Feb. 18. 1830. have parted with the ample security which the bills of lading of the Trewe afforded them.

Respondents.—The transaction was explicitly detailed in the letters. Johnston was to be absolutely credited in L. 10,000 and L. 1000, and Anderson and others gave their bills for L. 13,000, not in any circumstances to pay more, but to receive back if the balance proved less.

The House of Lords considered the construction adopted by the Court of Session as the most fair and probable, and therefore ordered and adjudged, that the appeal be dismissed and the interlocutors affirmed.

A. GORDON—RICHARDSON and CONNELL,—Solicitors.

No. 5. ALEXANDER MEIN, (Trustee of JAMES TAYLOR), Appellant. *Brougham—Wilson.*

TAYLORS, and Others, Respondents.—*Lushington—James Campbell.*

Fee or Liferent.—Clause of a deed held (affirming the judgment of the Court of Session) to create a trust, so as to carry the fee to children, and a liferent to the father.

Feb. 23. 1830.

1st Division.
Lord Corehouse.

JOHN TAYLOR of Spring-Bank executed a general disposition and deed of settlement, by which, 'under the burdens, provisions 'and declarations, and for the purpose of being divided and held 'in manner underwritten,' he 'disponed his whole estate, heritable 'and moveable, to and in favour of James Taylor, baker and far-'mer in Whitburn, Thomas Taylor, farmer in Bankhead near 'Falkirk, Robert Taylor, baker in Glasgow, and William Taylor, 'grocer there, my brothers, heritably and irredeemably,' &c. surrogating and substituting the said James Taylor, Thomas Taylor, and William Taylor, in his full right, title, and place of the whole premises, with power to do every thing thereanent which he could have done if in life. For carrying the deed into effect, he bound and obliged himself, his heirs and successors, to infeft and seize the said James Taylor, Thomas Taylor, and William Taylor, their heirs and assignees, in the whole lands and other heritages above disponed, requiring infeftment; but declaring always, that the said disposition was granted, and to be accepted by his said

disponees, under the burdens and conditions therein written, and that the said subjects should be held by them in liferent, and belong to their children in fee, in the proportions after specified. First, With and under 'the burden of his debts and provisions to 'his widow,' &c.; and 'under these burdens my said subjects shall 'be held by my said disponees, in the proportions, and on the terms 'and conditions following: viz. My said disponees shall divide the 'same into twelve equal shares or parts; and I hereby appoint, 'that four and one-half of these shares or parts shall be held by 'the said James Taylor in liferent, during all the days and years 'of his lifetime; and, at his decease, the fee and property thereof 'shall be divided among the children lawfully procreated of his 'body, as follows; viz. One equal share to each of his sons, and 'one equal share to his two daughters, Mary Taylor, spouse of 'James Ross in Carluke, and Ann Taylor, spouse of Thomas 'Grosart, late baker in Glasgow, to be divided equally among 'them; declaring, that the survivors or survivor of my said disponees shall see the share devised to the said Mary Taylor and 'Ann Taylor equally divided betwixt them, and the half belonging to the said Mary Taylor secured to her in liferent, and to 'her children equally among them in fee, and the other half 'secured to the said Ann Taylor in liferent, and to her children 'equally among them in fee. In the next place, I hereby appoint 'that two of the foresaid shares shall be held by the said Thomas 'Taylor in liferent, during all the days and years of his lifetime, 'and at his decease the fee and property thereof shall be divided 'equally among the children lawfully procreated of his body, 'share and share alike. In the third place, I appoint that one of 'the said shares or parts shall be held by the said Robert Taylor 'in liferent, during all the days and years of his lifetime, and at 'his decease the fee and property thereof shall belong to Elizabeth Taylor, his daughter; but if he shall leave any other lawful 'child or children, the same shall be divided among his whole 'lawful children, share and share alike: And, in the fourth place, 'I hereby appoint that four and one-half of the foresaid shares or 'parts shall be held by the said William Taylor in liferent, during all the days and years of his life; and, at his decease, the 'fee and property thereof shall belong to, and be divided among 'the children lawfully procreated of his body, share and share 'alike. And I hereby provide and declare, that in case 'any of the children of my said brothers shall die, leaving lawful 'issue of their bodies, the share which would have descended 'to such deceased, shall belong to and be divided among his

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Feb. 23. 1830. 'or her children equally, share and share alike: And in these 'terms this general conveyance of my subjects above written shall 'be accepted and held by my said disponees, and not otherwise.'

As this deed only contained a general obligation to execute all deeds necessary for carrying the settlement into effect, Thomas Taylor, the immediate elder brother, expede a service as heir of conquest to John Taylor; and in that character was infeft in the heritable subjects which had belonged to his brother. He then executed the necessary dispositions to himself and his brothers, narrating the disposition and settlement by John Taylor, and in terms thereof disponed the properties to the four brothers, under the special provision that they should hold them on the terms and conditions contained in the settlement. At the date of the deed, James, one of the disponees, had children alive. He thereafter became bankrupt; and Alexander Mein having been appointed trustee, instituted an action of declarator to have it found, that although James Taylor was ex facie of the deed only a liferenter, yet as the fee was granted to children nascituris, it by virtue of law vested in him.* The children answered, that the rule of law on which the trustee founded had no application to fiduciary fees; and that, under the settlement in question, the property vested only in trust in the four brothers, who, while they enjoyed the liferent, held the principal for behoof of the fiars.

The Lord Ordinary sustained the defences, found expenses due, and issued the subjoined note, explanatory of his judgment.†

* The trustee did not dispute the rights and interests of the two daughters to the fee of their respective shares, because they were called nominatim.

† 'When a conveyance is made to one in liferent, and his children, unnamed or 'unborn, in fee, it is settled law that the fee is in the parent, and that the children have 'only a hope of succession, to prevent the infringement of the feudal maxim, that a fee 'cannot be in pendente. It is perhaps to be regretted that the point was so settled, 'because the plain intention of the maker is, in consequence, often sacrificed to a mere 'form of expression; and the feudal maxim might have been saved by supposing a 'fiduciary fee in the parent, as is done when the liferent is restricted by the word alle-'narly or only. Upon this point, however, it is too late to go back; but certainly the 'principle ought not to be extended to cases which have not yet been brought under 'it. In the present case, the subjects are not disponed to Messrs Taylor in liferent, 'and their children in fee, but on the contrary, to the Messrs Taylors in fee, because 'the obligation to infeft is in favour of them and their heirs and assignees. The ques-'tion therefore is, Whether the fee so given is absolute or qualified? a question to be 'determined by the ordinary rules of construction. It appears clearly that it is a qua-'lified or fiduciary fee, because it is granted under certain burdens and conditions. 'The disponees are required to divide the property into twelve equal shares, four and 'a half of which are to be held by James Taylor in liferent, two by Thomas in liferent,

The Court (8th June 1827) adhered.*

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Alexander Mein appealed.

Appellant.—It is an established principle in the law of Scotland, that where a liferent is vested in the parent, and the fee destined to children, either unborn or unnamed in the deed, the right of fee is held to be in the parent, and the children have only a hope of succession. If, however, the taxative word 'allenarly' or 'only' be introduced, the interest of the parent is reduced to a bare usufruct, and the fee is fiduciary in him for behoof of the children. This has been fixed by a series of decisions.

Lord Chancellor.—You do not mean to argue, that there is nothing except the word 'allenarly,' that could produce that effect?

Wilson.—No, my Lord; but still the rule of law is important in considering what other expressions, apparently conveying a mere liferent, have been held to amount to the conveyance of a fee.

Lord Chancellor.—This case seems to have been decided on the ground of the fee being a fiduciary fee. It is most material to meet the case on that ground. It is the one on which Lord Corehouse decided. Not that the facts were precisely the same in this case as in the case which he cited; but he extracted the principle of that case, and applied that principle to the facts of this case. It came afterwards before the Court of Session, and was there decided on the same principle; and therefore the material inquiry is, whether the judgment can be supported on that ground.

'one by Robert in liferent, and four and a half by William in liferent; and it is declared, that at the death of each liferenter his share or shares shall belong to his children. The mode of division is also distinctly pointed out. In the case of James Taylor, who had children in existence, the disponees, or the survivor or survivors, are specially directed to divide the shares of the two daughters who are named, equally betwixt them, and to secure them to the ladies in liferent, and their children in fee; and particular directions are also given with regard to the division of the shares of Robert Taylor and William Taylor; all which implies that the disposition to the Messrs Taylors is a trust to enable them to execute certain purposes. But where a fiduciary fee is given to a person, and it is directed that he himself shall enjoy the liferent, and still more clearly, when a fiduciary fee is vested in several persons collectively, and the survivor or survivors, and each of them separately is to have a liferent, such liferent must be construed a naked usufruct, in the same manner as if it had been qualified by the word allenarly.—See the case of Seton against the creditors of Hugh Seton, 6th March 1793,' (4219. voce Fiar).

* 5. Shaw and Dunlop, No. 364. p. 779.

Feb. 23. 1830. The general rule of the Scotch law on this subject seems very clear and distinct.

Wilson.—We shall adopt the suggestion of your Lordships, and, refraining from saying any thing more on the rule of law, shall only further inquire, whether this is a deed so expressed as to come under the operation of the case of Seton. The soundness of that decision we do not dispute; but it was a case of direct trust. The present deed, however, is neither in form nor terms a trust-deed. On the contrary, it possesses all the qualities of a simple disposition. The property being cumulo, and the four brothers constituted joint tenants, a division was necessary: accordingly, the property is conveyed to the four brothers, for the purpose of being divided in manner underwritten. But to divide implies to convey; and the instant that there is a division and conveyance, the joint labour of the four brothers ceases. Even, therefore, if they divided and conveyed qua trustees, that trust expires with the act of division. But the property being divided, what are the interests of the parties? The deed says, the properties are to be held in manner underwritten,—the shares 'shall be held by the said 'James Taylor in liferent,' not that the disponees are to hold for James Taylor in liferent. Now if, as is clear, the testator had disponed directly to James Taylor in liferent, and to the children in fee, the fee would have been in James; why should any other conclusion follow, where the testator dispones to four disponees, directing them to convey in liferent, &c.? Even if the testator intended otherwise, his intention cannot be permitted to disturb a fixed rule of law. But the manner in which he uses the word 'descendants' implies, that he considered the children took as heirs, and not as trust-disponees to the four brothers.

Lord Chancellor.—Are there any precise words necessary by the law of Scotland, for the purpose of creating a trust-deed? Is it not sufficient, if you collect from the whole tenor of the instrument, that the property is conveyed in order that certain things may be done by the parties who are grantees and feoffees? Does not that make them trustees according to the law of Scotland, as well as of England? Does not this deed, under the burdens, provisions and declarations, and for the purpose of being divided and held in manner therein and herein underwritten, give, grant, assign and dispone, and so forth?

Wilson.—Very true; but if there be a trust at all, it expired when the division among the brothers took place. Then the brothers became fiars.

Lord Chancellor.—I ask this for information: A certain num-

ber of shares are to be held by Taylor in liferent, what is there to prevent the fee being still in the trustees? Then, at the death of James Taylor, he, holding in liferent, something further is to be done: at his death the fee of the property is to be divided among the children lawfully procreated of his body. Is there any thing inconsistent with the law of Scotland, (certainly there is not with the law of England), in the trustees having the fee, and James Taylor the liferent?

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Wilson.—Nothing, my Lord, if the party express himself in an apt and legal form.

Lord Chancellor.—Then the fee is not in pendente. The case is very clear:—The testator says, 'the survivors of my said dispo-'nees shall see the share devised to Mary Taylor and Ann Taylor 'equally divided between them;' and when it is said, 'at his death 'the real property shall be divided,' that imports that it is to be divided by the trustees. But if there be a trust continuing during the life of James Taylor, how can the fee be said to be in pendente?

Wilson.—If that be your Lordship's view of the import of the deed in question, it will be difficult to oppose the judgment.

Lord Chancellor.—I have been of that opinion from the beginning. Mr Brougham argued the case extremely well and fully in all its points, except this; he passed it over very gently. I was glad to hear his dissertation on the law; but by passing over this point so lightly, he confirmed me in my opinion, and satisfied me that he felt as I felt.

On *Dr Lushington* opening for the respondents,—

Lord Chancellor.—Although this is not a formal trust-deed, I consider it to be one substantially. In the case of the creditors of Frog, which has been referred to, a legal subtlety prevented the fee vesting in the children nascituri. That is avoided here by the appointment of trustees. I consider that the trust, as far as relates to the fee, remains in the trustees, and the liferent in the particular individual, James Taylor. Under these circumstances, it is quite unnecessary to apply the general rule; and this seems to have been the ground upon which the case was decided below. That is my opinion as one of your Lordships; and if the rest of your Lordships are of that opinion, we may save time and go no further.

The House of Lords ordered that the Interlocutors complained of be affirmed.

Appellant's Authorities.—Cases under head 'Fiar,' (4258—4297.) Creditors of Frog, Nov. 25. 1735, (4262.) Mackintosh, Jan. 28. 1812, (F. C.) Wilson, Dec. 14.

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1819, (F. C.) Maxwell, June 7. 1822; 1. Shaw and Dunlop, No. 520. Kennedy, Feb. 19. 1825; 3. Shaw and Dunlop, No. 378. Dewar, Feb. 5. 1821; affirmed May 5. 1825, 1. Wilson and Shaw, No. 161.

A. Dobie—MacDougald and Callender,—Solicitors.

No. 6.

Trustees of John Brown, Appellants.

Mary Brown, Respondent.

Foreign—Res Judicata.—Judgment having been pronounced in a competent Court in the United States of America, finding a Scotch legatee entitled to a legacy under a settlement executed in the United States of America by a Scotchman domiciled there;—Held, (affirming the judgment of the Court of Session), That, under the circumstances, an offer to prove by the opinion of American Counsel, that the clause in the settlement conveying the legacy did not import a right of fee, but only of liferent, was inadmissible.

Agent and Principal.—Circumstances under which it was held, (affirming the judgment of the Court of Session), That a party receiving money as attorney of another was bound to lay it out at interest within six months thereafter, and was liable in 5 per cent for all money not so laid out; and that he was entitled to a commission of 2½ per cent on the money received by him.

March 3. 1830.

1st Division.
Lords Alloway and Eldin.

William Brown, a Scotchman, domiciled in the United States of North America, died at Richmond in Virginia in 1811. He was survived by his father and mother, James and Mary Brown, and by three sisters, Jean (Mrs Muir), Isabella (Mrs Black), and the respondent Mary Brown, all residing in Scotland. By a will dated in 1805, he declared, that 'the remainder of my 'estate, after deducting therefrom the above legacies, is to be di- 'vided in the following manner: viz. To my father and mother, 'James and Mary Brown of Kirkcudbright, North Britain, 'I leave one-fourth share of the balance of my estate, to them or 'the survivor of them. To my sister Jean Muir, Kirkcormick, 'in Galloway, Scotland, I leave one-fourth share of the balance 'of my estate, at her death to be equally divided between her chil- 'dren. To my sister Isabella Black, of Castle Douglas, Scot- 'land, I leave one-fourth of the remainder of my estate, to be at 'her death equally divided between her children. To my sister 'Mary Brown, Kirkcudbright, North Britain, I leave the remain- 'ing one-fourth share of the balance of my estate, at her death to 'be equally divided between her children, should she have any.' He had also a nephew, John Brown, the natural son of a deceased brother, to whom he left a small special legacy.

The will was regularly proved in America, and the testator's father and mother administered to some funds which he had in