selling has the substantial right to the subject a delay of a few days will not void the bargain.

With this precaution, I agree with your Lordship that the Sheriff-Substitute is right.

Lord Justice-Clerk—I concur in the result arrived at, and that very clearly. I also agree with Lord Gifford that when a sale is made with entry at a certain date, the mere fact that the title is not completed at that date will not necessarily render the sale void.

But this is a totally different case. Here the purchaser bought for the purpose of speculating—and I may remark that there are some things in the case which do not make the action a favourable one—and then found that his own title could not be obtained. I think in these circumstances the second purchaser is clearly not bound.

The Court adhered.

Counsel for Kelman (Appellant)—Keir. Agents—H. & A. Inglis, W.S.

Counsel for Macharg (Barr's Trustee) (Respondent)—Balfour—Rhind. Agent—George Begg, S.S.C.

Friday, May 24.

FIRST DIVISION.

[Lord Young, Ordinary.

GRAY *v.* GRAY'S TRUSTEES.

Entail—Disentail followed by a General Trust-Disposition—Evacuation of a Special Destination in a Deed of Entail—Proof of Intention of Granter of Deed.

An heir of entail in possession disentailed the estate with consent of her son, the next heir of entail, and left a general disposition and settlement altering the line of succession contained in the deed of entail. She then burdened the fee of the estate with debts which she had contracted. In an action at the instance of the son to have it found, *inter alia*, that the general disposition did not evacuate the line of succession under the deed of entail—*held* that that was a question of the granter's intention, and that the facts and circumstances of the case showed that an alteration of the succession was intended.

Observations per curiam upon the case of *Thoms* v. *Thoms*, March 30, 1868, 6 Macph. 704.

Mrs Carsina Gray was born in the year 1831, and was heiress of entail in possession of the entailed estate of Carse, or Carse Gray, in Forfarshire, under a deed of entail executed in May 1765. She was married first to Lieutenant William Hunter, afterwards William Hunter Gray, by whom she had several children, and by her second marriage, which took place in 1865, she had also several children. In 1875, under the provisions of the Entail Amendment (Scotland) Act of that year, she executed a deed of disentail of the said lands with the consent of her eldest son, the next heir of entail and her apparent heir. The deed of consent was executed upon the 18th August 1875, and next day Mrs Gray expede an instrument of disentail, which was recorded under warrant of the Court in the Register of Entails early in 1876. On the 10th March of that year Mrs Gray executed a trust-disposition and settlement in favour of Graham Binny, W.S., and James Webster, S.S.C., whereby she conveyed to them her whole estate, heritable and moveable. The deed conveyed "All and sundry lands, houses, and tenements, messuages, and other heritable and real estate of every description which shall belong to me at the time of my death, wherever situated, whether in Scotland, England, or Australia, or elsewhere; as also my whole household furniture, plate, stock, chattels, and effects, rents, and other personal estate of whatever kind and denomination, heirship moveables included, which shall belong to me at the time foresaid of my death, and wheresoever the same may be situated, together with the whole titles, writs, and evidents, vouchers and instructions of my estate and effects hereby generally conveyed, and all that has followed or may be competent to follow thereon." There was, *inter alia*, this further clause—"And I hereby confer on my trustees full power to sell or dispose of the whole or any part of the trust-estate in such lots and portions as my said trustees shall consider most advantageous, and to grant or execute all deeds necessary for rendering the said sale or sales effectual; and binding me and my heirs in absolute warrandice thereof in the same manner and as amply and effectually as I could have done myself, with power also to borrow money upon the security of the said trust-estate, and to grant leases thereof for such term of years as they may find necessary or approve of; also to give easements to tenants, to enter into arbitrations, and generally to do everything falling within the duties of trustees in like cases; and I hereby reserve to myself, not only my own liferent of the trust-estate above conveyed, but also full power at any time of my life to alter, innovate, or revoke these presents in whole or in part as I shall think proper." Among the other purposes of that deed were the providing an annuity of £1000 a-year to her second husband, the payment of £4500 to her children by the second marriage, and the division of the residue among the whole children of the marriage, including the eldest.

Mrs Gray died on 16th May 1876, and the trustees under her trust-disposition thereafter made up a title to the estate of Carse, and became infeft in it. This action was raised at the instance of Charles William Gray, Mrs Gray's eldest son, against the trustees under the trust-disposition above mentioned, and concluded for reduction (1) of the deed of consent to the disentail, and of all that followed thereon, and (2) of the trust-disposition and settlement mentioned above, and relative notarial instrument.

There was also an alternative conclusion for declarator that the lands contained in the deed of entail were not conveyed to the defender by the trust-disposition and settlement, and that they passed to the pursuer on the death of his mother, under the destination in the deed of entail.

The latter conclusion alone was the subject of the present argument and decision, and it is unnecessary here to state the averments or pleas by which the former was supported.

It appeared from the defenders' statement of

facts that under the contract of marriage between the pursuer's father and mother, Mrs Gray had bound herself, and her heirs entitled to succeed to her in the entailed estate, to make payment of a sum of £4500 to all children of the marriage who should be alive at her death. After the disentail she implemented that obligation by granting a bond and disposition in security over Carse in favour of the defenders, as trustees for the purposes therein mentioned.

The defenders further averred—"(Stat. 10) The trust-disposition and settlement of 10th March 1876 was executed by Mrs Gray—with the intention of thereby disponing the estate of Carse Gray for the purposes of the said deed. At the date of its execution, and down to her death, she believed, as was the fact, that the estate of Carse Gray was carried by the said trust-disposition. Neither at the date of the said trust-disposition and settlement, nor at her death, was Mrs Gray possessed of any heritable or real estate, either in Scotland or elsewhere, other than Carse Gray. At the date of the said trust-disposition and settlement Mrs Gray had no means or estate of any description apart from the estate of Carse, except the furniture in the mansion-house of Carse Gray, of the value of £600 or thereby, and Mrs Gray was then in debt to the amount of £35,000 or thereby, which to a great extent had been secured over her life interest in the estate of Carse Gray, and by policies of assurance on her life, held in security. Unless out of the income from and proceeds of the estate of Carse Gray, there existed no estate whatever belonging to Mrs Gray at the date of said trust-disposition and settlement from which the provision of £4000 in favour of the pursuer, payable at Mrs Gray's death under her letter of 18th August 1876, or any of the provisions made by her trust-disposition and settlement could be implemented. After the date of said trust-disposition and settlement, and immediately previous to her death, Mrs Gray borrowed from the Scottish Provident Institution, under the bond and disposition in security mentioned in statement 9 for the defenders, the sum of £38,000 on the security of the estate of Carse Gray, and with that sum paid off her debts, and thereupon procured retrocessions of the several policies of assurance which had been effected in security thereof. It was the intention of Mrs Gray to surrender the whole of said policies before any further premium thereon became payable, but her death occurred suddenly, immediately after she had been retrocessed in the several policies, and before arrangements had been carried through for their surrender. The whole estate belonging to Mrs Gray at the time of her death, apart from the estate of Carse Gray and the said policies of assurance, consisted of the said furniture in Carse Gray mansion-house, the accrued rents from the Carse Gray estate, and a balance of £3000 or thereby of said loan of £38,000, which had been set apart for the purpose of redeeming an annuity affecting Mrs Gray's liferent of the estate of Carse."

The pursuer pleaded, *inter alia*—"(4) Assuming the said deed of consent to have been effectual, the destination contained in the deed of entail continued operative, and the said trust-disposition and settlement being a general disposition, did not validly evacuate the said destination."

The defenders pleaded—"(5) The estate of Carse was effectually conveyed to the defenders by the trust-disposition and settlement of 1876, in virtue of its intention and terms."

The facts alleged in the statement quoted above were not admitted by the pursuer, and the defenders were allowed, first by interlocutor of the Lord Ordinary (YOUNG), and subsequently, on a reclaiming note being presented, by the Division, "a proof of their averments regarding the property belonging to the late Mrs Gray at the date of her disposition of 10th March 1876, and at the time of her death."

The result of the proof sufficiently appears from the Lord Ordinary's note and the opinions of the Court.

The Lord Ordinary (YOUNG) pronounced an interlocutor in which, *inter alia*, he found that the averments of the defenders referred to above were true in fact, and repelled the fourth plea-in-law for the defenders, sustaining the plea for the defenders quoted above, thereby holding that the destination in the deed of entail was evacuated by the terms of the trust-disposition. He added this note.

"*Note.*—[*After explaining the previous procedure in the case.*]—A full debate took place accordingly, upon which, after taking time for consideration, I delivered a written judgment as follows:—

"'The parties were, I think, rightly agreed that the fourth plea-in-law for the pursuer ought to be first considered and disposed of.

"'This plea assumes that the course of succession prescribed by the entail of Carse was not, by the instrument of disentail executed by the late heir in possession, Mrs Gray, defeated or otherwise affected than by the removal of the prohibition against alteration. I think the assumption is right, but as the defenders dispute it I shall briefly state the grounds on which I think it is right.

"'The term "fee-simple" is used in two different senses, the most frequent and familiar being a fee of which the owner has the absolute power of disposal, or perhaps, more correctly, a fee whose owner's power of disposal is not limited and restrained by a statutory entail. In this sense the term is applicable notwithstanding of a simple destination, which, although efficacious while it is allowed to stand, the owner may alter or defeat at pleasure. In the other sense of the term, it signifies a fee which descends to heirs-in-general according to the legal rules of succession. The term "entail" is also used in two different senses, which respectively correspond and are employed in opposition to the two senses of fee-simple. The common and familiar meaning of the term is a strict entail, whereby the course of succession is not only prescribed but protected under the statute, while the other and more strict, though less common meaning, is any prescribed course of succession, although unprotected and subject to be altered or defeated by alienation at the owner's pleasure. An unprotected course of succession is in the familiar daily language of the profession and the Courts called a simple destination, and not an entail, which term is in that language reserved for a protected succession or strict entail, while a fee under simple destination is a "fee-simple" as that term is commonly used and understood.

"'It is I think clear, that in the Entail Act of 1848 the terms "fee-simple" and "entail," or

"entailed estate," are used in what I have represented as the common and familiar meaning of these terms respectively. The provisions of the statute are applicable to strict entails only, and would be found senseless if attempted to be applied to an entail by simple destination. The term "fee-simple," again, is plainly in this Act used in opposition to "entail" or "entailed estate" in the sense of the Act—that is, in opposition to a fee strictly entailed, and not to a fee under simple destination, which the term "fee-simple" as commonly used comprehends.

"'By section 32 of the Act of 1848 it is enacted that an instrument of disentail shall have the effect "not of altering, but of entitling such heir in possession to alter the course of succession prescribed by such tailzie"—language which I think implies that he (the heir) may leave it to stand if so minded, and that if he desire "to alter" it he must do so by some deed appropriate to the purpose, as in the case of any other owner of a simply destined fee, which by the declared effect of the disentail his fee has become. In short, while by the disentail all prohibitions, limitations, and fetters are removed, and the owner is set completely at liberty to deal with the estate, he is left to use his liberty or not as he pleases, and in such manner and to such extent as he pleases, and the course of succession is not altered any more than the estate is alienated or burdened without some appropriate action on his part after acquiring his freedom.

"'I am therefore of opinion that the estate of Carse was not by the disentail rendered fee-simple in the sense of being descendible to heirs-general; that Mrs Gray possessed it till her death on the deed of entail, the course of succession prescribed by which governed its descent; and that the question whether or not it passed to her testamentary trustees under her trust-disposition and settlement must be judged of with reference to that quality of the estate, viz., that it stood on a special destination to heirs which she left unaltered, unless indeed the trust-settlement itself operated an alteration of succession, which I think it clearly did not. In saying so I only mean that if the general conveyance of the settlement operates on this estate at all, it must do so, not as a deed altering the course of succession, but as an alienation operating directly on the fee, whereby all "succession" to or through the testator is terminated, just as it would have been by a particular or special conveyance to a purchaser, which, however efficacious for its purpose, would not have been an alteration of the order of succession.

"'Assuming, then, that according to the title on which the testator held it at her death the estate of Carse stood destined to a particular order of heirs, the question is, Does it or not pass to her testamentary trustees under the general conveyance of her trust-settlement? This question I must, on the authority of the case of *Thoms*, answer in the affirmative. The defenders urged that the authority of this case was shaken by the observations which had been made upon it by the Lord Chancellor and Lord Colonsay in the subsequent case of *Glendonwyn*. But if I considered that a single Judge of this Court was entitled to disregard the authority of a judgment of the whole Court upon mere doubts expressed in a subsequent case in the Lords (which, speaking generally, I do not), I should think the doubts expressed in this instance did not so affect the authority as to entitle me to disregard it as binding upon me here. Lord Colonsay's doubt only regarded the proposition that a general conveyance should, in the absence of any evidence of intention to the contrary, carry everything, including specially destined property which the disponer had power to convey—the inclination of his opinion being apparently favourable (although he would probably have objected to this as too strong an interpretation of what he said) to this other proposition, that in the absence of any evidence of contrary intention the special destination should prevail over the general disposition. The Lord Chancellor questioned the propriety in principle of the decisions admitting extrinsic evidence of the intention, and stated his preference for a rule whereby either the general conveyance (as in England) or the special destination, as upon a Scotch view (which he thought neither unreasonable nor inconvenient), should prevail to the exclusion of all extrinsic evidence. The judgment in the case proceeded on evidence of intention, and as a judgment is clear authority for the admissibility of such evidence notwithstanding that but for the previous decisions the Lord Chancellor would probably have been against admitting it. In this case all the circumstances *dehors* the deed—the disentail by which it was preceded, the state of the family, the terms of the family settlement, and the absence of all property besides the disentailed estate for that family settlement to operate on—support the view that it was according to the testator's intention to pass the estate in question to her trustees. Unless indeed there is a rule of law which on this question of intention compels a Judge to disregard what the human understanding if not so restrained would find irresistible, I see no room for doubt that the testator meant Carse to be carried by her general disposition. The judgment in the case of *Glendonwyn* is therefore in my opinion no obstacle to here proceeding on the authority of the case of *Thoms*, for in *Glendonwyn's* case the evidence of intention was—or so the Court and House of Lords thought—clearly the other way, and both here and in the Lords the decision was on evidence of intention. I shall perhaps most accurately represent the grounds of my judgment by saying that it proceeds on the authority of *Thoms'* case *plus* this confirmation of the conclusion thereby reached that the whole evidence *dehors* the deed supports that conclusion as being probably (I might say certainly) in accordance with the testator's intention.'

"No interlocutor was pronounced, because of a suggestion of my own that it was proper that the fact (which had been assumed in the argument and in my judgment) that the late Mrs Gray possessed and left no estate except the lands of Carse for her general settlement to operate upon, should appear on the record as one upon which the parties were agreed. In accordance with this suggestion the record was amended. The amendment, in consequence of the position which the pursuer saw fit to take up, led to my interlocutor of 21st June, and to the reclaiming note which resulted in the interlocutor of 20th July.

"The result of the proof has been what was to be anticipated, assuming the integrity of the trustees. The proof was merely formal, and the

pursuer's counsel offered no remarks upon it, but assented so far to the judgment which I have now pronounced. I offer no reflection on the conduct of the pursuer, who was no doubt advised that the argument in support of his fourth plea might conceivably be prejudiced if he admitted a fact which although true was according to that argument irrelevant. This groundless (as I think it) apprehension has delayed the case for six months, and occasioned a considerable amount of unnecessary expense. In saying so I do not overlook the additional statements and relative plea-in-law for the defenders which the Court allowed to be added to the record; for these are (I think manifestly) worthless, and I was not surprised when the defenders' counsel announced that he was unable to state an argument upon them.

"The points embraced by the judgment which I formerly delivered (and which is now included in this note) were not re-argued, and I have only to say that on reconsideration I adhere to the opinions on which it proceeds. There is one point—a very material one no doubt—on which I would, in order to avoid any possible misapprehension, desire to add a few words of qualifying explanation. I am not of opinion that a general proof or proof at large of the intention of the maker of a deed is allowable in any case with a view to the construction or legal effect of the deed. There is, I think, an important and well-founded distinction between such a proof and evidence of the nature and extent of a person's property, and the relation in which he stood to it at the time when he made a deed regarding it or (if of a testamentary character) at the time of his death. Such evidence is (or frequently may be) necessary to enable the Court to put itself in the same position with respect to knowledge of material facts as the maker of the deed, so that his language, which that of the deed must be taken to be, shall be interpreted and have effect accordingly. The purpose being to reach his intention always with due circumspection and safety, one is apt to speak popularly of evidence to this end as evidence of intention, although it is in truth only evidence of existing facts of a character to be presumably known to the maker of the deed, and with reference to which therefore it is reasonable to conclude that he meant the language of his deed to be considered and have effect. To the extent of interpreting a description of subjects or identifying those to which general words are applicable, it is, I think, generally agreed that evidence of the character referred to is and must be admissible. I doubt if it is here necessary to exceed that proposition, but if it is, I am for carrying it as far as the reason of it extends, and beyond this I think the judgment that I now pronounce does not go." . . . .

The pursuer reclaimed.

Authorities—*Thoms* v. *Thoms*, March 30, 1868, 6 Macph. 704; *Glendonwyn* v. *Gordon*, July 20, 1870, 8 Macph. 1075—House of Lords, July 20, 1870, 11 Macph. (H. of L.) 33; *Catton* v. *Mackenzie*, July 19, 1870, 8 Macph. 1049.

At advising—

Lord President—The late Mrs Carsina Gray was born in the year 1831, and she was heiress of entail in possession of the entailed estate of Carse under a deed of entail executed in the year 1765. She was thus in a position, with the consent of the pursuer, her eldest son, who was the next heir of entail and her apparent heir, to disentail the estate, and she proceeded to do so in the manner prescribed by the Entail Amendment Act 1875, and executed an instrument of disentail on 19th August 1875. The order to record that instrument of disentail was pronounced by the Court on 12th January 1876, and on 10th March following she executed the trust-disposition and settlement which is now before the Court. The question is—Whether that trust-disposition and settlement conveys the disentailed lands? and that, I apprehend, is a question of intention. The words of conveyance in the deed are habile to operate a conveyance of every estate which belonged to the maker of the deed, whether heritable or moveable, but the question is, Whether the maker of the deed intended to comprehend in that conveyance the disentailed lands of Carse?

It has been a question frequently brought into dispute, whether, in dealing with intention of this kind, the Court are bound to confine their attention to the nature and terms of the deed itself, or whether they are entitled to consider other circumstances not to be found on the face of the deed—that is to say, the relation which the granter of the deed bears to the estate in question, the condition of the parties interested in the previous settlement of the estate, and their relation to the granter of the deed, and above all, the mode in which the granter of the deed has dealt with the estate which is said to be conveyed, in other deeds and transactions regarding that estate, and also the way in which he has dealt with his succession generally, if the general disposition is a disposition intended to settle the affairs of the trust.

Now, I think it is conclusively settled in the law that such elements as these are fair elements for consideration in dealing with this question of intention. I think that has been decided, particularly in two recent cases. The first is the case of *Catton* v. *Mackenzie*, and the second is *Glendonwyn* v. *Gordon*, which were decided in this Division of the Court on two successive days, the 19th and 20th of July 1870, and which were both therefore under the consideration of the Court at the same time, and, I am entitled to say, received very deliberate consideration from the Court. Both of the cases were appealed, and in the case of *Catton* v. *Mackenzie* the House of Lords avoided deciding the question which had been decided by this Court, and preferred to rest their judgment upon the ground that the lands which were said to be conveyed by the general disposition were held under the fetters of a valid and strict entail, and therefore could not be conveyed by the disposition there in question. But in the case of *Gordon* v. *Glendonwyn* the House of Lords did determine the same question which had been decided in this Court, and they affirmed the judgment, upon the ground that the manner in which the maker of the general disposition in that case had dealt with the estate in question, and the circumstances surrounding the maker of the deed as regarded his family, and the relation particularly in which two nephews stood to her as regarded her succession, were all fair elements to take into consideration in deciding the question whether she intended to convey the entailed estate by the

general disposition or not. Therefore this is a question of intention in which such considerations as I have adverted to must be taken into account in arriving at a conclusion.

Now, this case differs from both the cases to which I have referred, and from every other case of the same kind in one very important respect. The general disposition which is said to convey the lands was preceded by a disentail of those lands by the maker of the general disposition. That is a very significant and important fact. No heir of entail could be supposed not merely to go through the formality, but to incur the expense, and it is always attended with considerable expense, of procuring the requisite consent or consents to the disentail of the estate, unless he has some object in view which is to be carried out after the disentail has been accomplished. And accordingly, if Mrs Gray, particularly in the circumstances in which she was placed, had contented herself with executing this instrument of disentail, and never had done anything more as regarded those lands, one could not but have been very much surprised that she had taken all the trouble and incurred all the expense of making a disentail, and yet left the lands precisely as they were before—made no use of them either for the purpose of selling them, or as a fund of credit, she being in very embarrassed circumstances. Accordingly, we find that the very first thing she does after carrying through the disentail is to execute this general disposition. No doubt that is followed by another transaction, which perhaps of itself might have been sufficient to account for her disentailing the estate, and would have afforded a sufficient motive for the disentail. She had been obliged to borrow money upon the security of her life interest as heiress of entail to a very considerable amount, and of course she was paying the heavy burden of not merely the interest upon the debt, but the annual premium upon policies of insurance, which are always necessary in cases of that kind to operate a sufficient security to the creditors, and it was a very great object with her that she should be relieved of that heavy burden, and that the debt which stood secured in this way should be made a burden directly upon the fee of the estate, and so relieve her from the necessity of keeping up policies of insurance. That, I say, would have been a sufficient reason for her carrying through this disentail of itself, but it is not immaterial to observe that that is not the first use she makes of her freedom from the fetters of the entail, if this general disposition be sufficiently expressed to carry the entailed lands, and if it was her intention so to convey them. Well, as I said before, the general disposition is dated upon 10th March 1876, and it is not until the next month of April that, on the 10th and 19th of that month, she carries through that creation of the burden on the estate for the debt which had been previously secured upon her life interest.

But now we proceed to a consideration of the deed itself and of the circumstances in which Mrs Gray was placed otherwise at the time of executing that deed. She had been twice married, and by her first marriage she had, I think, six children, and by her second marriage she had four children. As I said before, she had incurred a very considerable amount of debt. By her marriage-contract with her first husband a sum of £4500 was settled upon the younger children, the entailed estate being destined of course to the eldest son. There was no provision for the children by the second marriage. It appears further that when she executed this deed on 10th March 1876 she had no other heritable estate except the disentailed estate of Carse, and she had no moveable estate at that date either. She came to have moveable estate, which formed the subject of an inventory at the time of her death by reason of that transaction which followed, by which she made her previous debts a burden upon the fee of the lands of Carse, because thereby the policies of insurance which had existed as securities for that debt came to be liberated and to belong to her estate; and though she had intended apparently to surrender those policies, her sudden death prevented that from taking place, and those policies became valuable assets of her estate in consequence. But beyond that and household furniture, and some things of that kind, she had no moveable estate any more than she had any heritable estate to become a subject of conveyance in this general disposition excepting only the estate of Carse. Now, certainly, when a person with the view of settling her affairs executes a trust-disposition and settlement conveying her whole estate, heritable and moveable, and had no heritable estate to convey except one, there is a strong presumption that that estate is intended to be conveyed. However, that presumption, whatever it may be worth, cannot be taken without reference to the whole provisions of the deed, and particularly to the purposes and objects of the deed, because if it be found that those purposes and objects can be carried through without the necessity of holding that the estate of Carse is conveyed by the general words of conveyance, then the presumption would be very slight indeed. But if it be the case that it is impossible to carry out any one of the purposes of the deed without holding that the estate of Carse is embraced within the conveyance, then, on the other hand, the presumption becomes very strong.

Now, how does the matter stand? The first purpose of the deed, after providing for the payment of her debts, is to provide a liferent annuity of £1000 to her husband if he survive her. The second is to provide a sum of £4500 to the children of her second marriage. This is obviously done with the intention of placing the children of her second marriage upon a footing of equality with the younger children of her first marriage, because the provision is obviously equivalent to that which is made for them in the marriage-contract with her first husband. And then, having placed all those children upon a footing of equality, she proceeds to dispose of the residue and remainder of her estate by dividing it among the whole children of both marriages. Now, the £4500 which she had provided to the children of the first marriage by her marriage-contract was of course done in the form of an entailed provision under the Acts of Parliament permitting heirs of entail to make such provision out of the entailed estate. The provision for the children of the second marriage was naturally not done in the same way, because the lands being disentailed it was quite unnecessary to have recourse to any such power; but if the £4500 for the children of the first marriage was from the beginning destined to come

out of the entailed estate, it would be very strange indeed if this £4500 for the children of the second marriage were not to be derived from the same source, seeing there was no other source from which it could be derived.

Then she proceeds to confer on her trustees "full power to sell or dispose of the whole or any part of the trust-estate, in such lots and portions as my said trustees shall consider most advantageous, and to grant or execute all deeds necessary for rendering the said sale or sales effectual; and binding me and my heirs in absolute warrandice thereof, in the same manner and as amply and effectually as I could have done myself; with power also to borrow money upon the security of the said trust-estate, and to grant leases thereof for such term of years as they may find necessary or approve of; also to grant easements to tenants," and so forth—all those clauses plainly implying that she had by disposition conveyed to trustees a heritable estate which might be sold either in whole or in portions, and which, if sold, was to be sold under the ordinary terms of absolute warrandice, and giving her trustees at the same time power to deal with the tenants of the lands.

Now, I must say, taking all those things together, and keeping in view the condition of this lady's family, and the fact that she had freed herself from the fetters of the entail immediately before the execution of this deed, for the purpose of enabling her to deal with this estate as she thought fit, it is in my opinion impossible to resist the conclusion that this lady intended by her general conveyance to settle and dispose of her estate of Carse for the benefit of her whole family by both husbands. If there was any rule of law to exclude the considerations to which I have referred, I should regret very much that it was so; but I do not think there is any such rule of law. I think that has been settled, and I very much sympathise with the emphatic statement of the Lord Ordinary, where he says—"Unless, indeed, there is a rule of law which on this question of intention compels a Judge to disregard what the human understanding, if not so restrained, would find irresistible, I see no room for doubt that the testator meant Carse to be carried by her general disposition."

Lord Deas—This deed of entail is said to be evacuated by the general trust-disposition and settlement executed by the deceased. I agree with your Lordship that such a general disposition is a habile deed to convey the entailed lands, in this sense, that if it appears to have been the intention of the deceased to convey these lands, the deed is sufficient to express that intention. It is not a general disposition—it is not of itself, in a proper sense, a conveyance of the lands—it is only of the nature of an obligation, but it is quite sufficient as the foundation of proceedings for obtaining a proper conveyance. But it depends upon the intention of the deceased whether or not it shall have the effect which is here proposed to be attributed to it. I am of opinion with your Lordship that facts and circumstances are admissible and competent in ascertaining that question of intention. I continue to hold the opinion which I expressed in the case of *Thoms* (6 Macph. 748), that "the words of the deed do not afford conclusive evidence on the point of intention, and I think it necessarily follows tha you must either refuse it that effect or allow an inquiry into the facts and circumstances calculated to throw light upon the granter's intention. . . . I do not say that there ought to be a proof at large. But a proof of facts and circumstances calculated to afford real evidence of the granter's intention is, I think, perfectly competent." That that is the law is, I think, sufficiently established by the cases to which your Lordship has referred—of *Catton* v. *Mackenzie*, and more particularly *Glendonwyn* v. *Gordon*, both of which cases were affirmed in the House of Lords.

I further agree with your Lordship that the facts and circumstances of real evidence here are sufficient to establish that it was the intention of the granter to convey those disentailed lands. I do not rest my opinion at all upon the judgment of the Court in the case of *Thoms*. I concurred in the result of that case, but upon a ground or grounds quite special to the case, and I adhered throughout to the opinion that there ought in that case to have been a proof allowed of facts and circumstances before any judgment was arrived at. I concurred in the result at which the Judges arrived upon the very narrow and special ground that there were on the part of the pursuer very distinct and strong averments of facts and circumstances tending to show that the deed was not intended to evacuate the destination, but that he had declined to offer a proof upon any one of these. Notwithstanding that, I was of opinion that even to the end of the chapter there ought to have been a proof allowed to both parties of facts and circumstances of real evidence applicable to the case. It appears to me therefore, on the whole, that the judgment in that case ought not to rule a case like the present. On the contrary, I entirely concur in the views distinctly and ably stated by Lord Colonsay in the case of *Glendonwyn* as to the law applicable to such questions. I think that, though the Lord Chancellor doubted—it was a doubt simply—the opinion of Lord Colonsay ruled the judgment, and I should be bound to accept that opinion therefore as the law, even if my opinion throughout the case had not been all in the same direction. But I think with your Lordship that the principle of the case of *Glendonwyn* is expressly applicable to this case. Facts and circumstances are competent to prove what the intention of the granter was, and I think the facts and circumstances here distinctly show what the intention of this lady was.

The fact that she recently had disentailed this estate is a fact of great importance in the case. The deed of consent to that disentail was executed upon the 18th of August 1875, and the instrument of disentail followed next day. The trust-deed and settlement executed by her was dated 10th March 1876, and she died in the same year. Now, I entirely concur with the Lord Ordinary in holding that the estate of Carse was not by the disentail rendered fee-simple in the sense of being descendible to heirs-general, but that it merely put it in the power of the lady to convey the estate—to make it descendible to heirs-general if she thought proper after the disentail to do so. The fact that she did execute the disentail is a material fact to connect with what followed, and more particularly with the terms of the trust-disposition and settlement which

appear to me, taken in that light, to be conclusive as to her intention. By that deed of settlement she conveys "all and sundry lands, houses and tenements, messuages, and other heritable and real estate of every description which shall belong to me at the time of my death, wherever situated," and likewise her whole movable estate. Now, it is proved and admitted that she had no other heritable estate in Scotland than this estate of Carse. Well, keeping that fact in view, we come to the powers which she conferred upon her trustees in that deed. Some of those powers, to say the least of it, look very like as if she was dealing with heritable estate. "To sell or dispose of the whole or any part of the trust-estate in such lots or portions as my said trustees shall consider most advantageous"—that is very like dealing with heritable estate. So is the power to borrow money upon the security of the trust-estate. That is very like dealing with heritable estate. But when we go further, and find power "to grant leases thereof for such term of years as they may find necessary or approve of, and also to give easements to tenants," the inference is irresistible—there is no doubt at all that she is there dealing with heritable estate, and in the most specific manner. I cannot imagine more competent and more clear evidence under her own hand of the intention to convey this estate which she had just before disentailed. I think the evidence is of a kind quite conclusive. The difficulty in many of those cases is as to what extent we are to allow evidence. In the case of *Thoms* I said I did not mean to say that every kind of evidence was competent, but, whatever difficulty there may have been about that, there is no room for the difficulty here, for when you connect this deed with the fact of the previous disentail, you have distinct evidence—just as distinct as if she had expressly declared—that she meant to convey the estate of Carse.

In that view, I have no difficulty whatever in agreeing with your Lordship and the Lord Ordinary.

Lord Mure—I so entirely concur in the views which your Lordship has expressed with reference to this important case that I feel it unnecessary to make any observations of my own. But as doubts have been thrown on the decision by the whole Court in the case of *Thoms*, in consequence of some observations which were made in disposing of the case of *Gordon* in the House of Lords, I have thought it necessary to look carefully into the opinions of the Lord Chancellor and Lord Colonsay in that case, and also to look again carefully into the opinions of the Judges in the case of *Thoms*. Unquestionably the decision in the case of *Thoms* is binding upon this Court, even if the views there enunciated were not altogether in conformity with those which appear to have been expressed in one or two passages of the opinions of the Judges in the House of Lords in the case of *Gordon*.

I think that the import of the opinion of Lord Colonsay chiefly relied upon by the pursuer, as given in the rubric of the report of that case, appears to lay down the propositions which Lord Colonsay embodied in his opinion; and the observations which he is said to have made are these—(1) that in determining what effect should be given to a general disposition the question has always been treated as one of presumption as regards intention; (2) that a general disposition *mortis causa* does not derogate from a prior special disposition unless it be made clear that it was intended to do so; and (3) that in dealing with such cases the Court has taken into consideration the circumstances calculated to throw light on the intention of the testator, whether found within the deed or collected from external circumstances. Now, I adopt these three rules as a very fair statement of the general doctrine applied in the cases of this description that have been referred to, and so adopting them I have no difficulty in coming to the conclusion to which your Lordships and the Lord Ordinary have come in this case.

In the next place, I hold, without going further into details, that we have three broad leading features which appear to show quite distinctly that this lady must have intended that the estate should be carried by the general disposition. There is first the disentail, the object of which was to enable her to some extent to assist the pursuer, who was in difficulties, and also to meet her own debts, which appear to have been pretty considerable. Then it is matter of absolute proof, if not admitted indeed by the pursuer, that she had no other estate of any description either in Scotland or anywhere else. Now, having no other estate than this estate of Carse—having got the disentail in order to provide for her difficulties and to meet the demands upon it—she executes this deed in 1875. It is not a mere general conveyance of her estate, but a complete settlement of her whole affairs for the benefit of her two families, and it so purports in the narrative of it; and the object of it is to enable the trustees to pay the debts, and make provision for both her families, with power to them to sell this estate—the only heritable estate she had—in order to meet the claims of every description which were made upon her. Now, if this estate was not to be carried by the deed, it was like building castles in the air to make such a provision as she did for the payment of her own debts, and to make a provision for her children, when it is proved there is no other estate at all; and accordingly she makes those provisions of different descriptions, and I think it is most material to observe that the residue is to be divided, not amongst the younger children, which would have been the thing to do if the estate of Carse was to belong to the heir of entail, but equally amongst the whole of her children—six of the one family and four of the other—including the pursuer. If the deceased had intended that the pursuer should succeed to the estate of Carse I think his name would not have appeared as one who was to take an equal share with his brothers and sisters in this estate, which was to be sold to carry out the provisions of the trust.

Upon these grounds, I agree with your Lordships that the evidence is clear to the effect that it was the intention of Mrs Gray that the estate of Carse should be carried by the deed.

Lord Shand—I agree with your Lordships and the Lord Ordinary that the effect of the disentail carried through by the late Mrs Gray was only to free the estate from the fetters of the entail, leaving it subject to the destination

contained in the deed of entail,—so that if Mrs Gray had executed no deed habile to convey the lands, that destination would have received effect. But a deed was executed which was capable of conveying the lands, and the question for determination is whether that deed has effectually conveyed the fee. If this case had presented substantially the same question as occurred in the case of *Thoms*, I think, after the expressions which fell from Lord Colonsay in the House of Lords in the case of *Glendonwyn*, it would have been only right that the question should have been re-argued, and probably before the whole Court. That question would have arisen if, in place of a trust-disposition such as we have here with detailed purposes, all of which deal with a large estate, there had been simply a general conveyance of lands and estate—it might be in favour of the second husband—without any purposes indicating the nature or extent of the estate which the truster intended to convey. But I do not think we are in a case of that kind, for I am of opinion that, even if the presumption were that a simple general disposition does not affect the fee of a property held by the granter under a special destination with substitutions, yet there are circumstances or specialties (to use the expression of Lord Colonsay in the case of *Glendonwyn*) which here leave no doubt that the truster intended to convey, and therefore did convey, this estate by her trust-disposition and settlement. And accordingly, in deciding this case, so far as I am concerned I proceed entirely upon the principle of the case of *Glendonwyn*. The result is different. In the case of *Glendonwyn* it was held that the circumstances were such as to show that the estate was not conveyed. In the present case I am of opinion that the circumstances are such as clearly to show that the estate was conveyed. We have had in previous cases considerable discussion as to the extent to which proof is admissible as bearing upon the intention of the granter of the deed. I am very far from thinking that a proof at large could possibly be allowed upon such a matter. But, on the other hand, I think it clear that there are here facts decisive of the question which the Court are entitled to take into view, and which are supplied on the record and proof. Those facts are shortly these —In the first place, that this lady had, immediately before executing this deed, disentailed the estate ; in the second place, that it was her intention to surrender the policies which are mentioned in the confirmation of her estate printed in the appendix, and that that intention would have been carried out but for the circumstance that she died suddenly ; and as the result of what I have now stated, in the third place, that practically this lady had no estate whatever which she could call her own except the estate of Carse which is now the subject of dispute. She possessed some moveable estate consisting only of furniture. She had the rents of the estate of Carse, but there was no accumulation of them, for they were required for the annual family expenditure and maintainance. The deed throughout its whole terms deals with a very large estate, and this lady had no other estate with which she could deal, heritable or moveable, except the estate of Carse. I say the deed deals with a large estate, and I do not intend to repeat what your Lordships have said upon that subject; but I may observe that in the first place an annuity of £1000 a-year is provided to the second husband, which upon ordinary calculations may be taken to represent about £20,000 of a capital sum. There are children's provisions—to the first family of £4500, and to the second family of the same amount. So that altogether there is a capital dealt with expressly of about £30,000, and beyond that there are provisions for payment of legacies which might be left, and for the distribution of a residue among the various members of her family by both her marriages. If it is to be held that Carse was not in the view of the truster in executing this settlement, she was dealing with enormous sums with nothing whatever in her possession from which those sums could be provided. In addition, as your Lordships have pointed out, there are powers in this deed by way of sale of heritable property which can only be accounted for upon the footing that she was dealing with the estate of Carse. I agree with your Lordships in thinking that there is no doubt that it was the purpose of this lady to convey the estate of Carse by this deed, and that she has effectually done so.

The Court adhered.

Counsel for Pursuer (Reclaimer)—Balfour—Mackintosh. Agents—Mackenzie & Black, W.S.

Counsel for Defenders (Respondents)—Asher—J. P. B. Robertson. Agents—Webster, Will, & Ritchie, S.S.C.

Thursday, March 28.

NORTHERN CIRCUIT.

(Aberdeen.)

YOUNG *v.* YTHAN FISHERY BOARD.

(Before Lord Young.)

Justiciary Cases — Fishing — Weekly Close-time— Where Annual Close-time for Salmon-Fishing ends on Sunday Evening.

Held by Lord Young—*affirming* the Sheriff-Substitute of Aberdeenshire (Comrie Thomson)—upon a construction of "The Salmon Fisheries (Scotland) Act 1862, that the annual close-time of 168 days provided to be observed by the 7th section of that Act has no reference to the days of the week, and that where it terminated at twelve o'clock on the night of Sunday, the weekly close-time as fixed by the same section of the Act applied so as to prevent any fishing till six o'clock upon Monday morning.

Counsel for Appellant — Shaw. Agent — H. Maclennan.

Counsel for Respondents—Jameson. Agent—F. T. Gordon.