled to the privileges of the Trusts Acts, it appears to me that the expenditure made or proposed to be made is of such a nature as properly falls to be chargeable by trustees against the fee of the estate."

On the case being heard in the Summar Roll, counsel for the petitioners referred to *Cumstie* v. *Cumstie's Trustees,* June 30, 1876, 3 R. 921, 13 S.L.R. 595.

Counsel for the *curator ad litem* stated that he had no objection to the prayer of the petition being granted.

LORD PRESIDENT—It seems to be clear that questions might arise in regard to the legal construction of the destination here, because there is, *prima facie,* a repugnancy between the gift in "liferent allenarly" and the destination to the "heirs and assignees" of the liferenters. The first phrase appears to limit the petitioners' right to a liferent; the second, by giving an unqualified power of disposal, to enlarge it to a fee. But in a process of this kind it is not necessary to decide that question. It is manifestly desirable that the petitioners should obtain the powers they ask, because they cannot help paying the municipal charges, and it is plainly expedient that the vacant ground should be feued. I therefore think that, without pronouncing any judgment on the legal construction of the destination, it is reasonable and proper that we should grant both the power to charge—which seems to be necessary—and the power to feu, which, to say the least, would be highly advantageous.

LORD ADAM concurred.

LORD M'LAREN—The destination in the testator's second codicil raises an interesting question in the chapter of law known as fee and liferent, if the proper parties for determining it were here. At present we are only concerned with the destination for the purpose of seeing whether the Court may grant the powers which are desired. Looking at the question in that light, if the true construction of the destination of the fee is that suggested by Lord Deas in the case of *Cumstie* (3 R. 921), that "heirs" in this connection should be restricted to children, there might be great difficulty in granting these powers. No doubt counsel for the curator *ad litem* would argue that on the birth of a child the fiduciary fee was at an end. But as the decision of the Court in *Cumstie* was that the words "heirs whomsoever" should receive their ordinary meaning, the difficulty does not arise, because it is plain that the liferenters can have no heirs whomsoever until their death.

I have not much difficulty in holding, for the purposes of this case, that if the petitioners are not fiars, they are fiduciary fiars in trust for their heirs, and are therefore entitled to apply to the Court for reasonable powers of administration. On that ground, as the report is wholly favourable on the merits of the application, I think both the power to charge and the power to feu may be granted.

LORD KINNEAR—I agree that we should grant this application as an act of fair and reasonable administration, but I think we should do so without expressing any opinion on the question whether the right of the petitioners is one of fee or of liferent coupled with a fiduciary fee.

That question may never arise, and if it does it may then be decided in a question between the proper parties.

The Court granted the prayer of the petition.

Counsel for the Petitioner—H. Johnston, K.C.—Pitman. Agents—A. & G. V. Mann, S.S.C.

Counsel for the Curator *ad litem* — M'Lennan.

Saturday, June 14.

SECOND DIVISION.

MILNE *v.* E. & J. BIRRELL.

Inhibition — Discharge of Inhibition — Demand by Creditor that Debtor should Pay Expenses of both Imposition and Discharge of Inhibition — Expenses of Petition for Recal—Expenses.

A creditor used inhibition in security of his debt, and the debt was thereafter paid. The debtor requested his creditor to discharge the inhibition, and offered to pay the expenses of the discharge. The creditor demanded payment of the expenses not only of discharging but also of laying on the inhibition, and the debtor accordingly presented a petition for recal. The Court *granted* the prayer of the petition, and found the creditor liable in the expenses of the application and of the removal of the inhibition.