the next of kin, who both stood in the same position, viz. claiming to benefit by the undisposed of residue. I therefore submit to your Lordships, that the sound rule of construction is to adhere to the unambiguous words in the statute, and to apply the law of the country in which that statute passed, to the construction of that statute; and, therefore, I move your Lordships that the interlocutor of the Court below be affirmed.

LORD BROUGHAM.—My Lords, I had not the advantage of hearing any part of the arguments in this case. Nevertheless, I have made it my business, as it was my duty, to look into the cases and into the arguments of the Court below, and the opinions of the learned Judges. Their view of this case is quite unanimous, and I am clearly of opinion from my perusal of those documents, and my looking into the statute 1617, that your Lordships could not reverse this unanimous judgment of the Court below, without, in the first place, overruling the case of *Nasmyth* v. *Hare*, and which, though it never had the sanction of affirmance of your Lordships upon appeal, as stated by my noble and learned friend, yet has stood for upwards of 30 years the undisputed expositor of the act 1617, in the Scotch law. But, independently of the authority of that case, your Lordships, in overruling that case, and in reversing the present judgment, would be also doing the next thing to repealing the act 1617. I therefore am entirely of opinion with my noble and learned friend, that this appeal should be dismissed, and the judgment of the Court below affirmed. I do not think if the act 1617 had been *in ipsissimis verbis* a new statute, we could have come to another conclusion.

Mr. Bethell.—My Lords, as I understand it, in the case of *Stoddart* v. *Grant*, *supra*, we have agreed, with your Lordships' approbation—as we find that that was the rule adopted in the Court below—that the costs of the appellant and respondents there should come out of the fund *in medio*. But with regard to this case which is a personal quarrel, if I may so call it, between the executors and the appellants, the appellants, who are very different from the parties in *Stoddart* v. *Grant*, seek to take away from the executors that which the statute gives them,—therefore I must ask your Lordships to dismiss this appeal with costs.

LORD BROUGHAM.—What was done with the costs below in this case?

Mr. Bethell.—They were not given out of the fund.

Solicitor-General Kelly.—The costs were allowed.

LORD TRURO.—I think that this is a case in which costs should be allowed. It is the construction of an act of parliament; and as parties have had no opportunity of bringing before the House the construction of this statute, which has a very extensive application, I think it reasonable that they should take the opinion of the House, and it does not strike me as a case in which the appeal should be dismissed with costs.

Interlocutor affirmed.

First Division.—Lord Murray, *Ordinary*.—Spottiswoode and Robertson, *Appellants' Solicitors*. Connell and Hope, *Respondents' Solicitors*.

JUNE 28, 1852.

MISSES AGNES and MARY BROWN, Plaintiffs in Error, *Appellants*, *v.* HER MAJESTY'S ADVOCATE-GENERAL, Defendant in Error, *Respondent*.

Legacy Duty—Conveyance Inter Vivos—Testament—Statutes 48 Geo. III. c. 149; 55 Geo. III. c. 184—*Five sisters executed, in* 1825, *a deed whereby they assigned, disponed and conveyed over, "from us and our heirs severally, to and in favour of each other, and to the heirs and assignees of the last survivor," their whole heritable and moveable property, effects, means and estate, then belonging or which might belong to them. On the death of one of the granters, the Crown, treating the deed as of a testamentary nature, claimed duty on the estate of the lady as personal succession, and the Court of Exchequer found for the Crown.*

HELD (reversing judgment), *that the clauses of the deed imported that it was a conveyance* inter vivos, *and not of a testamentary nature.*[1]

Five sisters living in Scotland, (two of whom are the appellants,) executed the following deed in 1825:—"We, Grace Brown, Agnes Brown, Euphemia Brown (since deceased), Mary Brown, and Jessie Brown (since deceased), do, for the love, favour, and affection, &c., hereby assign, dispone, convey, and make over, from us and our heirs severally, to and in favour of each other, and to the heirs and assignees of the last survivor, all lands, heritages, tacks, steadings, rooms, possessions, heritable bonds, wadset rights, decreets and abbreviates of adjudication, and grounds and warrants thereof, together with all and sundry goods, gear, debts, sums of money, body clothes, wearing apparel, rings, jewels, and other paraphernalia, and, in general, the whole

[1] S. C. 24 Sc. Jur. 565.

heritable and moveable, real and personal subjects, effects, means and estate, &c., now pertaining, belonging, indebted, or resting-owing to us, &c., and we consent to the registration, &c." And they bound the survivors to pay the whole debts of those predeceasing.

This deed was acted upon subsequent to its date. By a deed of disposition dated 21st February 1831, John Brown, the brother of Grace, conveyed to "the said Grace, Agnes, Euphemia, Mary and Jessie or Janet Brown, and the survivors and survivor of them, and the heirs or assignees of the survivor," certain redeemable rights over heritable property in Glasgow amounting to £13,000. Grace and her sisters in investments and conveyances had everything conveyed to "the five sisters, and the survivor and their heirs and assignees whomsoever." Grace died in June 1841. Thereafter a claim was made by the Crown for payment of legacy-duty on her estate, valued at £6500. The claim of the Crown was founded on § 38 of the statute 48 Geo. III. c. 149. A different rate of duty is exigible if a deceased leave a testamentary disposition of his property from that payable in the case of intestacy. This is regulated by the schedule to the act 55 Geo. III. c. 184.

The present case was alleged to fall under the former of these descriptions. The Crown insisted that the deed of 1825 was a testamentary disposition of personal estate. On the other hand, the plaintiffs in error contended that the instrument was not testamentary, but a present *inter vivos* disposition. *Lords Jeffrey* and *Cuninghame*, sitting in Exchequer, after a special verdict, being of opinion that the deed was of a testamentary description, and that legacy-duty was chargeable on the succession as personal, found for the Crown.

On appeal, it was maintained in their *printed case* that the judgment should be reversed for the following reasons :—1. Because the instrument of 1825 was not a testament, or testamentary disposition of the personal estate of Grace Brown.—Swinburne, part 1, § 2 ; Godolphin, part 1, c. 1, § 2, and 2 Bl. Com. 499 ; Durie, June 29, 1625 ; Sugden on Powers, vol. i. p. 260, 7th ed. ; and authorities cited *infra*. 2. Because, at all events, inventory-duty was not exigible in respect of the property to which the plaintiffs in error had right under the investments made by them and their sisters during the lifetime of Grace Brown. 3. Because inventory-duty was not exigible on personal estate invested in England. 4. Because, even assuming the instrument of 1825 to be testamentary, and to govern the right of succession to the interest of Grace Brown in the personal property enumerated in the verdict, the judgment complained of is erroneous.

For the Crown, it was argued that the judgment ought to be affirmed—Because the plaintiffs intromitted with moveable estate and effects in Scotland of the deceased Grace Brown, and so were liable to give up an inventory of the same duly stamped.

Bethell Q.C., and *Anderson* Q.C., for appellants.—1. The instrument of 1825 must be either a deed *inter vivos*, in the nature of a contract, or it must be a testament ; it cannot have a double character. It is not a testament, for that is an instrument which remains dormant, and is revocable during life, and comes into operation only at death.—Per *Shepherd* C.B. in *Adv.-Gen.* v. *Ramsay's Trustees*, 2 Cr. M. & Rosc. 224 ; whereas this instrument came into instant operation. It required no delivery, as it consisted of mutual obligations ; and the moment it was executed, it was held by whichever of the sisters possessed it, for all the others.—Ersk. 3, 2, 44 ; *Crawfurd* v. *Vallance's Heirs*, M. 12,304. The provisions, which are to have operation, are all mutual considerations,—some were to be operative during life, in others the term was to be postponed ; but this does not alter the character of the instrument, otherwise all marriage settlements would be testamentary, which they are not.—*Thompson* v. *Thin's Crs.* M. 3593 ; *Grant* v. *Grant*, M. 3596 ; *Braidwood* v. *Braidwood*, 14 S. 64. This is also an onerous deed. Each sister conveyed her property away, and got instead an interest in the common fund,—viz. an undivided fifth part. Another element of onerosity was, that each covenanted to pay the debts of a predeceasing sister without any restriction, which was a most valuable consideration. In *Curdy* v. *Boyd*, M. 15,946, the quality of onerosity rendered an instrument, otherwise and in form testamentary, irrevocable, and took it out of the class of testamentary deeds.—See also *Duguid* v. *Cadell's Trs.*, 29th June 1831, F. C. The last quality, shewing that the instrument is a deed, is that it was irrevocable. This is clear from the circumstance, that it contained a clause of absolute warrandice, whereby each sister warranted the deed from all acts prejudicial thereto. In England the same distinction is found between a testamentary deed and a deed of instant operation—as may be seen in *Att.-Gen.* v. *Jones*, 3 Price, 368, where *Wood* B., though in the minority, was right ; *Thompson* v. *Browne*, 3 My. & K. 32 ; *Sheldon* v. *Sheldon*, 1 Rob. Eccles. 81. Hence, if no power of revocation is reserved, a deed is held to be not of a testamentary nature.—*Fletcher* v. *Fletcher*, 4 Hare, 67 ; *Glynn* v. *Oglander*, 2 Hagg. 248 ; *King's Proctor* v. *Daines*, 3 Hagg. 218. The instrument of 1825 being therefore not a testament, was a deed. There was one contract throughout, and one only, and it is impossible to hold that it consists of two separable parts. The Judges below (Lords Jeffrey and Cunninghame) treated the clause of survivorship as an ultimate destination, distinct from any arrangement of the joint rights of parties ; but that clause of survivorship was really part of the consideration, and part of the contract, as much as the life interest ; all must be treated as one indivisible instrument.—*Lord Boyd* v. *King's Adv.*, M. 4205 ; *Fergusson* v. *M'George*, M. 4202 ; *Riddell* v. *Scott*, M. 4203 ;

Bisset v. *Walker*, M. App. Deathbed, No. 2. Lord Jeffrey also assumes that each sister could, during life, test on her fifth share of the common property; but that was not the case. Suppose Grace Brown had so tested, could her doing so defeat or revoke the clause in the deed binding her survivors to pay her debts? The creditors clearly acquired a *jus quæsitum* under that deed from the moment of its execution, and the obligation became a personal one in the surviving sisters to discharge the predeceaser's debts, whatever they amounted to. This was not, therefore, a case of a mere destination, but much stronger, for the clause of warrandice itself would strike effectually at any attempt made by Grace Brown to test away any part of the joint property to strangers. All that the creditors could attach during the life of each sister was her chance of survivorship, or her contingent reversionary interest; they could not seize any part of the property in specie. The fee was in the last survivor, and all the interest each had during life in the common fund, was a mere liferent. It is a mistake, therefore, to say the fee was in each and all; it was only in the last survivor.—Ersk. 3, 8, 35. The case is not unlike what is called joint tenancy in England, where the share of one of the joint tenants, which has never been severed by him or attached by his creditors, accresces to the surviving joint tenants. Though there is nothing in Scotland directly answering to this kind of interest called joint tenancy, yet there is what is in effect equivalent—the doctrine of accretion—*jus accrescendi.*—Stair, 3, 8, 27. It is quite competent in Scotch conveyancing to put the fee in contingency, and the plain and natural interpretation of this deed is an illustration of that operation. What takes place at the death of each sister, in the present case, is, therefore, purely the result of the contract contained in the deed, which supersedes a will entirely—and that being so, inventory duty is not leviable. 2. At all events, the judgment of the Court below was wrong in finding that inventory duty was exigible on the personal estate invested in England. It is the locality of the property, and not the domicile of the testator, which regulates this subject, and hence duty was not leviable on property situated out of the jurisdiction of the Commissary Court.—*Att.-Gen.* v. *Hope*, 1 Cr. M. & Rosc. 530; *Pearse* v. *Pearse*, 9 Sim. 430; 48 Geo. III. c. 148, § 41.

Lord-Adv. Inglis and *Sol.-Gen. Kelly* for respondent.—The statute 48 Geo. III. c. 148, § 38, is not directed to executors only, but to every person who takes possession, or intromits with personal estate of the deceased. Here the appellants clearly intromitted with Grace Brown's estate, and this was quite enough to make the liability attach, for such a consequence is not confined to any particular character of the deed. The mere form of the instrument, as well as the nature of the title to be completed under it, was not material, for it is quite possible for a party to give another such a title to his personal property during his life, as shall enable the grantee to take it up after the granter's death without completing a formal title by confirmation. This would happen, for instance, where there is a gratuitous assignation of funds in the hands of third parties, granted expressly *mortis causâ*, and intimated to the parties in whose hands the funds were during the lifetime of the granter. It is not necessary that the kind of intromission alluded to should take place under a formal testament, nor is it an essential character of a testament that it be revocable; for though all testaments are *primâ facie* revocable, yet it is possible that, owing to some onerous obligation undertaken in respect of the testament, the latter may become irrevocable—as was the case in *Curdy* v. *Boyd*, *supra*. On the other hand, a deed in form a conveyance *inter vivos* delivered during lifetime, and admitting of having a title completed under it, may, from its being substantially a *mortis causâ* disposition, be revocable by the granter, even notwithstanding a clause expressly renouncing the power of revocation.—*Dougall* v. *Dougall*, M. 15,949; *Balders* v. *Ireland*, 22d Dec. 1814, F.C.; *Leckie* v. *Leckie*, M. 11,581; *Somerville* v. *Somerville*, 18th May, 1819, F.C. It is therefore an unsafe guide to trust to the characteristic of the deed being irrevocable. The instrument is peculiar in its structure. There is, first, a general conveyance, and we do not deny that, in a certain sense, it is a *de presenti* conveyance; but it is as clearly, in its latter part, of a testamentary character, for it transfers to the survivors the estate that was in the deceased, and, moreover, it gives these a power to uplift and pay debts, which is neither more nor less than making them executors. It is said that, in the ordinary case, the creditors of the deceased have a right to attach her personal estate, whereas the obligation to pay each other's debts here is matter only of personal contract; but by the operation of this clause, there is no real difference between this case and that of any other dying and leaving personal estate. During life, each sister had a right to one-fifth, and the creditors could attach this; and if they could attach it, then the deed could be defeated, and the right of survivorship was a mere destination—an imaginary right. Besides, the conveyance in the first part of the deed is a general conveyance; it conveys no particular subject, and it would be impossible out of it to make up a title to any particular subject. While it is a very general conveyance, it is also a conveyance of the property pertaining to each "now or at death;" so that it would not pass property acquired between the execution of the deed and the day of death, unless such property continued to belong to deceased till the last.

[LORD CHANCELLOR.—But, then, the survivors are bound to pay all debts incurred during the life of the other.]

But that is a contract merely entered into with each other, to which the creditors are no party.

Indeed, the most absurd results might be deduced from holding this a deed, and not a testament. Suppose one sister dies whose debts far exceed the whole joint estate, are her surviving sisters bound by this deed to pay all these debts; or can they retain that property in spite of the creditors? There are many reasons for holding that the deed could not stand against the claims of creditors. First, there is, in reality, no onerous cause, except what is elusory and scarcely colourable. Suppose the funds were in the hands of a third party, and a competition arose between the creditors of one sister on the one hand, and the surviving sisters jointly on the other hand, the creditors of the deceased sister could clearly carry off all belonging to their debtor. We hold, therefore, that there is nothing in the deed sufficiently onerous which either bars the parties during life, or excludes creditors after death. We also contend, that Grace Brown was full fiar to the extent of one-fifth of the joint property. When property is conveyed in Scotland to two persons jointly, and the survivor, a half of the fee vests in each.

[LORD CHANCELLOR.—Without any words at all such as "and their heirs"?]

Yes. Erskine (3, 8, 35) shews that each has a fee affectable by creditors during life, but which goes to the survivor subject to the predeceaser's debts. Bell (1 Com. 64) treats such a right as a mere destination. It seems to follow, therefore, that each sister, having the fee during life, could dispose of her share during life, and it passed to the others, subject to her debts.

[LORD CHANCELLOR.—Then you say, that a limitation to A and B, and the survivor and their heirs, is in fact the same as a limitation to "A and B and the survivor, and the heirs and assigns of the survivor"?]

Yes. In Scotland, it requires an express destination to heirs to make a survivorship; and it is not as in the case of joint tenancy here, when the property accrues to the survivor where nothing is said. This case has been improperly assimilated to marriage settlements,—where, of course, the peculiar presumptions arising out of the relation of husband and wife prevail, and influence the result. We hold, therefore, that to make the present deed testamentary, it is enough for us to shew that each sister could at death pass property which would not have so passed but for the deed; and inventory duty is leviable.

LORD CHANCELLOR ST. LEONARDS.—My Lords, in this case, the question arises as to the liability of the property of Miss Grace Brown to legacy-duty, that liability entirely depending upon a very short instrument in the Scotch form, to which I must now call your Lordships' attention. I will state this document, and consider its operation, without reference to any special law at all. I will look at it and see what its natural construction is according to the ordinary rules of construction, without considering for a moment what the operation upon it of the English law or the Scotch law ought to be.

It appears, my Lords, that five maiden ladies of the name of Brown agreed to throw the whole of their separate property into a common fund, and, accordingly, they executed a deed by which, in terms which would be singular to an English conveyancer, they "disponed and made over from them, and their heirs severally,"—the expression in another passage being "from us severally, and from the predeceaser and predeceasers," "to and in favour of each other, and to the heirs and assignees of the last survivor,"—in another passage the words are, "to and in favour of ourselves jointly, and the survivors and survivor of us,"—all lands, and, in short, all property of every description which they then had, or which they might have at their respective deaths. This property is to be held "in favour of ourselves jointly, and the survivors and survivor of us, whom we hereby surrogate and substitute in the full right, title, and place of us severally, and of the predeceaser and predeceasers, with full power to us, and to the survivors and survivor of us, to intromit with, sell, use, and dispose of the subjects, effects, means and estate, heritable and moveable, real and personal, hereby conveyed, and to uplift and discharge the debts and sums of money that may be owing to us separately, or to either of us, at present or during our joint lives." So that, as to debts, the instrument goes a little further than usual; it includes debts due to them at any period during their joint lives, "or at a period of our or either of our decease,—declaring, however, as it is hereby expressly provided and declared, that the survivors and survivor of us shall be bound and obliged, as by acceptance hereby we bind and oblige ourselves, and survivors and survivor of us, to pay off and discharge the whole debts, sickbed and funeral charges, of the predeceaser and predeceasers;"—then they warrant the agreement to themselves, their heirs, and "to each other, and to the survivors and survivor of us, from all facts and deeds done and granted by us severally, prejudicially hereto; and we consent to the registration hereof, and letters of horning."

Now, my Lords, upon the face of this instrument, it is a deed, and would *primâ facie* be considered to operate as such. I do not see in any part of the deed any change of language. I am merely speaking of it now in reference to the power and effect of the language which is used. I see no change of language, but it is throughout a disposition by deed.

Now, what is the disposition? Nothing can be more simple than it is, looking at it as a disposition independently of the particular construction which your Lordships may be compelled to put upon it by the rule of law, if there be such a construction. We have here on the part of each a separate interest, not in a fifth part, as seems to have been supposed, but in the whole of

that property. They say—"There are five of us, and we agree to throw our property into a common fund, and it shall be for ourselves, and the survivors and survivor of us, and the heirs and assignees of the survivor." What does that mean? It imports that all of them are to have a joint interest in the common fund, and that there is to be a survivorship in that fund, which survivorship cannot be but for life as against the limitation, because the ultimate limitation is to the survivors, and the heirs and assignees of such survivors. In those words, therefore, there is no difficulty; but then, there is a power to them, and the survivors and survivor of them, to intromit with the property, and sell and dispose of it. Is that inconsistent with the plain construction which I have suggested as that which the document admits of? Very far from it; because, having all joined in the act, all the interest and every limitation is vested in them all, —that is to say, one party must be the survivor—every one of them has an interest during her life; the entire interest being represented by the five, it is equally so by the four, and so by the three, and so by the two. Therefore, the power to all or any of them to dispose of the property, is not to any of them severally to dispose of a portion, but to the whole of them to dispose of all the joint property,—which is altogether consistent with the construction to which I am drawing your Lordships' attention.

Then, with respect to the onerous clause, the consideration is perfectly sufficient. It is not simply their love and affection for each other, but it is that each of them gives up her property to be thrown into the common fund, in consideration of the share which she takes in the property of the others, also thrown into that common fund. There is therefore abundant consideration. It is therefore a deed for onerous causes. Then the warranty prevents the deed from being revoked; it is therefore irrevocable—it is a deed for good consideration, and a binding deed.

Now, supposing your Lordships were to hold that this instrument would operate throughout as a deed, and a deed only, what would then be the effect of that? Why, that every intention of these parties would be effected by the deed, without having reference to any consideration of its being a deed *mortis causâ*, and all that would happen would be, that these ladies' share would not be subject to legacy duty. Your Lordships would disappoint no intention expressed or implied by holding this to be a simple deed, as it purports to be throughout. My Lords, that is the clear construction upon the face of this instrument, which never changes its language; it is a deed which purports to execute its own object throughout as a deed—and so as to carry out the objects of the parties, as it is admitted to carry out those objects, with respect to the property which it was intended should be devolved upon them.

There certainly ought to be some powerful rule of law, there ought to be some overpowering construction, which should compel your Lordships to treat this instrument, not as a deed, as it purports to be, for onerous consideration, and carrying its own purposes into effect as a deed in every part of it,—but to treat it, as it has been treated in the Court below, partly as a deed for onerous causes, irrevocable, and dealing with the property of the ladies jointly, but at the same time operating in a different sense as a deed *mortis causâ*, and as an actual disposition by testament, instead of by the deed itself, of the property which thus vests in them by the deed. Why should not the deed, in its natural interpretation, execute all its objects?

My Lords, this case was decided by the Court below, the decision being accompanied by very elaborate reasons and very ingenious reasons; and I should wish to speak with all possible respect of the very learned Judge by whom those reasons were delivered, but they are reasons in which I feel it impossible to concur.

The learned Judge admitted that the conveyance would have the operation, which as I have stated to your Lordships it would have, if it were to be considered throughout as a deed operating by its own force; but, then, he denied that it had that operation. The effect of what the learned Judge stated was, that the parties had only changed the property, but that they had not changed their interest in point of fact. He admitted that these ladies had no longer any interest in the divided property, but he considered them to take exactly the same interest in the joint property as they had in the divided property. Now that, to begin with, can hardly be said to be accurate. For me to have a separate property consisting of three fields, is one thing, and to throw that into the surrounding estate, and to have a fifth part in common with other persons, is quite another thing. The learned Judge then speaks of this deed operating during the lifetime of the parties for the purpose of regulating the property, and then he speaks of it, as in case of death, proceeding to give the property from the dead to the living; and the learned Judge seems to me to place great reliance upon that circumstance, as shewing that it is a deed *mortis causâ*, because the property is to pass from the dead to the living. But, my Lords, what distinction is there between such a case and an ordinary settlement which has nothing upon the face of it distinct from a regular disposition? Take the case of a marriage-settlement to the father for life, to the mother for life, and then to the children,—it is from the dead to the living, and in many cases it is not, as here, confined to the living, but it passes the property from the dead to those who are not yet living. But that does not give it a testamentary character—that does not impress upon it the character of a disposition analogous to a testament, but it is a disposition by deed

designating the persons, with the time when they are to take under the limitations of the deed itself.

Now, my Lords, the learned Judge admits that the deed operated to divest each of these ladies of all her property; he thought new rights were conferred, and that the common fund was held by each as limited. He then says, that this could not be a liferent. That is one of the questions which your Lordships have to consider. In making that statement, the learned Judge certainly seems to have forgotten for the moment the nature of the limitations. He says—"In the first place, it says nothing whatever about trust or liferent or aliment, and contains no words that can by any possibility be held to imply a purpose to create any such limited right. On the contrary, it expressly, and in the most ample terms," "assigns, dispones, conveys, and makes over from us, and our heirs and assignees, to and in favour of each other," all that the parties may severally possess or afterwards acquire, "with full power to us, and the survivors and survivor of us, to intromit with, to sell, use, and dispose of the whole subjects so conveyed, without restriction or limitation of any kind or degree." Now, that is not the limitation. The limitation is not to these parties and their heirs, to and in favour of each other, but it is "in favour of each other, and the survivors and survivor, and the heirs or assignees of the survivor;" and, therefore, that power, which is put in juxtaposition, and as if it immediately followed upon that curtailed statement, in no respect breaks in upon the real limitation. But it would be a very different thing if the limitations were as the learned Judge here stated them to be.

Then the learned Judge observes very much upon the liability to debt. In the observations which he makes, I cannot concur. He considers it a *mortis causâ* instrument. He then observes, that none of the ladies were "divested of any property by this arrangement. A change was merely made in the specific form or description of that property. But, then, new shares of it were as fully vested in each of them as the old had ever been, and were consequently, it would seem, as open to attachment by their creditors." This really puts all the limitations of the deed out of the question. In point of fact and law, every one of them was divested of her property by this arrangement. I should state this proposition in exactly the opposite terms, that every one of them was divested of her property by this arrangement, and that she took a new property in the common fund created by the several properties brought in by every one of the five.

With respect to the creditors, I will at once relieve the case of the question of debts, as far as it strikes my mind. The debts provided for by this instrument, I think clearly are whatever debts may be contracted by any of the sisters during their lives; and I think it equally clear that those debts were a charge, not upon the share of each only (there is not a single word in the deed leading to that conclusion), but a charge upon the whole fund. It was argued at the bar that that would lead to great absurdity and inconvenience. It might do so, but we must put a construction upon the deed. It is not an illegal provision, and it must be remembered that these ladies were not likely to feel any difficulty arising from such a provision. They meant to live together—they meant to have a common fund; and no difficulty has arisen, and I will venture to say that no difficulty will arise. But supposing a difficulty does arise,—it is the will and act of the parties, and your Lordships have no more power than any individual at the bar to refuse to give the effect which the law allows to be given to such a disposition, although it may be an unwise disposition.

Then, as respects the legal liability to debts, it is not necessary to say that this deed would have an operation against the existing creditors at the time it was made. That is one question upon which your Lordships need give no opinion; because, if the estate were liable to the debts of each, that could in no manner affect the conveyance of property any more than it would in this country. When a man in debt conveys property, the conveyance is binding subject to those debts. It may be that creditors in Scotland, as well as creditors in England, may have the power to impeach the deed as a fraud upon them; but that would not prevent a *bonâ fide* conveyance which is subject to the payment of the debts, from being operative between the parties of the deed; and, therefore, the liability to the debts would in no respect affect the validity of this instrument. With regard to the liability to debt, upon which great reliance was placed in the Court below, after the execution of the deed, no difficulty can arise upon that. As far as the deed is operative, I take it to be clear that the creditors could not impeach it. It is a deed for onerous causes; and, as far as the limitations are to take effect, the creditors could not impeach that deed. But it is a totally different thing to say that the creditors could not attach the property of each under that deed. Why should they not? Supposing an estate were given to them all for their lives, each has a joint estate which is attachable by the creditors, and it is, therefore, not the slightest objection to the true construction of this instrument, that the property which they take under the deed would be attachable by the creditors. But, then, I deny that the creditors could attach this property so as to affect the ultimate limitations. They may take the property during their lives if your Lordships should be of opinion that that is the true construction; and if the party indebted should be the survivor, they may take it as against the deed,—but they could not take it after the execution of the deed, as against the limitations of that deed;—that I apprehend to be the distinction.

Now, my Lords, this case is elaborately argued (as elaborately as I ever saw a case argued) in the defendant's case. I will just draw your Lordships' attention in a very few words to the real bearing of those arguments, taking up the views entertained by the learned Judges. The argument is, that each of these ladies still possessed singly what she gave up, and was rendered neither richer nor poorer by the transaction. But it is perfectly clear, that while each gave up a separate property, those properties altogether formed a joint fund, and each of them had an interest given to her, by this instrument, in that joint fund.

It is then admitted—and this goes a long way to decide the case—that the survivor will have a right to make a testament, and that heirs and next of kin are excluded. Now, those are precise admissions against this most elaborate argument. Heirs and next of kin are excluded, and the right of making a testament remains in the survivor. The object of the deed is perfectly obvious. Taking up the ground given to me by the learned Judges, they say that a separate testament being excluded, and the heirs and next of kin being excluded, the deed is to have a testamentary operation. I hardly know where that is to be found; but they say it is to have a testamentary operation, and that it is no longer a deed, *qua* deed, for onerous causes, although irrevocable; they admit it to be irrevocable—they admit the testamentary right is excluded—and they admit that the heirs and next of kin are excluded. Then, is not this a simple destination? Where is any simple destination to be found except upon the face of this deed, *qua* deed? Why are your Lordships to be called upon to treat this half as a deed and half as a testamentary disposition or a deed *mortis causâ*, without the slightest intimation of any such intention, and, except for the purpose of adding to the revenue, without the slightest necessity, that I can see, for coming to any such conclusion?

Then, my Lords, when they say it is a testament, why should it be deemed to be a testament? Will not it operate according to the intention of the parties if your Lordships treat it as a deed? —It will. Had not it a consideration?—It had a sufficient consideration. Was it not for onerous causes?—It was. It is admitted to be so. Is there any doubt about the persons to take?—Not the slightest. Why should it not, therefore, operate as a deed? They admit that the clause of warrandice barred revocation, and they admit that it could not be altered because it was a mutual settlement, and, therefore, could not be altered by any one of them without the others.

They then proceed to shew the absurdity of making this a joint fund; they say that no one of them might give part without immediately calling together the whole of the others to know if she might do so. That is an absurdity which they must forgive me for saying does not exist; because, if the absurdity exists here, then in every joint tenancy in England, and every tenancy in common in some measure in Scotland, the same thing would exist. There is nothing absurd in five ladies having an estate in common or in joint tenancy; the fund would be received, and would be enjoyed, according to the rights of the parties under this deed.

They then shew, in the same manner, that each of them might have renounced the succession of liability to the debts. I utterly deny that, because they are bound by the acceptance to the debts, and they never could relieve themselves from the liability. The deed says expressly that they bind themselves to the debts by the acceptance.

Now, the learned Judge in the Court below, in his very elaborate reasonings, relies upon the authorities. It will be my practice, my Lords, in advising your Lordships upon Scotch cases, never to introduce without necessity any English law. I desire to see how the authorities stand upon the Scotch law, and that this case should be decided simply, and only, upon Scotch law. There are different forms of conveyancing in the two countries. If this case were to be decided upon English law, it would not occupy a second of your Lordships' time, because, though our rules of conveyancing would not admit of a deed being framed in the same way, yet a deed framed to carry out the same purposes would not admit of the slightest argument. The question is, how this deed stands with reference to the Scotch law. One case which was very much relied upon was *Curdy* v. *Boyd*, M. 15,946. It was said in that case, and it was also said in the argument at your Lordships' bar, that that deed conferred the office of executor, and therefore was a testamentary instrument. In point of fact, it was not so, for Boyd had obtained the office of executor before there was an attempt to set aside the deed. He did obtain the office of executor; but when an attempt was made by an action of reduction to set aside the deed, the Judges held clearly that it was a deed which was irrevocable, and in every respect a deed, and was to be received as such. In that case, in consideration of an obligation by Boyd to maintain John Curdy at bed and board, and, if he should survive him, to pay to him and his heirs £1000 Scots, Curdy granted an assignation and settlement, reciting love and favour, and assigning in favour of Boyd all goods belonging to him. Curdy went on, being an industrious man, working and earning money. Money had been lent by Curdy to Boyd; Boyd paid the interest regularly, and, at Curdy's death, he claimed that with the rest. "The question therefore comes to this, how far the deed in question was alterable,—which the Judges generally thought it was not, for that here there was not a disposition merely gratuitous, but proceeding on an onerous cause, which the other party could have required implement of. Besides, that *pacta de successione viventis*

are valid by our law when granted for an onerous cause, and the onerosity was thought sufficiently instructed in this case." Therefore they sustain the defence as a deed operating *qua* deed, without any reference to its being a *mortis causâ* deed. The fact, therefore, that Boyd had obtained the office of executor before the attempt to set aside the deed, proves nothing at all except that he had done an act which was altogether unnecessary.

The case of *Braidwood* v. *Braidwood*, *supra*, which was decided by your Lordships, is very much to the same effect. It differs from the case of *Curdy* v. *Boyd*.

The whole of the argument upon the limitations turned upon what is stated in Erskine and in Bell; and it is singular enough, but it was owing to the necessity of doing so, that the quotations from both these books by the learned Judge in his judgment, and by the learned counsel in their elaborate reasons, stopped short in each case of, and just excluded that very statement which I will call your Lordships' attention to, which proves that no dicta exist as regards this case in point of law. Erskine, in dealing with this subject (3, 8, 35), makes these observations—"If the right be taken to two jointly, and their heirs, without any mention of liferent, the conjunct fiars enjoy the subject equally while both are alive, as in the former case. But, on the death of the first, neither the fee, nor even the liferent of his half, accrues to the survivor, but descends to his own heir." Now your Lordships will see, that there being no words of survivorship, there is no survivorship, and, by the law of Scotland, you must have a limitation. It is not like the law of England; the very limitation to two jointly, where there is not a several clause, carries it to the survivor. . That is all it proves. The words, "their heirs," are therefore used distributively. That is the whole of that passage—"Where a right is taken to two (or more) jointly, and the longest liver," that is what was so much relied upon—"(or survivor), and their heirs, the words 'their heirs' are understood to denote (what is expressed in the present case) the heirs of the longest liver; and, consequently, though the several shares belonging to the conjunct fiars are affectable by their several creditors while both are alive, yet, upon the death of any one of them, the survivor has the fee of the whole," exclusively of the heirs and their fees, "not only of his own share, but of the share belonging to the predeceaser, in so far as it is not exhausted by his debts."

Now, it was said that that was the same as this case—that as the words "their heirs" meant the heirs of the survivor, it was precisely the same as the limitation in this case, which is to the survivors and survivor, and the heirs and assignees of the survivor. Now, the words here are, "to them and the survivor of them, and their heirs;" and the question really there was this:—There can be no doubt that the words "their heirs" refer to the two, and the question was really whether "their heirs" also extended to the survivors; and as there is a limitation to the two, and to the survivor of them, the words "their heirs," by the natural construction of them, seem to extend both to the two and to the survivor, and then all that follows is quite a matter of course. Then comes this passage, which was not referred to by either of the learned Judges, and is not referred to in the reasons given by the defendant—"If the right be taken to two strangers, and to the heirs of one of them, he to whose heirs the fee is taken is the only fiar; the right of the other resolves into a naked liferent." Now, my Lords, I press the words which follow upon your Lordships' attention—"All the rules arise naturally from the import of the several expressions." There is no magic in it. The question simply is, what is the meaning of the parties, and they have told you what their meaning is. Erskine tells you distinctly, that where there is a limitation to two, and to the heirs of one of them, one takes the fee, and the other takes the liferent only. If there be a limitation to five, and the survivors and survivor, and the heirs and the assigns of the survivor, what is there to distinguish between the two cases? In the one case, the person is known and designated as Thomas or William; in the other case, the person is unknown. You do not know who will be the survivor. But the law allows of such a limitation; and when the person is ascertained, he then takes in precisely the same way as if he had been named in the instrument. It is therefore clear, that according to the very passage here referred to in Erskine, this is a good limitation to the survivor in fee, and cannot be shaken by the rules of Scotch law.

Then, my Lords, this passage in 1 Bell's Com. c. 1, § 2, p. 49, is referred to—"Where it is to two jointly, and the survivor and their heirs,"—which is the same case as is put by Erskine,—"each has a fee which his debts will affect. The survivor, indeed, will become sole fiar, but the right thus bestowed seems to be of the nature of a mere destination; for either of the parties may onerously dispose of or grant securities over the subject, which will be effectual notwithstanding the destination to the other,—or his creditors may adjudge it, and so defeat the right of the associate." That is because it is to two jointly and their heirs; and though the survivor will be the absolute fiar if he should survive, yet each has the disposition of the fee to him in the mean time. Then come these words, which have not been adverted to in the judgment or the reasons—"Where it is 'to two jointly, and the heirs of one of them,' the one less favoured is a bare liferenter,—the other is a fiar, and not only cannot be gratuitously disappointed, but cannot, even by onerous conveyance, be deprived of his right." That is exactly the case before your Lordships. There is nothing here about liferent. The way in which Bell expressly puts it is;

that where it is to two jointly, and the heirs of one of them, it must go to the one to whom the fee is assigned to go, and it cannot be prevented being charged with the debts.

Then, what is the true construction here according to these decisions, and according to these rules? It is simply that the two take as liferenters without the word "inheritance;" and the word "inheritance" not being necessary in the Scotch law, that does not exclude such a limitation as this, where there are words of inheritance applicable to one, whichever may be the survivor, and not applicable to the other. Therefore the limitation to them, and the survivors and survivor of them, and the heirs and assigns of the survivor, must be to them as liferenters, and the survivors and survivor of them, and then the fee to the last taker. I have already said that one of them must be the survivor; and the limitation being as if they could all dispose, that power is entirely consistent with the limitation.

My Lords, I have given my anxious consideration to this case, partly from my respect to the learned Judges who decided the case in Scotland, and also from its being a case the decision of which is dependent upon Scotch law. I have come to a clear opinion that this is a decision which cannot be supported, and which was not called for; because the result of it is not to effect the object of the deed, so as to let the destination go to the parties according to its language, but it is indirectly to put upon it a very strained construction, when, if you allowed the deed to speak for itself, according to the natural construction of the words, and according to the rules of Scotch law, every object contained in it would be effected. I therefore move your Lordships that the judgment of the Court of Exchequer be reversed.

Judgment reversed.

Dodds and Greig, *Plaintiffs' Solicitors.*—J. Timm, Solicitor of Inland Revenue, *for Defendant.*

JULY 1, 1852.

DIONYSIUS ONUFRI MARIANSKI, *Appellant, v.* JANET FAIRSERVICE OR CAIRNS, and Husband, *Respondents.*

Proof—Competency—Reduction—Facility—Jury Cause—*In a reduction, on the ground of facility and fraud, by the representatives of a party deceased, of documents of debt granted by him to the defender, who maintained that the same had been granted in respect of payments made by himself for behoof of the deceased:*

HELD (affirming judgment), *that the books and verbal statements of the deceased were competent evidence to shew the state of mind of deceased, but not that the payments in question had truly been made by the deceased, and not by the defender.*

Proof—Competency—Jury Case—Defences in separate action—*In a jury trial:*

HELD (affirming judgment), *that it was competent, with a view to proving that a party was a person of slender means, to put in, (but only as containing representations by himself as to his means,) defences, signed by himself, to an entirely separate action of aliment at the instance of his wife.*

Reduction on Ground of Facility, Circumvention, &c.—Issue—Verdict—Process—Jury Cause—*An issue in a reduction of documents on the ground of facility, circumvention, &c., went to trial in the form of issue adopted for the trial of such cases:—"Whether, at the dates, &c. of the writings Nos. 5, 6, 7, 8, (and 16 others,) of process, or any of them, the said A was of weak and facile mind, and easily imposed upon; and whether the defender, taking advantage of his said weakness and facility, did, by fraud or circumvention, or intimidation, procure or obtain the said subscriptions and indorsations, or any of them, to the lesion of the granter?" The verdict was "for the pursuer" generally—and the Court reduced, decerned and declared, in terms of the conclusions of the libel. On appeal, it was maintained that the verdict was incompetent, because, as the issue put two distinct alternative grounds to the jury, it should have distinguished the particular alternative ground on which it proceeded,—and, as it did not do that, no judgment could validly follow by reason of the uncertainty of the ground on which it proceeded.*

HELD (but without oversetting the judgment), *that the form of issue was objectionable, for ambiguity, but the verdict might be amended by the judge's notes; and remit made to the Court of Session to amend the entry of the verdict.*[1]

In this case, the general conclusion of the summons of reduction was to declare void and null the writings particularly narrated and referred to. The defender appealed against the interlocutors of July 18, 1850, disallowing the bill of exceptions and discharging rule for new trial, and

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[1] See previous report 12 D. 919; 22 Sc. Jur. 586. S. C. 1 Macq. Ap. 212: 24 Sc. Jur. 579.