[13*th April* 1835.]

JAMES FORRESTER, Appellant.—*James Russel—A. M'Neil.*

Trustees of Mrs. MARY MACGREGOR or FORRESTER, Respondents.—*Dr. Lushington—Mr. Stewart.*

Husband and Wife—Liferent and Fee—Clause.—A husband by antenuptial contract of marriage having conveyed his " half of the nine-shilling-and-ninepenny land of old " extent in the Garth quarter called Bullshill" to himself and his promised spouse " in conjunct liferent during all " the days of their lifetime, and to the longest liver of " them, and their heirs or assignees in fee."—Circumstances in which held (affirming the judgment of the Court of Session) 1. That the conveyance comprehended the whole lands in the Garth quarter belonging to the husband, being the half of a nine-shilling-and-ninepenny land, which half was called Bullshill. 2. That the wife having survived the husband the fee was in her.

2D DIVISION.
Lord Meadowbank.

JAMES RIDDOCH of Bullshill, on the 23d Dec. 1751, conveyed to himself and to his wife Janet Hutton " all " and haill the just and equal half of the nine-shilling- " and-ninepenny land of old extent in the Garth " quarter, extending to a four-shilling-and-tenpence- " halfpenny land of old extent, commonly called Bulls- " hill, with houses, &c., all lying within the barony of " Temple-Denny, parish thereof, and sheriffdom of " Stirling." Janet Hutton was infeft; and, having survived James Riddoch, on the 29th Dec. 1780 she conveyed the lands of Bullshill, described as above, to her second husband, James Forrester, who was infeft upon her disposition. Janet died, and

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James Forrester married Mary Macgregor. By contract of marriage entered into between them on the 9th August 1787, " James Forrester, in consideration " of the sums after mentioned, contracted on the part " of the said Mary Macgregor, dispones and conveys " to and in favour of himself and the said Mary Mac- " gregor, his promised spouse, in conjunct liferent " during all the days of their lifetime, and to the " longest liver of them, and their heirs or assignees, in " fee, heritably and irredeemably, all and haill the just " and equal half of the said James Forrester's nine- " shilling-and-ninepenny land of old extent in the " Garth quarter, commonly called Bullshill, with the " houses, &c., all lying within the parish of Denny and " shire of Stirling, and which sometime belonged to James " Riddoch, who disponed the same to Janet Hutton, " deceased, the said James Forrester's late spouse." By the procuratory of resignation contained in this contract " he also resigned and surrendered all and haill the " just and equal half of the foresaid nine-shilling- " and-ninepenny land of old extent in the Garth " quarter, commonly called Bullshill, and whole perti- " nents thereof, lying as aforesaid;" and granted precept of sasine for delivering heritable state and sasine of " all and haill the said just and equal half of the fore- " said nine-shilling-and-ninepenny land of old extent " in the Garth quarter, commonly called Bullshill, and " whole privileges and pertinents of the same, lying as " aforesaid, to him the said James Forrester, and Mary " Macgregor his promised spouse, in conjunct liferent, " and to the longest liver of them, and their heirs or " assignees in fee, heritably and irredeemably."

Upon this precept infeftment was given of " all and " haill the foresaid just and equal half of the foresaid

" nine-shilling-and-ninepenny land of old extent in the
" Garth quarter, called Bullshill, and whole privileges
" and pertinents of the same, lying as aforesaid, to the
" said James Forrester and Mary Macgregor, in conjunct
" liferent, and to the longest liver of them, and their
" heirs or assignees in fee, heritably and irredeemably."

James Forrester died about the year 1801, and was survived by Mary Macgregor, and on the assumption that she was fiar, she possessed the lands, and sold to the late George Brown, writer, St. Ninian's, a small portion of them, the price of which was paid to her, and the disposition was granted by her in her own name. The pursuer was the eldest son of the marriage, and alleging that he was fiar, and that his mother had only a liferent of the lands, he proceeded to act on that feeling. His mother then applied for and obtained from the Sheriff of Stirlingshire an interdict against him. In order to have her right declared, she brought an action before the Court of Session, setting forth the above facts, and concluding " that the pursuer has, in virtue of her
" rights and infeftments in the lands and others above
" written, the only good and undoubted right and title
" to all and whole the foresaid just and equal half of
" the nine-shilling-and-ninepenny land of old extent in
" the Garth quarter, called Bullshill, extending to a
" four-shilling-and-tenpence-halfpenny land of old ex-
" tent, with the pertinents and privileges thereof, as
" described in manner above mentioned, or as the same
" might be farther or otherwise described in the said
" deceased James Forrester's titles thereto, being the
" whole of the said lands of Bullshill and others, to
" which the said deceased James Forrester himself had
" right, and that the same pertains heritably in property

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"to the pursuer." There were also the ordinary conclusions against molesting, and for moving, expences, &c. The appellant lodged defences, in which he pleaded, that "the clause of the marriage contract gave the pursuer "only a right of liferent in the lands therein expressed, "but not a fee."

The Lord Ordinary reported the question on cases; and on the 3d June 1831, the Court pronounced this interlocutor, "The Lords having advised the cases for "the parties, and heard counsel thereon, they repel the "defences, and decern in terms of the conclusions of the "libel."

James Forrester appealed.

Appellant.—1. Although the conveyance, whether in fee or liferent is limited to a half, yet the respondents maintain that they have right to the whole of the lands. This theory they found upon the following statement: James Forrester, they say, never possessed a nine-shilling-and-ninepenny land; and that all the lands which he possessed at Bullshill amounted to only the half of a nine-shilling-and-ninepenny land. He committed an error, therefore, it is said, when he thought that he had a nine-shilling-and-ninepenny land, and conveyed, in his marriage contract with the pursuer, only the half of it, and that what he truly intended to convey was all that he himself possessed.[1]

The radical error of this argument lies in taking the reference to the valued rent as being taxative instead of demonstrative, and deriving the interpretation of the

[1] 9 S., D., B., p. 675. The original pursuer Mary Macgregor died, and her trustees were sisted in her place.

clause, not from what is distinct and essential, but from what is indifferent. James Forrester was not disponing a superiority; nor was he conveying a certain quantity of valued rent. He was conveying his lands, or part of his lands, of Bullshill; and, if he has distinctly set down, whether he conveyed the whole, or only a part of them, the expressed dispositive words can be neither limited nor extended by a reference to a mere accidental quality of the lands, which might safely have been omitted altogether. The lands, and the extent and boundaries of the lands, remained the same, whether they stood valued in the cess-books at nine shillings and ninepence, or at four shillings and tenpence halfpenny. If James Forrester had conveyed "all and whole my ten-shilling "land of Bullshill," and it had turned out that the lands of Bullshill formed only a five-shilling land, it could never have been maintained that only one half of the lands was carried instead of the whole. The respondent's plea proceeds on the assumption, that, although dispositive words distinctly mark out the quantity conveyed, they are to be altered and contradicted by references to the valued rent, where the valued rent is of no moment in the transaction. The express conveyance in the contract is of only one just and equal half of James Forrester's lands of Bullshill, and by that the rights of the parties must be regulated.

If it were either proper or necessary to have recourse to more indirect indicia of the maker's intention, it would be important to observe, that the marriage contract contains likewise a conveyance to the moveables, in the event of the pursuer surviving her husband, and it gives her right to only one half. In a question of intention, it would be difficult to conceive why the hus-

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band should have meant to give her a greater share of his heritable property — which was all his own before the marriage — than of the moveables, to which, as forming the proper common stock of the spouses, she had a direct and substantial right.

2. There is nothing in the words themselves, or their grammatical construction, to raise a fee in the surviving wife; all they give is a liferent. There is, first, a conjunct right of liferent "to himself and the said Mary Mac-"gregor, in conjunct liferent during all the days of "their lifetime;" next comes a right of survivorship, "and to the longest liver of them;" lastly, comes a right of fee, "and their heirs in fee." But there is nothing in the mere structure and arrangement of these members of the clause to make the intermediate right of survivorship applicable to the fee which follows, more necessarily than to the liferent which precedes. From its position it is, at least, equally applicable to both. The words, "and to the longest liver of them," are merely the following out of the liferent, which has already been given as a conjunct liferent, and is thus continued in favour of the survivor. It is a conjunct liferent during the lifetime of the spouses, then a liferent during the lifetime of the survivor, then a fee in the heirs of the spouses, which character is held by the appellant, the eldest son of the marriage, claiming the property, which was exclusively his father's. But independent of the words, which it is contended give a liferent and nothing else, the circumstances show that this must have been the intention; and if there be any ambiguity, effect must be given to the evidence of intention.

The property came entirely by the husband, and

belonged to him when he entered into this marriage. At the date of the marriage, Mary Macgregor was not possessed of any heritable property, and it does not appear that she had even any moveable goods. In the marriage contract, indeed, she conveys, in general terms, all debts and sums of money whatsoever, presently "pertaining and belonging to her, with the "bonds, bills, and other vouchers of the same;" but all this would have passed to her husband jure mariti, without a conveyance. On the other hand, she was secured in one half of the moveables, while her legal share, as there are children of the marriage, would have been only one third. Even under the pleas which the appellant is maintaining she will liferent one half of the heritable property, while her right of terce would have given her a liferent of only one third. But according to her construction she was to have the power of disposing at her pleasure, in a second marriage contract for instance, of the whole of her husband's lands, to the utter deprivation and destitution of the children of that very husband.

That construction leads to such a conclusion as no court will adopt, unless the words be so clear and express as to leave it no means of escape. Marriage contracts are always to be construed so as not to leave the children of the marriage unprovided, with due regard to the just rights of the widow. The law presumes the intention of the spouses to have been to secure their property for their issue, after they have themselves enjoyed it; and it particularly presumes this to have been the intention of the husband in regard to his own possessions, and more especially still, in regard

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to his real property, which, of itself, formed no part of the common stock.

" The person from whom the subject flowed is " accounted fiar," says Mr. Erskine[1], " unless where " it appears, from the strain and contexture of the con- " junct right, that the fee was intended to be given to " the other."

Thus in Muirhead against Paterson[2], the wife, who was possessed of some heritable property, entered into a marriage contract, by which she disponed that property " to the said Alexander Paterson, my husband, in con- " junct fee and liferent, and to our foresaid children," viz. " the children procreate or to be procreated of " our marriage." The marriage having been dissolved by the predecease of the husband without children, his heirs claimed the property on the ground that, by the words of the deed, he had been fiar. So far as the naked words themselves went, he was fiar: a right to husband and wife, in conjunct fee and liferent, and to the children generally, is a fee in the husband. But the Court, altering the judgment of the Lord Ordinary, held that the fee was still in the wife, and held so principally on the ground that the property had originally belonged to her. Under this rule, the appellant is entitled to maintain, unless there be express words which clearly exclude him, that the fee was intended to be reserved for the heirs of the husband, from whom the property flowed, especially when these heirs, as children of the marriage, were the proper and natural depositaries of the fee.

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[1] Ersk. iii. 8. 36.
[2] Jan. 16, 1824. 2 Shaw, p. 617. (p. 525, New Ed.)

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Another source from which assistance is derived in ascertaining whether doubtful words give a liferent or a fee is found in the consideration, on whose heirs the destination is made to terminate. The maxim is, "he "is fiar cujus hæredibus maxime prospicitur[1];" and, according to this maxim, "the wife is fiar, where her "heirs are more favoured in the substitution than those "of the husband." But, in the present case, there is no such preference. The destination does not terminate on the heirs of the wife, as distinguished from those of the husband. It is framed to carry the property to the children equally the heirs of both; and it is a child equally the heir of both who is now claiming the fee in the person of the appellant.

This the appellant denies, unless these words of survivorship connected with a fee, and where that fee is subsequently destined to the heirs of the spouses, do in law necessarily import a fee in the wife, unless they be accompanied by some of the known circumstances, such as the preference of her heirs, or the property being hers, which confessedly would give her more than a liferent. It is certain that the law of Scotland, down to the period of a solitary decision on which the respondents whole plea is founded, was just the reverse. A series of cases had fixed, that such clauses, however they might sound, gave the surviving widow only a liferent. In Aiton v. Johnston[2], "Bartill Tullo and Jamieson "his spouse having lent 7,000 merks to the Gudemen "of Carberry, he obliged himself to refund the said "sum to them, and the longest liver of them two, suc- "cessive, at the term of payment, and failing thereof,

[1] Ersk. iii. 8. 36. [2] Nov. 10, 1609; Dict. p. 4198.

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" to infeft them, and the longest liver of them two, in " conjunct fee, and their heirs, in an annual rent of it, " furth of his lands." There were no children of the marriage. The husband predeceased. In a competition between his heirs and those of the widow the lords found that the widow had been only life-rentrix, and that her heirs had no claim to any part of the sum.

In White v. Bickerton[1], " a bond, binding a debtor " to pay a sum to a man and his spouse, the longest " liver of them two, and to their heirs, no bairns being " betwixt them two, after the decease of the husband " the wife claims right to the sum as pertaining to her " by the bond, and her heirs." But the Court found that these words did not enable her to transmit any right to her heirs, and that the sum belonged to the heirs of the husband. In Justice v. Stirling[2], the destination was, " to the said husband and his spouse, and " the longest liver of them two, and the heirs gotten " between them, or their assignees, which failing, to the " heirs of the last liver." On the death of the husband, the widow claimed the sum as fiar; but the Court found that she had only a liferent, and that the fee was in the children. It thus appears, that a right taken to the husband and wife conjunctly, and to the longest liver of them, and their heirs, gave the surviving widow only a liferent, reserving the fee to the husband and his heirs.

But a different rule is said to have been introduced by the case of Ferguson in 1739, and on that case, and the doctrine laid down by Mr. Erskine, as deducible from that case, stands the whole argument of the respon-

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[1] Dec. 9, 1630; Dict. p. 4199. [2] Jan. 23, 1668; Dict. 4228.

dents. Erskine says, "where the right is taken to the "husband and wife, and to the longest liver, and their "heirs, the fee is, in the event of the wife's survivorship, "adjudged, by our later decisions, to belong solely to "the wife, to the entire exclusion of her husband's "heirs, as if the right had been granted in the same "terms to two strangers, contrary to our older practice." And he alludes to the case of Ferguson v. M'George[1], 22d June 1739, which is thus reported by Lord Kilkerran :—"Where a bond bore the sum to have been "received from husband and wife, and was taken to the "man and his wife, and the longest liver of them two, "their heirs, executors, and assignees, the marriage "dissolving by the predecease of the husband without "children, the sum was found to belong absolutely to "the wife, as longest liver; several of the Lords dis-"senting, who were of opinion, that it resolved into a "liferent only to the wife, agreeable to the express "opinion of Craig, L. 2. Dieg. 22, and that the con-"struction put upon that opinion of Craig's, that it "referred only to proper feus and not to money, was "without foundation, his reasoning in that passage "applying to the one as well as to the other. There "was no doubt but the husband was so far fiar, as not "only to have the disposal of the money during his "life, but that it was also affectable by his creditors. "But the question turned upon this, whether, by the "words, 'their heirs,' were only understood the heirs of "the marriage, who alone could be properly called "their heirs, and that the farther substitution of the "husband had, per errorem, been neglected, as being

[1] Dict. 4202.

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" dicto loco; or if the natural force of the words, 'their " heirs,' in this case was the same as if the bond had " borne 'and to the heirs of the longest liver;' which " last prevailed, as above."

It seems manifest that the Court, in deciding this case, never imagined that it was intermeddling with the ordinary rules regulating destinations of heritable property. On the contrary, Lord Kilkerran's statement of the opinions of the Judges, in reference to the authority of Craig, shews that they did not think the same rule would apply to proper feudal subjects.

Besides, this decision, and the doctrine founded on it, applies only to the case where there are no children or the marriage to satisfy the term "their heirs," and where the question arises between the survivor, and the heirs whatsoever of the other; and the principles on which it proceeds not only exclude its application to a case like the present, where a child of the marriage claims as "their heir," but seem necessarily to imply that the existence of such heirs would lead to a contrary result.

Respondents.—1. The whole argument of the appellant on the first branch of the case is founded on a loose and inaccurate quotation of the terms of the deed. He says that "the husband conveyed in distinct and " unambiguous terms all and haill the just and equal half " of the lands of Bullshill in the Garth quarter." But what is conveyed is not the just and equal half of Bullshill; it is the just and equal half of the nine-shilling-and-ninepenny land in the Garth quarter, being the whole of the four-shilling-and-tenpence-halfpenny land commonly called Bullshill; and the respondent's plea

therefore is, that the whole being conveyed to her, and she being infeft in the whole (just as much as James Forrester himself was), her feudal title is to stand and cannot be affected by the blunder, whether in fact or merely in words, by which James Forrester is made to speak as if he supposed himself possessed of more than he actually conveyed.

Again he argues, that the mention of the amount of valued rent is not taxative, but merely descriptive; and a blunder in regard to it can have no effect upon the substance of the conveyance, which is a conveyance of one half of the lands.

But if James Forrester did make a mistake as to what he meant to convey, it was not a mistake as to the valued rent; for what he conveys is one half of the nine-shilling-and-ninepenny land in the Garth quarter, viz. the lands of Bullshill, which were a four-shilling-and-tenpence-halfpenny land. So that there is as little mistake respecting the valued rent as there is respecting the lands. The only mistake relates to the other half of the nine-shilling-and-ninepenny land in Garth quarter, which forms no part of the subject of conveyance, and it consists in his (apparently) assuming that these other lands did belong to him, contrary to the fact. But this has nothing to do with the present question.

2. The conveyance is of a right of fee and not of liferent. There is a conveyance, first, of a conjunct liferent to the spouses, and secondly, of the fee to the longest liver of them, their heirs or assignees. The liferent is contained in the first member of the clause, by which the granter "dispones and conveys the lands "to himself and his promised spouse, in conjunct life-"rent during all the days of their lifetime;" and then

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follows the disposal of the fee, " and to the longest liver of them," and " their heirs or assignees in fee, heritably " and irredeemably."

If James Forrester had merely conveyed the lands to himself and his wife in conjunct fee, or in conjunct fee and liferent, the wife's right, according to established rules of construction, would have been limited to a liferent, while the fee would have been established in the husband's person exclusively, as the persona dignior of the conjoined parties. But here there is no conjunct fee, nor conjunction whatever of the parties, in so far as relates to the fee. The liferent is given to the spouses conjunctly, but the sole conveyance of the fee is directly to either of them indifferently, whichsoever should happen to be the survivor of the marriage ;—for the words are, " and to the survivor of them, their heirs or " assignees in fee, heritably and irredeemably."

Cases have no doubt occurred, where there was a conveyance " to the survivor of the marriage;" but in all these cases, the conveyance to the survivor did not form the primary and only conveyance of the fee, but was preceded by, and formed merely a sequel to, a conveyance made to the two spouses conjointly, — as, for example, where the words run in some such terms as " to the husband and wife in conjunct fee (or conjunct " fee and liferent), and to the longest liver of them, " their heirs or assignees."

In all these cases, there is unquestionably a conjunct fee created in favour of husband and wife; and the only question therefore which arose was, whether the established rule of construction in regard to such rights was to be affected by its being farther carried out by the words, " and to the survivor of them," &c. By the

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oldest decisions, the general rule as to conjunct fees to husband and wife was adhered to, notwithstanding the addition of these words; but it appearing unwarrantable to obliterate or deny effect to language so unequivocal, and so inappropriate to the constitution of a mere conjunct fee, a different rule has been established by our later practice. Accordingly, Mr. Erskine[1], after stating the general rule, that "where a right is taken to a husband and wife in conjunct fee and liferent, and the heirs of their body, or their heirs indifferently, the husband is sole fiar, as the persona dignior," proceeds to say, "but this rule suffers several limitations, all founded on the intention of parties, presumed from the different circumstances of cases;" and, after mentioning various circumstances, and, among others, the importance of the term "assignees" being employed, he adds, with immediate reference to the present subject, "Where the right is taken to the husband and wife, and to the longest liver, and their heirs, the fee is, in the event of the wife's survivorship, adjudged by our later decisions to belong solely to the wife, to the entire exclusion of the husband's heirs, as if the right had been granted in the same terms to two strangers. Ferguson, June 22, 1739, Dict. p. 4202. Contrary to the older practice, Justice, 23d Jan. 1668, p. 4228." With regard to the expression "their heirs," occurring in the above connexion, Mr. Erskine had previously laid down the general rule of construction thus[2]: "In a right taken to two jointly, and the longest liver and their heirs, the words 'their heirs' are understood to denote the heirs of the longest

[1] Ersk. iii. 8, sect. 36. [2] Sect. 35.

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" 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, exclusive of the heirs of the predeceased."

The doctrine thus stated was distinctly recognized. In that case the conveyance was [1], " To the said John " Murray and Catherine Orthington his spouse, and " the longest liver of them, and their heirs and assignees " whomsoever, heritably and irredeemably." The case was attended with specialties of a marked description, which induced the Court in the case of Murray v. Murray to decide against the right of the widow; but in so doing, their lordships, with the utmost anxiety, placed the judgment upon the specialties of the case, so as to avoid the possibility of disturbing the established rule and practice of the law.

LORD BROUGHAM said:—My Lords, this case turns entirely upon the construction of a clause in a marriage settlement, or rather contract, in the following words:— " In contemplation of which marriage, and in con- " sideration of the sums after mentioned, contracted on " the part of the said Mary Macgregor, the said James " Forrester hereby dispones and conveys to and in favour " of himself and the said Mary Macgregor his promised " spouse, in conjunct liferent, during all the days of " their lifetime, and to the longest liver of them, and " their heirs or assignees in fee, heritably and irredeem- " ably, all and hail the just and equal half of the said " James Forrester's nine-shilling-and-ninepenny land

[1] Murray, 17 May 1826. S. & D. iv. p. 589. (p. 596, new ed.)

"of old extent in the Garth quarter, commonly called "Bullshill, with the houses, biggings, &c., which some- "time belonging to James Riddoch, who disponed the "same to Janet Hutton deceased, the said James For- "rester's late spouse, and from whom he acquired right "by his contract of marriage as to the one half; and by "a disposition from her, bearing date the 29th day of De- "cember 1780, as to the other half, and upon which titles "he stands infeft."

Upon the point of the description I have no doubt thereby that Bullshill is treated clearly as a separate tenement, so that the only question is, whether this provision gave the fee to the survivor, whether husband or wife, or only to the husband, with a life-rent to the wife. The Court below held that the wife took a fee by having survived, and I am of opinion that their lordships came to a right conclusion. As in other countries, so in Scotland, considerable nicety has been introduced into the construction of instruments which deal with the fee of estates, while they also deal with a life interest in the same, or, as we should say in England, which at once give a particular estate, carved out of the whole fee, and dispose of the remainder, or that which remains of the fee, upon the determination of the particular estate. The Scotch law regards the interests successively taken as successive fees peculiarly restricted, and not as one estate or interest carved into portions. But one remark is applicable to both systems of jurisprudence, because it arises from the natural course of things in men's dealing with their property, without having very well-defined ideas of their own intentions. The constructions given by the Courts to certain words are really often much less arbitrary and

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refined than they appear to be. The Court is forced to find a meaning where the party has expressed it most obscurely; still oftener where he entertained inconsistent and repugnant intentions, and where we are obliged to choose between the two; or where he only entertained an imperfect or partial intention, and we must supply the defect, so as to further what was his most probable and therefore presumable intentions. The rules of construction thus adopted from necessity are to be regarded as fixed, in order that men's affairs may be governed by known principles, and that the law may be uniform. Of this, the doctrine of the Scotch law, touching settlements or gifts to husband and wife, affords a remarkable illustration. If an interest is given to husband and wife, in conjunct fee and liferent, and to the heirs of the marriage, or to the heirs of their bodies, the latter expression clearly shows that, as far as this marriage goes, the husband's heirs take, and the wife's heirs being his, the fee is in fact his;—at least, there being a necessity to choose which shall have a fee, which both cannot have, and the law not allowing a fee to remain in suspense or abeyance, the husband is preferred, and the fee is vested in him. No violence is done to the words; and the plain intent is followed out as far as it can be without being inconsistent with any other meaning expressed, and with known positive rules of law. But when it is to the parties in conjunct fee and their heirs, their "marriage" being dropped, the heirs of the one are not those of the other party; and as some one must have the fee, the law does not hold this a joint estate, but prefers the husband propter personæ dignitatem. The wife's right, notwithstanding the words "conjunct fee," is reduced to a liferent; and "their heirs," as well as

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"heirs of their body," is read as if it had been the husband's heirs only,—under certain restrictions in special circumstances, not necessary to be here gone into.

Something of the same kind is observable in our doctrine of limitations of estates: where something self-repugnant is to be found in a gift—where the giver, whether testator or settlor, discloses not one plain or consistent intention, but two meanings which cannot both stand,—we must choose between them the best way we can. Mathematicians call this an impossible case; where there is something self-repugnant or contradictory in the different conditions of a problem, and of course they cannot resolve it; but the courts of law are obliged in the affairs of mankind to come as near the prevailing or general intent as they can, and to this they sacrifice the particular intent. Thus an estate to a man for life, and no longer, with remainder to the heirs of his body, is self-contradictory, for there is by one part of the gift an estate for life, and in another an estate tail given to him; and so an estate to a man for life, with remainder to his heirs and assigns, is a fee, because one part being a life estate, and another a fee, we cannot give him both, and must choose by the prevailing and therefore probable intent. The settlement before us is materially different from the ordinary case, of which alone we have hitherto spoken. It is not to the party in conjunct fee, but in liferent only, and to the longer liver, and their heirs or assigns in fee; and the question is, whether or not the rule in the husband's favour applies here? It is quite plain that we are not driven here, as we might be thought in the former case to be, by the necessity of choosing between two irreconcileable intentions; the whole may in the present instance stand

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well together. The husband and wife have no conjunct fee given them, and then something to their heirs; but they have a conjunct liferent only, and a fee is given to their heirs and assigns. But in case this should be thought to import a fee to themselves, as if it had been to them in conjunct fee and their heirs, the important words are added, "and to the longer liver of them, "and their heirs." Now, I think this may, consistently with the rest of the gift, be read "to the parties "jointly for life, and then to the survivor, and that "survivor's heirs," which is plainly a liferent to both jointly, and a fee to the longer liver.

The authority of Erskine is quite explicit in favour of this view of the gift. He says, "when "the right is between the husband and wife, and to "the longest liver, and their heirs, the fee is, in "the event of the wife's surviving, adjudged by our "late decisions to belong solely to the wife, to the "entire exclusion of the husband's heirs, as if the right "had been granted in the same terms to two strangers, "contrary to the older practice. III., 8, 36." And he cites, as showing the old practice, the case of Justice in 1668[1], reported by Lord Stair; and, as showing the altered and modern course of decision, he cites that of Ferguson in 1739.[2] There can be no doubt that this last decision fully bears out Mr. Erskine's statement. It was the case of a bond to the husband and wife, and the longer liver of them two, "their heirs, executors, "and assigns;" and Lord Kilkerran, who reports the decision, states it to have gone on the force assigned to the words, "the longer liver and their heirs," which was, he said, read as if it had been to the heirs of the

[1] 23 Jan. 1668; Mor. 4228.

[2] 22 June 1739; Mor. 4202.

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longer liver. Nor can we avoid this inference without wholly rejecting these words, "longer liver?"—a violence far too great to be done to such a material expression. But I do not think that the older case of Justice, cited by Mr. Erskine, so satisfactorily proves the old law to have been wholly different on this point. It was a bond to husband and wife, "and the legal heir of "them two, and heirs gotten betwixt them, or their "assigns, which failing, to the heirs of the last heir;" and it was held to be a fee in the husband, and that the heirs of the marriage were heirs of provision to him, and that failing heirs of the marriage, the wife's heirs were substituted as heirs of tailzie; and they ordered such a disposal of the money as gave the reversion to the wife's heirs and assigns after the decease of the only heir of the marriage. Dirlton, who also observes upon the case, says, that the Lords held the wife had not the fee, but that her heirs took as heirs of provision to the heir of the marriage. The denial of the wife taking any fee is hardly reconcileable with the decision which vested the reversion, expectant upon the only child's life interest, in the assignees as well as heirs of the wife; for what is the interest in a chattel given to assignees as well as heirs other than a fee simple? However, we need not embarrass ourselves with this case, when, even if its import be as Mr. Erskine reads it, we find that of Ferguson so much more clear the other way. Indeed, independent of nice construction on the cases, the plain and unhesitating dictum of Mr. Erskine is of the greatest weight. It stands unimpeached by subsequent decision, it is in strict accordance with the principle which I have stated, and it is contradicted by no principle of law. It therefore must be taken to be sufficient for settling this point.

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I have carefully examined the other cases upon these questions, both the older ones and those of a more recent date, and I find nothing inconsistent with the opinion which I have formed. I can find no doubt expressed as to the doctrine of Erskine, and the soundness of the case of Ferguson, except the observation of part of the Court, in the late case of Murray, 1826.[1] That case was not, however, decided on this ground, and Lord Gillies expressly says, that but for the specialty in it the law would have been clear upon the authority of Erskine and of Ferguson's case. The decision must, therefore, be affirmed.

The House of Lords ordered and adjudged, That the said petition and appeal be, and the same is hereby dismissed this House, and that the Interlocutor therein complained of be, and the same is hereby affirmed.

THOMAS DEANS—ALEXANDER DOBIE—Solicitors.

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[1] 17th May 1826: 4 S. & D. p. 589, (New Ed. p. 596.)