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and, on the contrary, is entitled to damages from the respondents.

Respondents.—Advertisements are mere recommendatory notices, and are never understood to form the bargain between the parties, but only to induce intending offerers to make inquiries. Accordingly the appellant made inquiries, and, in his offer for the File-mill, he proposed to take it and the adjacent ground 'as they presently stand,' without any stipulation whatever in regard to any regulation for the supply of water. The existing regulation at the time, and for many years previously, was precisely the same as that which was inserted in the lease to Miller. The respondents, in that lease, stipulated that Miller should keep his sluices open for at least three hours in the day; and if the appellant could shew that he was entitled to compel Miller to keep them open for a longer period, there was nothing in the clause to prevent him doing so.

The House of Lords 'ordered and adjudged, that the appeal 'be dismissed, and the interlocutors complained of affirmed.'

SPOTTISWOODE and ROBERTSON—J. DUTHIE,—Solicitors.

No. 19.

HUGH DEWAR and Others, Trustees of JOHN M'KINNON CAMPBELL, Appellants.—*Sol.-Gen. Wetherell—Adam.*

Mrs ELIZABETH CAMPBELL or M'KINNON, Respondent. *Abercrombie—Keay.*

Fee or Liferent—Clause.—A lady who was heir of provision to certain estates, having by her contract of marriage, in the event of succeeding to them, disponed them, 'under 'the reservation of her own and her husband's liferent right and use thereof,' 'to and 'in favour of the heir-male of this marriage;' and having succeeded to them;—Held, in a question between her and the heir-male of the marriage, (affirming the judgment of the Court of Session), That she was fiar of the estates.

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2D DIVISION.
Lord Pitmilly.

IN 1751 Archibald Campbell, proprietor in fee-simple of the lands of Ormaig and Blairintibbert, disponed them, by a contract of marriage between his daughter Catherine and John Campbell, to them 'in conjunct fee and liferent, but for his liferent 'use allenarly, and after their decease to the heirs-male to be lawfully procreated of their bodies of the said intended marriage, 'which failing, to the heirs-female to be procreated thereof,' in

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their order. Of this marriage there were two children—a son James, and a daughter, the respondent, Elizabeth.

On the 17th of February 1780, Elizabeth being about to be married to the Reverend John M'Kinnon, minister of Kilfinnan, an antenuptial contract was executed between them, the material clauses of which were in these terms:—'In consideration of the said marriage, the said Elizabeth Campbell, 'with consent aforesaid, hereby assigns and dispones to and in 'favour of the said Mr John M'Kinnon, in liferent during all 'the days of his lifetime, all and sundry provisions, donations, 'legacies or others, made and granted in her favours by the now 'deceased Archibald Campbell of Ormaig, her grandfather; 'and also all and sundry provisions, legacies, or donations al'ready made or to be made in favours of the said Elizabeth 'Campbell, by Alexander Campbell, Esq. of Grenada, James 'Campbell, Esq. of Tobago, her uncles, John Campbell of 'Ormaig, her father, and James Campbell, son to the said John 'Campbell, or any of them, or by any other person or persons 'any manner of way. Farther, the said Elizabeth Campbell 'assigns and dispones to and in favour of the said Mr John 'M'Kinnon, in liferent as said is, all and sundry lands and heri'tages that she shall succeed to, during the marriage, any man'ner of way: And the said Mr John M'Kinnon and Elizabeth 'Campbell hereby bind and oblige them severally, that how 'soon the said provisions, legacies, donations, or other subjects 'already provided, or to be provided in the said Elizabeth 'Campbell's favours, shall be paid to or recovered by them, that 'the same shall be laid out, at the sight of two of her nearest re'lations, in the hands of a sufficient person or persons, and that 'the security therefor shall be taken payable to the said Mr 'John M'Kinnon and Elizabeth Campbell, in conjunct fee and 'liferent, and the fee thereof to the children of this marriage, 'whom failing, to the said Elizabeth Campbell, her heirs and 'assignees whatsoever: And, in the event that the said Eli'zabeth Campbell shall succeed to the lands of Ormaig and 'Blairintibbert, she hereby, under the reservation of her own 'and the said Mr John M'Kinnon's liferent right and use there'of, and other conditions after-mentioned, assigns and dispones 'all and sundry the said lands of Ormaig and Blairintibbert, 'with the pertinents, to and in favours of the heir-male of this 'marriage, whom failing, to the heir-female thereof; declaring 'always, that in the event of the said Elizabeth Campbell's suc'ceeding to the said lands, that the heir-male or heir-female

'succeeding to the said Elizabeth Campbell therein, shall pay, 'and is hereby burdened with the payment of two hundred 'pounds sterling to the younger child or children of the mar-'riage, if any be, and that against the term of Whitsunday or 'Martinmas next and immediately following such heir's succeed-'ing me in the said lands, with the legal annualrents thereof 'from and after the said term of payment till payment thereof; 'and also declaring that the heir of this marriage, whether male 'or female, that may happen to succeed the said Elizabeth 'Campbell in the foresaid lands, shall be obliged to assume and 'bear the surname and designation of Campbell of Ormaig: 'Moreover, the said Mr John M'Kinnon hereby assigns and dis-'pones, to and in favour of the said Elizabeth Campbell, in the 'event that no child or children shall be procreate and existing 'of the marriage at the dissolution thereof, the just and equal 'half of the whole moveable subject that shall happen to per-'tain and belong to him and the said Elizabeth Campbell, in 'common, at that period: But in the event of a child, one or 'more, then existing, the said Mr John M'Kinnon assigns and 'dispones to the said Elizabeth Campbell one-third part only of 'the said moveable subject: And it is hereby provided and de-'clared, that in the event the said Mr John M'Kinnon shall 'marry a second time, during the existence of a child of this 'marriage, then and in that case, the liferent provisions above-'mentioned, conceived in favours of the said Mr John M'Kin-'non, shall cease, and are hereby declared to be null and void 'as to him, from and after the eldest child of this marriage then 'in life attaining the age of twenty-one years complete, and such 'liferent provision shall thereafter pertain and belong to the 'child or children of this marriage: And, on the other hand, if 'the said Elizabeth Campbell shall happen to marry a second 'time, and that there shall be a child or children of this mar-'riage then existing, the liferent provisions reserved to the 'said Elizabeth Campbell by this contract, whether proceed-'ing from the rents of the said lands or otherwise, shall, and are 'hereby restricted, after her second marriage, to the sum of 'thirty pounds sterling yearly, and the remainder shall pertain 'and belong to the children of this marriage.'

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On the death of his parents, James Campbell succeeded to the estates, and made up titles in 1789, by service to his mother, Catherine, as heir of provision under the contract of 1751.

Of the marriage between Mr M'Kinnon and Elizabeth Campbell, there were two sons, of whom the eldest was John. In

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In the meanwhile John died, and the appellants, his trustees, were then sisted as pursuers in his place.

In support of the action they maintained,—

1. That as the stipulation in the contract of marriage was, that 'in the event that the said Elizabeth Campbell shall succeed to the lands of Ormaig and Blairintibbert, she hereby, 'under the reservation of her own and the said Mr John 'M'Kinnon's liferent right and use thereof, and other conditions 'after-mentioned, assigns and dispones all and sundry the lands 'of Ormaig and Blairintibbert, with the pertinents, to and in 'favours of the heir-male of this marriage;' and as her eldest son John was the heir-male of the marriage, she thus came under an effectual obligation to dispone to him these lands, under reservation of her own liferent. And,

2. That it was plain, from the whole terms of the contract, and more especially from the clause restricting her liferent in the estates to L.30 in case of entering into a second marriage, that it was the meaning and intention of the parties that she should only have a liferent; and that as this was a question not with creditors, but with the heir, as to what was the meaning of a contract of marriage or family arrangement, effect should be given to what appeared to be the intention of the parties, and that that intention ought not to be superseded by a strict technical interpretation of the words employed.

To this it was answered,—

1. That as it had been established, by a series of decisions, that where an estate is disponed to a parent in liferent, and children nascituris in fee, without any restrictive words, the fee belongs to the parent, it was plain that, on applying this rule to the words of the deed, the fee was vested in the respondent, and not in the heir-male to be procreated. And,

2. That if such were the true construction of the dispositive clause, then it was not competent to controul it by expressions in other parts of the deed; but supposing it were so, then, as she was fiar under the contract of 1751, it was necessary to shew a clear divestiture by her of that fee; whereas, instead of there being any clause to that effect, the whole scope of the deed shewed that it was the understanding of parties that she was the fiar; and, accordingly, her succession to the estates prior to that of the heir-male was distinctly contemplated, and there was no destination to the heirs of her husband.

The Lord Ordinary having 'considered the extract registered 'contract of marriage libelled on, and whole process, found that 'the fee of the lands in question is vested in the defender, Mrs 'Elizabeth Campbell; sustained the defences pleaded for the 'said defender; and assoilzied her from the conclusions of the 'libel.' To this interlocutor the Court, on the 5th of December 1820, on advising a petition, with answers, adhered, and found expenses due; and on the 5th of February 1821 they refused a petition without answers.*

The trustees having appealed,

The Lord Chancellor, in the course of the Solicitor-General's reply, observed, "I understand that you mean to contend, that the deed is to be read as if the word allenarly had been in it. You mean also to contend, that there are other re-

* Not reported.

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The Solicitor-General having proceeded in his reply:—

The Lord Chancellor again observed, "I think what Lord Rosslyn meant was, that the Court of Session had so frequently decided, that, where the word "only" was not in the settlement, the fee should be considered as being in the parent, that he would not determine that the word "only" should make any distinction, but that he could not understand how the parent would be a fiduciary. Whether that is understood in Scotland, I cannot say."

The Solicitor-General having again proceeded:—

The Lord Chancellor observed, "According to the English law, the son would not be bound to pay one farthing; for his obligation would arise only out of his taking this estate by virtue of this instrument. According to the English law, I take it to be as clear as the sun at noon-day, that no child of this marriage would have been bound, by this contract, to pay the L.200, unless he took under this contract. Then how is that clause to operate in the case mentioned, that of the wife's estate being restrained to L.30 a-year?"

The House of Lords 'ordered and adjudged, that the appeal 'be dismissed, and the interlocutors complained of affirmed.'

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LORD CHANCELLOR.—My Lords, the Solicitor-General of England has expressed a doubt, whether his mind is not in the situation of being a good deal influenced by his notions of the law of England. I would fairly say, that I am conscious that may be equally the case with my mind; and I hope that may afford an excuse, not unreasonable, for my desiring of your Lordships some time to consider of this important case. I cannot help representing that my mind may be in some danger of being misled by the doctrines of the law of England, taking care, as I would at the same time, to state, that there is no principle which I have held more sacred, ever since I have had the honour of assisting your Lordships in judicial matters respecting the law of Scotland, than to recollect, and to act upon that recollection, that we are sitting here as the Court of Session in Scotland, to decide as that Court ought to decide, and that we are bound not to apply our English principles, and our English doctrines, in judicial decisions upon the law of Scotland.

My Lords,—Perhaps this is a case which has a stronger tendency to mislead an English lawyer than most cases have, because the distinction in our law with respect to immediate conveyances, and contracts for conveyances, is so well settled, that a man's mind is apt to dwell, perhaps too readily, on matters that are extremely well settled. Your Lordships know, that, in conformity to what is here stated to be the law of Scotland, if an immediate conveyance is made of lands to A for life, with remainder to the heirs of his body, or remainder to his right heirs, though that estate is given him only for life, yet, on settled principles, he has the fee in him, by virtue of the estate tail, with remainder to the heirs of his body, with the remainder in fee to himself. This doctrine is carried so far, that, even in wills where it appears to be the general intention of the testator that the person shall not take an estate merely for his life, still, although it is expressly given him for life, you sacrifice the particular intention to the general intention of the testator, and you give him an estate tail. A more remarkable case cannot be stated than the case Robinson *v.* Robinson, in which an estate was given to a man for life, and no longer, and yet he was held to have an estate of inheritance on account of the general intention of the testator.

With respect to a marriage-contract, there can be no manner of doubt that, according to what is held to be the effect of a marriage-contract, an agreement to convey an estate in future, we should take great care so to limit the estate, that the children should not have merely a spes successionis, but that they should have a secure estate of inheritance vested in them, though, if the same words had been used in an ordinary disposition, those children would have taken no estate, unless they took by inheritance from their parent.

Now, there is one principle in the law of Scotland which is common to the law of England, and I take it to be this:—In the first place, If

May 5. 1825. you find points settled, particularly points of title, you must take infinite care not to disturb them on slight reasons of distinction; and, that although the mind of the individual who is to discharge the duties of a Judge may possibly suggest, and without his being able to get rid of the effect of that suggestion, that the actual intention of the party was different from that which is the implied intention of certain words that have been long settled to have a definite meaning, you must dismiss the reasoning that the individual applies upon the subject, and take yourselves to, and give the parties the benefit of, that implied intention which has been considered to be the meaning of the words, that have frequently, and during a long period, received judicial interpretation, though that judicial interpretation may be contrary to that which ought originally to have been put upon these words.

My Lords,—There is another reason why I feel particularly anxious to have a little time to consider this case, and I will fairly avow that it arises, not perhaps from circumstances connected only with this case, but from circumstances connected with your general administration of justice in Scotch causes. My Lords, there is a great degree of inconvenience, I am ready to admit, in frequently remitting causes for farther consideration to the Court of Session. It is impossible to deny that it leads to a great deal of delay, and a great deal of expense. On the other hand, it must never be forgotten, as it appears to me that your Lordships, forming a court of judicature, run very great risk, if the points are first discussed at your Bar, and first decided upon there, whether you are right or wrong, because you are a court of appeal, and the great doctrines of the law of Scotland ought to be originally discussed, and decided in Scotland; and, having been overlooked in the Court below, you run the risk of making the decision, which you must do as the Court of Session, in a way which the Court of Session itself, if the matter had been discussed before it, would not willingly have acceded to, as stating properly the doctrines of their law.

My Lords,—I remember perfectly well what it was that led to the remittances, at a particular period, when there were a great number of them;—it originated in a conversation held between my Lord Thurlow and my Lord Rosslyn, in this House, soon after I had the honour first of sitting upon your Lordships' woolsack: the particulars of that conversation it may not be necessary or fit for me to state now, but I shall very readily communicate the substance of it to any of my friends, the lieges of Scotland, who are at your Lordships' Bar, who may wish to know what the nature of that conversation was.

Now, there are some important points in this case which have been discussed, and, as far as one collects from the papers, have been discussed for the first time; and it will remain for consideration, whether it will become necessary to consider of them in disposing of this cause, and in what way this House ought to dispose of it. My Lords, in res-

pect to the doctrine itself, I should take it to be clearly established, (and whether right or wrong it is not of much consequence to inquire, when the point is clearly established), that if there is a limitation in a conveyance of an interest in presenti, and unconnected with any question of contract, to a man and his wife, and the children of the marriage, on feudal principles, the fee is in the parents,—one of the parents is the fiar—which of the parents depends upon the circumstances;—and it is impossible, in my view of the case, to read what fell from my Lord Thurlow in the case of Newlands, without seeing that it was his notion, that after that doctrine was once clearly established, it would have been infinitely better to have adhered to that doctrine, than to deny the application of that doctrine because the word 'allenarly' was used. That appears to me to have been his meaning; but his Lordship would not venture upon those doubts about the impropriety of introducing that distinction to disturb that which had been settled, because the distinction had been adopted in the law of Scotland, because, in the administration of the law of Scotland, settlements had been construed by applying that distinction; and so it was held.

Then comes another question, which undoubtedly is a question of great importance, whether, if the word allenarly makes a distinction, there are other words, or other provisions in this instrument, that shall be of the same effect as the word allenarly. I am ready to go this length, namely, to say, that as this House was advised, by my Lord Rosslyn, that the effect that was originally attributed to the word allenarly ought, in his judgment, still to be attributed to it, so it ought to have that effect; at the same time, I apprehend your Lordships will take great care not to extend the effect of that word farther, unless you are convinced that you ought to extend it farther.

My Lords,—I have not the slightest hesitation in saying, that if this was an English contract of marriage, I could not bring my mind to say that there ought to be an original limitation to the children; but it is quite a different question what ought to be the principle applied to it, taking it to be a Scotch instrument. It must be admitted there are clauses in this instrument, particularly with respect to the personal estate, which would appear to me, even according to the law of Scotland, to go a long way to bring this case, if it related to the personal estate, within the authority of the case of Seton; for nothing is more clear than that there is an agreement, that whenever a sum of money shall be uplifted or recovered, a security shall be taken for that in the names of trustees, as I understand it, for the father and mother and children. The doctrine in the case of Seton was this, that because trustees were to have the property, therefore the fee could not be in pendente, but that it was in the person who was trustee, and therefore the general doctrine should not apply; and I agree so far with my Lord Rosslyn, that unless you are to consider the parent in those cases in which you hold him a fiduciary to be a trustee, it is

May 5, 1825. very difficult to say how you get the case out of the general rule, that the fee is not to be considered in pendente.

But then there is another way of looking at the case, which is this: Supposing that would be the true way of considering the matter as to the personal property, Would the intimation that such is to be the application of the personal property be sufficient to authorize you to say, that, with respect to this estate of Ormaig, a similar decision should be made? And that brings it back to the question, Whether intimations of intention, scattered throughout the contract, are to have the same effect as the words in the cases alluded to have been determined to have, namely, to give the children an estate distinct from their parents? My Lords, it is an extremely difficult thing for an English lawyer to find out, in any event, if the heir-male of the marriage or the heir-female of the marriage did not take under this contract, how the heir-male of the marriage or the heir-female of the marriage would be bound to pay one shilling of that L. 200. But then we must not apply a difficulty which applies to English cases, and insist, that because that difficulty arises in English cases it will in Scotch, though the mind of the English lawyer cannot possibly find out how the estate of the wife, in the case mentioned, was to be restricted to L. 30 a-year, if the wife was to take the inheritance under this contract. That is a puzzle in the mind of an English lawyer, and perhaps the mind of an English lawyer is apt to be puzzled. How far our doctrines are to be reconciled with this case is, I think, that which we ought to dismiss from our minds entirely; for the case must be decided according to what is the settled doctrine of the law of Scotland. And what is the settled doctrine of the law of Scotland we must endeavour to find out by what has been decided in the Courts of Scotland, regard being had also to that which has been decided in matters of the same nature in this House. For me, my Lords, I am only doing justice to myself when I say, that I never have intentionally approached to a conduct so grossly wrong as to intimate to your Lordships that you ought to apply English rules in the decision of such causes; and I hope and trust, that to the last moment to which I shall have the honour of advising your Lordships, I shall do my utmost to put you in mind that it is your positive duty to apply the law of Scotland to all Scotch causes, and to act here as you would do on the application of the legal doctrines if you were sitting in the Court of Session in Scotland. Having made these few observations, I will humbly propose to your Lordships to allow a week or ten days for the examination of cases bearing upon this point, before your Lordships are moved to come to a decision.

Lord Chancellor.—There is a cause which was heard before your Lordships several weeks ago, in which a gentleman of the name of Dewar, and others, are appellants, and a Mrs Campbell, or M'Kinnon, and others, are respondents. It arises from an action of adjudication in

implement brought before the Court of Session in Scotland, for the purpose of trying the legal question, whether Mrs Campbell can be restricted to a mere liferent of the property in dispute, or whether she is entitled to the fee of the property?

In defence, Mrs Campbell founded upon her marriage-contract with Mr M'Kinnon in 1780, as vesting her with the absolute fee of the estate. She also propounded three other defences, to which I shall not now call the attention of your Lordships.

My Lords,—This question having come on to be argued before my Lord Pitmilly as Lord Ordinary, that learned Judge, upon the 8th of December 1818, pronounced an interlocutor, finding that the fee of the lands in question is vested in the present respondent, Mrs Elizabeth Campbell; and his Lordship adhered to the interlocutor, upon considering a representation and answers for the parties.

My Lords,—The cause was then brought under the review of the Court of Session, in the Second Division, by a reclaiming petition on the part of the appellants, when the Court refused that petition, and adhered to the interlocutor of my Lord Pitmilly; as they also did upon a second petition from the same parties. There was yet another interlocutor of the Court afterwards pronounced; but as it relates solely to the costs of the suit, I shall say nothing farther upon it at present.

My Lords,—The result of these proceedings is, that here we have an appeal from two interlocutors of my Lord Pitmilly, and from two interlocutors of the Court of Session in the Second Division, upon a dry technical point of Scotch law, which is very ably stated in the papers upon your Lordships' table, and was argued with the very greatest ability at the Bar of this House.

My Lords,—It seems to be universally held as the law of Scotland, that where a land estate is settled upon a parent in liferent, and upon his children nascituri in fee, the fee must of necessity be in the former; a necessity said to arise from this notion or from this principle, that a fee cannot be in pendente, although it appears to be admitted that, if the right of liferent be qualified by the term 'allenarly,' or 'only,' the parents' right would be reduced to that of a liferent, or fiduciary fee.

My Lords,—The question therefore comes to this, whether, in Mrs Campbell's marriage settlement, the context is such as to bring the present case under the same rule? And I confess, when I find so many consecutive judgments of these learned persons in the Court below, and so powerful conviction expressed by them, that an adherence to this doctrine is necessary for the support of land rights in Scotland, your Lordships certainly ought to pause before you give any countenance to an opposite principle.

My Lords,—Since the hearing of this case, I have applied myself with most anxious attention to an examination of all the authorities which have been brought forward upon the present occasion; and although I do find cases (not easy to be distinguished from the present)

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where the right had been restricted to a bare liferent, yet, in a question involving the security of land rights in Scotland, and on which the whole profession of the law in that kingdom appear to feel so strongly, that an adherence to received and established opinions is of such importance to the security of family settlements, and to the peace and quiet of individuals, I dare not say to your Lordships that the interlocutors complained of are not well founded; but while I move that they be affirmed, I feel myself constrained to add, that, under all the circumstances, the appellants were perfectly justified in bringing the matter before this House, and that there is no ground whatever for subjecting them in the costs of the appeal.

Appellants' Authorities.—Carnslaw, Nov. 25. 1705, (Dalr. No. 64. p. 82.); Gerran, June 4. 1781, (4402.); Grays, Feb. 25. 1773, (4210.); Boyd, June 28. 1774, (3070.); Turnbull, July 28. 1778, (4248.); Newlands, July 9. 1794, (Bell's Cases, 54. and 4294.); M'Intosh, Jan. 28. 1812, (F. C.)

Respondent's Authorities.—Thomson, Feb. 4. 1681, (4258.); Veitch, July 9. 1630, (4256.); Wemyss, Feb. 10. 1672, (4257.); Creditors of Pringle, June 2. 1714, (4261.); Frog, Nov. 25. 1735, (4262.); Lilly, Feb. 24. 1741, (4267.); Douglas, July 7. 1761, (4269.); Cuthbertson, March 1. 1781, (4279.); Lindsay, Dec. 9. 1807, (No. 1. App. Fiar).

M'Dougal and Callender—J. Richardson,—Solicitors.

No. 20.

JAMES REID, Appellant.

ROBERT HOPE and Others, (Hope's Trustees), Respondents.

Compensation—Legacy—Proof.—A party having brought an action for payment of a legacy, and compensation being pleaded on an illiquid debt;—Held, (reversing the judgment of the Court of Session), That there was not satisfactory evidence of the debt on which the compensation was founded.

May 6. 1825.

1st Division.
Lord Alloway.

The appellant, James Reid, nephew of Robert Hope in Newton, became bankrupt, and his estates were sequestrated in 1807 on his own application, with concurrence of his uncle, who was a creditor for L.544. 10s. He settled with his creditors by a composition of 3s. per pound, for which his uncle became cautioner to the extent of 2s. 6d. per pound. Subsequent to this discharge, his uncle executed a deed of settlement, by which he conveyed his whole effects to the respondents, as trustees and residuary legatees, subject to the payment of various legacies. Among others, there was one in these terms: —' To each of James (the appellant) and Charles Reid, my