material for supporting the roof of the mine where necessary. The statutory duty of the mine-owner is to give necessary support to the roof, and in my opinion it is not an answer to a case of neglect of that duty to say that the employer had delegated the performance of the duty to a competent manager.

I should have come to this conclusion independently of authority, but on a question of such importance we should wish, if possible, to be guided by authority, and it is satisfactory to know that this is the view of the employers' responsibility that was taken by the Court of Appeal in England in the case of *Groves* v. *Lord Wimborne*, [1898] 2 Q.B. 402. The statutory duty then in question was that of providing fencing for dangerous machinery, and it was held that the defence of common employment was not applicable where injury was caused to a servant by the breach of that duty. Lord Justice A. L. Smith in his opinion first considers whether the statute can be founded on for any other purpose than that of rendering the employer liable to a penalty, and he comes to the conclusion that, as the statutory provision was passed, not in the interest of the public at large, but for the benefit of workers employed in particular industries, and as the penalty was not to be applied for their benefit, it could not be intended that the provision which imposes a fine as punishment should take away the *prima facie* right of the workman to be compensated for injury occasioned by that neglect. On this point the learned Judge quotes with approval the decision of this Court in *Kelly* v. *Glebe Sugar Company*, 20 R. 833. His Lordship then examines the authorities on the defence of common employment. He says—"In the present case, which is an action founded on the statute, there is no resort to negligence on the part of a fellow-servant or of anyone else. There being an unqualified statutory obligation imposed upon the defendant, what answer can it be to an action for breach of that duty to say that his servant was guilty of negligence, and therefore he was not liable? The defendant cannot shift his responsibility for the performance of his statutory duty on to the shoulders of another person." The other Judges expressed themselves to the same effect.

With regard to the dictum of Lord Chelmsford in *Wilson* v. *Merry & Cuninghame*, 6 Macph. (H.L.) 92, I agree with Lord Justice Smith that the judgment of the House of Lords only decided that the law as to the effect of common employment where the fellow-servant was in a position of superintendence was the same in Scotland as in England, and that Lord Chelmsford's opinion on the question of statutory duty not being necessary to the judgment of the House of Lords is open to reconsideration.

On the whole matter I am of opinion that the rule which we granted should now be discharged.

LORD ADAM and LORD KINNEAR concurred.

The LORD PRESIDENT was absent.

The Court discharged the rule.

Counsel for the Pursuer—Shaw, K.C.—W. Thomson. Agent—D. Hill Murray, S.S.C.

Counsel for the Defender—Orr, K.C.—Horne. Agents—W. & J. Burness, W.S.

Friday, June 23.

SECOND DIVISION.

MORRISON AND OTHERS (MORRISON'S TRUSTEES) AND OTHERS.

Succession—Testament—Revocation—Special Destination of Heritage—Subsequent General Disposition.

In 1898 and 1902 A having purchased with moneys belonging to himself certain heritable properties, took the destination in the dispositions which were registered "to and in favour of the said A and B, wife of and residing with the said A, and to the survivor of them, and to their heirs and assignees whomsoever."

Dying in July 1904, A left a trust-disposition and settlement dated April 1904, by which he conveyed his whole estate, heritable and moveable, including all means and estate over which he had power of disposal by will or otherwise, to trustees to pay the liferent of the whole residue to his widow, burdened with an obligation to maintain and educate the children who were not self-supporting, and the fee to the children on her death. Power was given to the trustees (1) to encroach upon capital if the income was insufficient for the maintenance of the widow and children, (2) to sell and burden heritage.

At the time of his death the testator's estate consisted of personal estate of the value of £3337, and the heritable properties above mentioned, valued at £4900. He was survived by a widow and children, some in pupilarity and minority.

Held that the prior special destination in the dispositions was evacuated by the subsequent general settlement, and that the heritable properties were conveyed thereby to the trustees.

Robert Morrison, paper-hangings manufacturer, 341 Argyle Street, Glasgow, died on 22nd July 1904 leaving a trust-disposition in the following terms:—"I, Robert Morrison, . . . for the settlement of the succession to my means and estate, do hereby dispone and make over to (certain trustees) all and sundry the whole means and estate, heritable and moveable, real and personal, of every kind and description, and wheresoever situate, that shall belong to me at the time of my death, including therein all means and estate over which I have power of disposal by will or otherwise, . . . but these presents are granted in trust for the following purposes, *videlicet:* (First) For

payment of all my just and lawful debts and sick-bed and funeral expenses: (Secondly), I direct my trustees to hold and apply the residue of my means and estate for behoof of my wife in liferent, for her liferent use only, during all the days and years of her life, burdened with the suitable maintenance, education, and upbringing of such of my children as may at my death be unable to maintain themselves; and I provide that in the event of my trustees being of opinion at any time that the income of my estate is insufficient for the comfortable maintenance of my said wife and that of any of my children who may be unable to support themselves, they shall have power from time to time to encroach upon and pay to her for that purpose part of the capital of my estate, and that to such extent as they deem proper: (Thirdly), On the death of my said wife, or on my own death should she predecease me, I direct my trustees to hold and apply, pay and convey, the residue of my means and estate equally to and among my whole children, payable and to be conveyed to them as they respectively attain twenty-one years of age after the death of their mother: Declaring that in the event of any of the said children predeceasing the period of payment and conveyance to them leaving issue, such issue shall be entitled equally among them to the share which their parent would have taken on survivance; and further, that in the event of any of the said children predeceasing the period of payment and conveyance without leaving issue, then the share of such predeceaser shall accresce to the survivors and survivor of the said children, and the issue of any child who may have predeceased leaving issue, such issue in that case being entitled equally among them *per stirpes* to the share which their parent would have taken on survivance; and with regard to the shares of the said residue which may fall to daughters, I provide and declare that my said trustees may, if they consider it most for the advantage of any daughter or daughters, withhold payment of the fee thereof and limit the share to a liferent only, for the liferent alimentary use only of such daughter, and on her death pay the fee thereof to such daughter's issue, and that in such proportions and under such conditions as their mother by any writing under her hand may appoint, and failing such appointment, then equally among them: . . . And to enable my trustees to carry out the purposes of this settlement and of any codicils thereto, I confer upon them all requisite powers, and particularly (but without prejudice to the said generality) power, without incurring any personal liability, to retain unrealised and unaltered for such period as they may see fit any investments, securities, or property that may be held by me at the date of my death, or any part thereof, and also to borrow money on the security of my heritable estate, and to grant bonds and dispositions in security or other necessary deeds for the sums so borrowed, and also to sell my heritable estate in such lots, at such prices, and with such warrandice as they may think proper, and also (and in addition to the powers of investment conferred upon trustees by statute) from time to time to lend out the trust funds or any part thereof on the mortgages or bonds and assignations in security of any trust or joint-stock company incorporated under Act of Parliament in any part of the United Kingdom, and also to invest the said funds or any part thereof in the purchase of heritable property, or of the guaranteed or preference stock of any dividend-paying railway company in the United Kingdom, or of the stock of any corporation or trust incorporated under Act of Parliament in any part of the United Kingdom, and also to deposit the said funds or any part thereof, for such period as they may think fit, on deposit-receipt with any British or Colonial or foreign bank." . . .

Mr Morrison, who was survived by a widow and children, some in pupilarity and minority, left personal estate valued at £3337, 8s. 2d, exclusive of policies of assurance on his life payable to his wife of the value of £674, 12s. 6d., and heritable estate of the net value of £4900. The heritable estate consisted of (1) a villa known as "Cowal," Cambuslang, purchased from William Clouston Johnston, solicitor in Glasgow, and Jeanie Young Renfrew or Johnston, wife of and residing with the said William Clouston Johnston, conform to disposition granted by them, dated 16th, and with warrant of registration thereon on behalf of the truster and his wife, recorded in the Division of the General Register of Sasines applicable to the county of Lanark, 17th May 1898, whereby they, in consideration of £200 paid to them by the truster, and of his freeing and relieving them of £650, being the balance of a bond and disposition in security affecting the property, sold and disponed the said villa "to and in favour of the said Robert Morrison and Sarah Gaw or Morrison, wife of and residing with the said Robert Morrison, and to the survivor of them, and to their heirs and assignees whomsoever;" (2) a tenement of dwelling-houses forming No. 525 Alexandra Parade, Dennistoun, Glasgow, the title to which consisted of a feu-contract dated 15th and 17th, and with warrant of registration thereon on behalf of the truster and his wife and the survivor of them, recorded in the Division of the General Register of Sasines applicable to the county of the barony and regality of Glasgow, 24th January 1902, entered into between the trustees of the deceased Alexander Dennistoun of Golfhill, in the county of Lanark, of the first part, and the said Robert Morrison and Mrs Sarah Elizabeth Gaw or Morrison, his wife, of the second part, by which the said Alexander Dennistoun's trustees sold, alienated, and in feu-farm disponed the said subjects "to and in favour of the said Robert Morrison and Mrs Sarah Elizabeth Gaw or Morrison, and the survivor of them, and his or her heirs, and their, his, or her assignees whomsoever;" and (3) another tenement of dwelling-

houses known as No. 5 the Oriels, Langside, Glasgow, the title to which consisted of a feu-contract dated 11th, 12th, 13th, and 14th, and, with warrant of registration thereon on behalf of the truster and his wife for their respective rights and interests, recorded in the Division of the General Register of Sasines applicable to the county of the barony and regality of Glasgow, 20th June 1902, entered into between the trustees of the deceased Matthew Pettigrew, sometime manufacturer in Glasgow, of the first part, and the said Robert Morrison and Sarah Elizabeth Gaw or Morrison, his wife, of the second part, by which the trustees of the said Matthew Pettigrew disponed the said subjects "to and in favour of the said Robert Morrison and Sarah Elizabeth Gaw or Morrison and the survivor of them, and their heirs and assignees whomsoever." In the case of each property the price or cost of building was paid by Mr Morrison out of his own funds. The bond and disposition in security for £650 over the Cambuslang property was held by Mrs Morrison, and the loan was given from her own funds.

Questions having arisen as to the rights of parties in the heritable properties, a special case was presented, to which the trustees and executors acting under the trust-disposition and settlement were the first parties, the widow the second party, the children and the tutors and curators of such of them as were pupils or minors the third parties.

The second party maintained that she, being the survivor of the spouses under the several special destinations in the titles, was now absolute proprietrix of the three heritable properties to the exclusion of the first and third parties. Alternatively she maintained that the heritable properties were vested in fee jointly and in equal shares in her late husband and herself, and that if the trust-disposition and settlement applied to the subjects, it conveyed only that one-half *pro indiviso* share in which the truster was vested, and that she was vested in the fee of the heritable properties to the extent of the other one half *pro indiviso*. On the other hand, the first and third parties maintained that the conveyances of the heritable properties, so far as conceived in favour of the second party, were revocable by the truster as donations *inter virum et uxorem*, that these special donations were evacuated by the trust-disposition and settlement, and particularly by the conveyance therein contained of "all means and estate over which I have power of disposal by will or otherwise," and that the heritable properties fell therefore to be wholly administered by the first parties as part of the trust estate.

The questions of law submitted to the Court were—"(1) Is the second party, in virtue of the special destinations in the titles to the heritage (*a*) proprietrix of the whole of these several properties, or (*b*) proprietrix of one-half thereof? or (2) Does the said trust-disposition and settlement evacuate the special destinations in the titles, and convey (*a*) the whole of said several properties, or (*b*) one-half thereof to the first parties to be administered by them as part of the trust estate?"

Argued for the first and third parties—The special destinations had been evacuated by the general settlement. The destinations in the titles of the heritable properties formed donations *inter virum et uxorem*. The only donation *stante matrimonio* by a husband to a wife which was not revocable was one corresponding to a reasonable provision to take effect after death. The present far exceeded a reasonable provision—*Rust* v. *Smith*, January 14, 1865, 3 Macph. 378; *Dunlop* v. *Johnston*, April 2, 1867, 5 Macph. (H.L.) 22, 3 S.L.R. 372; *Thomas* v. *City of Glasgow Bank*, January 31, 1879, 6 R. 607, 16 S.L.R. 244; Fraser, H. & W., vol. ii, pp. 926, 947. The question therefore came to be, was there revocation, and did the settlement evacuate the special destinations? When a general settlement and a special destination were made by the same person, it was for the Court to determine whether the truster intended the former to evacuate the latter, and the Court could look not only at the deeds themselves, but also at all the surrounding circumstances. In the present case these all favoured evacuation—*Campbell* v. *Campbell*, July 8, 1880, 7 R. (H.L.) 100, 17 S.L.R. 807; *Gray* v. *Gray's Trustees*, May 24, 1878, 5 R. 820, L.P. Inglis at 824, 15 S.L.R. 571; *Walker's Executor* v. *Walker*, June 19, 1878, 5 R. 965, L.P. Inglis at 969, 15 S.L.R. 636; *Walker* v. *Galbraith*, October 21, 1895, 23 R. 347, 33 S.L.R. 246; *Brydon's Curator Bonis* v. *Brydon's Trustees*, March 8, 1898, 25 R. 708, 35 S.L.R. 545; *Minto's Trustees* v. *Minto*, November 9, 1898, 1 F. 62, 36 S.L.R. 50; *Currie* v. *M'Lennan*, March 3, 1899, 1 F. 684, 36 S.L.R. 494.

Argued for the second party—The general presumption of law was against evacuation, and it could only be overcome upon the strongest evidence of intention. There was here no such evidence. The cases cited by the first parties showed that before such intention would be presumed, either the general settlement must contain a clause of revocation, or the two deeds must be incompatible. In the present case neither of these conditions was fulfilled. The truster's intention must be gathered from the deeds, and not from a general consideration of the circumstances—*Glendonwyn* v. *Gordon*, March 19, 1873, 11 Macph. (H.L.) 33, 10 S.L.R. 451. The present case was ruled by *Thoms*, March 30, 1868, 6 Macph. 704, 5 S.L.R. 418; *Paterson's Judicial Factor* v. *Paterson's Trustees*, February 4, 1897, 24 R. 499, 34 S.L.R. 376; *Lang's Trustees* v. *Lang*, July 14, 1885, 12 R. 1265, 22 S.L.R. 866; *Webster's Trustees* v. *Webster*, November 8, 1876, 4 R. 101, 14 S.L.R. 51; *Farquharson* v. *Farquharson*, July 19, 1883, 10 R. 1253, 20 S.L.R. 836; *Thomson's Trustees* v. *Thomson*, July 9, 1879, 6 R. 1227, 16 S.L.R. 727; *Connell's Trustees* v. *Connell's Trustees*, July 16, 1886, 13 R. 1175, 23 S.L.R. 857; Erskine iii, 8, 36. Further, in the present case there could at any rate be no evacuation in the case of

the one-half of the properties, for under the recorded titles the second party was at her husband's death vested in one-half *pro indiviso*, and to that half the truster's settlement obviously could not apply.

LORD STORMONTH DARLING—The success of the second party's contention would mean that the testator, having a wife and eight children, and an estate to dispose of among them worth £4900 in heritage and £3337 in personalty, so dealt with it as to give his widow a right of fee in the whole heritage (as well as in £674 of insurances on his life), besides a liferent of the whole personalty, under burden of maintaining and educating such of the children as might at his death be unable to maintain themselves, thereby leaving to the eight children only the fee of the moveable estate at the widow's death. Such a division among widow and children is not perhaps a very likely one for a testator to make. But the widow has in her favour a certain presumption of law that a general settlement by a testator will not evacuate any special destination which he himself has previously made. And the question here is whether the provisions of Mr Morrison's general settlement, read in the light of the surrounding circumstances, are sufficient to overcome that presumption. In my opinion they are, for the following reasons — (1) The conveyance to trustees is of Mr Morrison's whole estate, heritable and moveable, including therein all means and estate over which he had power of disposal by will or otherwise—a description which seems to apply to the three house properties which in 1898 and 1902 had been bought with his own money, but the titles to which he had taken to himself and his wife and the survivor, and to their heirs and assignees whomsoever. There was no other property to which the description could apply, and these destinations were undoubtedly revocable as being *quoad* one-half of the fee donations *inter virum et uxorem*, and *quoad ultra* destinations of the truster's property admittedly testamentary. (2) The total liferent given to his widow after paying debts and expenses, although not absolutely inconsistent with a fee to her of the heritage, is much more consistent with an intention to limit her to a liferent of his whole estate, both heritable and moveable. This view is, I think, strengthened by the power given to the trustees to encroach upon capital, in the event of their being of opinion at any time that the income was insufficient for the comfortable maintenance of the widow and those of the children who might be unable to support themselves, for encroachment could hardly be required if the widow, besides having the liferent of the moveable estate, was also intended to have the fee of the heritable estate. (3) Express power is also given to the trustees to deal with heritage, both by selling and burdening, and there would be no heritage either to sell or burden if it all went to the widow.

I do not think that, in point of practical result, any distinction can be drawn between the whole and the half of the properties specially destined. Either the widow, as the survivor of the spouses, is entitled to the whole, or the destinations in the titles are completely evacuated. I am in favour of answering the questions in the case to the latter effect.

The LORD JUSTICE-CLERK, LORD KYLLACHY, and LORD KINCAIRNEY concurred.

The Court pronounced this interlocutor—

"Answer the first question of law therein stated in the negative: Answer the first alternative of the second question therein stated in the affirmative: Find and declare accordingly, and decern."

Counsel for the First and Third Parties—C. H. Brown. Agents—Smith & Watt, W.S.

Counsel for the Second Party—Valentine. Agent—Henry Smith, W.S.

Friday, June 23.

SECOND DIVISION.

[Sheriff Court of Stirling, Dumbarton, and Clackmannan, at Falkirk.

PRINGLE *v.* CARRON COMPANY.

Mines and Minerals—Right to Support—Feu-Disposition—Construction of Clause—Exemption from Claims for Mineral Damage in Favour of the Disponers and "Other Persons Deriving Right from Them"—Mineral Owner Causing Damage to Grantee of Disponers' Predecessors.

A in 1898 obtained a feu-disposition of a plot of ground from the testamentary trustees of the twelfth Duke of H., with clauses excepting the subjacent minerals from the conveyance, and providing that A should have no claim in respect of injury to the surface caused by the working of the minerals against "the said trustees or their foresaids or their tacksmen, or other persons deriving right from them." At that date the C. company were owners of coal underlying the feu in virtue of a recorded deed of excambion between it and the eleventh Duke dated in 1854, and had also through an unrecorded minute of agreement with the twelfth Duke dated in 1889 right to work such coal by long wall system although the surface might thereby be damaged.

Held that a claim by A for damages for injury to the surface of his feu against the C. Company fell to be dismissed, as the company came under the term "persons deriving right" from the trustees of the twelfth Duke of H.

William Pringle, Hill Cottage, California, near Falkirk, brought an action against the Carron Company, Carron, Stirlingshire, for the sum of £110 sterling for damages caused to the surface of the plot of ground on which Hill Cottage was built,