March 26, 1827. tute, the Court shall make the party who fails pay the full costs of suit; it does appear to me that the party is in fact entitled to full costs of suit, and that being so entitled to full costs of suit, the Court below ought, by their judgment, to have given full costs of suit, unless they were prepared to say that this was a case out of the statute. If it is a case out of the statute, it would be a question of discretion, and therefore no appeal would lie; but, on the other hand, if this is a case within the intent and meaning of the statutes to which I have referred, it appears to me that the costs ought to be given. The great difficulty I have had to decide is, in what form we are to do this—how we are to give that judgment. The two gentlemen who stand at the bar, who are the agents in this matter, will probably give me the benefit of their knowledge of the practice of the Court of Session; and, desirous that we may be quite right, I would propose that we should have the opportunity of seeing the agents before I move your Lordships to proceed to judgment in the precise terms in which it should be entered. I am, however, of opinion that this judgment ought to be affirmed; and I humbly submit, that if your Lordships concur in that opinion, in some way or other this House must take care to provide that the party who has not failed, shall have full costs paid to him by the party who has failed.

Appellants' Authorities.—Wight, 340.—Bell on Elect. 489.—Glass, Feb. 28. 1754, (1857); Wight, 356.

Respondents' Authorities.—16 Geo. II. ch. 11. § 4.—Young, January 1766, (Wight, 339.)—Robb, Feb. 17, 1785, (Bell, 493.)—Henderson, July 3, 1821.—(1. Shaw and Bal. No. 125.)—Wight, 340.—Coutts and Others, Feb. 17, 1747, (Wight, 358.)—4 Ersk. 1. 18.

SPOTTISWOODE and ROBERTSON,—RICHARDSON and CONNEL, —Solicitors.

No. 41. J. NAPIER, Appellant.—*Keay.*
A. CROMBIE, (for Lady GORDON,) Appellant.—*Wetherell.*
W. G. SCOTT and Others, Respondents.—*Murray—Bligh.*

Fee and Liferent—Competition.—A party having sold his estate to his son-in-law, under burden of the price, payable at certain stipulated periods; and having declared that the interest of part of the price should be liferented by his son-in-law and his wife, and the property vested in their children, (of whom one was then alive,) and the price not having been paid,—Held (affirming the judgment of the Court of Session)—1, That the fee belonged to the children, and not to their parents;—and, 2. That they were preferable on the price to the heirs ab intestato of the seller.

May 14, 1827. 1ST DIVISION. Lord Alloway.

THE late William Glendonwyn, proprietor of the estates of Parton and Crogo, entered into a transaction with his son-in-law, Mr Scott, by which he agreed to sell the property to him,

under burden of the price. This was carried into effect by a missive, executed in duplicate, by which Mr Glendonwyn conveyed the estate to Mr Scott, who bound and obliged himself 'to 'make payment to the said William Glendonwyn, and his fore-'said of the sum of L.60,500 sterling, as the price of the said lands 'and estates in the parish of Parton, at the terms, in the way 'and manner, and by the proportions, after mentioned; viz. the 'sum of L.20,500 sterling at any time upon receiving one 'year's previous notice after the said term of entry, the said 'William Glendonwyn discharging the said estate from the 'burden of this said sum upon receipt thereof; and the sum of 'L.30,000 sterling at the expiry of one year after the death of 'the said William Glendonwyn, with the interest, at the rate 'of 4½ per cent, of the said sums of L.20,500 sterling and 'L.30,000 sterling, before mentioned, from the said term of 'Whitsunday 1810 to the respective terms of payment before 'written, and in all time thereafter during the not-payment.' And further, 'declaring, that, during the life of the said Wil-'liam Glendonwyn, no interest shall be payable by the said 'William Scott upon the remaining sum of L.10,000, which 'principal sum of L.10,000 sterling is to be secured to the said 'William Scott and Mrs Ismene Magdalene Glendonwyn alias 'Scott, daughter of the said William Glendonwyn, and spouse 'of the said William Scott, in manner following; viz. The interest 'of the said sum is to be liferented by the said William Scott, 'and Mrs Ismene Magdalene Scott his spouse, during their lives, 'and during the life of the survivor of them; and the said prin-'cipal sum of L.10,000 to be the property of, and divisible 'amongst the issue of the marriage, male and female, as their 'said parents may jointly direct by any settlement under their 'hands, and in default of such direction amongst the said issue, 'as the survivor may direct by deed or will, and in default of 'issue, as the said Mrs Ismene Magdalene Glendonwyn alias 'Scott may direct by her own will and settlement: And fur-'ther, the said William Glendonwyn, out of the said interest, 'promises to pay to his daughter, the said Mrs Ismene Magda-'lene Glendonwyn alias Scott, during his life, the sum of L.200 'sterling yearly for her own separate use, free from the debts 'or control of her present or any future husband, as in the 'nature of pin-money; and further, that the said sum of 'L.200 sterling yearly is to be secured to the said Mrs Ismene 'Magdalene Glendonwyn Scott in like manner, by the sum of 'L.4000 sterling being retained out of the said sum of L.30,000 'sterling; and the said sum of L.4000 sterling shall be the ab-

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'solute property of the said Mrs Ismene Magdalene Glendon-'wyn Scott, and which she shall have the power of conveying 'and settling at her pleasure, to take effect after her death: 'Declaring always, that the disposition to be granted by the 'said William Glendonwyn of his said lands and estate in the 'parish of Parton shall be specially burdened with the pay-'ment of the foresaid price of L.60,500 sterling, and all inte-'rest to become due thereon, payable in manner before stipu-'lated; and the same shall remain a real lien and nexus over 'the said lands and estates, and preferable to all other debts and 'deeds.'. A few days prior to the execution of it, Mr Glendonwyn had addressed a letter to his agent, in which, in reference to it, he stated that 'I find it expedient to delay no longer ma-'king a settlement of my affairs, and in that measure have pro-'posed a transaction with one of my sons-in-law, William Scott, 'Esq. barrister, for the estate of Crogo.' No power of revocation was reserved, and a duplicate of the missive was delivered to Mr Scott, who took possession of the estate, and proceeded to make improvements on it. At this time there was a son in existence of the marriage between Mr Scott and the daughter of Mr Glendonwyn, and soon thereafter Mr Glendonwyn died, having made no other settlement of his affairs; and having left three daughters, namely, Lady Gordon, Miss Glendonwyn, and Mrs Scott. After an unsuccessful attempt on the part of Lady Gordon to set aside the transaction, a disposition, in terms of the missive, was executed by her in favour of Mr Scott, in virtue of which he was infeft, and obtained possession. Having afterwards become insolvent, and having paid no part of the price, a process of ranking and sale of his estates was instituted, in which various claims were made; and in particular a claim was lodged by Mr Crombie, as assignee and on behalf of Lady Gordon, one of the three heirs-portioners, for a third share of the price, and another by Mr Napier of Mollance, as assignee to Mrs Scott's third share, and also as having right in the same character to the L.10,000. The common agent having ranked Napier as in right of the L.10,000, and made it preferable to the claim of Lady Gordon, appearance was entered by the children of Mr Scott, who insisted that the L.10,000 belonged to them; and objections were stated on behalf of Lady Gordon to the mode of ranking. The Lord Ordinary having reported the case on informations, it was contended by Napier, that the fee of the L.10,000 was vested in Mrs Scott, and now belonged to him as her assignee. On the other hand, it was maintained by the children,—1. That the assignation on

which Napier founded conveyed only Mrs Scott's share as an heir-portioner, and not the specific sum of L.10,000, and therefore he had no title on which to compete for this sum.—2. That it was evident, from the whole tenor of the deed, that it was the intention of Mr Glendonwyn that the L.10,000 should belong to them; that accordingly he declared that the 'property' of that sum should be vested in them, and that their parents should only have right to the interest during their lives, with a power of division, and a substitution to Mrs Scott in the event of failure of issue.—3. That, independent of the intention of Mr Glendonwyn, the legal construction of the deed was in their favour, because one of the children having been in existence at the date of its execution, the fee immediately vested in him, subject to the emerging claims of future issue;—and, 4. That at all events, as there was no conveyance of the capital sum itself to the parents, but merely of a right to the fruits, it remained in hæreditate jacente of Mr Glendonwyn, liable to be taken up by the children at any period, as heirs of provision. May 14, 1827.

On the part of Lady Gordon it was contended,—1. That whether the fee belonged to Mrs Scott or to the children, the L.10,000 could not be ranked preferably to her share of the price as an heir-portioner, and, as such, a creditor of Mr Scott;—and, 2. That, on the contrary, she had right to a preference, because the missive being a deed inter vivos, conveying the estate to Mr Scott under condition of payment of the price, and he having failed to do so, neither he nor his family could make any claim until he had implemented his part of the transaction. To this it was answered by the children, that the missive was to be regarded as a combination of two deeds,—the one relating to the sale of the property, and the other being a settlement by Mr Glendonwyn of his affairs; that in this question it was to be regarded in the latter view; and that Mr Glendonwyn having bequeathed to them the L.10,000, they, as special legatees, were entitled to payment, in preference to the heirs ab intestato. The Court found, 'that the fee of the sum of L.10,000 provided 'by the deceased William Glendonwyn, Esq. in the instru-'ment mentioned in process, dated 22d April 1809, belongs 'to William Glendonwyn Scott, and the other children of the 'said William Scott, and Ismene Magdalene Glendonwyn, his 'spouse; that John Napier has no right to the said sum, and 'repelled his claim thereto; sustained the objections made by 'the said William Glendonwyn Scott and the other children, 'and their tutor ad litem, to the ranking proposed by the com-'mon agent: Found that they were entitled to be ranked upon

May 14, 1827. 'the fund in medio, preferably to the heirs-portioners of the said 'deceased William Glendonwyn, and those deriving right from 'them, for the said principal sum of L.10,000, payable at the 'death of the last survivor of their said parents, with the lawful 'interest thereof during the not-payment, and ordained them to 'be ranked accordingly.' To this interlocutor the Court, on the 14th February 1826, adhered, on advising petitions with answers.*

Crombie and Napier, each entered an appeal.

Appellant. (NAPIER.)—It is a rule of the law of Scotland, placed beyond doubt by a long series of authorities, that a destination to parents in liferent, and to their children generally, without naming them, in fee, does in legal construction vest the fee as well as the liferent in the parents. This construction has probably arisen from an ancient maxim, that a fee cannot be in pendente; and as it must necessarily vest somewhere, and cannot vest in parties who are not at the time in existence, or are not named, therefore the fee must necessarily vest in the parents, although ex figura verborum the liferent only is conveyed to them. The only mode in which the right of the parents can be limited to a liferent, is by its being expressly restricted to a right of that nature by the word 'allenarly.' But there is here no such restrictive word, in regard to the rights of Mr and Mrs Scott. On the contrary, the liferent is destined to them, and the fee or property (which terms are synonymous) to their children,—being exactly that destination which, according to all the authorities, vests the fee in the parents, or in one or other of them.

But the matter does not rest here; for the evident design of the maker of the deed was to give the fee to the parents. Mr Glendonwyn expressly directs the L.10,000 to be secured 'to the 'said William Scott and Mrs Ismene Magdalene Glendonwyn 'Scott,' and to them only, without any mention of the children in this part of the clause. The subsequent directions as to the liferent and fee merely regulate the mode in which the money is to be secured to Mr and Mrs Scott, being that mode which, according to the law of Scotland, vests the fee in the parents, and under which the right of the children resolves into a spes successionis, protected against the gratuitous but not the onerous deed and obligation of the parents. This was, therefore, the most proper mode of accomplishing Mr Glendonwyn's

* See 4 Shaw and Dunlop, No. 301.

avowed intention to secure the L.10,000 to his daughter and son-in-law: and, correctly speaking, the fee was vested in the former, because the L.10,000 were provided by her father, and were placed at her disposal on the failure of children of the marriage. May 14, 1827.

The plea, that there was a child in existence at the date of the deed, does not alter the case; because the fee was not taken in his favour nominatim. Neither is there any foundation for the plea, that the fee remained in hæreditate jacente of Mr Glendonwyn, and that the children are entitled to take it up as heirs of provision. By the tenor of the deed, it is plain that Mr Glendonwyn was divested, and consequently the fee could not remain in hæreditate jacente of him, and therefore it must have vested in some one; so that the question just returns to the point, as to whether the fee, by construction of law, was in the parents or the children. In regard to this point, it was not relevant to inquire into the intentions of Mr Glendonwyn; because the words employed by him had a fixed and technical meaning, which could not be contradicted by going into extraneous circumstances, indicative of an intention at variance with their established meaning.

Respondents.—1. The appellant, Napier, has no title to the L.10,000, and therefore no right to compete for it. Under the deed, Mrs Scott, according to his own plea, had two species of rights,—one as a legatee, or singular successor in regard to the L.10,000,—and the other as one of three heirs-portioners, in relation to the residue of the price. But, by the assignation founded on by him, she merely conveyed her right as an heir-portioner, without any mention of her right as assignee; and consequently, if the L.10,000 belonged to her, she had not conveyed that sum to him.

2. But the fee was not vested in her. On the contrary, it belonged to the respondents, both according to the legal construction of the words of the deed, and the will and intention of Mr Glendonwyn.

All the cases in which it has been found, that although ex figura verborum there was only a liferent, yet there was truly a fee, are essentially different from the present. In all of them, whether relating to land, houses, or money-bonds, there was an actual divestiture of the granter and conveyance of the *subject itself* to the disponee, accompanied by an apparent limitation of the right of property; and the question of law which always arose in such cases was, whether the right had been effec-

May 14, 1827. tually *limited*, or whether it must be held to be absolute and unbounded. Now, the Court seeing that the fee was no longer in the granter, or his hæreditas jacens, and that there was no person in existence in whom it could vest, held ex necessitate juris, that as the subject itself had been conveyed to the disponee, he must have right to the fee, although ex figura verborum his title was limited to that of a liferent.

But, in the present case, Mr Glendonwyn did not convey the principal subject either to Mr or Mrs Scott, and consequently this formed an important distinction from all the former cases. All that he gave to them was the enjoyment of the annual rent or interest, while he disposed of the subject itself in another way.

Besides, even if the party to whom the fee was provided had not been in existence, the fee would not therefore have vested in the liferenter of the produce or annual rent. It would have remained in hæreditate jacente of the granter, liable to be taken up by the person to whom it was destined, so soon as he came into existence.

Accordingly, in this case Mr Glendonwyn did not divest himself of the L.10,000 in favour of Mr and Mrs Scott, but only declared that it should be secured to the effect, first, of providing to them the annual rent, and secondly, of giving the property to the issue of the marriage. It follows, therefore, that, if there had been no one in existence to take up the fee at his death, it would not ex necessitate juris have vested either in Mr or Mrs Scott, but would have remained in hæreditate jacente of Mr Glendonwyn, liable to be taken up by the issue of the marriage. But, in point of fact, there was a child in existence, in whom the fee vested, subject to the emerging claims of future issue.

Even supposing, however, that the L.10,000 had been conveyed to Mr and Mrs Scott, still there are words sufficient to constitute a fiduciary fee. The term 'allenarly' is not indispensable, but may be supported by others equally strong. Now, in the deed it is declared, that the parents shall have right only to the interest,—that it shall be liferented by them,—that this liferent shall subsist only during their lives, and that of the survivor; and although, no doubt, a power of division was conferred on Mrs Scott, this could not bestow on her the property of the subject itself.

If, however, there were any doubt as to the legal effect of the words, the intention of Mr Glendonwyn was manifest, both from the whole scope of the deed itself, and from the peculiar circumstances in which the family of Mrs Scott stood. If he had

intended to give the L.10,000 either to Mr or Mrs Scott, he would not have laid him under an obligation to pay it, but would have deducted it from the price; or he would have employed the same words as he did in relation to the provision of L.4000 to Mrs Scott, which he declared should be 'her property.' May 14, 1827.

Appellant. (CROMBIE.)—The missive was not a proper mortis causa deed, but properly one inter vivos. By it a provision of L.10,000 was made to the family of Mr Scott the purchaser, who therefore was, in the event of duly implementing his part of the contract, to retain it on their behalf. On the one hand, therefore, Mr Glendonwyn and his representatives were constituted creditors of Mr Scott for the price, less the L.10,000; and his children, on the other, became his creditors for that sum. It is plain, therefore, that the representatives of Mr Glendonwyn, and these children, stand in pari casu; and consequently, the latter cannot be entitled to be preferred to the former. But farther, as these children were only to have right to the L.10,000, on the supposition that Mr Scott performed his part of the contract, by paying the residue of the price, and as he had failed to do so, the representatives of Mr Glendonwyn, and the appellant, as in right of one of them, was entitled to be preferred to those children.

Respondents.—The missive may be regarded either as a mortis causa deed, or as one inter vivos. In either case, the respondents are entitled to be preferred to the appellant, who does not dispute that the provision of L.10,000 belongs to them, but merely that they are not preferable on the fund in medio. If the deed be considered as one mortis causa, then, as the respondents are special legatees, and as the appellant claims in right of an heir-portioner, they are manifestly preferable; because, it is fixed law that a legatee, who succeeds by the express will of the testator, must be paid before an heir who succeeds merely to the residue by his presumed will. In the next place, and regarding the missive as a deed inter vivos, as it was an onerous contract, containing no power of revocation, and which was delivered and acted on, the respondents acquired right as creditors to the L.10,000, on the principle of jus quæsitum tertio; and if so, then, as creditors, they were entitled to be preferred to the appellant, who claimed as an heir-portioner. The construction put by him on the deed, was unwarranted by its terms. No power was given to Mr Scott to retain the L.10,000. On the contrary, he was bound to pay the full price; and Mr

May 14, 1827. Glendonwyn appropriated L.10,000 out of it to the respondents, without any condition as to whether Mr Scott should implement his part of the contract or not. They were, therefore, vested in the L.10,000; and, as special legatees in the one view, or as creditors in the other, were entitled to be preferred.

The House of Lords, in each of the cases ordered and adjudged, 'That the said interlocutors therein complained of, be 'and are hereby affirmed; and it is further ordered, that the 'appellants do pay, or cause to be paid, to the said respondents, 'the sum of L.100 for their costs, in respect to said appeal.'*

Napier's Authorities.—(3.)—Stair, 328; Mack. 233; 1 Bell, 43; Frog, Nov. 25, 1735, (4246); Lillie, Feb. 24, 1741, (4267); Douglas, July 7, 1761, (4269); Cuthbertson, March 1, 1781, (4279); Dict. Fiar Ab. and Lim. and Prov. to Heirs, &c.

Scotts' Authorities.—(2.)—Bell's Cases, p. 55; Newlands, July 9, 1794, (4294); M'Intosh, Jan: 28, 1812, (F. C.);—Gerran, June 14, 1781, (4402); Signet Cases, p. 56.—(4.)—1 Bank. 9, 18; 3 Ersk. 8, 2; 3 Ersk. 3, 91; 3 Stair, 4, 2; 1 Stair, 20, 5; 3 Ersk. 3, 91; 1 Bell, 243; Gartland, 8 March 1632, (915); Clark, June 30, 1675, (917); Meldrum, 11 Dec. 1667, (928): 1 Stair, 5, 6.

SPOTTISWOODE & ROBERTSON, J. DALLAS, and J. CHALMERS, —Solicitors.

No. 42. **Rev. ROBERT MOORE, Appellant.—*Connell—Keay—Stuart.***
ALEXANDER HEPBURN MURRAY BELCHES, Esq. Respondent.—*Spankie—Campbell.*

Grass Glebe.—Stat. 1663, *c.* 21.—A Presbytery having designed, under the above statute, to the minister of the parish a grass glebe out of kirk lands belonging to one of the heritors, whose mansion-house had formerly been built on them; and the Court of Session, (altering the judgment of the Lord Ordinary,) having found that the heritor was entitled to object to those lands being so designed; and that the minister was bound to accept a glebe out of other lands, which were not kirk lands, but which

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* After the death of Lord Gifford, and the resignation of the Lord Chancellor Eldon, the Lord Chief-Baron Alexander, and the Master of the Rolls, Sir John Leach, were appointed to hear appeals from Scotland; but as their Lordships had not the privilege of delivering their opinions in the House of Lords, the Reporters have been unable, in several Cases, to give the grounds on which the judgments were pronounced, except so far as they could ascertain them from the observations which occasionally fell from their Lordships in the course of the debate at the bar. Their Lordships generally communicated their opinions in a private room to the parties; and of which the Reporters have, in some instances, obtained notes.

The above case of Napier was heard by the Lord Chief Baron.