JULY 6, 1855.

WILLIAM POLLOK MORRIS and Others, *Appellants*, *v.* CHARLES J. TENNANT, *Respondent.*

Trust—Settlement—Fee and Liferent—Liferent coupled with Faculty—Reduction—Deathbed.

HELD (affirming judgment), *in reference to the terms of a trust settlement, that a right of liferent in the residue was conferred by the truster on his daughter, and not one of fee, but with power to her to convey the fee of the residue; and that a* mortis causâ *deed by the daughter, in exercise of the power, was not reducible on the ground of deathbed.*

Gift of a liferent allenarly to A, and on the death of A, the fee to the children of A, and if no children, then power to A to dispose of the fee absolutely, and failing exercise of this power then the fee to third persons named, are not equivalent to giving the fee to A.[1]

This was a reduction by the appellants of a deed on the ground of deathbed.

The deed under reduction was granted in the defender's favour by his deceased wife, Mrs. Janet Tennant or Pollok, on 19th December 1849. She died on 9th February 1850. It was granted by her in exercise of a faculty contained in the trust disposition and settlement of her father, the late James Pollok of Logie Green, who died on 23rd February 1842.

The trust deed and settlement of the deceased James Pollok was dated 13th February 1839. It conveyed the whole of his property, heritable and moveable, to trustees, for certain purposes. The *first* purpose was, payment of debts, expenses, and funeral charges. The *second* was, fulfilment of the truster's obligations under his own marriage contract and under those of his only children, being two married daughters, Elizabeth and Janet Pollok. The *third* purpose was, payment of legacies. All these three purposes had been implemented when the present question arose.

The clauses of the trust deed in question were those embodying the fourth, fifth, and sixth purposes of the trust.

The fourth purpose was thus expressed: "In the *fourth* place, after implementing and fulfilling the foregoing purposes of the trust, and paying the whole expenses of managing the same, I direct my said trustees to hold the free residue of my estate, heritable and moveable, in manner following—viz. they shall hold one half of said residue for behoof of the foresaid Elizabeth Harriet Pollok in liferent for her liferent alimentary use allenarly, but with power and faculty to her, as after mentioned, and for behoof of the child or children of the body of the said Elizabeth Harriet Pollok, in such proportions, and subject to such conditions, as she may fix and determine by a writing under her hand, which she shall have power to execute in manner after mentioned. . . . And I hereby provide and declare, that in case of the death of the said Elizabeth Harriet Pollok without leaving a child or children, or issue of the body of such child or children, or in case of the failure of all her children, and of the issue of their bodies, before attaining majority, then and in these events it shall be lawful to, and full power and faculty are hereby given her, by any *mortis causâ* deed, to dispone, destine and convey, a portion of the share of the residue of my estate liferented by her, not exceeding £3000, to such person or persons, and in such way as she may think fit; and in regard to the remainder of the fee of said share, or the whole thereof, should the above power and faculty not be exercised, I direct my said trustees, in the events foresaid, to hold the same in trust for behoof of the foresaid Janet Pollok in liferent, in case she shall survive the said Elizabeth Harriet Pollok, for her liferent use allenarly, and for behoof of the child or children of the body of the said Janet Pollok, in such proportions, and subject to such conditions, as she may have fixed and determined by a writing under her hand, which she shall have power to execute in manner after mentioned; which failing, equally among them, and the heirs of their bodies respectively in fee."

The fifth purpose: "In the *fifth* place, I direct my said trustees to hold the other half of the residue of my estate in trust for behoof of the foresaid Janet Pollok in liferent, for her liferent use allenarly, but with power and faculty to her as after mentioned, and for behoof of the child or children of the body of the said Janet Pollok, in such proportions, and subject to such conditions as she may fix and determine by a writing under her hand, which she shall have power to execute in manner after mentioned, which failing, equally among them, and the heirs of their bodies respectively in fee. . . . And I hereby provide and declare, that in case of the death of the said Janet Pollok without leaving a child or children, or issue of the body of such child or children,

[1] See previous report 15 D. 716; 25 Sc. Jur. 432. S. C 27 Sc. Jur. 546.

or in case of the failure of all her children, and of the issue of their bodies, before attaining majority, then and in these events it shall be lawful to, and full power and faculty is hereby given her, by any *mortis causâ* deed, to dispone, destine and convey, a portion of the share of the residue of my estate liferented by her, not exceeding £3000, to such person or persons, and in such way as she may think fit; and in regard to the remainder of the fee of said share, or the whole thereof, should the above power not be exercised, I direct my said trustees, in the events foresaid, to hold the same in trust for behoof of the foresaid Elizabeth Harriet Pollok, in liferent, in case she shall survive the said Janet Pollok, for her liferent use allenarly, and for behoof of the child or children of the body of the said Elizabeth Harriet Pollok, in such proportions, and subject to such conditions as she may have fixed and determined by a writing under her hand, which she shall have power to execute in manner after mentioned; which failing, equally among them, and the heirs of their bodies respectively in fee," &c.

The sixth purpose: "In the *sixth* place, in case it shall happen that neither of my said daughters shall leave a child or children, or issue of the bodies of such child or children, or in case of such child or children, or issue of their bodies, existing, but all dying before attaining twenty-one years of age, then and in these events full power and faculty is hereby committed to my said daughters respectively to settle, destine and convey, the fee of the share of the residue of my estate liferented by them respectively, to such person or persons, and in such way and manner as they may think fit, but under burden always of the survivor's liferent; and failing my said daughters, or either of them, exercising such power and faculty, then the fee of said share or shares shall go and belong, in equal proportions, to my brothers William Pollok and Morris Pollok, and my sister Susan Pollok, and their respective heirs."

Mrs. Tennant (Janet Pollok) survived her sister, and both of them died without issue. The deed under which the defender claimed, bore to be in exercise of the faculty conferred on Mrs. Tennant by the sixth purpose of her father's trust deed. It was a deed in her husband's favour in trust for certain purposes, and for his own behoof; but its particular terms were not material to the present question.

Miss Susan Pollok, though her name appeared in the summons as joint pursuer with her two brothers, lodged in process a minute disclaiming the action.

In defence, the plea of deathbed was denied to be applicable in point of fact. But farther, the defender maintained that Mrs. Tennant was a mere liferentrix, though with a power to settle, destine and convey the fee; and that in law the plea of deathbed was inapplicable to a deed granted in exercise of that power.

The Court of Session held that the fee of the residue did not vest in Janet Pollok, but only a liferent coupled with a power, and that her exercise of the power was not challengeable on deathbed at the instance of the pursuers.

The pursuers appealed, maintaining in their case that there ought to be a reversal—1. Because the deed of Mrs. Tennant conveys heritage to the prejudice of the appellants, her heirs of provision, and being executed *in lecto*, is reducible. 2. Because the previous deed by Mrs. Tennant in *liege poustie*, was no bar to the appellants' challenge, inasmuch as it was revoked, and the rights of the appellants as heirs of provision restored. 3. Because the circumstance that the fee was feudally vested in trustees was immaterial, inasmuch as the law of deathbed strikes against alienations of all rights to heritable estate, whether the granter be infeft or not, or whether his right be of a feudal or a personal or equitable character; and further, because the possession and seisin of the trustees was in law the possession and seisin of Mrs. Tennant and the other parties who might be or become beneficially interested. 4. Because, on a sound construction of Mr. Pollok's trust disposition, his daughters, in the events provided for by the sixth purpose, were beneficial fiars or owners of the residue of his estate, heritable and moveable. 5. Because a liferent with an absolute power of disposal constitutes, by the law of Scotland, a right of property, whether such liferent and power be by reservation or constitution. 6. Because the general disposition did not pass the fee to the trustees, but became feudally vested in Mrs. Tennant, as Mr. Pollok's heiress at law; and the power and faculty of disposal became, after the trustees made up their titles through her, to all intents and purposes, a reserved power in Mrs. Tennant. 7. Because the appellants were, in the event which happened, of neither of Mr. Pollok's daughters having any issue, effectually constituted their heirs of provision, and, as such, had a perfect title to reduce the deed under challenge. 8. Because, at all events, the deed of Mrs. Tennant is ineffectual, in so far as it purports to deal with the moiety of the heritable estate originally provided for Mrs. Sym, as it was either vested in Mrs. Tennant absolutely as heiress at law of her father, or if not, passed to the appellants as heirs of provision of Mrs. Sym, or as substitutes to her, or for her, under Mr. Pollok's settlement.

The defenders supported the judgment on the following grounds:—1. Because the right of Mrs. Tennant under her father's settlement was not of the nature of a *fee* in her person, but a *liferent*, with a personal faculty or power to convey the fee to a disponee on her death. 2. Because, on the assumption that no right in the fee of the residue of her father's trust estate

vested in Mrs. Tennant, the law of deathbed cannot apply to the settlement executed by her in favour of the respondent. Ersk. iii. 8, 95, 97, 100; Ersk. iii. 8, 98; 2 Paton, Ap. 133.

Rolt Q.C., and *Anderson* Q.C., for the appellants.—This deed is reducible on the head of deathbed. In the first place, the property was heritable in its nature, and it was not converted into moveable by the trust settlement of James Pollok. It is true he gave the trustees a power to sell, but that was merely with a view to change the securities, and not to convert the heritable into moveable property. Besides, it was not a peremptory direction, but the trustees were entrusted with the discretion of selling, and that is not sufficient to change the legal character of the property left. Assuming, therefore, the property to be heritable, it is well settled that by the law of Scotland the heir is entitled to reduce all gratuitous deeds made on deathbed.—Ersk. iii. 8, 97. The first question will be as to the extent of the faculty given to Mrs. Tennant. We contend she had only power to dispose of her own moiety in the event of her sister predeceasing her without issue. She had no right to dispose of Mrs. Sym's share in the event that happened. (Here the respondent's counsel interrupted, contending that this point was not made in the Court below, and that, therefore, it could not now be insisted on. The appellants' counsel replied that it was impossible to say whether the point was raised in the Court below or not, as there were no cases ordered; but that, at all events, the conclusions of the summons were wide enough to admit of the argument. Ultimately the point was waived.) As to the general question, we say that Mrs. Tennant was absolute fiar of the moiety over which the faculty was given. It is said the fee was not in her, but in the trustees. That, however, was a mere matter of feudal title, not material. She was beneficially entitled to the fee, though in point of strict form it was feudally vested in the trustees, and her right equally an heritable right.—Bell's Prin. § 1796. Thus, in *Durie* v. *Coutts*, M. 4624, an heritable bond was vested in trustees for behoof of A, and it was held that A's right to it was heritable property. The law of deathbed is one of policy, and looks to the substance of the right, not the mere external form.—Stair, iv. 20, 38. What we say, then, is, that Mrs. Tennant was substantially the owner of the fee of this property. The trust settlement of James Pollok gave her, in the first instance, a liferent, but then it added the most ample power of disposing of the property. Then it was well established in the law of Scotland, that a liferent, coupled with a faculty or absolute power of disposition, was in effect equivalent to the fee. There is a long series of cases to that effect. *Davidson* v. *Davidson*, M. 3255-8; *Irvine of Drum*, 1 Fount. 479; *Earl of Dunfermline* v. *Earl of Callander*, M. 2942; *Rome* v. *Graham's Crs.*, M. 4113; *Cuming* v. *Her Majesty's Advocate*, M. 4268; *Per* Lord Cranworth, L. C., in *Scott or Glendonwyn* v. *Maxwell*, *ante*, p. 383: 26 Sc. Jur. 535. See also 3 Ross L. C. 712-5, *ibid.* 63-5. The cases of *Forbes* v. *Forbes*, 2 Pat. Ap. 8; and *Pringle* v. *Pringle*, *ibid.* 130, though reversed by the House of Lords, are not inconsistent with the prior cases, for these two cases proceeded on the ground that the heir was barred by some exception, amounting to consent, from challenging the deed. Accordingly these two cases were not, nor have they been considered, inconsistent with the doctrine.—Bell's Prin. § 1807, 1 Sandford, Her. Suc. 114. So subsequent cases have confirmed the doctrine.—*Dickson* v. *Dickson*, M. 4269; *Baillie* v. *Clark*, 22d Feb. 1809, F.C. There is no sound distinction in this respect between a reserved faculty and a conferred faculty.—*Anderson* v. *Young*, M. 4128; *Hyslop* v. *Maxwell*, 12 S. 414. It follows, therefore, that Mrs. Tennant was absolute fiar, and the appellants were substitute heirs, and not conditional institutes as regarded this moiety of Mrs. Tennant. They are heirs of provision of Mrs. Tennant, and not of James Pollok.

[LORD BROUGHAM.—Surely they must take as heirs of the person giving the faculty, and not as heirs of the person exercising it.]

That assumes that our proposition is bad, viz., that the liferent, *plus* the absolute power of disposal, is equivalent to the fee. The maker of the settlement must be taken after giving that faculty to be away from the estate altogether, and whatever Mrs. Tennant did was in her own right as fiar, and everything flowed from her.

Lord Advocate (Moncrieff), and *Solicitor-General* (Bethell), for the respondent, were not called upon.

LORD CHANCELLOR CRANWORTH.—My Lords, I am sure that your Lordships would not have taken the course which you have taken, of stopping the further argument, and calling upon the counsel in reply, if you had not felt, after the argument yesterday, and the opportunity you have had of looking into the documents, that it really was a matter which admitted of no doubt, and that it was quite clear to the minds of your Lordships, that the conclusion at which the Court of Session had arrived was the only conclusion at which they could have arrived. I shall propose that the judgment which I shall advise your Lordships to give should be qualified, in order to leave the matter open, by saying, that it shall not in any manner prejudice any question in the existing suit as to Mrs. Sym's moiety; therefore, for that purpose, we may consider that as disposed of.

The action was one of reduction, at the instance of the two appellants Mr. Morris and Mr. Pollok, who claim as heirs of provision to the deceased Mrs. Janet Pollok or Tennant, and they so claim by virtue of the settlement which has been so often referred to, made by the father of

Mrs. Tennant and of another lady, Mrs. Sym. By that settlement he made a variety of provisions. He provided for his two daughters for their lives, giving them a liferent allenarly, that is, to each of them, with a provision at their death, giving the estate to their children if they should have any—the moiety of each to the children of each; and if they should not have any children, there was a power to give by will or by deed *mortis causâ* a sum of £3000, and then a liferent in the whole to the survivor. Then he proceeds—"In the sixth place, in case it shall happen that neither of my said daughters shall leave a child or children, or issue of the bodies of such child or children, or in case of such child or children, or issue of their bodies existing, but all dying before attaining 21 years of age, then, and in these events, full power and faculty is hereby committed to my said daughters respectively, to settle, destine, and convey the fee of the share of the residue of my estate liferented by them respectively, to such person or persons, and in such way and manner as they may think fit, but under burden always of the survivors' liferent; and failing my said daughters or either of them exercising such power and faculty, then the fee" is to go to the gentlemen who are now claiming, the present appellants.

The question is, whether they are correct in representing themselves as entitled to this property, or that they would have been entitled under this deed to this property as heirs of provision of Mrs. Tennant, who was the surviving daughter; for if they were entitled as heirs of provision, then, undoubtedly, by the law of Scotland, as their right is only defeated by a deed executed by Mrs. Tennant upon her deathbed, their right could not have been defeated by that deed, and they would still be entitled.

But the answer which the persons who resist this action of reduction make, is this—they say, you are not entitled, as heirs of provision of Mrs. Tennant; you are entitled by another right; you are entitled as claiming under the same person under whom Mrs. Tennant claims, and the law of deathbed does not apply to such a case. It is admitted that the only question is—whether or not the present appellants are entitled as heirs of provision of Mrs. Tennant, or whether they claim merely under an exercise of the power given by Mr. Pollok, and not as heirs of provision of Mrs. Tennant.

Now, my Lords, that by the law of England they would claim under an execution of the powers, not as heirs, in any sense, is not disputed. But the argument turns mainly upon this, that by the law of Scotland a liferent given to a person, with such a power superadded as is here contained in the deed, makes that person the absolute owner. And various cases were relied on as establishing that doctrine. In the first place, there was the case of *Davidson* v. *Davidson*, a very old case, decided more than two centuries ago, in which a person having purchased an estate "to himself in liferent, and his eldest son Mr. Alexander Davidson in fee, reserving always to himself an express faculty to alter the said fee, and to dispone *etiam in lecto*," it was held that though the purchaser took by the terms of the deed only a liferent, and at his death the estate went to his eldest son, yet the superadded power which he took made him, in truth, the owner of the fee. The question arose in this way,—he, by a deed executed on his deathbed, gave away the property from his eldest son, and the question was, whether the eldest son was or was not defeated by the operation of that instrument. In the first place, it was held that it was incompetent to the party to make the stipulation; that the doctrine of deathbed should not apply; and that it was to be dealt with as if there had been no such stipulation. Then the question was, whether the person having the liferent with this superadded power, could defeat the right that had been previously given to the son. It was held that he could not. It was held that the execution of this deed upon deathbed was, in truth, an execution of a deed which the heir had a right to dispute, and that he was, in truth, the absolute owner.

Now, my Lords, that was followed by two cases which were relied upon, the case of *Cuming* v. *His Majesty's Advocate*, and *Baillie* v. *Clark*. In *Cuming* v. *His Majesty's Advocate*, the case was this: Adam Hay obtained a charter of certain lands to himself in liferent, and to his son Andrew in fee. By this charter there was reserved to himself a power of contracting debt, and of disposing of the lands. The son died; afterwards the settler disposed of the property; and it was afterwards forfeited by the disponee in the rebellion of 1745; and the question was—whether the son had such an interest there as that his widow would be entitled to her terce. It was held that he had not; for that, although he had been named in the charter, the father being named as having had a liferent, and the son as having a fee, yet, inasmuch as there were superadded powers to the father absolutely to dispose of the property, that made, as we should say in this country, the son in the nature of a trustee for the father, and the father still retained the absolute power, and the son had no interest upon which his widow could rely, as giving her a claim to terce or dower.

Then, again, there was the case of *Baillie* v. *Clark*, a more modern case, which was to the same effect. There, again, Clark purchased some property, in which he took the conveyance to himself in liferent, and to his son, his heirs and assigns. The deed, however, contained a reservation in favour of the father to burden and affect the lands, and to sell and dispose of them at pleasure without the consent of the son. On this disposition infeftment was taken in favour of the father and son in the respective interests of liferent and fee. The father did not there

exercise the faculty, but he died, and the eldest son took a share with the other children in the personal estate. The question was, whether he was bound to collate the heritage; and that depended upon this, whether he held the heritage by descent from his father, or whether, as he insisted, he took it as institute under the original conveyance. The Court of Session held, that his being named in the charter was immaterial; that, in truth, the father having a liferent, with an absolute power of disposition, had the whole fee in him, and so the son took the estate by descent from the father, and he must collate.

That was followed, again, by a case, the exact terms of which I do not recollect, but it appeared to all your Lordships, I believe, certainly to myself, to come exactly within the class of cases that were decided in the last session of *Scott or Glendonwyn* v. *Maxwell*, and the other cases. But in all those cases the person who was called liferenter had the absolute power of owner in fee simple, and nobody could question anything that he did. He might burden the estate with debts to any amount—he might convey the property away—he might dispose of it as if he was the owner in fee simple—and then the law of Scotland says, that in such a case he is the owner in fee simple.

But the question is, how that applies to the present case. It seems to be an unarguable proposition, that in this case Mrs. Tennant was in that predicament. Mrs. Tennant was the liferenter, and she had nothing more than the liferent. That she was intended to have nothing more than the liferent is obvious from the terms of the provision. Whether that provision is valid or not, is not for the present purpose material to be considered, but it is most important, with a view to see what is the interest that the settler intended to be given to her. The settler, after having, in three passages, said that she is to have a liferent allenarly, expressly goes on to "provide and declare, that the provisions herein conceived in favour of my said daughters, shall be exclusive of the *jus mariti* of their respective husbands, and shall not be subject to their debts or deeds, or to the diligence of the creditors of either of them, all which are hereby expressly excluded; neither shall said provisions be assignable by my daughters, or either of them, or liable for their debts or deeds, but the same shall be purely alimentary to them." What can be more clear than all these provisions for the purpose of shewing, that (whether they were all available or not—whether they were such as could be enforced or not, is not material) the settler meant to give to those ladies a life interest, and a life interest only? The question is—whether it was competent to him to do it, and whether he has done it. He intended that they should have a life interest; that is plain. What he says is, that they are to have a life interest, and then at their death it should go to their children, if they have any; if they have not any, then he gives a power to each of them to charge the estate, by a *mortis causâ* deed, with £3000; and, subject to the life interest of the survivor, he says that they may dispose of the estate in such a way as they may think proper.

Does that make them the owners of the fee? The whole of the arguments that were applied in all those cases to which I have referred entirely fail here, because, in order to apply those arguments, the settlement must be such a settlement as would have enabled the daughter, at any time in her life, to have disposed of the property so as to have defeated the claims of all other persons. It is clear that she could never have defeated the rights of her children. In the cases of *Cuming* v. *Her Majesty's Advocate*, *Baillie* v. *Clark*, and *Davidson* v. *Davidson*, the liferenters had an absolute power of defeating the estate which was given to the son, and to the children—that is, if they thought fit. That was not the case here. The case here was, that the children would take as institutes under the original settlement, if there had been children; but there being no children, a power was given to these ladies to dispose of the property as they thought fit; or if they did not, as conditional institutes, (I believe that to be the correct description,) these two gentlemen would take, not as heirs of provision of the daughters, but as claiming by virtue of the conditional institution from the settler himself. The law of deathbed, therefore, does not apply to this case; and it appears to me, therefore, that the Court of Session came to the only conclusion at which it was possible for them to arrive, viz., that the parties instituting this action of reduction failed upon that which is the preliminary duty of a party prosecuting such a suit, viz., to make out his own title. I therefore move your Lordships that this appeal be dismissed.

LORD BROUGHAM.—My Lords, I take the same view of this case as my noble and learned friend, and the Lord Ordinary, and all the Judges in the Court below. Upon the second plea it is not necessary to express my opinion. I am inclined to agree with the Lord Ordinary in rather withdrawing from expressing any opinion upon the point, whether, "supposing Mrs. Tennant to be fiar, the right must be viewed, having regard to the provision of Mr. Pollok's settlement, as moveable, and not heritable, in any question affecting her succession?" I do not think it necessary to deal with that question at all, because I am of opinion, that upon the first ground no right of fee in the trust estate of her father is conferred on Mrs. Tennant by his trust settlement, and also that this is an exercise of a power not reserved, but constituted by this conveyance.

I entirely agree with my noble and learned friend in the comments that he makes upon that part of the deed referred to, that it plainly intimates the meaning and intent of the party creating

this right, that it is not a faculty reserved, but created; and the latter part of the judgment of the learned President of the Court below expresses my opinion clearly upon this case, as does also the opinion of Lord Fullerton.

LORD ST. LEONARDS.—My Lords, I entirely concur with my noble and learned friends that this appeal should be dismissed. I think the case quite free from doubt, and upon very solid grounds, applicable as well to the law of Scotland as the law of England. Your Lordships have always been careful, as I am sure you will always continue to be, not to confound the two laws. But, on the other hand, when the same principle applies, and there is no reason why the same rule should not be applicable to both, it is very much to the advantage of both countries that the same rule should be established—certainly, never in violation of the law of Scotland.

Now, as regards the case before your Lordships, it has been embarrassed by reference to cases which stand simply upon the law of Scotland. The cases which have been referred to are of this nature:—A father either settles his estate upon himself, and upon his son in fee, or he reserves to himself, upon the settlement of the estate, a power over the estate, which gives him a dominion over the fee. In both those cases the law of Scotland has an operation which the law of England would deny to such an instrument, and, of course, the law of Scotland, with reference to Scotch property, must prevail. The father, in both these cases, is considered still to have the dominion over the fee. Now, if a father in England were to settle an estate on himself for life, with remainder to his son in fee, it is perfectly clear that the father would be tenant for life only, and that the son would take the fee, which the father could not defeat except under the Statute of Elizabeth, which would enable him, if the settlement were simply voluntary, not by any act of his own alone, but by a sale to a third person, to defeat that voluntary settlement, otherwise the remainder would take effect just as any other remainder, and the father would have no power to defeat it.

Now, in reference to the other case, which also depends upon the law of Scotland, there is a passage in Erskine, which is very singular, with respect to an estate conjunctly to husband and wife for their lives, and to their heirs. Now, if there were such a limitation in the law of England, it would give a tenancy by entirety to the husband and wife, and it would survive accordingly, and the husband could not defeat that estate. But by the law of Scotland "their heirs" are rejected, and the whole fee is held, contrary to the clear express terms of the settlement, to vest in the husband.

Those are cases which your Lordships will not touch, and ought not to touch. You sit here as a Court of Scotch Judicature, and you are bound to administer Scotch law; and therefore those cases, singular as they are, and contrary to principle as they seem to be, yet are law, beyond all question, and must be adhered to. But in a case such as that now before your Lordships there is no such rule laid down. Nobody can point to a case (and the learned counsel at the bar would, if anybody could, I am sure, have furnished your Lordships with cases for the purpose) which, upon a settlement, has decided that even a general power, (I take the most general power of appointment,) followed by gift over in default of appointment, amounts to a fee. There is no such authority in the law of Scotland. There are authorities in the law of Scotland, and there are equally authorities in the law of England, that where you give to one for life, and then a general disposition of the property, that may amount to a fee; but there is no case in the law of England, and none has been cited from the law of Scotland, which says, that if you give an estate to one for life, with a most absolute power, subject to that life estate, to dispose either by will or by deed, or in any way he may think proper, in default not only of the heirs of the person, but in default of appointment, that that operates as a gift in fee. There may be both in the law of England and in the law of Scotland, something amounting to a disposition of the fee, although not in words so expressed.

Now, we must remember this, that the case now before your Lordships is not a case of reservation. It is not a case of settlement, such as I have before referred to; but it is a case of direct settlement in succession to every man taking from the original granter, not with reference to his being the heir of line, or the heir of provision, but simply as a person nominated to take under the particular settlement.

Now, if you look at the different powers that were given, and to which your Lordships' attention has been very properly drawn, you will see that there can be no doubt whatever as regards two of the powers. Nobody can dispute or question it. Take the estate of one daughter. It is a gift to the daughter as liferenter absolute; that is clear enough. But it goes further: what follows? "Then to her children, as she shall appoint." Does that enlarge her estate? It is absurd to suppose so. It is a simple power to give the estate, not in a way to enlarge her life estate, but it would give the estate to her children, as purchasers, as we should say in this country, or as persons nominated under the power, and when the power is exercised, they will take under the particular settlement.

Then, suppose there were no children, what then? In default of children she has a power by a *mortis causâ* deed to dispose of £3000. Is that property? Can anybody argue it to be property? It is clearly confined to a particular portion of the property. It is simply only what, in

this country, is called a power, and what, in the Scotch law, is called a faculty—different words, but having precisely the same meaning.

Then those two powers being perfectly clear, we come to the third, which is not to arise unless there be a default of children, and subject or not, just as the event may turn out, to the £3000 being given or not. Nothing can be larger than these terms. But what is it? Is it a power or a property? We have already seen that the first two dominions given to the ladies to be exercised, for dominions they are, are both strictly powers, and never can be considered, by any possible misapprehension, as property. Then, what is the third? It is larger in extent, but is it different in principle? It is not the extent of a power which makes it property. It might as well be a property in the case of the £3000. If giving a power to dispose of that particular portion of the property would confer property on the person to whom you give the power of disposition, there would be just as much reason to make that property as there would be to make it property if you extend the power over the whole of the fee. It is not the extent of the power that gives property; it is the nature of the power that may or may not give the property, and not the extent of it. A power to appoint £3000 or £3 may, by a particular expression, I admit, amount to property, and to a gift of the money, where a person seems, in words only, to have a power of disposition over; but the extent of the power, whether it is limited to £3000, or whether it extends to the whole of the fee, cannot alter the nature of the dominion which is given to the party.

Now, if any words could expressly create a clear power, you find the words in this particular deed. Words cannot be more clear. Did man ever see such words used by a person competent to draw such an instrument as this, were a fee intended to be given? Yet that is what was attempted to be argued at the bar.

Now, I do not embarrass myself in the opinion which I am submitting to your Lordships at all with the question—whether, by the construction of this instrument, the lady was confined to a *mortis causâ* deed with reference to what followed, or with reference to what preceded, or whether she had a general power; but I desire to be understood, as far as my opinion goes, that I am clearly of opinion, and I advise your Lordships to act upon it to that extent, that the life-rent in this case, with the most extended power that words can give to dispose of the fee, but with a grant over to other persons in default of the exercise of the power, gives only a life estate, according to the terms of the settlement; or a power, according to the terms of the settlement, over the fee. If the fee be given, or whatever be the estate over in default of appointment, and only in default, and subject to appointment, that in no manner vests any property beyond the life estate in the person. That I apprehend to be clear law. That clears away a great many difficulties which might otherwise have appertained to this case, without breaking in at all upon the law of Scotland, without infringing on any case that was ever decided in the law of Scotland. It fortunately places the law of Scotland upon the certain, clear, and solid foundation of principle upon which the law of England stands, and will in future leave the laws of both countries exactly the same.

Now, with regard to the authorities, without embarrassing your Lordships with the earlier Scotch cases, those of *Forbes* v. *Forbes*, and *Pringle* v. *Pringle*, were referred to, which were both decided in this House, and which, in my apprehension, clearly establish the principle which I am now asking your Lordships to act upon. It appears to me that this is clearly a case coming within the principle of the authorities laid down by the Judges in the Courts of Scotland, and that they would have great reason to complain if your Lordships came to a different determination. For, in both *Forbes's case* and *Pringle's case*, where they desired to establish a different rule, this House overruled their decisions; and now, when they have conformed to your Lordships' decision, as they were bound to do by the constitution, it is attempted to set up the old law again, and reverse that which they have decided in conformity with the decisions of your Lordships' House. And I must observe, that this is not the first case this session in which I have had occasion to call your Lordships' attention to that very circumstance, that where, by decisions of this House, the law as established and laid down in Scotland has been reversed, and a clear rule laid down, which the Judges, to their great credit, have afterwards clearly adopted and acted upon, as they were bound judicially to do, parties have come to your Lordships' bar, praying you to reverse your own rule, and to reverse everything which the Judges in Scotland have decided in obedience to precedents of your Lordships.

My Lords, I think that this is a case which does not admit of the least doubt, though I have thought it necessary to add to what my noble and learned friends have said, in order that there may be no misunderstanding of the principle upon which these cases stand; and I hope that your Lordships will think it right that this appeal should be dismissed, with costs.

LORD CHANCELLOR.—This will be without prejudice to pending actions?

LORD ST. LEONARDS.—Of course it will be understood that in these words the House does not express any opinion, or, either directly or indirectly, intend to give the most remote hint of what their opinion may be as to those actions.

Mr. Rolt.—That is the only object the appellants had in mentioning it.

Interlocutors affirmed, with costs.

Robert Ainslie, W.S., *Appellants' Agent.*—Wotherspoon and Mack, W.S., *Respondent's Agents.*

JULY 6, 1855.

DONALD MACLAINE, &c., *Appellants*, *v.* DONALD MACLAINE, ARCHIBALD BORTHWICK, H. G. WATSON, and Others, *Respondents.*

Sasine, Registration of—Grounds and Warrants—Statutes 1617, c. 16; 1693, c. 14.

HELD (affirming judgment), *That the date of presentment of a sasine for registration is the date of its registration, and the record of the date of presentment is the minute book of the Register of Sasines.*

The following objections, in a reduction improbation, were stated to the validity of the registration of a sasine:—1. *That the month and day of the month, and the year of the sovereign's reign, were not written in the body of the record, but were entered as a marginal note, to which no separate subscription was appended.* 2. *That the name of the party taking sasine, "Maclaine," was entered in the minute book of the register as "Maclean."* 3. *That the person presenting the sasine, the registration of which was objected to, having, at the same time, presented several other sasines for registration, all of which were entered on one and the same page, the entry of the sasine in question was not separately subscribed, but only one signature was affixed by the keeper, and the party presenting, to the whole writs presented.*

HELD (affirming judgment), *These objections were properly repelled.*[1]

On appeal, it was pleaded that—1. The instrument of sasine following upon the charter of resignation of 1785, dated the 15th October of that year, and appearing *ex facie* of the register to have been recorded upon the 16th December 1785, *i. e.*, more than 60 days beyond its date, was consequently null and void. 2. It was not legally recorded, in respect the portion of the instrument which sets forth the month and day of the month, and the year of the king's reign in which it is alleged to have been expede, was not inserted in the register, but appears in the form of a marginal note, not subscribed or authenticated. 3. It was not legally registered, in respect its date was not set forth in the entry in the minute book, and the party who presented it for registration, and the keeper of the register, did not sign the entry in the minute book, as required by statute, but only subscribed at the foot of the page of the minute book where it appeared, and after the entry of six other sasines. 4. It was further unavailing, in respect the proper and true name of "Maclaine" does not appear in the minute book, while another and a different name, "Maclean," is substituted for it.

The *respondents* supported the judgment on the following grounds:—1. Because the Court of Session correctly gave effect to the entry in the *minute* book of the Register of Sasines as the legal evidence of the *date* of registration, and that entry proves that the instrument of sasine was duly recorded on 10th December 1785, being within 60 days after 15th October 1785, the date of the sasine. 2. Because, although in transcribing the said instrument of sasine the record keeper copied part on the margin, there was no ground for holding the marginal writing to be a part of the record.

Lord Advocate (Moncreiff), and *Baggallay*, for the appellants.—The whole system of registration in Scotland is matter *positivi juris*, and this question turns on the construction of a series of statutes. The substance of the question is—whether, under those statutes, where the minute book differs from the record itself, the one is to be believed in preference to the other. Under the Statute 1617, c. 16, it was necessary to prefix the date of recording the instrument, for unless it had been so, it could never be ascertained whether the registration had been in time. Such has accordingly been the invariable practice since the year 1617. The date as prefixed, therefore, must be treated as part of the register. It was not till the Statute 1693, c. 14, that the necessity of a minute book was established, but even then the record itself was in no way superseded. It still continued essential to have the date of recording prefixed to the engrossment. The minute book was intended merely to supplement and aid the register, not to derogate from it. It seems, therefore, an obvious conclusion, that where these two parts of the registry conflict, the principal register must be entitled to credit. There is no direct authority on the subject. Two election cases, *Adam* v. *Duthie*, 19th June 1810, F. C., and *Drummond* v. *Ramsay*, 24th June 1809, F. C., contradict each other, and, perhaps, neither is entitled to much weight. There

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[1] See previous report 14 D. 870; 24 Sc. Jur. 545. S. C. 27 Sc. Jur. 550.