

the proceeds, but to invest them in securities upon the same trusts as attached on the lands sold. Possibly the Court might have thought that this left the character of real estate still attaching on the money produced by the sale, and so that the statute did not apply." Now, that is one of the facts in this case. In the case now before your Lordships' House, the trustees have the power to reinvest the proceeds. Therefore in this case there can be no conflict with the previous authorities, and, without overruling any of the subsequent cases, your Lordships may come to the determination which the Court of Exchequer came to in the case *in re Evans*, viz., that the act does not apply.

In the case of the *Attorney-General v. Mangles*, which, in the *Attorney-General v. Simcox*, is rather supposed to have overruled the case *in re Evans*, your Lordships will find that there was a clear and express trust—"to sell, convey, or otherwise convert into money the residue of the estate, real and personal;" and although there was a power there to retain the shares of the estate as real estate for the benefit of the parties entitled, the shares of the estate so retained were to be treated as personal estate. It was very difficult, therefore, to say that they could take those shares of the real estate in a manner to be free and discharged from liability to duty under the act of parliament, because there was a direct trust to sell the estate, and although the shares under discussion were not to be sold, but retained, still they were to be treated as personal estate. The Court there decided, that the duty attached upon the amount of the part which was actually sold, and I think they came to a right decision. Indeed it was impossible they could decide otherwise. But they also decided that the duty did not attach upon the part which was unsold, and therefore they did not hold that the will contained a direction which was imperative, although it would be contingent. And in some of the cases it was so put, that it was not a conversion out and out, although, when the parties were allowed under the will to retain the real estate, it was to be treated as personal estate. I think, therefore, that goes a very long way to shew, that the decisions have not gone to the extent which has been supposed.

Then in the *Attorney-General v. Simcox*, it was supposed that the case of the *Attorney-General v. Mangles* had overruled the case *in re Evans*, though the Court made a distinction between the cases. I cannot say I think that to be the case; and therefore I think that, consistently with all the authorities upon the subject, your Lordships may hold the true construction of the will and of the act of parliament to be, that the duty does not attach in this case. I am clearly of opinion, that, without overruling any of the authorities, we may uphold the judgment of the Court below; and I must add, that this is a case in which I regret we are unable to give costs. The parties have been brought here at a great expense, and considering the nature of the case, and the fact that this appeal is made from the unanimous opinion of the Judges in Scotland, I very much regret that we cannot give costs.

Judgment affirmed.

For plaintiff in error, J. Timm, Solicitor of Inland Revenue. *Solicitors for defendant in error*, Maitland and Graham.

JUNE 22, 1854.

MRS. ISMENE MAGDALENA GLENDONWYN or SCOTT, *Appellant*, v. MRS. CLEMENTINA HERRIES MAXWELL, *Respondent*.

Fee and Liferent—Husband and Wife—Conveyance—Clause—Construction—*Lands belonging to a married woman were settled by her upon herself and her husband, and the survivor, whom failing, in favour of A (their eldest son) and his heirs whatsoever. The deed reserved a power of revocation and alteration in favour of the spouses, and the survivor. In a second deed they altered the destination by calling the heirs of A's body, and certain other heirs, in place of his heirs whatsoever. The second deed did not contain a renewal of the power of alteration, but confirmed the former deed, except in so far as altered.*

HELD (affirming judgment)—1. *That the surviving husband was absolute fiar.* 2. *That the power of alteration contained in the first deed was not exhausted by its exercise in the second.*

3. *That a disposition of the estate by the surviving husband, in favour of himself and his heirs whatsoever, was within the powers conferred upon him by the two deeds, and was therefore not reducible at the instance of an heir called under the second destination.*

Quære,—*How far the House can overturn a previous decision of its own: per Lord St. Leonards.*¹

¹ See previous report 12 D. 932; 22 Sc. Jur. 408. S. C. 26 Sc. Jur. 535.

The pursuer appealed, maintaining in her case that the judgments of the Court of Session should be set aside, because,—“1. According to the sound construction of the deeds of 29th July 1799 and 11th April 1809, John Maxwell possessed only a liferent in the estate of Munches, or at most only a limited fee, with no other power of altering the succession to that estate than what was specially conferred. 2. The power of altering the succession to the estate was fully exercised and exhausted by the deed of April 1809, and no further power of alteration remained competent to him. 3. The deed of 21st June 1809, executed by him, was *ultra vires*.—Ersk., b. iii. t. 8, § 36; Dirl. 85; *Johnston*, M. 4199; Hope Mag. Pr. Liferent, Kincaid; *Creditors of Paterson*, M. 4223; *Forbes*, Dict. 4240; Craig, ii. 22, 6; Stair, iii. 5, 51; *Angus*, M. 4244, *Cranston*, M. 4227; *Creditors of Elliot*, M. 4244; *Ferguson*, M. 4202; *Stair*, Mor. 4228; Ersk. iii. 8, 35; Falconer, i. 206; *Riddels*, M. 14,878; *Forrester v. Macgregor's Trustees*, 1 Sh. & M'L. 441.”

The respondent maintained that they were correct :—“1. Because John Maxwell, the granter of the disposition, sought to be reduced, had power to execute it, in respect he was unlimited fiar under the deed executed by his wife and himself in 1799,—his character and right as unlimited fiar not having been in any way affected by the deed subsequently executed by them in 1809.—Ersk. Instit., iii. 8, 36; *Ferguson v. M'George*, Mor. 4202; Mor. 4203; Mor. 4205. 2. Because John Maxwell was entitled to execute the disposition, in respect that while the deed of 1799 reserved full power for that purpose to Mrs. Maxwell and him, and the survivor, such right was confirmed by the deed of 1809. 3. Because by the deed of 1809, John Maxwell was not laid under any obligation, either express or implied, not to alter the order of succession specified in it.”

Sol.-Gen. Bethell, and *Rolt Q.C.*, for appellants. This is a question entirely of construction. The deed of 1799 gave only a liferent to John Maxwell. This is perhaps not clear from the words of the destination taken by themselves, but any doubt is removed by the circumstance, that the infestment was to be given directly to Alexander Maxwell, the son, thereby inferring that the fee was in Alexander. If the fee had been intended to be vested in Mr. and Mrs. Maxwell, there would have been no warrant for infestment of Alexander. Any other construction than that which gives a liferent only to John Maxwell would be anomalous. Thus, if John Maxwell had the fee, there would have been no necessity for the ample and elaborate clause of reservation of powers to sell. Besides, how can the legacy of £8000, given by the deed of April 1809 to John Maxwell, on surviving his wife, be reconciled with the notion that he was a fiar? It, in fact, burdens with the payment of that sum an estate which belongs in fee to him already, which would be unintelligible. We hold that the words “to ourselves and the longest liver of us, and failing of us both by death, to Alexander Maxwell,” ought to be construed as if they were “to ourselves, and the longest liver of us *in liferent*, and to Alexander Maxwell *in fee*.” There is no technical rule hostile to this construction, for Ersk. iii. 8, 36, applies only to cases where the question is, which of the two spouses is the fiar,—it being admitted one or the other is so. The case of *Forrester v. Macgregor's Trustees*, 1 Sh. & M'L. 441, does not apply; for there the fee was expressly given to the survivor, which is not so here. The same is true of *Burrowes v. M'Farquhar's Trustees*, 4 D. 1484. But even assuming that John Maxwell had the fee under the deed of 1799, that fee was not absolute and unlimited, but was confined to the reserved power. This is a question of construction as to the intention of Mrs. Maxwell, who was originally entitled to the estate, and from whose voluntary act all the husband's right came. In that view the husband's capacity is plainly restricted to a particular exercise of the power. That power, no doubt, extended to an alteration of the succession; but it is not a power to be exercised “from time to time.” The power, therefore, was exhausted by the first valid exercise in April 1809. That deed of April 1809 reserves no power to make any further alteration; not only so, but the succession, as thereby fixed, is warranted at all hands and against all deadly, which plainly implies a final and irrevocable exercise of the power. It was therefore quite incompetent for John Maxwell, after the death of his wife, to alter the destination a second time. [They also referred to *Mackintosh*, 28th Jan. 1812, F.C.; *Dykes v. Boyd*, 3d June 1813, F.C.; *Hutton's Trustees v. Hutton*, 9 D. 639; *Mein v. Taylor*, 4 W.S., 22; *Mackintosh v. Gordon*, 4 Bell's Ap. C. 105; *Ramsay v. Beveridge*, 26 Sc. Jur. 329.]

Sir F. Kelly, and *Anderson Q.C.*, for respondents.—It is settled in the law of Scotland, that a conveyance to the husband and wife and the survivor, gives the fee to the survivor.—Ersk., iii. 8, 36; *Ferguson v. M'George*, Mor. 4202; *Riddels v. Scott*, M. 4203; *Lord Boyd v. King's Advocate*, Mor. 4205; *Forrester v. Macgregor's Trustees*, 1 Sh. & M'L., 441; *Burrowes v. M'Farquhar*, 4 D. 1484; *Newlands v. Newlands*, Mor. 4295; 3 Ross, L.C. 635; *Falconer v. Wright*, 2 S. 633; *Holditch v. Spalding*, 9 D. 1207; *Gordon v. Mackintosh*, 4 Bell, Ap. 105; *Baillie v. Clark*, 23 Feb. 1809, F.C.; *Cumming v. L. Adv.* 10 Feb. 1756, F.C. It has been held in the above cases, that the addition of the words “their heirs,” though somewhat equivocal, cannot alter the rule; and therefore the rule must be still stronger in a case like the present, where no such equivocal words are used. To hold that the fee was not in John Maxwell, would be to cause the fee to be *in pendente* during his life, for Alexander Maxwell was not to succeed

till after the death of both Mr. and Mrs. Maxwell. But not only was the fee in John Maxwell under the deed of 1799, but that fee was unlimited. The children had a mere *spes successionis*. So far was this fee from being limited, that express power was given to Mr. and Mrs. Maxwell and the survivor to alter the destination, and dispose gratuitously of the estate. The deed of April 1809 was only a partial exercise of the ample powers given them, and it left untouched the deed of 1799, save only as to the nomination of heirs entitled to succeed as substitutes. The latter deed did not in any respect alter the rights of the institutes, as they stood under the former deed of 1799, but rather confirmed them. There is therefore no pretence for saying the deed of June 1809 was not valid.

LORD CHANCELLOR CRANWORTH.—My Lords, this case appears to me to be an extremely simple one. The question turns entirely upon the effect that is to be given to two instruments, one a disposition and settlement of 29th July 1799, which is to be read in conjunction with a subsequent deed of 11th April 1809. By the first deed of 29th July 1799, Mrs. Agnes Maxwell being entitled to the estate of Munches, the estate in question, and being married, she and her husband made a settlement, somewhat in the nature of a will, of this property, the material part of which is this:—After reciting that she was entitled to the property for life, she says, with the advice and consent of her husband—“I give, grant and dispoise to ourselves,” (that is, the husband and wife,) “and the longest liver of us, and failing of us both by death, to Alexander Maxwell, eldest lawful son of me, the said John Maxwell, and his heirs and dispoisees whatsoever, but reserving always to us and the survivor of us to nominate and appoint any other series of heirs to succeed us in the said estate that we or the survivor of us may judge fit.” Then the deed describes the property, and there are the usual directions for completing by infestment, reserving always power to vary and alter the order of succession, and with this condition always, “that the heirs that may be called to the succession of the lands and others before dispoised in the way and manner above provided, shall be obliged constantly to bear, use and retain, in all time after their succession, the surname, arms and designation of Maxwell of Munches.” This power is reserved in the same way to sell, alienate and dispoise the assigned lands or any part thereof.

Now, my Lords, the first question is—What interest did Mr. and Mrs. Maxwell take under that settlement? I think it is perfectly clear, upon principle and upon authority, that Mr. and Mrs. Maxwell took what we should call a joint fee, which, of course, therefore vested the fee in the husband, if he happened to survive, and upon that principle the parties acted. And I must observe, that, in the argument below, that was a proposition never controverted. That seems to have been assumed all along as being the basis on which the parties were to proceed, and I take it to be so upon a principle and doctrine perfectly well understood in the law of Scotland.

What was suggested was, that the husband only took a liferent, with what we should call a remainder to Alexander. That I apprehend to be a complete misunderstanding of the nature of a Scotch settlement. I very much doubt whether, in order to arrive at the conclusion at which I have arrived, that they took the fee, it is necessary to draw in aid, and to have recourse to these subsequent provisions, reserving to them the unlimited power either of appointing new heirs or of selling, disposing, or doing whatever they please. I very much doubt whether it is necessary to draw that in aid in order to come to the conclusion that the parties took the fee. I rather incline to think (but upon this I do not wish to express any decided opinion) that they would have taken the fee, if it had only been granted to them conjunctly, under the words, “give and grant to ourselves and the longest liver of us.” I rather incline to think that that alone would have done, and that they would have taken the fee, appointing Alexander merely as the substitute. That is a matter upon which I have not sufficiently explored the authorities, and therefore I wish not to be understood as giving any opinion upon that point. But what seems to me to be perfectly established is this, that with such a limitation as this—with a subsequent faculty to the parties to alienate, dispoise, change the succession, wadset and dispose of it as they pleased, that is to all intents and purposes an absolute own rship in fee simple. In every sense it would be so if there were no authority upon the subject. But there were two very distinct authorities to which we were referred, which do not decide that, but which decide something beyond that, namely, that in such a limitation, even though the first takers are expressly taking a liferent, that does not matter, they nevertheless took the fee, because the gift of the absolute power of dispoising is, in fact, the gift of the fee. That was decided in the case to which we were referred, the case of *Cumming v. His Majesty's Advocate*, decided in 1756, which was confirmed by the subsequent case of *Baillie v. Clarke*, in 1809. These cases I need not again call your Lordships' attention to. The first was a case in which Adam Hay made a disposition to himself in liferent and to his son Andrew in fee, but reserving to himself the power of contracting debt and of dispoising of the lands. And it was held that, notwithstanding the interest taken by Adam Hay was described as being an estate in liferent, yet that, coupling that with the absolute power which he had of dispoising of the fee, it was, in truth, a fee simple estate. So in the other case of *Baillie v. Clarke*, in 1809, Clarke took the conveyance to himself in liferent during all the days of his life, and to his son George Clarke, his heirs and assignees whomsoever. The deed contains a reservation in favour of the father of full power and liberty to burden and affect the lands, tithes

and others before disposed, and to sell or dispose of the same, or any part thereof, at pleasure. It was held to be an absolute fee, though it was described as an estate in liferent. If that be so, it follows *a multo fortiori* where the two disponees take not under a destination of a liferent, but *simpliciter* to them, that, coupled with the absolute power of disposition, gives them the absolute fee simple of the estate. That being the construction of the deed of 1799, the result was, that Mr. and Mrs. Maxwell took the fee to themselves and to the survivor, and the question that was argued was—What was the interest of the survivor—whether it was a life estate only, or whether it went to the survivor? Now, what the Court decided was, (which they supposed to be the only question,) that the survivor took the fee. I think that was a perfectly right decision. Mr. Maxwell having survived his wife, would have become entitled to the fee under that deed of 1799, if nothing else had been done upon it afterwards.

That being the effect of that deed, then the question arises—What was the consequence of the second deed, dated 11th April 1809? The contention is, that whatever might have been the effect of the first deed—by the effect of the first deed, coupled with the second, the estate went, on the death of Mr. Maxwell, in a series of successive entails, to which I need not particularly advert, under which the present appellant would claim. I think that that is an entirely wrong construction of that deed.

I am assuming now, that my construction of the first deed is right, and I will proceed to consider what is the effect of the second deed. The second deed begins by reciting the first, and then it says:—“By which disposition, power is reserved to us, or the survivor of us, to nominate and appoint any other series of heirs to succeed us, &c., and to vary and alter the said settlement or disposition, revoke or annul the same as we might see cause, &c. Now, know ye, that we have revoked and annulled the said disposition and settlement, in so far as our said lands and estates are thereby disposed and conveyed to the said Alexander Maxwell, and his heirs and disponees whatsoever, &c.; and failing the said John Maxwell my husband, and me, and the longest liver of us, I, with consent aforesaid, do hereby nominate and appoint the said Alexander Maxwell, and the heirs whatsoever of his body, to succeed to the whole of the foresaid lands and estate, &c., whom failing, James Maxwell, Esq. of Kirkconnell, and the heirs male of his body,” &c.

Now, reading that along with the other deed, for that is the way to deal with a case of this sort, what is the effect of the two deeds taken together? It is exactly the same as if the deed had been to John Maxwell and his wife, in one conjunct fee, and failing by death, to Alexander and his heirs male; then, instead of “Alexander and his heirs male,” read the names that are substituted in that second deed. That is the way to take the two deeds together. But still it leaves the question just as it was before, as to what interests were prior to the interest which, by the first deed, was given to Alexander. It left them the power of disposing of the fee just as it stood before.

My Lords, this appears to me to be so clear, that it is not necessary to draw in aid any other little matters which, in spelling out the instrument, tend to fortify that construction, if it were necessary so to do. It appears to me, that any other construction than that which I have put upon the first deed, is utterly irreconcilable with the proviso which I find under the condition, “That the heirs of me, the said John Maxwell, and the other heirs that may be called to the succession, shall be obliged constantly to bear, use and retain, in all time after their succession, the surname, arms and designation of Maxwell of Munches.” The only person that was stated by way of substitute was Alexander; and that clause is hardly reconcilable with any other supposition than that the heirs general of Maxwell’s heirs might be persons called to the succession, and then that obligation is imposed upon them as well as upon others.

Upon the whole, therefore, it appears to me, that it is perfectly clear that the result of the two deeds is, that there was an estate in conjunct fee in the spouses, and that Mr. Maxwell being the surviving spouse, he had the power which the circumstance of his being the surviving owner of the conjunct fee gave him, and that he exercised that power by the third deed, the particulars of which I need not advert to, under which the respondents claim. I have therefore no hesitation in moving your Lordships that this interlocutor be affirmed with costs.

LORD BROUGHAM.—My Lords, I entirely agree with my noble and learned friend, and with all the Judges in the Court below, as to the interest which was taken under the deed of 1799, and also under the subsequent deed of 1809. It is unnecessary for me to trouble your Lordships with any argument in this case. I rely upon the reasons which have been partly adverted to by my noble and learned friend, and which have been given explicitly by the learned Judges in the Court below. Reference was made to many of the former cases by the appellant’s counsel. On looking into the cases, which I have done with great care, I find no reason to doubt that this case stands entirely clear of anything decided in those cases. In fact, the difficulties which arose in some of those cases do not arise in the present case at all. It is very much to be lamented that these extremely nice, subtle and technical rules, have been introduced into the decisions of the Scotch Courts, and affirmed by your Lordships upon grounds connected with the principles of the feudal laws. It is to be regretted in those cases particularly, that the plain and manifest intentions of the maker of the instrument have been set aside by these technical rules, because

it was absolutely necessary that the Court should come to some clear decision upon these principles in those cases. In the present case that difficulty does not arise. The cases to which I particularly allude are *Newland v. Newland*, *Faulkner v. Wright*, and *Holditch v. Spalding*—in all of which it was quite manifest (and it is lamentable to consider how manifest it was) that the plain and obvious intention of the parties were set at nought by the application of those technical principles to which I have referred.

Now, my Lords, I need not trouble your Lordships or myself with repeating what I have more than once urged in dealing with cases of this description, more especially the cases I think of *Gordon v. Macintosh* and *Faulkner v. Griffiths*. I will only repeat, that I hold entirely by the doctrine which I then took leave to expound. My only consolation is, that in the present case we do not labour under the same difficulties that we laboured under in deciding those cases. This case not only is in accordance with all those other cases, but it stands upon grounds which are higher in my opinion, and more clear than any upon which those cases were decided.

LORD ST. LEONARDS.—My Lords, in this case we are bound to proceed entirely upon the rules of Scotch law. We sit here as a Scotch Court of Justice. I believe that this appeal never would have been brought to this House if the Scotch law had not greatly differed from the English law, and that this appeal is simply an attempt upon the judicial administration of your Lordships, in the hope that the English law would be applied to this Scotch settlement. But as we are bound, in deciding upon this case, to adhere to the Scotch law, which differs wholly from the English law, this case must abide the result which has been stated by my noble and learned friends.

But so much has been said about the rules of law that I think it may not be useless to consider the arguments which have been addressed to your Lordships.

The first argument is, that in the original deed the limitation to the husband and wife and the survivor of them, and after their death, over, is only a liferent. Now the whole law of Scotland is to the contrary. The learned counsel referred to Ersk. iii. 8, 35, at the end of which you find these words, speaking of the rules which have been laid down:—"All these rules arise naturally from the import of the several expressions. But, notwithstanding the last mentioned rule, a father who takes a right to himself and his son *nominatim*, and to his son's heirs, continues the only fiar, and the son is barely an heir substitute to him, though he should be infeft by his father in the right, for rights from fathers to children being gratuitous, and granted merely in consequence of the natural obligation annexed to the relation of a parent, are interpreted favourably for the granter, so as not to deprive him of the fee during his own life, unless it appear from the tenor of the grant that his intention was to vest it in the son." Now that is a stronger case than the case now before your Lordships. It is the case of a gift *nominatim* to the son. But here, supposing this to be as strong a case, you have a limitation generally to the granter, and the estate having been the wife's, and the settlement being a proper one, with the assistance of the husband, it is without the words "in liferent."

Now it was argued very speciously and very forcibly, that the words "liferent" have no operation; that even where they have been used, the same construction has been adopted as where they were not used. But the argument is really just the other way; for the rule in Scotland, in favour of the fee remaining in the fiar, is so powerful, that it even prevails against the express words "in liferent," although these words are followed by limitations to the children, so that, instead of shewing that the words "in liferent" are altogether inoperative, it shews that the rule is so strong as even to overrule and govern those words. The argument, therefore, tells just the other way.

Now, I apprehend that upon the general limitation in the law of Scotland there can be no dispute, and that there ought to be none. In the Court below, where the rule is perfectly well understood, there was none; for if you refer to the report of the case in the Court below, you will find that in a passage which was quoted at the bar, and which I have referred to, the reporter at least was misled, for he states expressly that this was not denied. He states that in so many words. Every one of the Judges states the same thing, so that the learned counsel managed very cleverly to conceal that which they meant to admit, for they misled both the reporter and all the Judges. They all fancied that no such point was ever made. The truth is, that no counsel dared to make such a point in the Courts of Scotland, where the law is perfectly well understood. But as our law is directly the reverse, of course the inclination of every English lawyer, looking at this limitation, and not being perfectly aware of the Scotch law, would be apt to say that the party took only a life estate. That was the cause of this appeal coming to this House, and nothing else.

It was first said that the power of revocation had no operation. It is very important to settle that point, for this reason, that, if the fee remains in the granter, then that fee must of course be conveyed by a substantive instrument. It must be by infeftment, according to the principles of the feudal law; but if the power can prevail in the Courts of Scotland as it prevails in this country, then the power may be executed according to the terms of the instrument creating it, without any transfer of the property at all, by a mere simple destination or alteration of the persons to take under the original settlement.

Now, I take it to be perfectly clear that the power operates *qua* power, not under any statute of uses, but as a liberty, or right or faculty reserved to the parties, which they are at liberty to exercise, not by a mere transfer of the estate, the fee remaining in them, but by a mere instrument in writing, without any of the solemnities required by the law of Scotland.

It is very important to settle that point with reference even to this case. There were some points of law referred to in the argument which were not very accurately stated. In the first place, it was said at the bar that the power could not subsist with the fee — there is no such rule in the law of Scotland; now, the rule by the law of England is just the other way. The point has been settled a long while ago, and ought not to be disturbed. The rule ought to be considered sacred. After great dispute and great doubt, it has been settled for a long time by a series of cases, to which it would be mere pedantry to refer. The law of Scotland does not differ in that respect; and, therefore, supposing the fee to remain in the granter, the parties would be at liberty to transfer that fee just as they thought proper, irrespective of the power. The law of Scotland, no doubt, has taken a very singular course, because, as we all know, the Courts in Scotland have admitted exceptions to the rule. Where there is a mere limitation of an estate, to pass the fee (which is directly contrary to our rule) they permit certain words to have the effect of loosing that fee to a life interest. It is clear that the word “*allenary*” will have that effect, and where it is expressly limited in *liferent*, and then to the children *nominatim*, and even where it is to children to be procreated, there it has been held that still it may be loosed to a *liferent*.

Now, that has been very much doubted. It was doubted in *Boyd's case*, which was referred to in 17 F.C., 339. But in *Mein v. Taylor*, 4 W. S., 22, the right of the children *nominatim* was not disputed, although the right was denied of the children to be procreated. But the result clearly is, that there may be such a disposition coupled with a *liferent*, or with such a word as “*allenary*,” rendering it beyond all doubt that a life estate only was to pass; but, with that exception, that rule seems to be perfectly clear to the extent I have stated it.

Now, in *Mackintosh v. Gordon*, 4 Bell's Ap. C. 105, the law of Scotland was directly contrary to the law of England, and yet Lord Cottenham there acted on the law of Scotland, as he was bound to do, but without being very well satisfied with the law. Yet that law was acted upon. In that case there can be no doubt that by the law of England it was a mere life interest, and by the law of Scotland it was an absolute interest. With respect to the words “*liferent*” or “*allenary*” being of themselves sufficient, Lord Loughborough, in the case of *Newland v. Newland*, Mor. 4295, which has been referred to, unwillingly assented, and expressed a very singular opinion. He said that he yielded without being convinced, and that he would therefore have it understood, that “this consideration alone restrains me; and I would wish that the Court would in some future case proper for the purpose, reconsider the principle of their judgment in this case, which, in consequence of this high authority, I think more safe for the present to let remain unaltered, in the hope that the question may afterwards come again before the Court to be maturely settled.” The reporter then adds a very cogent note:—“It cannot well be conceived how, in any future case, the Court could be at liberty to decide in opposition both to their former precedents and practice and to this decision of the House of Lords.” That shews one thing (to which I may refer in passing) with reference to a point which has sometimes been a matter of controversy between myself and a noble and learned friend of mine, who is now absent, as to the power of this House, not of reversing its own decisions, but of correcting an error in law in future cases. It is quite clear that Lord Loughborough considered, that if this House went wrong in point of law in particular cases, although they could not reverse their decision, yet they were not bound to persevere in error. That opinion, I may by the way observe, I still entertain.

Taking the case, therefore, upon the first settlement, I consider it to be perfectly settled by the law of Scotland that the parties had the absolute fee, and they had also the power. Then comes this deed of 1809, which is very singularly framed. The settlement of 1799 is recited, with the power. Then, in the exercise of that power, the wife, with the consent of the husband, makes the new settlement. That is in the exercise of what she calls her power. What power had she to do any such thing? There was a joint power, and a power to the survivor. There was no power to her during the life of the husband, and no other power was intended to be exercised except her power. The settlement, therefore, must, in my opinion, have one of two operations, unless it was invalid altogether. It must either operate as a conveyance of the fee *mortis causa*, with the approbation and consent of her husband, or, she not having survived, it must be considered altogether to have dropped, and to have no operation at all. It is quite clear it was upon the ground of survivorship that it was executed. Now, nothing can be more clear by the law of England than this, (and it equally applies to the law of Scotland,) that if a power be given to the survivor of two persons, it cannot be exercised by either of them before one of them has become the survivor. It can only be exercised so as to come into effect when it is the execution of the power by the survivor. Now, in this case, it is quite clear that this was executed in anticipation of her survivorship; and that accounts at once for the clause with respect

to the £8000. It was in anticipation that she might survive. It was part of the *mortis causa*, and therefore she meant that, at all events, her husband or his successors should have the £8000 if she survived, and if he survived, of course the £8000 would merge in the fee. Now, the mere circumstance of her providing for her own death is nothing very extraordinary; for, in the first deed, which was also probably partly a *mortis causa* deed, she appoints her husband her executor. Therefore she is looking to her own death in her husband's lifetime.

Your Lordships are not called upon to decide a question which might be one of some difficulty—Whether, if this deed would operate in no other way, the husband having consented to the exercise by the wife of what she deemed her power, and they both having a joint power—whether the deed would operate as an exercise of that joint power? That I should consider a very difficult question. Your Lordships are not called upon to decide that. But my strong impression is, that this was merely intended as an exercise of the power which she would have if she survived, and she not having survived, this deed has not the slightest operation. But, supposing it does operate, then, what is the effect of it? Why, nothing can be so clear, and I was quite surprised how any argument could have been raised upon it. The deed itself expressly only leaves the estates which were before given to the husband and wife precisely where it found them, although a great deal of stress has been laid on the words “after her death,” as if that made a life estate.

Yet, even supposing that minute criticism to be correct, see what the effect is—see how it stands upon this deed. She appoints, disposes and conveys, and so on; and “failing the said John Maxwell my husband, and me, and the longest liver of us, I do here nominate and appoint Alexander Maxwell and the heirs of his body to take.” It is, therefore, “failing us,” which are the strongest words which can be used, following a general limitation by the law of Scotland to leave the fee in the granter. Then, what is the operation of that? After the failure of the limitation to the husband and wife and the survivor, then there should be a substitution. Then that left the fee exactly where it was before. It left the fee in the husband and wife and in the survivor of them, and the husband having survived, of course the substitution never took effect. Therefore, whether the deed of 1809 became a nullity because the husband survived, or whether it was operative, it did not affect the fee, because that was left untouched by the deed. So that, in either view of the case, the property remained in the husband, and his disposition was perfectly valid. My Lords, a part of the instrument, which was adverted to by my noble and learned friend on the woolsack, is also very strong as bearing upon this question. I mean the clause as to the name and arms, because it shews clearly that the parties understood that there might be a descent to the heirs general of the husband, which could not be, unless they considered that the fee remained in him.

A good deal has been said upon the question of warranty. But I think that much that has been said is entirely out of place here. The warranty would have the effect of warranting the property according to the limitations. But there is nothing to prevent the tenant in tail acquiring the fee and defeating the gift over, because the warranty is only, that the instrument shall have full operation, and the warranty here had its full operation. Upon the whole, I think I never saw an appeal with less foundation than that which has come before your Lordships, and I entirely concur that it should be dismissed, with costs.

Interlocutors affirmed, with costs.

Tatham, Upton, Upton and Johnson, *Appellant's Solicitors*.—Grahame, Weems and Grahame, *Respondent's Solicitors*.

JULY 6, 1854.

MARY MUIR or PATERSON and OTHERS, *Appellants*, v. M. WALLACE and COMPANY, *Respondents*.

Master and servant—Negligence of Master—Reparation—Question for Jury—*P.*, a miner, complained to *S.*, the owner's manager, of a dangerous stone in the roof of the mine, and *S.* promised to remove it. While *P.* was working, and before its removal, the stone fell and killed him. HELD (reversing judgment), That it was for a jury to say whether the stone was left by the negligence of the owner, and whether *P.* was killed by its falling, and not by his own rashness. A master is bound to protect servants employed in dangerous occupations against extraordinary danger.¹

¹ See previous report 16 D. 233; 26 Sc. Jur. 123. S. C. 1 Macq. Ap. 748: 26 Sc. Jur. 550.