[Heard 6*th March*. Judgment, 17*th April*, 1845.]

CAPTAIN THOMAS MACINTOSH and DAVID NIGHT, by Attorney,
Appellants.

JANE GORDON or MACINTOSH, and KENNETH MACKENZIE,
Respondents.

Fee.—Life-Rent and Fee.—The reputed father of a natural child, in contemplation of her marriage, granted a bond for a sum of money payable to her in life-rent, excluding her husband's *jus mariti*, and to the children of the marriage in fee, and failing issue of the marriage to the husband in fee after the issue had failed, *held*, that the fee was in the wife.

ON the 27th of July, 1825, Alexander, Duke of Gordon, in contemplation of the marriage of the respondent, his natural daughter, with Lachlan Macintosh, and for love, favour, and affection to her granted a bond, whereby he bound himself, and his heirs, executors, and successors, "to make payment to the said "Jane Gordon, at the first term of Whitsunday or Martinmas "after the said intended marriage, of the sum of 5000*l.* sterling, "and that to the said Jane Gordon in life-rent, during all the "days of her lifetime, secluding the *jus mariti* of the said Lach-"lan Macintosh, her intended husband, and to the children to "be procreated of the said intended marriage in fee, and that in "such proportions as the said Jane Gordon and Lachlan Mac-"intosh shall appoint by any writing under their hands, and "failing thereof, to the said children equally among them, share "and share alike, or failing issue of the said intended marriage, "then to the said Lachlan Macintosh in fee: And farther, I do "by these presents bind and oblige myself, and my foresaids, to "make payment to the said Jane Gordon, during all the days of "her lifetime, secluding the *jus mariti* of the said Lachlan Mac-

" intosh, of a free life-rent annuity of 200*l.* sterling per annum, " payable half-yearly, commencing at the first term of Whit- " sunday or Martinmas, which shall happen one year after the " date of the said intended marriage, and so forth thereafter half- " yearly, at each term of Whitsunday and Martinmas, during " the lifetime of the said Jane Gordon, with a fifth-part more of " the said annuity of liquidate penalty for each term's failure in " payment thereof, declaring that the said annuity, and also the " interest on the foresaid sum of 5000*l.* sterling, shall be payable " upon the receipt of the said Jane Gordon alone during her life- " time, and declaring also that in case I, the said Duke, or my " foresaids, shall incline to pay up the foresaid sum of 5000*l.*, " we shall be entitled to do so at any term of Whitsunday or " Martinmas, on giving six months' notice to that effect; and in " that event the foresaid sum of 5000*l.* shall be again lent out " and reinvested on good and sufficient security, at the sight and " to the satisfaction of the Most Noble George, Marquis of " Huntly, Adam Gordon, Esquire, of Newton, and Captain " John Anderson of Candacraig, or the survivor or survivors of " them, the security to be taken in the same terms as are above " expressed."

The right to the money provided by this bond was contested between the respondent, the widow of Lachlan Macintosh, and the appellant, his brother, in a multiple-poinding raised by the latter for that purpose, and under the circumstances detailed in the following interlocutor, pronounced by the Lord Ordinary, (*Cuninghame,*) to which he added the subjoined note. After finding the granting of the bond and its terms, as already set out, the interlocutor proceeded thus:—

" Finds that the said Lachlan Macintosh was, soon after " the date of the said bond, married to the said Jane Gordon; " but that it does not appear, from any documents produced or " otherwise, that he made any settlement on his spouse on that " occasion: Finds, that notwithstanding the seclusion of his *ju-*

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" *mariti*, contained in the said bond, the said Lachlan Macintosh " was allowed by the only trustee who acted under the said bond, " to intromit with and uplift the said sum of 5000*l*. in the year " 1830, on a consent obtained from Mrs. Macintosh during her " coverture; that the said sum was invested by Macintosh in the " purchase of a redeemable annuity from Thomas Fraser, Esq., " then of Lovat, now Lord Lovat, and the repayment of the " capital was secured on certain policies of insurance effected by " Macintosh on the life of Lovat, and his wife, the premiums of " which were annually provided for out of the annuities payable " by Lord Lovat in consideration of the said 5000*l*.: Finds that " the marriage between the said Mrs. Jane Gordon and Lachlan " Macintosh, was dissolved by the death of Macintosh in 1832; " and that Alexander Adam Gordon Macintosh was the only " surviving child of the marriage, but that he died in pupillarity " in 1839: Finds that the legal rights of Mrs. Jane Gordon in " the sum as secured to her by the said bond, at the date of the " marriage, cannot be affected by the transactions of the said " Lachlan Mackintosh, subsequent thereto, which were hazard- " ous and prejudicial to her, and unauthorised by the bond, and " that the husband's heir cannot found on any deed or deeds of " consent obtained by him from his wife *stante matrimonio*: " Finds that Mrs. Jane Gordon is now entitled to repudiate and " recall the same, and that she has, by a competent deed produced, " recalled her consent: Finds that, according to the terms and " conception of the said original bond, and under the admitted " state of the fact, that both the child of the marriage and the said " Lachlan Macintosh have predeceased his wife, the prospective " but contingent interest of these parties, under the substitution " in the bond, has now ceased; and that the sole interest in the " fund, secured by the said bond, and the right of uplifting, dis- " posing, and burdening the same at pleasure, is vested in the " claimant, Mrs. Jane Gordon; and in respect it is not denied " that the fund *in medio* consists of money to be realized under the

" foresaid policies, which must be held as a *surrogatum* for the " amount of the original bond, uplifted by Lachlan Macintosh as " aforesaid, finds, on the whole matter, that the same is now " claimable by the said Mrs. Jane Gordon, and prefers her ac- " cordingly to the fund *in medio:* Finds no expenses hitherto " incurred due to either party, and decerns.

" (Signed) J. CUNINGHAME.

" NOTE.—The claim of Mrs. Macintosh to the property and " control of her own fortune, under the whole circumstances " articulately detailed in the interlocutor, appears to the Lord " Ordinary to be so strongly founded in justice, that he should " have regretted if any rules of strict law had prevented him " from giving effect to it. But it is apprehended that the autho- " rities which fix the legal construction of the principal docu- " ments on which the question turns, decisively support the plea " of Mrs. Macintosh.

" In the outset, it is supposed to be quite clear that the rights " of this lady must be ascertained and governed by the terms of " this bond under which the original portion was bestowed on " her by her father. The fund stood on that bond at the date of " the marriage. The *jus mariti* of the husband was strictly " *excluded*, and therefore no transaction or arrangement which he " prevailed on his wife to give her consent to, *stante matrimonio*, " can affect her legal rights as previously constituted.

" The next and chief question in debate is, What was the " extent of the right vested in Mrs. Macintosh under the Duke's " bond of 1825? The *heir-at-law* of Lachlan Macintosh con- " tends that Jane Gordon was effectually and in apt and formal " terms excluded from the fee of the sum provided under this " bond—that this was held by her as a trustee for the child of " the marriage, whom failing, for Lachlan Macintosh;—while " Mrs. Macintosh maintains that the fee was vested in *her* for " her own behoof, subject to such limitation in her use or control " of the fund as the peculiar terms of the bond (subject to renewal

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" in the events specified) may import in law. The Lord Ordi-
" nary is of opinion that Mrs. Macintosh's plea is well founded
" on every consideration of weight in the law, whether founded
" on the presumed intention of the granter of the bond, or on the
" authorities and precedents which fix the legal meaning and
" import of an obligation and destination expressed in the terms
" used in the bond which is now the subject of construction.

" In the *first* place, it is hardly possible to suppose that any
" rational parent granting a provision to a daughter in the terms
" of this bond, could seriously *intend* that in case of the pre-
" decease of her husband a few years after the marriage, and of
" the death of the children of the marriage in *pupillarity*, the fee
" of the provision should be claimable by the collateral and dis-
" tant heirs of the first husband, thus depriving a woman still
" in youth, and likely to form another connexion in life, of the
" capital of the whole provision. If that extraordinary arrange-
" ment had been contemplated by the father, there were various
" ways of carrying his intentions into effect; but most assuredly
" the bond in that case never would have been expressed in the
" terms in which it was here framed. But

" In the *next* place, it is apprehended that the clauses in the
" bond, according to their legitimate and established construction
" in our practice, were sufficiently calculated to preserve every
" interest which the parties must be presumed to have had in
" view at its date; and as these interests no longer exist, Mrs.
" Macintosh is now left in the free and uncontrolled right of the
" provision secured to her by her father. The material clauses
" of this bond deserve to be separately considered.

" 1. In the leading and obligatory clause of the bond, the
" Duke became bound to '*make payment* to the said Jane
" 'Gordon at the first term of Whitsunday or Martinmas after
" 'the said intended marriage, of the sum of 5000*l.* sterling,
" 'and that to the said Jane Gordon in liferent, during all the
" 'days of her lifetime, excluding the *jus mariti* of the said

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" ' Lachlan Macintosh, her intended husband, and to the " ' children to be procreated of the said intended marriage in " ' fee, and that in such proportions as the said Jane Gordon " ' and Lachlan Macintosh shall appoint by any writing,' &c., " ' or failing issue of the said intended marriage, to the said " ' Lachlan Macintosh in fee.'

" Now, if that clause stood *per se*, it is supposed that no " lawyer could seriously entertain a doubt that the payee of " the bond, though *ex figura verborum* a liferentrix, was truly " and legally the fiar. There have, it is supposed, been thousands " of instances since the case of Newlands, in 1794, in which " similar destinations to parents in liferent, and to children " *nascituri* in fee, have occurred in practice, and no party has " for many years attempted to question their legal effect. They " have been invariably held to vest a fee in the nominal liferenter. " The case of Cuthbertson in 1781 (*Dict.*, p. 4279) quoted in " Mrs. Macintosh's case, is an early precedent in point; but the " case of Lindsay in 1807, (App. to *Morison*, *voce* fiar, No. 1) " appears to be a still stronger exemplification of the leaning of " the law to hold a fee as vested in the nominal liferentrix under " a destination to a party in liferent, and her children *nascituri* " in fee. There, William Lamberton having given money to " his married daughter in trust, to purchase a tenement, the " conveyance as arranged was taken ' to William Lamberton " ' (the father) during all the days of his life, and after his " ' decease to his daughter Janet Lamberton, also in liferent " ' *during all the days of her life*, and to the children already " ' procreated or to be procreated of the marriage between her " ' and David Lindsay, equally among them in fee.' There was " a power reserved to William the father, without consent " of the daughter, to alter or innovate the destination, or even " to *sell* or *burden* the premises. He never did so; but on his " death Janet the daughter sold the tenement, when a declara- " tor was brought to try her right; and the Court with only one " dissentient voice, found that the fee was in Janet.

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" In short, upon these and other authorities of daily citation, " it is thought that the import of such a destination as that " which is set forth in the obligatory clause of the present bond, is " now irreversibly fixed, and that no question as to its import " could now be safely mooted.

" 2. But the whole difficulty of the present case is said to " arise from another provision in the bond, which now deserves " particular attention. The clause referred to is that whereby " the noble granter of the bond stipulated that he should be at " liberty to pay up the capital sum, and that so often as the sum " was paid up, and as the existing security was changed, ' it " ' should be *again lent out and reinvested* on good and sufficient " ' security, at the sight and to the satisfaction of the Most Noble " ' George, Marquis of Huntly,' (and certain other gentlemen " named), ' the security to be taken *in the same terms* as are " ' above expressed.'

" Here it will be observed that no provision was made for " any new restraint being introduced into the title. The secu- " rity was to be granted on every renewal precisely in the *same* " *terms* as the original bond. But the plea of the heir-at-law " of the husband is, that this stipulation had the effect of con- " verting Mrs. Macintosh's right into that of a mere *liferentrix*, " and that it reduced such fee as was technically vested in her " into a fiduciary fee for the children *nascituri* in the first " instance, and failing them, for Macintosh the husband and his " heirs-at-law.

" It seems, however, to be contrary to every sound and legi- " timate inference to hold that this was the real meaning of the " parties in the clause under consideration. The bond appears " to have been prepared by the agent before this Court of a " nobleman of extensive property, at a time when it had long " been understood by the profession, that a destination in similar " terms carried the fee to the nominal liferentrix, and it was " matter of equal notoriety at that period, that parties who

" intended to limit a provision about to be given to a young " relative, to a liferent only, were bound either to direct the " conveyance to be given for ' liferent use *allenarly*," as laid down " in the case of Newlands, or otherwise to convey the subject " or fund directly to *trustees*, as in the case of Seton (*Dict.*, p. " 4219), who would have held the fund securely for behoof of " all to whom any ultimate right was intended to be given. But " when the bond was not so expressed, it follows on every prin- " ciple of law and right construction that it was framed for " another purpose, which, if discoverable, must receive effect " from this Court.

" In this inquiry, it is well known that prohibitions to *uplift* " money secured by bonds in special terms, and obligations to " reinvest the fund if paid up, have not been of very frequent " occurrence in modern practice; but in the earlier periods of " our law these were not uncommon. In the *Dictionary* there " is a whole section on the effect of ' prohibitions to alter,' and " ' to uplift *without consent*,' and of clauses ' of return,' &c. " (*Dict.* 4304), and the import of all the decisions seems to come " to this, that such clauses were intended to prevent *gratuitous* " alienations; but that they could not affect the previous and " legal right vested in the original creditor or payee, at least " so far as to prevent the property or fund so vested in him from " being attached for his onerous debts and deeds, or even alien- " ated by the creditor for just and useful purposes. In illus- " tration of this doctrine, reference may be made to the case of " Drummond (*Dict.*, p. 4307), which is reported at great length " both by Stair and Gilmour, and to the cases of Strachan in " 1683 (p. 4310), and Strachan in 1714 (p. 4312)—all reported " under the same title of the *Dictionary*.

" It is conceived that these authorities sufficiently indicate " the legal import and extent of the obligation to keep up and " renew the security in the present case. That stipulation could " not have been inserted for the purpose of *diresting* the disponee

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" or creditor of the right vested in her by the obligatory clause " of the bond. On the contrary, it provides anxiously for the " repetition and renewal of the security in the precise terms of " the original right. The rights of parties in the fund, therefore, " must be judged of in the same manner as if the Duke of " Gordon had *retained* the fund upon the original bond, without " paying up the capital till the present period; in that event " the question would have occurred purely, and without any " specialty, if the fee or right of property in this fund now " remained with Mrs. Jane Gordon, the favoured party, or if it " had passed to the heirs of her deceased husband, who were " strangers in blood to her and her father. Could onerous cre- " ditors contracting with Jane Gordon not have attached this " fund as now free and disencumbered of every burden and inte- " rest previously existing in third parties? Or would Mrs. " Jane Macintosh be viewed as a mere fiduciary for her hus- " band's collateral heirs?

" The Lord Ordinary is of opinion that the widow's plea on " these points would have been insuperable. She was, by the " conception of the original bond, constituted in proper technical " terms the fiar of the fund; and though there was a substitution " fenced with a certain prohibitory clause, which effectually pre- " vented her from altering the destination, it is at least question- " able if her creditors would have been legally restrained, even if " the marriage had *subsisted*, from attaching the fund for any " properly *onerous* contraction of hers; and still less can she " be prevented from alienating the subject, when the parties " have *predeceased* her, whose contingent interest, now at an " end, was manifestly the sole cause of any limitation imposed " on her by her father, in the uplifting and disposal of her " portion.

" The case is treated by the heir-at-law as if the clauses of " the bond in the present instance were equivalent to a formal " and irrevocable *conveyance* of the fund *in trust*, to the parties

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" authorized to superintend the reinvestments. But if the legal " construction of the bond before suggested be correct, there is " an important distinction between the cases. The bond im- " posed a certain restraint upon the wife, but it did not in law " entirely exclude her administration and power over the fund " for *onerous* causes, as a conveyance to stranger trustees would " have done. This apparently was not intended. It might " have been greatly against the interest of Mrs. Macintosh's " children themselves, whose ultimate advantage was obviously " contemplated in this bond, so to restrain the fiar; as it might " be necessary for her to raise or borrow money on the bond, to " educate or establish them in the world, or for other purposes " beneficial to herself and her family. Hence the appointment " of third parties to advise the fiar in uplifting and reinvesting " the capital was proper, as her husband's *jus mariti* was ex- " cluded, and it was probably thought expedient to put some " restraint on her against unnecessary and gratuitous alienations. " But such a provision cannot change the legal character of the " right conferred on the payee under the principal clause of the " bond, or raise the mere *spes* of substitutes under a contingent " destination into an immediate right of fee.

" Finally, even if the sum in the bond here, instead of being " made payable directly to Jane Gordon, had been at first con- " veyed by the Duke of Gordon, in proper and formal terms, to " *trustees*, for behoof of the same parties who are called under the " substitution in the bond, it is probable that the claim of Mrs. " Macintosh, in the events which have now emerged, would have " been equally well founded. Even if the Duke of Gordon had " placed 5000*l.* in the hands of trustees, for behoof of his daugh- " ter in liferent, during all the days of her life, and of the children " of the marriage, whom failing, of Lachlan Macintosh, her " husband, in fee, (without any mention of heirs,) it is clear that " such a provision would not have been exigible from the trus- " tees till Mrs. Macintosh's *death;* and if so, no *jus crediti* would

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" have vested in any of the substitutes till the *period of payment*,
" as laid down by the First Division of the Court in the late
" cause of Wright and Ogilvie, which was elaborately argued
" and well considered. (See *Rep.*, 9th July, 1840.) But if, as
" has happened here, all the substitutes die without issue, *prior*
" *to the term of payment*, it follows that the provision, in so far
" as any contingent interest was given to substitutes, would
" lapse, and so leave the fund (if there had been a trust) to be
" claimable in absolute property by the party for whose primary
" behoof it was created.

" Indeed, even when a trust has been constituted over a wife's
" property in an antenuptial *contract of marriage*, or (semble) in
" any other deed in contemplation of marriage, it may be recalled
" or put an end to by the radical owner of the subject, on the
" dissolution of the marriage, when the interests have come to an
" end in respect of which the trust was created. This was almost
" the unanimous opinion of the Court in the case of Mrs. Torry
" Anderson of Tushielaw in 1837 (see *Reports*, 2d June, 1837),
" in which it was held, that while a trust made by a bride of her
" property, in an antenuptial contract of marriage, could not be
" recalled pending the marriage, it might unquestionably be
" revoked after the dissolution of the marriage, when no party
" had any longer an interest to maintain the trust. That prin-
" ciple might have applied to the circumstances of the present
" case as they now stand, even if a formal trust had been created;
" but the parties did not think it necessary to constitute any
" such stringent security when the marriage of the claimant
" took place.

" In every view, therefore, which the Lord Ordinary can
" take of this case, he is of opinion that there are ample
" grounds in point of law for sustaining the claim of Mrs.
" Macintosh."

The appellant reclaimed against the above interlocutor, but the Court (on 8th December, 1841,) adhered.

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The appeal was against these interlocutors.

Mr. Turner and *Mr. Anderson* for the Appellant.—The bond having been given *nomine dotis*, the presumption is that it was intended by the granter to go to the husband or his representatives, and it will take that course unless there be words in the deed expressly to the contrary, Gairns *v.* Sandilands, *Mor.* 4230, Watson *v.* Johnstone, 5 *Bro. Supp.* 927; this presumption is strengthened in the present case, by the circumstance that the appellant was an illegitimate child, who, according to the law at the date of the bond, could not test upon her personal estate: the natural presumption therefore, is, that she was intended to take a liferent interest only, the fee going to the children of the marriage, or the husband on their failure.

Upon the terms of the deed, apart from presumption, a mere life interest is given to the mother. Though in feudal rights a conveyance to A in liferent and her children *nascituri* in fee, gives a fee to A against the natural meaning of the words, that arises from the feudal principle that the fee must be somewhere, that it cannot be *in pendente*, and as the children are not in existence, it must, therefore, be in the parent. Yet, even in these cases, if the plain obvious intention of the deed is to give A only a liferent, though by force of the maxim she will take the fee, it will be only a fiduciary one, the trust being for the children. In grants of money, the same feudal technicality was introduced. But that gave way afterwards to the presumed intention of the granter, which is now the only question; and if the terms import unequivocally a gift to the parents in liferent and the children in fee, the parents take no more than a substantial liferent, unless indeed they have power to uplift, and no obligation is imposed upon them to reinvest, as in the present instance. Gerran *v.* Alexander, *Mor.* 4402; Mein *v.* Taylor, 5 *Sh.* 779; Turnbull *v.* Tawse, 1 *W.* & *Sh.* 80; Leitch *v.* Leitch's Trustees, 3 *W.* & *Sh.* 366. In Newlands *v.* New-

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lands' Creditors, *Mor.* 4289; Hunter *v.* Hunter's Trustees, 9 July, 1794, *Sig. Coll.* 73; Ewan *v.* Watt, 6 *S.* & *D.* 1125; Fisher *v.* Dixon, 10 *S.* & *D.* 55; the principle of decision was the intention of the granter, as discoverable from the words used in the instrument. The power of appointment given by the deed was inconsistent with any idea of the absolute fee being given, as was held by the judges in giving judgment in Millar *v.* Millar, 12 *Sh.* & *D.* 31. If the right had been to the respondent in liferent and her husband in fee, he would undoubtediy have taken the fee. The intervention of the unmarried institutes, the children of the marriage, cannot have any effect upon this right of the husband; the husband is a conditional institute. Gordon *v.* M'Culloch, Bell's *Octavo Cases*, 188; Brown *v.* Coventry, Bell's *Signet Cases*, 310; Whittet *v.* Johnston, 6 *W.* & *Sh.* 406.

[*Lord Campbell.*—The case seems to be not so much on the rules of construction as on the plain intention of the Duke. The intention seems to have been supposed to be that the lady should have the control of the money.]

Yes. But he did not intend that she should have it, except according to the rule of law. The moment a child came into existence, it took a vested interest in the provision, and this was not divested.

Lord Advocate and Mr. Bacon for Respondent.—Upon the terms of the bond the wife was fiar, under certain restraints on her power of dealing with the fund, which it might have been necessary to consider if children had been alive, but the discussion of which by their failure is altogether unnecessary. The intention of the granter is the rule of construction, and that intention must be presumed to have been to favour the respondent. She was the granter's daughter, and the party on whose account the provision was made, and the obligation to pay is directly to her, without qualification; the subsequent addition of

the words, "and that during all the days of her lifetime," cannot alter the right constituted by the leading obligation. Even where the right has been to the parent expressly in liferent, and children *nascituri* in fee, the parent has been entitled to a fee. Tovy's Creditors, *Mor.* 4262; Dewar, 1 *W.* & *Sh.* 161. So also where the words have occurred which exist in the present case, —Douglas, *Mor.* 4269; Lindsay, *Mor. voce* Fiar, App. No. 1; Cuthbertson, *Mor.* 4279; all that is in the children *nascituri*, is a mere *spes successionis*. If a liferent only had been intended, the right could be restricted to that only by the use of the word "allenarly," or something equivalent. Newlands' Creditors, Hunter *v.* Hunter's Trustees, and Ewan *v.* Watt, *ut supra*. The other authorities relied on by the respondent were Bell's *Principles*, 535, and cases there cited, Frog, *Mor.* 4262; Lilly, *Mor.* 4267; Muir, 4288.

LORD CAMPBELL.—This case turns entirely on the construction of a bond dated 27th July, 1825, which was executed by Alexander, Duke of Gordon, on the marriage of his natural daughter; and the question is, whether, in the events which have happened of there being one child of the marriage, and the husband and the child predeceasing the wife, she is entitled to the absolute interest in the sum of 5000*l.* mentioned in the bond, or, subject to her liferent, the money ought to go to the representatives of the husband, either in his own right or as representing the child.

If this had been an English instrument coming before an English court, the case would have admitted of no doubt. Most unquestionably the wife would have taken only a life interest in the 5000*l.*, and it would have vested in the child or children of the marriage as they came into *esse*, subject to the power of appointment given to the husband and wife; and if there had been no child then it would have gone to the husband.

I must say, my Lords, that if this had been a mere question

of the intention of the settler, to be got at from the language he employs, taken in its natural and usual sense, I should come to the same conclusion. He appears to me clearly to have meant to make a provision for the children of the marriage, and for the husband, if there should be no children, independently of the acts of the wife. He gives the money to her "during all the days of "her lifetime, and to the children to be procreated of the mar- "riage in fee, in such proportions as the husband and wife should "appoint, and failing issue of the marriage, to the husband in "fee." Now, the only footing on which it is contended that she is now entitled to the absolute interest in the money is, that she took the fee in it under the bond, with power at any time, for onerous cause, living children of the marriage, and living the husband, to have alienated the whole of it. But the words employed naturally import that she should merely take a life interest, and this meaning is strengthened by the directions as to the manner in which the money is to be secured and the interest is to be paid.

But we are bound to construe this Scotch bond according to the rules of the law of Scotland, and there turns out to be a rule in that law often recognised, that if there be a sum of money given to a parent in liferent, remainder to children *nascituri* in fee, the parent takes a fee in the money, with a power of alienation for onerous cause, unless the word *allenarly*, or some word of equal force, be added to the clause, describing the life interest of the parent. I have examined the case of Newlands and the other cases cited at the Bar, (which it is unnecessary to enumerate,) and I think they fully establish this rule. I am not at liberty to inquire into the reasonableness of it, or how far strict feudal principles, by which the disposition of real property has been regulated, ought to have been applied to the settlement of a sum of money as a provision for a family on marriage. The decisions of the Scotch Courts make no distinction between land and money in this respect, and with regard to money, treat such

a disposition to the parent for life, remainder to the children *nascituri*, without the word *allenarly*, as in effect a simple destination, which may be defeated by the parent who is considered the fiar. If the word "*allenarly*" is added, this is tantamount to fencing clauses in a deed of entail, and prevents alienation, though still the parent would be the fiar.

I cannot say that the word "allenarly" more clearly expresses the intention of the settler, who, when he gives a life interest to the parent and the fee to the children, can hardly intend that the parent should take the fee. But I consider that we are bound by the long and uniform current of authorities, and that these interlocutors, which have been unanimously pronounced by the Judges below, ought to be affirmed with costs.

LORD BROUGHAM.—My Lords, I concur with my noble and learned friend who has just addressed the House. Originally I did entertain considerable doubt upon this case; because I could not help feeling that if this question had arisen here, there would have been no doubt about it; but when I come to look into the authorities and the text writers down to the very latest period, (and no one text writer has stated more clearly the principle than Mr. Bell in his very excellent work, his *Abstract of the Principles of Scotch Law*, Sections 1713 and 1923,) looking to those authorities and to the decided cases, the law of Scotland appears to be very clear, particularly in that very strong case of Newlands, which seems to have gone to the very verge of the law in this respect, so far as regarded the opinions of the Judges, and of Lord Chancellor Loughborough in this House; for that case would have almost carried it to a fee in the parent, notwithstanding the word "*allenarly*;" it was within an ace of going to the parent, although the word "*allenarly*" existed in the instrument. How then can it be contended, that without "*allenarly*" it would not have gone to him?

The principle seems to have been taken from the Feudal Law

treating money as a feudal matter, which was the tendency of all the old law in every country of Europe at one particular time. You find it in the French law, you find it in the German law, you find it less perhaps in the Dutch law, they being a more mercantile community probably; and you find it in the law of all the Italian States. I have had occasion to look for other purposes, into the foreign systems of jurisprudence, and I find that, for a long period of time, about two centuries or more, there was a general tendency to feudalise everything,—they feudalised all the great offices of the country, they feudalised employments: in private manors they feudalised grants of every kind, rights of fishing and so forth, and rights of chase; and in the same way they feudalised money and they feudalised personal chattels; and accordingly the Scotch law, not less feudal than the rest, but perhaps even more feudal than any other system, had a tendency to introduce feudal principles into the disposition and dealing with personal chattels: whence is the origin of this? It is the holding in abhorrence the doctrine of the possibility of the fee being *in nubibus*, of which we have very frequent traces in our old feudal law with respect to chattels and real property. It held, that money could not be otherwise granted than according to the general feudal rules; and therefore, in the case of a grant simply of money, or a chattel interest to A in liferent and to B in fee, (without taxing words, without the word "*allenarly*,") or to A and B in conjunct liferent, (a very common case,) "and to their children "*nascituri* in fee," or a gift in any other way to unborn issue in remainder, as we should call it, after the takers for life, the rule was, that the fee was first granted to the parties *in esse*, unless there were words to tie up the interest given to the parties *in esse* to a mere life interest.

Now that word "*allenarly*" is a more solemn and usual word, and that word is sufficient to restrict the interest to a life interest, unless other words are to be found in the instrument which will

impeach and diminish the effect of that word. There may not be a life interest merely if the word "*allenarly*" be defeated in its operation by those other words. But if that word exists and be undefeated by other words in the instrument showing the intention, then it will restrict the interest of the parent, the first taker, to a life interest, and preserve the fee to the children *nascituri.*

Now the case of John Newlands shows how strong the principle is. That case was argued before the whole Court sitting in the most solemn form, and there seems to have been a very great disposition on the part of several of the Judges, constituting, however, the minority of the whole, even in that case with the word "*allenarly*" in the will of the testator, to give a beneficial interest to the parent, and to defeat the interest in remainder expectant upon the termination of his life interest in the issue; and the Lord Chancellor, Lord Loughborough, leaned towards that opinion, so strongly imbued was he with the principle. Nevertheless, the decision was that the word "*allenarly*" was sufficient there, and was not defeated in its operation and effect by other words; that it was sufficient to convey to the children the beneficial interest, and to the parent a life interest only. However, it is to be remarked, that in these cases there is still a fee given to the parent, from the abhorrence of the possibility of the fee being *in nubibus*, but it is only a legal fee; he being a trustee for the unborn issue, he takes what is termed in that decision a fiduciary fee.

Now, my Lords, in this case there is no such expression; there is nothing to limit the grant, there is no such word as "*allenarly;*" there is nothing to get rid of the grant, and, consequently, there is nothing to prevent the legal principle having its operation. For these reasons, however much I may lament it, (for it is quite clear what the intention was), I entirely agree in opinion with my noble and learned friend.

I cannot help here adverting to what I must say, in my view,

is of the greatest authority and weight, the venerable authority of Lord Corehouse, in one of these cases, Mein *v.* Taylor, in the year 1827, in which he says, in a note to his interlocutor to which the Court adhered, " Where a conveyance is made to one " in liferent and his children unnamed and unborn in fee, it is " settled law that the fee is in the parent, and that the children " have only a hope of succession to prevent the infringement of " the feudal maxim that a fee cannot be *in pendente*. It is per- " haps to be regretted," his Lordship says, (and I am sure I entirely join in that regret, and from what my noble and learned friend let fall probably he joined in that regret also), " that the " point was so settled, because the plain intention of the maker is " a consequence often sacrificed to a mere form of expression, and " the feudal maxim might have been saved by supposing a fidu- " ciary fee in the parent, as is done when the liferent is restricted " by the word '*allenarly*' or '*only*.' " Now that would have got rid of the whole difficulty, and there would have been no fee *in nubibus* any more than there is when the word "*allenarly*" is added, for then it is allowed that there is a fee, that the legal estate, a fiduciary fee, is in the parent, and it might just as well have been so settled. " Upon this point, however," says his Lordship, " it is too late to go back, but certainly the principle " ought not to be extended to cases which have not yet been " brought under it." That is quite certain. Now if this had been a case which had not been brought under it one might have had some ground for doubt, but it is a case which has been brought under it, and it falls within that principle, in my humble opinion, so clearly, (and we cannot get rid of that principle of law), that, however much we may regret that it has been adopted, it is too late, as Lord Corehouse says, to go back; it falls within the principle; it is too late to reconsider it, and we are bound by it. I therefore agree, with my noble and learned friend, that we have no course to take but to affirm the judgment of the Court below.

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LORD COTTENHAM.—My Lords, it is a matter of some surprise, that where the Courts in Scotland have professed to act upon the intention of the authors of such instruments, they should have prescribed one word—one word only—by which the party is at liberty to express that intention; and that even where the Court have no doubt of the intention, yet if that particular word be omitted, the Court have not the means of carrying into effect the intention. That is the professed object in general of the Court, and had not the decisions been to the contrary, I should have said that that would have been their duty.

Now, in this case, there can be no doubt of the intention of the maker of the instrument. It is clear that he meant that the daughter should enjoy the interest of the property for her life, and that her children should enjoy it after her death. But although he has expressed that intention, so that nobody can misunderstand it, he has not used the technical term, which alone the Court of Scotland deals with, rather than inquiring into the intention of the party.

It cannot, however, after the decisions which have taken place, be a matter in dispute, that the frame of this instrument falls exactly within the terms of the decided cases, and that the daughter took the fee not only in a fiduciary character, but beneficially; that it was subject to her own control, and that she had the power therefore of defeating the interest of her children. But the argument was pressed principally upon the clause which provided, in the event of the money being paid, for its reinvestment, and thence it was inferred that this either amounted to an expression of intention as clear as if the particular word "*allenarly*" had been used, or, which is the same thing, that it actually created a trust which would have been sufficient if such had been the intention of the original framer of the grant.

Now it would be strange indeed, if, in the very same instrument, the Courts were to reject an intention so palpably plain

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as it is from the terms in which the gift is made, and say, that that did not impart an interest for life only and a gift over to the children, but come to a conclusion in favour of the entail of the property from a subsequent clause in the same instrument, made for a totally different purpose. In fact, the terms of that provision, which relates to the reinvestment of the money by lending out the fund in the event of the bond being paid, clearly had no reference to the extent of the interest which the parties were to take, but merely provided that, in the event of the money being paid, and paid to the mother, for she was at liberty to receive it, it should be lent out again to be taken in the same terms. Now supposing it had been paid and lent out in the same terms, which would have been following strictly the directions of the author of this gift, we should then have found the money lent out in precisely the same terms in which the rights of the parties are declared in the earlier part of this instrument; it would not have extended the rights of the parties beyond that which was found previously to exist.

It appears to me, therefore, very clear that the subsequent provision as to the lending the money out in the event of its being paid, cannot operate upon the construction to be put upon the terms of the gift, and the terms of the gift are such as upon the decided authorities give the fee to the parent.

Ordered and adjudged, That the petition and appeal be dismissed this House, and the interlocutors therein complained of be affirmed with costs.

DEANS, DUNLOP, and HOPE—ALEXANDER DOBIE, Agents.