

this money; and the question is reduced to the simple one which your Lordship has explained—Does the Act of 1853 entitle the Inland Revenue to make any such double assessment upon woodland property? Now, I do not intend to go over in detail the different clauses of the statute to which your Lordship has referred. I am very clearly of opinion that in a case of this sort, where the woodland, the timber of which is cut and made matter of assessment, returns no other value whatever to the proprietor, the Inland Revenue cannot claim to have these lands assessed both on the value of the timber cut upon it, and for the value that the lands would have been worth to him if no timber had been grown on them—for that is what the Inland Revenue claim. That, I think, is not according to the language of the statute, and would be substantially to that extent a double assessment, which the Inland Revenue is not entitled to exact unless upon a clear and distinct provision of the Act of Parliament authorising it.

**LORD SHAND**—I am of the same opinion, and I concur in the judgments that have been now delivered. It is quite clear that the provisions of the Valuation Acts of 1854 and 1857 do not affect the incidence of taxation. Section 41 of the Act of 1854 expressly guards against any notion that the Acts could have such an effect, and one cannot read the whole of their provisions together without seeing that they are Valuation Acts only, intended to provide the means of valuation where there is a liability to taxation, but not intended to go further. Accordingly this question has to be settled upon the terms of the Succession Duty Act of 1853 alone. And I take it that the facts which are to be assumed in dealing with the question before the Court are these—that these woodlands are of no value to the proprietor except in so far as they are growing timber for the purpose of sale. The defender avers that he “derived and derives no income, rent, or profit of any kind from the woodlands, other than the profit, if any, realised by the sale of wood, and that the woodlands are incapable of yielding any income, rent, or profit other than as aforesaid;” and the first branch of that averment is expressly admitted by the Crown, by the addition made to the record in the course of the discussion. In regard to the second branch of the averment, the Crown have not asked for any proof that the woodlands are capable of yielding any income, rent, or profit other than the timber growing on them; and it was conceded upon the part of the respondent that if the woodlands did admit of being pastured to a limited extent notwithstanding the growth of timber, and if the Crown could have made that out, then to the extent of the profit or annual value thus accruing liability to duty could not be disputed. But as in point of fact there is no profit or rent derived from pasturing the woods, and as the Crown do not ask any proof that the woods are capable of being so pastured, I take the case on the footing that they are incapable of being pastured; and in that view of the case I have no difficulty in concurring with your Lordships in holding that under the Succession Duty Act the timber, which is the only subject that yields any return to the proprietor, is the only subject of taxation. I have only farther to say, that even if it could be shown that a proprietor

might make the woodlands available for pasturing to a limited extent, and to a limited extent only, in consequence of the timber with which they were covered, it appears to me that sec. 6 of the Valuation Act of 1854 would have no application. That section provides that where lands and heritages consist of woods, coppice, or underwood, the yearly value of the same shall be taken to be the rent at which such lands and heritages might in their natural state be reasonably expected to let from year to year as pasture or grazing lands—that is to say, that ground occupied by woods, coppice, or underwood is to be treated entirely as if it were pasture land. There is no valuation as against the proprietor of either the wood or the coppice or the underwood as a separate subject. The taxation is to be imposed entirely upon the footing of its being pasture land; and there would be therefore no double taxation in such a case, treating it first as land under wood, and secondly as land under pasture. Accordingly, that is the exhaustive valuation of the land in such circumstances.

The proposal of the Crown here is, that under the Succession Duty Act they should first take the ground as producing a valuable return or crop of wood, and value it in that way, and then treat it as if there were no wood upon it at all, and it were pasture land under sec. 6 of the Statute of 1854. It appears to me that that would be unreasonable, and that it is unwarranted by the Acts. I think that if in addition to the value of the woods there be any value at all in respect of the limited pasturing of these lands, which are truly woodlands, the return must be ascertained by getting at the actual value of the pasture, and not by adopting the provision of sec. 6 of the Act of 1854, which I think would have no application in that case.

The Lords pronounced this interlocutor:—

“Recal the second finding [Lord Curriehill’s interlocutor of 11th June last] therein contained, and in place thereof ‘Find that in said accounting the defender is entitled to credit for the amount paid by him in name of succession duty on the woodlands on said estate, in so far as these are occupied by timber, trees, or wood not being coppice or underwood, and not yielding any value except such as arises from sales of wood; and that he is entitled to deduction of all necessary outgoings:’ *Quoad ultra* adhere,” &c.

Counsel for Pursuer—H. M. Advocate (Balfour, Q. C.)—Rutherford. Agent—D. Crole, Solicitor.

Counsel for Defender—D. F. Kinnear, Q. C.—Blair. Agents—Hunter, Blair, & Cowan, W. S.

Friday, October 28.

## SECOND DIVISION.

[Lord Curriehill, Ordinary.]

GORDON v. GORDON’S TRS. (CLUNY ENTAIL).

*Entail—Trust to Entail—Construction of Trust—Entail executed in terms of Trustee’s Directions—Heirs whatsoever of Person last called—Heirs whatsoever of Entailer.*

The destination to an entailor's heirs whatsoever at the conclusion of the order of succession provided by a deed of entail does not call those persons as heirs of entail, but is only to exclude the Crown, and such persons have no right to prevent the last heir of entail in possession from alienating the lands as being his in fee-simple.

A trustor appointed his trustees to entail his lands on J and his heirs whatsoever, whom failing on C and his heirs whatsoever, whom failing on persons to be thereafter named by him, and failing such nomination, "then to my own heirs whatsoever and their assignees," excluding a certain person and the heirs whatsoever of his body, and declaring that no heir in possession of the estate of M. should succeed to his estate. C, a bastard, predeceased the trustor without leaving any heirs whatsoever, and the trustees after the trustor's death executed a deed of entail exactly in terms of the directions, except that all mention of C or his heirs was omitted. J, also a bastard, having died without issue, and leaving a deed whereby he dealt with the lands as his in fee-simple, the heir-at-law raised an action against the trustees to have it found that the deed of entail had not been executed according to the true meaning of the trustor's directions, in respect that that meaning appeared from the prior deeds of the trustor to be that he should be called as one of the heirs-substitute of entail, or, alternatively, that assuming the entail to have been executed in terms of the trustor's directions, he was entitled to succeed as heir of entail under the destination to the heirs whomsoever of the entailor—a term which, he contended, must be construed by reference to prior deeds executed by the entailor. *Held* that the entail had been duly executed in terms of the trustor's unambiguous directions, and that even if the destination to the entailor's heirs whomsoever were open to construction, there was no evidence that the trustor intended it to be read in any other than its ordinary sense, and that therefore the defenders ought to be assolizied.

*Entail—Destination—Heir of the Body—Heir whatsoever.*

*Question (per Lord Curriehill, Ordinary),* Whether a direction to entail on A and his heirs whomsoever, excluding heirs-portioners, is not a valid direction to entail on the stirps?

(See *Gordon v. Gordon's Trustees*, March 1, 1862, 24 D. 687; *M'Gregor v. Gordon*, March 7, 1863, 3 Macph. 148; *Gordon v. Gordon's Trustees*, March 2, 1866, 4 Macph. 101.)

Colonel John Gordon was proprietor of the estates of Cluny, Shiels, Midmar, and others, in the county of Aberdeen; of Braid, Craighouse, and others, in the county of Midlothian; of Kinsteary, in the county of Nairn; of Barra, South Uist, and Benbecula, in the county of Inverness. He was never married, and at his death on July 16, 1858, his nearest and lawful heir was Major-

General Charles Henry Gordon, the pursuer of this action, who was the eldest son of his younger and only brother Alexander Gordon of Myless, in the county of Essex. Colonel John Gordon had several natural children, of whom two were sons—John, afterwards Captain John Gordon of Cluny, and Charles, who predeceased his father, dying on December 12, 1857. Colonel John Gordon had three sisters—Mrs Johanna Gordon or Dalrymple, Countess of Stair, who died without issue in 1847; Mary Gordon, who died unmarried in 1846; and Charlotte Gordon, who was twice married, first to Sir John Lowther Johnstone of Westerhall, and after his decease to Mr Weyland of Woodeston, by both of whom she had issue. She died in 1845.

In 1833 Colonel John Gordon executed a deed of entail, which proceeded on the narrative that he was resolved, for the better preservation of his estates, family, and name, and for certain other good and weighty causes and considerations, to execute in the firmest manner an entail of his lands and estates therein mentioned, and by which he therefore disposed in favour of himself and the eldest son or heir-male procreated or to be procreated of his body, and the heirs-male of his (the son's) successively in order according to their seniorities, whom failing to the heirs-female of the body of his eldest son, the eldest heir-female always succeeding without division and excluding heirs-portioners, whom failing to his second son and his heirs in like manner, and so on to his other descendants according to their respective seniorities, whom failing to such person as he might nominate at any time of his life, and failing such nomination to Alexander Gordon of Myless (the pursuer's father) and the heirs whatsoever of his body, whom failing to his three sisters in succession and the heirs whatsoever of their bodies, whom all failing then to "my own nearest heirs whatsoever and their assignees, the eldest heir-female and the descendants of her body always excluding heirs-portioners." In order to leave no room for doubt as to his intention, he declared that his will was that the issue, both male and female, and whole descendants of his eldest son should succeed before his second son, and so on through the succession of his sons, and thereafter in the same way of his daughters; and he declared that by the term heir whatsoever of the bodies of my said brother and sisters is meant and shall be understood the heirs both male and female of their bodies successively according to their seniorities, the eldest heir-female always succeeding without division and excluding heirs-portioners. This deed of entail Colonel Gordon reserved right to alter or recall at any time of his life. It was never feudalised, and was found in Colonel Gordon's repositories after his death. On October 15, 1835, on the narrative of this deed of entail, and of his reserved power to execute a nomination of heirs, "and seeing that it is not at present my intention to marry so as to have lawful heirs of my own body to succeed me under said deed of entail, and that in performance of a promise to my dearest departed and ever to be lamented daughter I am desirous to call to the succession of my said entailed estates after my death my two natural sons Charles Gordon and John Gordon," and also of his desire to withdraw from the entail the estate of Catpair

and his heritable property in Midlothian, Colonel Gordon nominated and appointed "my son, the said Charles Gordon, and his heirs whatsoever, on his attaining the age of twenty-five years complete, but not sooner, to succeed to me under said deed of entail in the whole lands and estates therein enumerated, with the special exceptions hereinafter mentioned (the entailed estates being until that period conveyed by me to trustees for certain purposes under the general deed of settlement after mentioned executed by me of this date); and failing my said son Charles and his heirs whatsoever, I hereby nominate and appoint my said son John Gordon and his heirs whatsoever to succeed to said entailed estates, whom all failing, then the succession to open and descend to the series of heirs of entail or substitutes specially enumerated in my said deed of entail." In the event of the succession opening to females, the eldest of her heirs were always to succeed, excluding heirs-portioners. The deed then proceeded—"And to remove all doubt or ambiguity regarding my intentions by this present deed, I do hereby declare my wish and desire to be that my son, the said Charles Gordon, shall, on attaining the age of twenty-five, succeed to me and inherit my whole lands and estates specified and contained in said deed of entail, under the clauses and conditions therein specially enumerated (with the exception always of the lands, estates, and others which are withdrawn from the entail as after mentioned), and that after his death his lawful heirs, both male and female, shall succeed to him as heirs of entail according to the ordinary course of law, excepting only in the case of heirs-female that the eldest for the time shall always succeed without division, to the exclusion of heirs-portioners: And that failing my said son Charles Gordon and his heirs whatsoever, my son, the said John Gordon and his heirs whatsoever, shall in like manner succeed under said deed of entail to the lands and estates therein contained, under the exceptions before referred to; and until the succession opens to my said son Charles Gordon the said entailed estates and whole rents thereof are to fall under the dispositive clause of the general deed of settlement after mentioned executed by me of this date." The clause then proceeded—"And it is my distinct wish and intention that neither my brother nor any of the other heirs of entail or substitutes called to the succession by said deed of entail shall have any right or title to succeed under the same so long as my said sons Charles Gordon and John Gordon, or their issue, either male or female, are alive." The deed then declared the deed of entail to be recalled as regarded those portions of Colonel Gordon's estates which he wished withdrawn from the entail. By a general trust-disposition and settlement, executed *unico contextu* with this deed of nomination, Colonel Gordon conveyed his whole unentailed estates, heritable and moveable, to trustees for payment of debts and of annuities to his sons till they should attain the age of twenty-five; that to Charles to cease on his then succeeding as heir of entail to Cluny under the deed of 1833; while on John attaining the same age the trustees were to convey to him and his heirs in fee-simple a house in St Andrew Square, Edinburgh, and to entail the estates in Midlothian, and all others to be acquired by the

trustee south of the Dee, on "John Gordon and his heirs whatsoever, whom failing upon my son Charles Gordon and his heirs whatsoever, the succession in the case of heirs-female being always limited as in my said deed of entail; and upon the other heirs of entail or substitutes mentioned in my said deed of entail, upon the model of which deed of entail my said trustees shall cause the deed of entail of my said estates in Edinburghshire or south of the Dee to be framed. With all free income of the heritable estate, and with the whole produce of the personal estate, the trustees were directed to buy lands as near as possible to Cluny and the other estates north of the Dee, and the lands so bought were to be secured by deed of strict entail upon the same series of heirs, and under the same conditions, provisions, &c., as were contained in the Cluny entail and in the deed of nomination of Charles and John Gordon." The settlement contained this clause of revocation—"And I hereby revoke and recall all deeds of settlement heretofore executed by me, in so far as the same may be inconsistent with these presents, without prejudice, however, to my said deed of entail, which shall stand and remain in full force and effect, in so far as not altered, to my said son Charles Gordon, and the other heirs of entail, upon the lapse of the period fixed by me for his succession thereto; the rents in the meantime being payable to my said trustees in virtue of, and for the purposes specified in, this present deed; but should it happen from any cause that said deed of entail should be reduced or found inoperative, then my said trustees shall be entitled, and they are hereby authorised and required, to claim the whole of my said entailed estates in virtue of these presents, and to make up titles thereto, and to re-settle and of new entail the same, according to my intentions as expressed in my said deed of entail and in the relative deed executed by me of this date, for calling my said sons Charles Gordon and John Gordon to the succession, or as nearly consistent therewith as may be found advisable to give effect to the deed."

By last will, dated in 1837, Colonel Gordon settled the succession to his English and West Indian estates, and by a supplementary deed of settlement in 1847 he directed his estates in Inverness-shire, which had been recently acquired, to be included in the entail of his estates south of the Dee in favour of John Gordon and his heirs whatsoever, whom failing Charles and his heirs whatsoever, whom failing the heirs and substitutes mentioned in the deed of entail of 1833—and made certain alterations in detail upon his settlement of 1835, which in other respects he confirmed along with the deed of entail and deed of nomination.

In February 1852, Colonel Gordon being desirous that his son John should possess the statutory qualification for becoming a Deputy-Lieutenant of the county of Aberdeen, and a commission as captain in the Aberdeenshire Militia, disposed to himself in life rent and to John in fee the lands and barony of Midmar. Three days afterwards, in virtue of an arrangement to that effect, John Gordon, on the narrative that the disposition had been made for the purpose of affording him those qualifications, but was not to interfere with his father's powers to

cause Midmar to be held under entail, and on the same conditions as were contained in the Cluny entail of 1833, acknowledged and declared by bond of obligation that “notwithstanding the foresaid disposition and infestment in my favour, the said Lieutenant-Colonel John Gordon shall have full power and be at liberty, if he shall be so inclined, to execute, or cause to be executed, a deed of strict entail of the said lands and barony of Midmar and others, on the model of the said deed of entail of the estates of Cluny, Slains, and others: And I bind and oblige myself, my heirs and successors, if required, to concur in such deed of entail, and become a party-consenter thereto: And upon being called to the succession under such deed of entail, I become bound immediately thereafter to hold and possess the said lands and barony of Midmar and others under and by virtue of such entail alone, and under no other title;” and he bound himself to grant all necessary deeds for that purpose.

On 21st June 1832 Colonel Gordon executed another general disposition and settlement on the narrative of the entail of 1833, the deed of nomination of 1835, the disposition and settlement of the same date, the last will and settlement of 1837, the supplementary settlement of 1847, the disposition of Midmar to John Gordon and his relative obligation. With regard to that estate the words of this deed were (after narrating the disposition to John Gordon and its object) —“But he has by bond and disposition, of date the 24th day of February 1852, agreed to hold the said estate under the title of a strict entail, as I may direct, and to renounce and discharge upon his succession under such entail his infestment under the said disposition, and to hold and enjoy the estate under such entail exclusively.” The deed then proceeded—“And now seeing that from the deaths of two of my trustees in my original deed of settlement, and a variety of circumstances which have since occurred, I have resolved to make certain alterations upon my deeds of settlement, and to appoint new trustees and executors to carry my wishes into effect, and having full confidence in the integrity and ability of the parties after named for that purpose, therefore I do hereby give, grant, assign, and dispose to and in favour of” certain trustees his whole estates, heritable and moveable, with power to them to complete their title to the heritage, either by adjudication in implement, or, in their option, to require the testator’s heir-at-law for the time being to allow a feudal title thereto to be made up in his person, and grant the necessary procuratory or warrant for completing the service, and *unico contextu* therewith to denude and convey the whole heritage to the trustees, “under penalty of forfeiting all right and interest under my said deed of entail, or the other deeds of entail herewith appointed to be executed; and in case my heir-at-law for the time shall fail to comply with such requisition, and to execute the necessary deeds required, he shall forfeit all right to succeed to any part of my estates, heritable or moveable, or to claim any benefit from my succession.” The third purpose of this trust-disposition and settlement was as follows—“*Tertio*, After the said trustees shall have completed a title in their persons to the whole lands and estates belonging to me in Scotland, I hereby direct and appoint them to execute a deed or

deeds of strict entail in terms of the Act of Parliament of Scotland passed in the year 1685, entitled, ‘Act concerning Tailzies,’ of the whole lands and estates situated in Scotland now belonging or which shall belong to me at the time of my death (with the exceptions of the estates of South Uist, Benbecula, and Barra, and other lands now belonging to me in the county of Inverness, hereafter specially destined), and that to and in favour of my eldest son, the said John Gordon, now Captain John Gordon, and his heirs whatsoever, whom failing to and in favour of my youngest son, the said Charles Gordon and his heirs whatsoever, whom failing to any persons to be named in any deed of nomination to be afterwards executed by me at any time of my life, the eldest heir-female and the descendants of her body excluding heirs-portioners and succeeding always without division through the whole course of the female succession; and failing such nomination or of the persons so to be named, and their heirs whatsoever, then to my own heirs whatsoever and their assignees; but declaring always, as it is hereby expressly provided and declared, that my third sister Charlotte Gordon or Johnstone or Weyland, and the heirs whatsoever of her body, shall be expressly excluded from all right of succession to the said estates in the deed or deeds of entail to be executed by my said trustees: And further declaring that no member of the family of ‘Trotter of Mortonhall,’ possessing that estate, shall be entitled to succeed to any part of my estates of Braid or Craighouse, in the county of Edinburgh, under the said deed or deeds of entail to be executed as aforesaid: And I further appoint my said trustees to execute a deed or deeds of strict entail, in terms of the foresaid Act of Parliament of Scotland passed in the year 1685, entitled ‘Act concerning Tailzies,’ of the estates of South Uist, Benbecula, and Barra, and other lands belonging to me in the county of Inverness, to and in favour of my said youngest son Charles Gordon and his heirs whatsoever, whom failing to my eldest son John Gordon, now Captain John Gordon, and his heirs whatsoever, whom failing to any persons to be named in any deed of nomination to be afterwards executed by me at any time during my life, the eldest heir-female and the descendants of her body excluding heirs-portioners and succeeding always without division; and failing of such nomination, or of the persons so to be named and their heirs, then to my own heirs whomsoever and their assignees; but declaring always that my said sister Charlotte Gordon or Johnstone or Weyland and the descendants of her body shall be excluded from the succession of the said entailed estates as aforesaid.” The residue of the estates after payment of certain legacies and annuities was directed to be applied to the purchase of lands to be entailed, the destination being exactly similar to that just quoted down to and including the exclusion of Colonel Gordon’s sister Charlotte and her heirs whatsoever. The deed concluded with this clause of revocation of prior settlements—“And I hereby revoke and recall all deeds of settlement, and deeds of tailzie or provision, and all other deeds heretofore executed by me, in so far as the same are or may be inconsistent with these presents, but with this express provision and declara-

tion, that if this deed of settlement should be reduced or set aside, or from any cause become inoperative or ineffectual, then the foresaid deeds of settlement, deeds of tailzie or provision, and other deeds executed by me previous to the date of these presents, shall remain valid and effectual and receive full force and effect in all courts of law or equity, anything herein contained to the contrary notwithstanding; it being my express wish and desire that if the present deed of settlement is not to be given effect to, my previous deeds for settling and securing the succession to my heritable estates in the persons of my said sons Captain John Gordon and Charles Gordon, in preference to all other persons, and for making a suitable provision to my said daughter Susan Gordon, shall continue in full force and effect, so that the succession to my heritable estates may be secured preferably, and in the first place, to my own sons and their heirs whatsoever before any other person can claim to succeed to me, and that my said daughter may be fully secured in the provisions either now or formerly settled on her."

Of the same date with this deed Colonel Gordon executed a bond of provision in favour of his two sons and of his daughter Susan. It narrated all the deeds already mentioned, and bore to be granted to prevent the possibility of the grantor's views for his children's benefit "being defeated by the said deeds, or any of them being from any cause rendered inoperative or ineffectual to the prejudice of my said children." By it he bound himself to pay at the first term after his death to John £750,000, to Charles £250,000, and to Susan £10,000, with directions that the sums provided to his sons should be laid out by the trustees under the existing settlements in the purchase of lands to be settled and secured under strict entail as follows:—"Declaring that the estates to be purchased with the provision of my eldest son shall be settled and secured by a deed or deeds of strict entail . . . to and in favour of my said eldest son Captain John Gordon and the heirs whatsoever of his body, whom failing to my youngest son Charles Gordon and the heirs whatsoever of his body, whom failing to any persons to be named in any deed of nomination to be afterwards executed by me at any time during my life, the eldest heir-female and the descendants of her body excluding heirs-portioners and always succeeding without division; and failing of such nomination, or of the persons so to be named and their heirs, then to my own heirs whomsoever and their assignees; but declaring"—here followed an exclusion of his sister Charlotte Gordon or Johnstone or Weyland and her descendants precisely in the terms contained in the two trust-settlements of 1852 and 1853 respectively. And then followed similar directions to entail the lands to be bought with the £250,000 granted to Charles, the only difference being that the words used are "Charles Gordon, my youngest son, and his heirs whatsoever, whom failing upon my eldest son, the said Captain John Gordon, and his heirs whatsoever," the words "of his body" being omitted. The deed concluded with a declaration "that the present bond of provision shall only be binding and effectual in case my said sons and daughter shall from any cause be prevented or debarred from succeeding under the said deed of entail, deeds

of settlement, and the other deeds of provision already executed, or to be hereafter executed by me, according to my declared wishes and intentions as expressed in these deeds; and in the event of their succeeding under such deeds, then this present bond of provision shall become void and null to all intents and purposes."

On 28th May 1853 Colonel Gordon executed another disposition and deed of trust settlement which narrated all the previous deeds, and specially narrated that the disposition and settlement of 1852 contained a power to call upon the truster's heir-at-law to allow feudal titles to be completed in his person, and then to denude in favour of the trustees. It then declared that inasmuch as the truster was now in a position to grant a special conveyance to his heritable property, and thereby to enable his trustees under his own authority to complete titles without having recourse either to the Supreme Court or to his heir-at-law, he therefore disposed to the trustees mentioned in the deed of 1852 the lands, &c., "hereinafter specially described, as well as the heritable and moveable, real and personal, estate generally hereinafter conveyed." Then followed a particular description of the properties and a general conveyance of his whole heritable and moveable estate. The rest of the deed was a mere transcript (with one additional clause to the effect of securing that all the heirs of entail should be obliged to bear and use the surname of Gordon, and the arms of Gordon of Cluny, as their proper surname and arms) of the general disposition and settlement of 1852, already quoted and referred to. This deed was not afterwards altered by Colonel Gordon, except to the effect of recalling a single legacy under it to Charles Gordon, on which occasion he confirmed the rest of the deed. On his death in 1858, predeceased as already mentioned by his son Charles, the trustees recorded in the books of Council and Session (1) the general disposition of 1852; (2) the disposition and deed of trust-settlement of 1853, with its codicil; (3) the English will of 1837, with a codicil thereto. Colonel Gordon had himself recorded the bond of provision of 1832, which remained latent in his custody as his own writ, the contingency under which it was to operate not having come to pass. The trustees executed a deed of entail, dated 4th and 9th April and 7th May 1859, and recorded in the Register of Entails 15th June 1859, in favour of John Gordon as institute, and his heirs whatsoever. The destination in this deed was exactly in the terms (except that Charles Gordon and his heirs whatsoever were of course omitted) of the deed of 1852 already quoted. John Gordon having entered into possession under this entail, was thereafter concerned in the litigations cited at the beginning of this report, and fully referred to in the note of the Lord Ordinary, quoted *infra*. Prior to the raising of the earliest of these (*Gordon v. Gordon's Trs.*, 1st March 1862, 24 D. 687), John Gordon communicated his intention to the pursuer of this action by letter, stating that the suit was to be raised, asking his aid in obtaining a friendly settlement of the question, mentioning that he would be called as a defender, and requesting him not to consider the proceedings taken for ascertaining the validity of the entail as any interruption to the friendly relations between them. In this letter John Gordon expressed his intention of "preserving the same series of heirs."

In 1865 John Gordon married the defender Mrs Pringle or Gordon, now Lady Gordon Cathcart. He died in 1878 leaving a trust-disposition and settlement dated Jan. 4, 1869, by which he conveyed to trustees the whole lands conveyed to him under the entail of 1859, and for payment to his widow of the whole free revenue of the mainland estates during her life; and "on the death of my said wife, or on my own death, in the event of my surviving her, my trustees shall hold the residue and remainder of my whole estate and effects, heritable and moveable, real and personal, in trust for behoof of the heirs in whose favour the entail of my estates of Cluny and others as herein-after mentioned is directed to be executed; and on the majority of the heir first in order of succession, or as soon thereafter as is practicable with reference to the due fulfilment of the other purposes of this trust, I direct and appoint my trustees to execute a deed or deeds of strict entail, in terms of the Act of Parliament of Scotland passed in the year 1685, entitled 'Act concerning Tailzies,' of my estate of Cluny and other lands and estates situated on the mainland of Scotland, now belonging or which shall belong to me at the time of my death, so far as not sold for the purposes hereof, in virtue of the powers after mentioned, or that may have been purchased by my trustees under the direction contained in this deed; and that to and in favour of the heirs of my body, whom failing to and in favour of any person or persons to be named or called in any deed of nomination to be afterwards executed by me at any time of my life; and failing such nomination, or of the person or persons so to be named or called, to and in favour of Charles Arthur Linzee, youngest son of Robert George Linzee, Esquire of Jermyns, Romsey, in the county of Hants, by Maria Frederica Gordon or Linzee, his wife, and the heirs of the body of the said Charles Arthur Linzee," whom failing to and in favour of the immediate elder brother of Charles Arthur Linzee and the heirs of his body, and so on through the sons of that family, whom all failing to their mother and the heirs of her body, whom all failing to the heirs whatsoever of Colonel Gordon and their assignees. The estates of Barra, South Uist, and Benbecula were, in the event which happened, of Mr John Gordon's death leaving a widow but no children, to be disposed to Mrs Gordon absolutely. John Gordon's trustees made up their title by various notarial instruments. Mrs Gordon having obtained a disposition to the Inverness-shire estates from the trustees, conveyed them to herself and her assignees whomsoever.

On 3d December 1880 the pursuer brought this action against Colonel Gordon's trustees, John Gordon's trustees, John Gordon's widow (now Lady Cathcart), and Charles Arthur Linzee and his brothers, for reduction of the deed of entail executed by Colonel Gordon's trustees, and of the other deeds narrated by the Lord Ordinary in his note, quoted *infra*; and for declarator that Colonel Gordon's trustees were bound to execute and deliver to him a deed of entail of the whole lands and estate of Colonel Gordon having the following destination—"to and in favour of the pursuer, the said Charles Henry Gordon, eldest son of the late Alexander Gordon of Myless, in the county of Essex, immediate younger brother of the said deceased Colonel John Gordon, and the heirs whatsoever of the

body of the said Charles Henry Gordon; whom failing Alexander Stillingfleet Gordon, only child of the deceased Cosmo Spencer Gordon, second son of the said deceased Alexander Gordon of Myless, and the heirs whatsoever of the body of the said Alexander Stillingfleet Gordon; whom failing George Augustus Gordon, third son of the said deceased Alexander Gordon of Myless, and the heirs whatsoever of the body of the said George Augustus Gordon; whom failing Eleanor Johanna Gordon, eldest daughter of the said deceased Alexander Gordon of Myless, and the heirs whatsoever of the body of the said Eleanor Johanna Gordon; whom failing Maria Frederica Gordon or Linzee, wife of Robert George Linzee, Esq. of Jermyns, Romsey, in the county of Hants, second daughter of the said Alexander Gordon of Myless, and the heirs whatsoever of the body of the said Maria Frederica Gordon or Linzee; whom failing, Marion Margaret Gordon, third daughter of the said Alexander Gordon of Myless, and the heirs whatsoever of the body of the said Marion Margaret Gordon; whom failing to and in favour of the heirs whatsoever of the body of the deceased Mrs Johanna Gordon or Dalrymple, eldest sister of the said deceased Colonel John Gordon; whom failing to the heirs whatsoever of the body of Mary Gordon, second sister of the said deceased Colonel John Gordon; whom all failing to the nearest heirs whatsoever of the said Colonel John Gordon and their assignees—which entail should contain an express clause providing that the whole heirs of entail succeeding under such deed or deeds of entail should be bound and obliged constantly to bear, use, and retain the surname of 'Gordon' and the arms and designation of 'Gordon of Cluny' in all time, after their succession to or obtaining possession of the said lands and estates, as their proper surname, arms, and designation; but under the express provision and declaration that the third sister of the said deceased Colonel John Gordon, Charlotte Gordon or Johnstone or Weyland, and the heirs whatsoever of her body, should be expressly excluded from all right of succession to the said estates in the deed or deeds of entails to be executed by his said trustees; and under the further declaration that no member of the family of 'Trotter of Mortonhall' possessing that estate should be entitled to succeed to any part of the said estates of Braid or Craighouse, in the county of Edinburgh, under the deed or deeds of entail to be executed as aforesaid." Otherwise, and in the event of its being found that the deed of entail executed by Colonel Gordon's trustees was executed according to their obligation and was valid, the pursuer claimed to be entitled, as the heir of entail entitled to succeed to John Gordon under that deed, to make up titles and enjoy the estate as heir of tailzie and provision, and claimed right to have John Gordon's will, the titles made up by his trustees, their disposition to Lady Cathcart, and her disposition to herself and her heirs and assignees whomsoever, reduced and set aside; or otherwise, that with regard to Midmar, John Gordon was, by virtue of bond and obligation granted by him in 1852 as above narrated, and by having concurred in and been a party to the deed of entail executed by Colonel Gordon's trustees in 1859, bound not to interfere with the destination therein contained as regarded Midmar.

The chief pleas of the pursuer were, as regarded the first alternative conclusion, as follows—“(1) The pretended deed of entail by Colonel Gordon's trustees does not give full and true effect to his testamentary writings condescended on, but is disconform thereto, in respect that—(1st) It is not, as regards the destination therein contained, a valid entail in terms of the Act 1685, c. 12; (2d) It does not contain a valid substitution of the pursuer and the other substitutes of entail appointed in Colonel Gordon's deed of entail of 1833 to John Gordon as institute, and the heirs of his body, and it ought therefore to be reduced as concluded for.”

As regarded his second alternative conclusion,—that assuming the deed of entail executed by Colonel Gordon's trustees to be good, he was entitled to succeed under it as an heir of entail, he pleaded, *inter alia*—“The substitutions in the said deed of entail not having come to an end in the person of John Gordon, his said disposition and settlement is not effectual to alter or evacuate the destination.”

John Gordon's trustees and Lady Cathcart lodged defences, in which the defender C. A. Linzee concurred.

The Lord Ordinary, on 25th June 1881, repelled the reasons of reduction, and assuozied the defenders, appending this note to his interlocutor—“This action relates to the settlements of the late Colonel Gordon of Cluny, which have already, in at least three several lawsuits, been under the consideration of the Court. The pursuer, who was the defender in the first of these litigations, but was not a party to the other two, maintains that the whole of them were ill decided by the Court, and that, notwithstanding the judgments of the Court, he is still entitled to vindicate his alleged right to be the proprietor of Colonel Gordon's estates. The pursuer is the eldest son of Colonel Gordon's only brother Alexander Gordon of Myless, and unless displaced from the succession by the settlements of his uncle, duly executed, he would undoubtedly have been entitled at Colonel Gordon's death to succeed, as his uncle's nearest and lawful heir, to the whole of his estates, which were situated in various parts of the country, and are of great extent and value. He still retains the character of his uncle's nearest and lawful heir, and he now maintains that he has not been effectually displaced from the succession, although he can now take only under the limitations of a strict entail; and that if the direction as to entailing the estates contained in his uncle's settlement had been duly carried out by the trustees of that settlement, he would now be entitled to possess the estates as heir of entail. To vindicate this alleged right he now asks the Court to reduce and set aside the entail executed by them after Colonel Gordon's death in 1859, and all the titles which have followed upon that deed, and to ordain the trustees to execute a new deed of entail in favour of himself as institute, and of several other descendants of Colonel Gordon's brother and sisters as substitute heirs of entail. And there are alternative conclusions to the effect (1) That assuming the entail as actually executed by Colonel Gordon's trustees to have been executed in terms of the truster's directions, he (the pursuer) is, according to the sound construction thereof, now entitled to succeed to the estates as the nearest heir of entail sub-

stituted to the institute and now alive; and (2) That, at all events as regards the estate of ‘Midmar,’ Captain John Gordon (the institute) was personally barred from regarding it as not entailed upon the pursuer, and was not entitled to alienate that estate gratuitously to the prejudice of the pursuer.

“The trustees, in pursuance of the directions to entail Cluny and the other estates which actually belonged to Colonel John Gordon during his life, executed a deed of entail, dated 4th and 9th April and 7th May, and recorded in the Register of Entails 15th June 1859. The entail is in favour of John Gordon as institute and his heirs whatsoever, precisely in the terms employed by the truster himself in his trust-deed, omitting of course Charles and his heirs whatsoever from the destination. John Gordon entered into possession of the entailed estates, and he thereafter raised an action of declarator in this Court, calling as defenders his father's trustees and the present pursuer Colonel (now Major-General) Charles Henry Gordon, who, as I have said, was the nearest ‘heir whatsoever’ of Colonel Gordon. In that action John Gordon sought to have it declared that the entail was ineffectual in respect that under the Act 1685 it was incompetent to make a valid entail upon the ‘heirs whatsoever’ of the institute, and that the entail having been executed in these terms was ineffectual as containing no proper tailzied destination, and that he therefore held the estates in fee-simple. The trustees and the present pursuer both lodged defences, in which it was maintained by the latter that the entail was valid, in respect that according to its sound construction as executed by the trustees, the term ‘heirs whatsoever’ of John Gordon meant and could mean nothing but ‘heirs whatsoever of his body.’ The present pursuer, however, was called as a defender only in his character as heir whomsoever of Colonel Gordon, and in respect that he did not allege or contend that he was an heir of entail, or possessed any other character than that of heir whomsoever of the entailer, the Court held that he was not a proper contradictor, and that there was no proper party in the field to defend the action, which they accordingly dismissed.—See *Gordon v. Gordon's Trustees*, 24 D. 687, which is the earliest of the three litigations to which I have already referred. It is pleaded by the present defenders (who are the trustees of Colonel Gordon, and the widow and trustees of Captain John Gordon), as a defence against the present action of reduction, that the judgment in that first action is *res judicata* against the present pursuer, to the effect that he, as the heir whomsoever of the entailer, is not entitled either to challenge the entail in question, or to maintain its validity against any challenge by a proper heir of entail. If this action had simply been one to have it declared that the entail as executed was a valid and effectual entail upon John Gordon and the heirs whomsoever of his body, I would be much inclined to hold that the question was *res judicata* against the pursuer. But the present is mainly, and in the first instance, an action of reduction of the entail on the ground that it has not been executed in terms of the truster's directions; and the pursuer maintains that according to the sound construction of these directions the entail should have been made in favour of John Gordon and the heirs whatso-

ever of his body, whom failing the pursuer and the other descendants of the truster in their order. These questions, it will at once be seen, are quite different from those raised in the first litigation, and for that reason the judgment in that case cannot be *res judicata* against the present pursuer.

“The second action (see *M'Gregor v. Gordon*, 3 Macph. 148) was a suspension by Donald M'Gregor of a threatened charge at the instance of John Gordon for the price of part of the estate of Braid, which John Gordon had sold to Mr M'Gregor. The charge was sought to be suspended on the ground that John Gordon, as heir of entail, had no power to sell any part of the estate. John Gordon, who was the only party called as respondent, maintained that the destination to him and his heirs whatsoever in the entail executed by his father's trustees (which was the only deed then before the Court) was not a valid entail, in respect that an entail could not competently be made in favour of such a series of heirs—in other words, that it was not competent to entail lands on an individual and his heirs whatsoever. The pursuer was not a party to that action, and as it is impossible to say that his interests were represented in it, the judgment of the Court declaring the entail to be invalid and refusing the suspension, is not *res judicata* against him. At the same time, as the judgment was in conformity with the opinion of twelve out of the thirteen Judges then on the bench, the judgment on the point so decided must, unless some new light is brought to bear upon the question, be regarded as finally settled in this Court, and as binding at all events upon a Lord Ordinary sitting alone in the Outer House. But, as I have already indicated, the main questions now raised are entirely different from that which alone was before the Court in *M'Gregor v. Gordon*. That judgment was merely upon the construction of the entail as executed by the pursuer. The present question is, whether the entail was executed in conformity with the truster's directions; and if the pursuer is right in maintaining that the entail was not so executed, it is possible that, notwithstanding the judgments in the two previous actions of *Gordon v. Gordon's Trustees*, 24 D. 687, and *M'Gregor v. Gordon*, 3 Macph. 148, he may be entitled to prevail in his reduction. But in order to do so he must establish two propositions—(1) that the direction to entail the lands upon ‘John Gordon and his heirs whatsoever’ was, contrary to the express words of the deed, a direction to entail upon ‘John Gordon and his heir whatsoever of the body,’ or at all events that according to the sound construction of that direction ‘heirs whatsoever’ meant ‘heirs whatsoever of the body’; and (2) that the direction to call at the end of the destination the truster's ‘own nearest heirs whatsoever and their assignees’ was truly a direction to call, in the first place, the pursuer as the truster's nearest lawful heir and the heirs of his body, whom failing the pursuer's brothers and sisters in their order and the heirs of their respective bodies, whom failing the descendants of the truster's sisters in their order, excluding the descendants of one sister from the whole estates, and the ‘Trotters of Mortonhall from the Midlothian estates.

“I need not say that to expand a direction to

conclude the destination with the words of style added after all entailed destinations—viz., to the entailor's own heirs whomsoever and their assignees—into a direction to enumerate these heirs *nominatim et seriatis*, and to limit the succession to the heirs of the bodies of these several persons is, to say the least of it, a startling novelty, and would be taking a very great liberty with the trust deed. The pursuer, however, is bound, if he would succeed in his reduction, to make out that proposition as well as the other already mentioned. It will not avail him to make out either proposition unless he can establish both. Thus, should he fail in showing that the special destination for which he contends must be read into the directions of Colonel Gordon's trust deed, it would not be of any advantage to him to show that the direction to entail the lands on John Gordon and his heirs whatsoever meant an entail in favour of John Gordon and the heirs whatsoever of his body. The reason is obvious; the pursuer would under an entail so executed simply be ‘heir whatsoever’ of the entailor, who, according to all the authorities, can never as such be a member of the tailzied destination, even though heirs-portioners be excluded (see *Primrose*, 16 D. 498). He would therefore have no right or interest to enforce any of the fetters of the entail against the institute or the heirs of his body, or to challenge any deed, onerous or gratuitous, by which the institute or any of his issue might affect its estate. That was decided—in my humble opinion rightly decided—in the first case of *Gordon v. Gordon's Trustees*, 24 D. 687. On the other hand, unless the pursuer can show that the ‘heirs whatsoever’ of John Gordon meant the heirs of his body, it will not avail him to show that the destination ought to have included himself *nominatim* as a member of the tailzie, because on this assumption the destination to John Gordon and his heirs whatsoever would be a fee-simple destination in the person of John, and the entail would be at an end as soon as it was delivered to him, either with or without a judgment of this Court to that effect, and the estate could therefore never reach the pursuer unless, by the goodwill of John Gordon the institute, the destination should be left by him unaltered. The pursuer must therefore, as I have said, make out both of the propositions which I have stated.

“As I think the second of these propositions is the more difficult for him to maintain, I shall notice it first, because if I am right in the view which I take of it, any very minute consideration of the pursuer's other propositions may be unnecessary. The pursuer is met at the very outset of his argument by this serious obstacle, viz., that the terms of Colonel Gordon's trust-deed of 1853 are clear and unambiguous—and do not even suggest that he ever intended or desired any special tailzied destination of his estates in favour of any person except his son ‘John Gordon and his heirs whatsoever’—and any heirs whom he might specify in any deed of nomination which he might ‘afterwards’ execute; and as he died in 1858 without leaving any such deed of nomination, ‘John Gordon and his heirs whatsoever’ are the only persons on whom—so far as appears from anything in the trust-deed—Colonel Gordon wished his estates to be entailed. Unless, therefore, we travel out of that trust-deed, and



attempt to construe it by other and prior settlements and deeds of Colonel Gordon, the pursuer's arguments must entirely fail. But he maintains, that besides his final trust-deed of 1853, Colonel Gordon left various other deeds and settlements, all more or less testamentary in their character, and that the Court is entitled and bound to read these along with the final deed in order to ascertain precisely Colonel Gordon's intention; and that if this is done it is made clear that his intention was that the pursuer and most of his other nephews and nieces and their descendants should be specially called *nominatim et seriatim* as heirs of entail at the end of the destination. The difficulty which I have in allowing reference to be made to these other deeds is, that all of them are substantially revoked by the clause of revocation in the final trust-deed. The revocation is thus expressed:—'And I hereby revoke and recall all deeds of settlement and deeds of tailzie or provision, and all other deeds heretofore executed by me, in so far as the same are or may be inconsistent with these presents; but with this express provision and declaration, that if this deed of settlement should be reduced or set aside, or from any cause become inoperative or ineffectual, then the foreshaid deeds of settlement, deeds of tailzie or provision, and other deeds executed by me previous to the date of these presents, shall remain valid and effectual, and receive full force and effect in all courts of law and equity, anything herein contained to the contrary notwithstanding: it being my express will and desire, that if the present deed is not to be given effect to, my previous deeds for settling and securing the succession to my heritable estates in the persons of my said sons Captain John Gordon and Charles Gordon, in preference to all other persons, and for making provision to my said daughter Susan Gordon, shall continue in full force and effect, so that the succession to my heritable estates may be secured preferably and in the first place to my own sons and their heirs whatsoever, before any other person can claim to succeed me, and that my said daughter may be fully secured in the provisions either now or formerly secured or settled on her.'

"In the ordinary case reference would not be permitted to be made to revoked settlements for the purpose of construing a final settlement, the terms of which are clear and unambiguous. But there are circumstances in this case which seem to me to take it out of the general rule. The clause of revocation is not absolute, but only to the extent to which the previous deeds and settlements are inconsistent with the final settlement. Further, Colonel Gordon, in the narrative clause of his final settlement, enumerates all or nearly all of these deeds, and refers to them in such a manner as to show that he regarded the whole as forming part of his testamentary writings, although superseded to a very great extent by the final settlement. The deeds so referred to are—(1) a deed of entail of Cluny and other estates in the counties of Aberdeen, Banff, Midlothian, and Nairn, dated 28th December 1833; (2) a deed of nomination executed by him on 15th October 1835, by which he called to the succession his two natural sons John Gordon and Charles Gordon, and their respective 'heirs whatsoever'; (3) a general disposition and settlement of same date; (4) a last will and

testament for regulating the succession to his English and West India estates, dated 24th April 1837; (5) a supplementary deed of settlement, dated 4th January 1847, for regulating the succession to South Uist, Benbecula, and Barra, in Inverness-shire, and the estate of Midmar in the county of Aberdeen; (6) a conveyance of Midmar, dated 21st February 1852, in favour of himself in liferent and his eldest son John Gordon and his heirs and assignees in fee; (7) a bond and obligation, dated 24th February 1852, by the said John Gordon to his father Colonel Gordon, qualifying the said conveyance; (8) a new general disposition and deed of settlement of the truster's whole estates, dated 21st June 1852. It was after enumerating all these deeds in his final trust-settlement of 1853 that Colonel Gordon therein explained that his reason for executing that final settlement was, that the titles to his estates in Scotland had now been completed in his own person, and that he was in a position to grant a special conveyance of the whole to his trustees, so as to enable them to complete their titles at once after his death, without having recourse either to the Court of Session or to his heirs-at-law, and then the deed concludes with the clause of revocation above recited. On the whole, I am inclined, though not without hesitation, to hold that it is competent to read all these other deeds of settlement of the truster for the following purposes:—First, to see how far any of them are to stand or receive effect along with his final trust-settlement; second, to see whether in these deeds, or any of them, the term 'heirs whatsoever' is used in connection with the names of John Gordon and Charles Gordon in such a way as to bear the meaning of 'heirs whatsoever of the body,' and whether, *tota re perspecta*, there is any reason to hold that the term was intended to bear a different signification in the final settlement. In the present stage of the argument, however, the earlier deeds are to be read only in order to see whether any of the directions or conveyances therein in favour of the pursuer stand unrevoked, or are so dealt with as to render it reasonable—or rather necessary—to hold that Colonel Gordon intended these benefits to be continued under his final settlement.

[His Lordship here narrated the deeds already fully quoted of 1833, 1835, 1837, and 1847, remarking that up to the last-named year it was plain that Colonel Gordon desired, that failing his sons and their heirs whatsoever, the succession should pass as a tailzied succession to his collateral relatives, *i.e.*, his brother Alexander and his sisters, and the heirs whatsoever of their bodies respectively. He also narrated the deed of 1852 relating to Midmar, also already quoted, the trust-settlement of 1852, and the bond of provision of the same year. The note then continued:—]

"Then follows the final settlement of 28th May 1853, to which full reference has been already made, and which only differs from the settlement of 21st June 1852 inasmuch as it contains a special conveyance of the whole landed estates which then belonged to Colonel Gordon, instead of a mere general conveyance, the declared purpose being to obviate the necessity of the trustees having to resort to the heir-at-law or to the Court of Session to complete their titles to the estates. Now, I am inclined to think that it is competent, looking to the general tenor of all these deeds,

to read them all (except perhaps the bond of provision) in order to ascertain whether there is any ground for holding, as the pursuer asks the Court to hold, that there is in the final settlements of 1852 and 1753 any direction, express or implied, by the truster, or even any indication of an intention on his part, to direct that his brother and sisters, and the descendants of his or their bodies respectively, or any of them, should be specially called as heirs of entail in the deeds of entail to be executed by his trustees. I confess I can see nothing of the kind; on the contrary, my opinion is that the two later deeds present a marked contrast to all the earlier deeds. These all proceeded on the footing that the entail of Cluny was to subsist—that although Colonel Gordon's sons and their heirs whatsoever were to have the first place in the destination, his brother and sisters and their descendants were still to take after them, and that the new entails to be made of lands subsequently purchased by Colonel Gordon, and to be purchased by his trustees, were to be made on the style and model of the Cluny entail, and on the series of heirs contained therein, and in the deed of nomination. But by the time when he came to execute the deed of 1852 and 1853 Colonel Gordon's views had materially changed; a change of circumstances had occurred, of which we know not the particulars, but which he gives as his reason for altering his settlements; and in his directions to entail his whole estates (including Cluny) he no longer directs the entail to be in the style and model of the old entail of 1833, or on the same series of heirs as in that deed and the relative deeds of 1835 and 1847; he no longer directs his brother and sisters and their descendants to be inserted as heirs of tailzie between the heirs to be nominated by him and his own heirs whomsoever; he merely directs deeds of strict entail to be made in favour of his sons John and Charles and their respective heirs whatsoever; and failing them, and any heirs to be nominated by him, then in favour of his own heirs whatsoever and their assignees. I cannot regard these alterations and omissions as accidental. They must be held to have been done of set purpose—possibly because his affection for his sons had so much increased that he no longer cared to perpetuate the succession to his estate in the collateral line; but be that as it may, the pursuer can take on this branch of the case no benefit from a reference to Colonel Gordon's earlier settlements. These negative instead of supporting his contention, and they afford no ground for construing the directions in the trust-deeds of 1852 and 1853 as to the destination otherwise than according to the natural signification of the words employed, viz., that failing John Gordon and his heirs whatsoever the succession was to open to the truster's own heirs whomsoever, who it is conceded are not and cannot (when so called) be heirs of entail. The pursuer, therefore, who is merely an heir whomsoever of Colonel Gordon, is not an heir of entail, and is not and never was under these directions entitled to call upon the trustees to execute an entail in favour of himself *nomi-natim*. The pursuer thus fails in establishing one of the two propositions, both of which must be made out before he can succeed in this branch of his action.

“I should here, however, notice another argu-

ment by which the pursuer tries to support the proposition which we have just been considering, and that is, that the calling of Colonel Gordon's own heirs whatsoever at the end of the destination is not the ordinary clause of style, inasmuch as it is followed by the exclusion of certain of these heirs whomsoever, viz., Colonel Gordon's sister Charlotte and her descendants, and certain members of the family of Mortonhall. But this appears to me to be no better than a clause excluding heirs-portioners, which it is now quite settled will not convert a destination to an entail's heirs whomsoever into a tailzied destination (*Primrose*, 16 D. 498). The best definition of a tailzied succession known to me is that by Sir Thomas Craig, lib. ii., dieg. 16, sec. 2,—‘*et talliata fenda [dicuntur] quæ, precisa et neglecta recta et lineali successione, ad certos hæredes, etiam ex transverso, qui ex provisione hominum instituuntur, perveniunt.*’ Two things are thus necessary to a proper tailzied destination, viz., not only a cutting off of the direct and lineal succession, but a destination in favour of ‘*certi hæredes,*’ i.e., heirs of certain classes or *stirpes* whom the entailer may be reasonably supposed to have had in view. The mere exclusion of the members of one *stirps* can not convert the clause of heirs whomsoever into a tailzied class. If, for instance, the nearest heir whomsoever should happen to be a woman, the succession on opening to her might, in the second or third generation, go out of the blood of the entailer altogether, which would clearly be inconsistent with the notion of a tailzie, which is to keep the estate among members of the selected classes or lines. The pursuer therefore has, in my opinion, not succeeded in showing that he holds any other character than that of ‘heir whomsoever’ of Colonel Gordon, or that he is entitled to be regarded as an heir of the tailzied destination directed by Colonel Gordon.

“And if I am right in these views, it is unnecessary to consider whether the pursuer has succeeded in establishing his first proposition, viz., that the directions of Colonel Gordon to his trustees were that they should entail the estates on his sons and the heirs whatsoever of their bodies respectively. I have already explained that this question has been deliberately decided by the whole Court adversely to the view of the pursuer—that is to say, the Court, by the large majority of 12 to 1, held that the entail, as executed by the truster in favour of ‘John Gordon and his heirs whatsoever,’ did not contain a good tailzied destination, and as the entail is *in terminis* in conformity with the directions of the truster, the pursuer cannot prevail in his demand to have that entail set aside as disconform to these directions unless indeed he can show that according to the sound construction of these directions the destination should have been limited to the ‘heirs whatsoever of the body’ of John Gordon. This construction (standing the decision of the Court in *M'Gregor v. Gordon*, 3 Macph. 148) cannot be maintained unless the pursuer, by a competent reference to the prior and contemporaneous settlements of the truster, can show that the direction in the trust-deed necessarily implies a direction to entail upon the ‘heirs whatsoever of the body’ of John Gordon. It is, in my opinion, not incompetent to refer to these other writings for the purpose of ascertaining whether through-

out his settlements the truster has used the term 'heirs whatsoever' in connection with John Gordon and Charles Gordon in such a manner as to show clearly that he used it not in its ordinary and natural signification, but in the limited sense of 'heirs whatsoever of the body.' I may here be permitted to say, with very great deference, and in all humility, that I have always regarded the decisions in the case of *M'Gregor v. Gordon*, and in the earlier case of *Leny v. Leny*, 22 D. 1272, as of doubtful soundness, and if the question had been still open I would have ventured to state at length the grounds of my doubts. All I shall say is, that but for these decisions I should have been inclined to hold that a direction to entail lands upon 'A and his heirs whatsoever,' excluding heirs-portioners, an entail executed in these terms, means an entail upon the *stirps*, and all the members of the *stirps*, *i.e.*, all persons of the blood of the *stirps*. The term 'heirs whatsoever' in such a collocation means something quite different from the term 'heirs whomsoever' of the entailor, usually inserted in entails at the end of the tailzied destination simply for the purpose of excluding the rights of the Crown as heir of the last member of the tailzie. Heirs whomsoever, so called, are unquestionably not heirs of the tailzie. But whether I am right or wrong in my views as to the meaning of 'heirs whatsoever' of John Gordon as occurring in the entail actually executed by the trustees, the question must now, in this Court be regarded as settled by the two judgments referred to. At the same time, I am of opinion that very slight evidence as to the intention of Colonel Gordon in using that expression in his settlements of 1852 and 1853 will suffice to displace the construction put upon the words by the Court in *M'Gregor v. Gordon* in 1864. The Court had then before them none of the settlements of Colonel Gordon—and, indeed, no document but the entail of 1859, executed by his trustees. But the question now is whether the trustees have executed that deed in conformity with his instructions, and if it shall appear that he intended the entail to be upon John Gordon and the 'heirs whatsoever of his body,' the Court will be entitled to say that his directions have not been fulfilled by an entail in favour of John Gordon and his 'heirs whatsoever.'

Now, it appears from the last of the three litigations, *Gordon v. Gordon's Trustees*, 4 Macph. 101, that several of these settlements were laid before the Court; the question there raised and decided being, whether, in view of the previous decision in *M'Gregor v. Gordon* that the entail executed by the trustees was invalid, the trustees were bound to purchase lands with the residue of the estate, and entail them in the same way as in the prior entail; or whether, as such an entail would be invalid, John Gordon was not entitled to call upon them to hand over to him the money unconverted?

"The Court, by a majority of nine to four, held that Captain Gordon should get the money. But in that case the Court did not apply their minds to the question as to what the direction to entail truly imported; and the necessary materials for disposing of that question were not before the Court. I have already pointed out that a very important clause in the deed of nomination of 15th October 1835, by which John and Charles

Gordon and their heirs whatsoever were for the first time introduced into the succession, was not contained in the print of documents laid before the Court. I mean the clause in which he explains the words 'heirs whatsoever' as being synonymous with the 'issue' of his sons, *i.e.*, the heirs whatsoever of their bodies. Having thus distinctly explained his meaning in using these words 'heirs whatsoever' by what may well be termed 'a declaration plain,' he goes on to execute his trust-settlement of the same date (15th October 1835), and his supplementary settlement of 1847, both of which undoubtedly, along with his original deed of entail of 1833, and the deed of nomination, constituted his testamentary arrangements, and must be read together as one deed. Yet in these two trust-settlements he directs entails of lands to be purchased to be made in favour of his sons and their 'heirs whatsoever,' meaning thereby clearly 'heirs whatsoever' in the sense of the deed of nomination, *i.e.*, 'heirs whatsoever of the body.'

"Colonel Gordon, therefore, in all of his settlements up to and including the deed of 1847, used the term 'heirs whatsoever' in connection with John and Charles Gordon as limited to and synonymous with 'heirs whatsoever of the body.' The only other question then is, Did he use these words in a different sense in his trust-deeds of 1852 and 1853? I can see no evidence of any such intention. He seems indeed to have altered his intention to include within the tailzied succession his brother and sisters and their descendants; but there is nothing to indicate that he intended or desired that the succession should not be secured by way of tailzie to his sons and their issue. This is, I think, made very plain by the bond of provision already referred to, executed by him simultaneously with the trust-deed of 1852. There is in it an express direction to his trustees to invest the large sum of £750,000, provided by John Gordon, in land, to be entailed on him and 'the heirs whatsoever of his body;' whom failing Charles and 'the heirs whatsoever of his body'—and although the lands to be purchased with the £250,000 provided to Charles are to be entailed on him and his 'heirs whatsoever,' whom failing on John and his 'heirs whatsoever'—it is clear that Colonel Gordon meant 'heirs whatsoever of his body' in the case of both sets of provisions—indeed the defenders conceded this in argument. But here, again, as in the series of settlements in and prior to 1847, we have Colonel Gordon using the words 'heirs whatsoever' in connection with his sons as equivalent to and convertible with 'heirs whatsoever of the body.' I cannot avoid the conclusion that if all these deeds had been fully before the Court in 1864 and 1866 the decision as to the meaning of 'heirs' whatsoever,' occurring in the entail and in the directions of the settlement of 1853 would have been different. At all events, the language of the deed of nomination and of the bond of provision, when read along with the directions in the trust-deeds of 1835, 1847, 1852 and 1853, leaves no doubt in my mind that Colonel Gordon intended and directed his lands to be entailed upon his sons and the heirs of their respective bodies.

"But while I have thought it right thus to express my opinion on this branch of the case, I do not see how—even if the pursuer were now to obtain

deeree to the effect that the entail ought to have been conceived in favour of John Gordon and the heirs whatsoever of his body—he could take any benefit. He cannot be in a better position than if the entail had been originally expressed in the form for which he contends. Now, John Gordon had no issue, and he was therefore at his death the last member of the tailzied destination. No one was entitled to succeed to him as heir of entail—certainly not the pursuer, who is merely an heir whomsoever of the entailer, and has no right to enforce the fetters of the entail. John Gordon, therefore, although not entitled to alienate or burden the estates by any deed to take effect during his life, or so long as an heir of his body was possible, was clearly entitled,—and even if the entail had been taken to the ‘heir whatsoever of his body,’ would have been entitled,—to dispose of the estate, either onerously or gratuitously, by any deed to take effect after his death. This he has effectually done by his trust deed, and by the provisions in favour of his widow, now Lady Cathcart; and on the whole, on this branch of the case I am clearly of opinion that the pursuer cannot prevail, and that the defenders are entitled to be assolzieed from the reductive conclusions of the action, and from the conclusion for declarator that the defenders Colonel Gordon's trustees are bound to execute a new entail in his favour.

“II. *As to the conclusion for declarator*—That, assuming the entail as executed not to be reducible, the pursuer is entitled, according to its sound construction, to succeed under it as an heir of entail—it follows from what I have already said that, standing the decision in the case of *M'Gregor v. Gordon*, I have no alternative but to assolzie the defenders from this conclusion also.

“III. *Conclusion as to Midmar*.—There are various other subordinate questions raised in the defences, such as prescription, homologation, and the like; but none of these can arise if the views which I have now taken upon the two general questions are held to be correct. But while my opinion upon the case generally is, as I have indicated, that the pursuer has no title or interest as an heir of entail to reduce the entail as executed, or the settlement of Captain John Gordon, and the other titles following thereon, or to insist that a new entail should be made in the terms which he demands, there may be a specialty as regards the estate of Midmar. The pursuer maintains that whatever may be the case with regard to Cluny and South Uist, and other estates of Colonel Gordon, John Gordon became bound by the deed of obligation, executed on 24th February 1852, to concur in the granting of a strict entail of these lands of Midmar upon the model of the estate of Cluny. It appears to me, however that this argument is not well founded, and that it is based upon a misreading of the bond and obligation. As I read that deed, it merely amounts to this, that if Col. Gordon should be so inclined he should be at liberty to cause a deed of strict entail of Midmar to be executed upon the model of the Cluny entail. Now, reading that obligation in connection with Col. Gordon's interpretation of it (already quoted) in his trust-settlement of 1852, I think the meaning plainly is, not that John Gordon shall absolutely in all circumstances be a party to entailing Midmar on the model of the Cluny entail, but merely that he will concur in executing such an entail as

Colonel Gordon shall direct. Now, Colonel Gordon deals with Midmar expressly in both of his later settlements, viz., those of 1852 and 1853; and in neither does he direct that estate to be entailed on the model of the old Cluny entail; on the contrary, he directs it to be entailed along with Cluny and his other estates in a new deed of strict entail, and upon a much more limited series of heirs. John Gordon complied with these directions, and along with his co-trustees he created a deed of entail of all these estates, including Midmar, in the terms prescribed by Colonel Gordon. It is beside the present question to say that because that entail has been held invalid on other grounds the pursuer is now entitled to insist upon a new entail of Midmar being executed in his favour on the style and model of the old Cluny entail, indicating the destruction of that entail. It appears to me that Captain Gordon did all he was bound to do by consenting to, and indeed being a party to, the execution of the entail of 1859, which included Midmar. I am therefore of opinion that the defenders are entitled to absolvitor from this as well as from all the other conclusions of the action.”

The pursuer reclaimed, and argued—The Lord Ordinary was so far with the reclaimer in thinking that heirs whatsoever of John Gordon were “heirs whatsoever of the body,” though his Lordship felt that in the state of the authorities he could not give effect to that opinion. Assuming that point, the question was one as to the meaning of the deed of 1852, which being a trust-deed was to be liberally construed so as to reach the true meaning of the testator. The words of the destination in the trust-deed would therefore be construed as a direction to entail on the persons whom the testator by the trust-deed wished to favour—*Weir v. Seel*, M. 11,359; *Connell v. Grierson*, Feb. 14, 1867, 5 Macph. 379. Words needing construction may be construed by other deeds of the truster relating to the same subjects, even if they were partially revoked—*Kerr v. Innes*, 5 Pat. Ap. 320. The narrative of the deed of 1852, to the effect that the testator wished to appoint new trustees and make certain alterations plainly of a minor nature, such as the new appointment of trustees, did not seem to favour the view that the truster intended then to cut out his own relatives from the entail whom he had always till then carefully wished to keep in it. There were other expressions in the trust-deed which plainly showed the truster did not look at the deed of 1833 as revoked. The provisions as to excluding Charlotte and as to Mortonhall showed that the truster did not wish what the other side contended to be the effect of his deeds.

Argued for respondents—The words “heirs whatsoever” may indeed be open in some circumstances to construction, but the words “heirs whatsoever” of the entailer could never mean anything but that the entail was at an end. The word “assignees” was also fatal to the pursuer. There was no ambiguity to clear up by the other deeds assuming it to be competent to read them. There was a contrast between the later and earlier deeds plainly indicative of intention. It is impossible after the case of *Primrose*, quoted by the Lord Ordinary, to infer an entail from a mere exclusion such as the exclusion of Charlotte and her heirs.

At advising—

**LORD JUSTICE-CLERK**—This case is one of very great interest. The estate is very large, and the questions belong to a category which includes very important legal propositions. But I cannot say that I have had any doubt whatever as to the result from the commencement of the argument. It seems to me that the contention on the part of the pursuer here, in so far as that has been argued by the Lord Advocate, is in the first place excluded by clear authority, and in the second place derives no support, notwithstanding the ingenuity of the argument submitted to us, from the apparent intention of the testator gathered from other parts of the deeds of settlement referred to. I shall state my views very shortly upon these two branches of the argument, all the more that I think the law applicable to this particular settlement has been so much canvassed by Judges of the highest authority that it is needless for me to go into any lengthened deduction of the grounds of my judgment.

In the first place, the Lord Ordinary—whose absence from our councils and the cause of it we very deeply regret—has dealt with two questions in his elaborate and very able note. The first of these questions is, whether the words “heirs whatsoever” in the principal and primary destination in this entail, viz., the heirs whatsoever of the institute John Gordon, are or are not susceptible of the construction “heirs of the body.” And he is of opinion that—notwithstanding that there are substantially three, at all events two, judgments of the Court to the contrary effect—in the first place, the case was not thoroughly before the Court when those judgments were pronounced, and, in the second place, he does not concur in the grounds on which they were pronounced; and further, he thinks the pursuer is not bound by them, and that the question is still open. The second question does not relate to the expression “heirs whatsoever” occurring in the middle of a tailzied destination, but relates to the expression “heirs whatsoever” of the entail inserted as the last limb of the destination in this entail. And it is said upon the part of the pursuer that these words, in the first place, are capable of receiving construction, limitation, or alteration from the apparent intention of the testator and entailor gathered otherwise; and it is said, in the second place, that the effect of that alteration or construction is to bring in before the ultimate destination certain heirs-substitute of entail who had stood in the substitution under the destination contained in the prior deed. This last contention the Lord Ordinary disallows. He has not gone at the same length into this as into the other question, but the words he has used are very precise, and I entirely concur in the result at which he has arrived. Therefore in what I am now to say I give no opinion upon this question. It may be that there are views—the Lord Ordinary has suggested them—on which, if this case goes elsewhere, a different view might be taken. I say nothing about that—the judgments stand in the meantime; but I am assuming here that the deed which is challenged in this case, viz., the conveyance by John Gordon, the institute of the entail, being the heir in possession—I shall assume that that was a conveyance which the heirs of his body could have challenged in respect of the entail. But John Gordon has died. He had no heirs of his body, indeed no heirs whatsoever, for he was illegitimate. And the question that now arises

is as to whether John Gordon was limited by any right in favour of any person entitled to enforce it, or whether the fetters of that entail prevented him from dealing with the estate as he has done, by conveying it to his widow notwithstanding the destination to heirs whatsoever—in other words, whether the pursuer had any *jus crediti* as an heir-substitute of entail, and was to be protected by the entail against this deed of John Gordon?

Now, I am of opinion that John Gordon being the heir in possession, and there being no person in right of the first limb of the substitution, viz., his heirs whatsoever, limiting it by the heirs of his body, to challenge that deed, the heirs whatsoever of the entailor called in the ultimate destination were not protected by the provisions of the entail, and that these provisions do not constitute any limitation whatever of John Gordon's right to dispose of the estate. Now, that is the whole question. In regard to the words “heirs whatsoever of the entailor,” they have a very clear and well understood, accepted—technical it may be called—but legal effect. The calling of heirs whatsoever at the end of a destination does not bring the heirs whatsoever under the fetters of the entail. That I take to be as clear entail law as any proposition can be. It only denotes and signifies the limit of the tailzie. The tailzie consists in cutting off the heirs whatsoever in favour of certain selected heirs who constitute the members of the substitution in the destination. But when you come to the conveyance to heirs whatsoever, that denotes the point at which the succession ceases to be cut off in tailzie and is turned into the channel of legal inheritance. I think that is the sound view of it as it has been laid down over and over again. Erskine, in a passage which has been referred to, points out—and it is quite true—that the reason for inserting that ultimate destination was not to bring them within the fetters of the entail, but in order to exclude the Crown. And that is not a mere technicality—a matter of style. It has been done. I mean that the Crown has come in and claimed an estate having a substitution of this kind, but without the ultimate substitution to heirs whatsoever. I thought it might be not uninteresting to refer your Lordships to a case reported in Fountainhall of the year 1675 before the passing of the Entail Statute—a case in which there is some rather interesting matter. It is the case of *Lord Rothes v. Lord Melville*, and is reported also in 3 Brown's Supplement, 172. It happened after the *Stormonth* case, but before the Entail Act, as I have already said. After dealing with entails and the effect of them, the decision goes on to say this—“A clause of tailzie of lands to a man, his heirs-male and assignees, without more, may occasion a caducity if he want sons, and be surprised with death before he dispone, as was in the last Earl of Dundie's case, which made the King and Halton his heir; so that failyieing of heirs-male it is fit and necessary ever to provide the lands to the heirs whatsoever.” That was a judgment of the Court in a case before the passing of the Entail Statute; but there is another case, about five years afterwards, where the Court sustained the right of the Crown as *ultima hæres* as against heirs of line, the destination being to heirs-male, and heirs-male having failed. It goes deeper than that, because the real

ground upon which this ultimate class is not brought within the fetters of the entail, or the heirs under it protected by the entail, is that the Act of 1685 does not authorise an entail upon heirs whatsoever, and, although it may be quite true that the words are capable of construction when they occur in a destination, if they are not construed, they are totally inhabile to protect the estate or limit the heir in possession, just because it is not according to the law of Scotland to entail lands upon the heirs whatsoever of the entailer. I am not going into Lord Stair's view upon this, because he wrote at a time when the Act of 1685 was being canvassed, and his first edition was published before the Act and his second edition after it. But I find in both of them (ii., 3, 43), these words—"Of these tailzies there are many several ways as the fiar pleaseth to invent, and ordinarily in them all the last member or termination is to heirs whatsoever of the last branch or person substituted, or the disposer's heir, and when that takes effect by succession, the fee, which before was tailzied, becomes simple." And he refers to the subject more than once in the course of his Commentary. In book iv. tit. 18, sec. 8, he says this—"Heirs of tailzie are sometimes the nearest male of the blood when fiars bring in their sons or other nearest relations nominatim as branches of a tailzie who would otherwise have been heirs-male; against such these clauses irritant ought not to be extended, nor against the heirs in the last termination of the tailzie, for if the estate come to the last branch of the tailzie and his heirs whatsoever it ceases to be a tailzied estate." And that has been, I apprehend, the uniform result of the decisions from the Act of 1685 downwards. But I shall just trouble your Lordships with a sentence or two from two of our greatest feudalists—I mean Lord Corehouse and Lord Rutherford. Lord Corehouse (in *Mure*, 15 Sh. and Dunlop, 584) says—"Anciently it was the law of Scotland, as it was of most other States of Europe which adopted the feudal system, that when all the heirs expressly called to the succession of lands in the grant or charter to the vassal had failed, the fee returned to the superior, or failing him and his heirs to the Crown. To prevent that rule from taking effect a clause was early introduced in this country as a matter of style, by which all grants were made to terminate by a limitation to the heirs and assignees whatsoever, either of the grantee or of some other person suggested by him. After strict entails were authorised by statute an attempt was made to convert the clause to a different purpose from that for which it was intended—the remoter heirs of the entailer maintaining that it imposed the fetters of the entail on the nearest heirs whatsoever. But the attempt was successfully resisted, as the clause was plainly intended not to be a nomination of heirs of entail under the restrictions of the deed, but merely to let in heirs-general to the exclusion of the fisk." And so Lord Rutherford, in the case of *Primrose*, 16 D. 510, says—and I think most soundly—that it is an inconsistency in terms to direct the fetters of an entail against heirs whatsoever; he says he would be disposed to adhere to the rule in question on the authority of Lord Stair alone, and he adds—"But I think if we go into the matter more deeply there is abundant reason for the rule."

The question there was, whether the exclusion of heirs-portioners indicated an intention that the fetters should be directed against these parties. "In the first place"—he goes on—"the existence of an entail has never been held to depend on the presence of a clause excluding heirs-portioners; and, in the second place, an entail on heirs whatsoever appears to me a contradiction in legal terms. For the definition of an entail is a certain order of succession struck out of the general order of succession, which last is just the destination to heirs whatsoever." And therefore on the several questions I can have no doubt at all that the clause destining the estate to heirs whatsoever, although it is quite true that the pursuer is one of the class called in that destination, is not a tailzied destination, but is a fee-simple destination, and the last heir of entail—supposing there had been an heir of entail—was entitled to deal with the estate in fee-simple, seeing there was no right in the substitutes arising out of the fetters. And that seems to me the whole case. The Lord Advocate has addressed to us a most ingenious and powerful argument to show that notwithstanding that being so—although the words used are inconsistent with any protection being derived from the fetters of an entail or any restriction placed upon the heirs of John Gordon—to show that we can see from the rest of the deeds that the entailer intended to bring in under heirs whatsoever those who are not heirs whatsoever in a proper sense, but persons made the subject of a special substitution under the fetters of entail. I very much doubt whether that is, as applied to a clause of this kind, a competent inquiry at all. But I do not think it necessary to go into that matter, because I am perfectly satisfied if I were to read the whole of these deeds in order to discover the intention of the entailer, that he did not intend to include within the destination his brothers and sisters whom he had called by the prior deeds. The history of the deeds necessarily leads to that conclusion. The first conveyance was to his brother, reserving the right to nominate. He then made a nomination bringing in before his brother the two natural sons. Then comes the third deed, in which he omits his brothers and sisters, gives effect to what he had done by the deed of nomination in favour of his sons, reserves to himself the right to nominate if he thinks fit other heirs to be put into the deed of entail by his trustees, but winds up with an ultimate destination to his own heirs whatsoever. I see in this not an indication that he intended his trustees to repeat the destination in the original tailzie to his brothers and sisters, which I think could be the strongest violation of the direction he had given that could be conceived, but, on the contrary, a predetermined resolution to leave this matter entirely open so far as the deed to be executed was concerned—as far as his instructions were concerned—leaving to himself the right to nominate if he thought fit. But the circumstances never did arise to produce that effect upon his mind, and therefore he left this deed, excluding these parties, but calling only his heirs whatsoever on the failure of the preceding substitution.

These are my general views. This is a very important case, but it seems to me a very clear one, and I have tried shortly to explain the grounds on which my conclusion is supported.

LORD YOUNG—I am of the same opinion, and I think with your Lordship that the case is simple and clear. The pursuer is, I understand, admittedly the heir of line or heir whatsoever of the late Colonel Gordon of Cluny, who is the author of the trust. His case is that the truster directed an entail of this land, under which, had the direction been pursued, the lands would have descended to him on the death of the truster's natural son John Gordon. A conveyance was made by the trustees in professed pursuance of the direction, and under it the lands passed to John, who disposed of them on the footing that he was proprietor in fee-simple. This Court has decided that such was his position under the conveyance, but the pursuer now contends that the conveyance was not according to the direction in the trust-deed, and that he ought to be restored to his proper position under these directions, and that John's alienation was to his prejudice. It is a trite enough rule of law that a conveyance by trustees which does not pursue the direction of their trust will not be permitted to prejudice beneficiaries, and that in such cases the Court will set it aside or direct it to be reformed. On the suggestion of a discrepancy the Court always refers to the trust, and not to the deed made in execution of it, as governing the rights of beneficiaries. I express so familiar a rule of law only because I think the Lord Ordinary attaches undue importance to the fact that in the prior litigations the questions were raised and decided with reference to the terms of the conveyance executed, and not to the trust directing it. This was so precisely because they were assumed and indeed stated by the parties and their legal advisers, and by the Judges who had both before them, to be in perfect harmony—the trust being exactly and properly executed by the conveyance—that is, the entail; but I am abstaining from using the word entail, because it has been held not to be such. I do not dwell on this topic, which probably warrants no stronger remark than this, that under such a scrutiny a real discrepancy was likely to be detected, for I am not of opinion that there is any formal barrier to prevent the pursuer from showing if he can that the trust-deed was not well executed. His first point is that the trust—I refer to the deed of 28th May 1853—directed an entail on John Gordon and the heirs of his body. The words of the direction are "heirs whatsoever," but the pursuer contends that, occurring not in a conveyance executed, but in a direction to testamentary trustees to execute it, they ought to be construed as meaning heirs of his body, that being presumably the truster's meaning, inasmuch as (1st) he directed an entail which could not be made on heirs whatsoever, while it might be on heirs of the body; and (2d), John being a bastard, could have no heirs except of his body. I think that is a forcible argument, and though I think the Court in the former litigation considered and rejected it, I rather desire to reserve my opinion, in case it should occur in some future case where it may be of real interest, which I do not think it is in this case; for here though the decision of the point against the pursuer would be conclusive, the decision of it in his favour would not benefit him in the slightest degree, inasmuch as John Gordon died without issue—and indeed the pursuer could take nothing so long as heirs of John existed. Failing their existence, or at their

extinction—it does not signify which—the ulterior destination would operate unless previously barred, but it could not operate before. I assume, then (and the pursuer can desire no more), that the trust directed an entail on John and the heirs of his body, "heirs whatsoever" in that sense being so construed. John died without issue. To whom according to the trust was the estate to pass in that event? The words of the direction are "to my own heirs whatsoever and their assignees," for I pass over what is said about a possible deed of nomination of heirs, none having been made. Now, a destination to heirs whatsoever of the entail is that which terminates every entail in Scotland. So much so that any conveyancer acting for trustees would as a matter of common style insert it without express direction in the trust. It does not extend the entail. It is indeed no part of it. It only provides for the return of the estate in fee-simple to the entailor's family on the termination of the entail so as to exclude the fisk. I desire to say that I very specially concur in the observations which your Lordship made, and in the passages which your Lordship read from the judgments of Lord Corehouse and Lord Rutherford—that a fee with destination to heirs whatsoever can never be an entail, for a destination to heirs whatsoever is a fee-simple. That is the meaning of fee-simple. The word "simple" has reference to the destination and nothing else; and a fee-simple means a fee which would go to the heirs of line according to rules of law. A fee-tail, or a tailzie, or an entail, is a fee which does not go to heirs whatsoever, but is distinguished from it by going to a set of heirs cut out and designated for the purpose. Now, here the destination after the heirs of entail—for I am assuming a good destination to John and the heirs of his body—to the heirs whatsoever of the entailor is a direction for a fee-simple. It is a provision for the return of the estate in fee-simple to the entailor's family on the termination of the entail, so as to exclude the fisk. This is the text law of our institutional writers, and is quite familiar to every lawyer. It was once a question whether or not the last heir of entail was fettered in favour of the heirs whatsoever of the entailor, so that the return of the estate to them might be secured. But this has long been settled in the negative. It is indeed as familiar law as can be that the fetters—that is, the prohibitions and the disabilities—only exist in favour of heirs of entail, and that heirs whatsoever, not being heirs of entail, the last heir of entail, on whose failure they would take in fee-simple, is at liberty to dispose of the estate as he pleases, and that they cannot complain of the disappointment. Admitting all this, as the pursuer's counsel did frankly, it is hard to see what can reasonably be said for his case. It seemed to be contended that those common words of style had no meaning—were here used in some special sense. But, *First*, no special sense was suggested, or occurs to me, or I suppose to anybody; and *Secondly*, it is proposed by the pursuer himself to follow the words, taking them exactly as they stand, and in their ordinary and, so far as I know, invariable sense, only introducing into them several very precise entail destinations to take effect before the reversion to the entailor's heirs whatsoever. But this is not a construction of the words in question as being used in a special or peculiar

sense, but as taking them in their ordinary sense, prefixing something to them which it would be irrational to suggest that they comprehended. If there is not an entail directed on John Gordon and the heirs of his body, there is no entail at all, and *cadit questio*. If there is, then the direction is that upon the failure of this entail by John's death without issue, or the subsequent failure of his race, the estate shall return to the entailor's heirs whatsoever and their assignees? The pursuer says no; it must first go to A and the heirs of his body, whom failing to B and the heirs of his body, and so on, and then to entailors' heirs and their assignees; and that all this is implied by the later words in the sense in which they are used. I cannot regard this as a reasonable argument, and I am certainly not surprised that on a former occasion, referred to by the Lord Ordinary—I mean in the case of *Gordon v. Gordon*, in March 1862—I am certainly not surprised that upon that occasion the counsel for the gentleman who is now pursuer, but was there called as a defender, declined to contend that he was an heir of entail, and that the learned Judges should have observed that such a contention would have been hopeless. It is just as hopeless now; and indeed this case has appeared to me to be entirely so for the pursuer from the first.

LORD CRAIGHILL—Your Lordships have observed that this is an important case, both as regards the value of the property at stake and also the questions presented for review. But from the first time I began to consider it I have not found it attended with any difficulty, and it humbly appears to me that the questions are simple, and I have arrived at a conclusion without any hesitation. Concurring as I do not only in the conclusions at which your Lordships have arrived, but in the reasons which have been given for these conclusions, it is unnecessary that I should repeat what has been already said by your Lordships.

The Court adhered.

Counsel for Pursuer—Lord Advocate (Balfour, Q.C.)—J. P. B. Robertson—Darling—Russel Bell. Agent—A. P. Purves, W.S.

Counsel for Defenders—D. F. Kinnear, Q.C.—Solicitor-General (Asher, Q.C.)—Pearson—D. Robertson. Agents—Skene, Edwards, & Bilton, W.S.

Saturday, October 29.

#### FIRST DIVISION.

TODD (PROVOST OF PEEBLES) AND OTHERS,  
PETITIONERS.

*Burgh—Returning-Officer—Nobile Officium—Where all Magistrates retire and seek Re-election—Act 15 and 16 Vict. cap. 32, sec. 5.*

Where all the magistrates of a burgh retired from office but sought re-election, and there was to be a contest, the Court appointed the Sheriff-Substitute of the county to act as returning-officer.

*Burgh—Returning-Officer—Eligibility of Town-Clerk—Act 3 and 4 Will. IV. cap. 76, sec. 10.*

At a municipal election all the magistrates being ineligible as returning-officer, the Court declined to appoint the town-clerk, on the ground that he had already the statutory duty laid on him of acting as poll-clerk.

All the magistrates of the burgh of Peebles fell to go out of office on 1st November 1881, the two bailies by rotation, and the provost as having been elected *ad interim*. They were all nominated for re-election, and as there were more candidates than vacancies, it was necessary that there should be a poll. By section 5 of 15 and 16 Vict. cap. 32, it is provided that "Whenever it shall so happen that the provost and magistrates of any of the said burghs shall all be included in the one-third of the council going out of office as aforesaid, they shall nevertheless retain and continue to exercise all the powers and functions of their several offices of provost and magistrates respectively until the election and coming into office of their successors, but they shall not after the period of their so going out of office be entitled to act or vote as councillors." In ordinary circumstances the duty of acting as returning-officer would thus fall upon the provost, but in the present case, in respect that the provost was himself a candidate for re-election, and that the other magistrates were in the same position, this application was presented for the appointment of a returning-officer.

The petition was at the instance of the provost, bailies, and town-clerk, with the concurrence of the members of council, and suggested that the town-clerk should be nominated as returning-officer—See *The Queen v. Owens*, June 11, 1859, L.J. (N.S.) 28, 2 B. 316.

The Court, without deciding that it was illegal for a candidate to act as returning-officer, expressed opinions that in such circumstances it was proper that some one else should perform that duty, and appointed the Sheriff-Substitute of the county, in respect that under 3 and 4 Will. IV. cap. 76, sec. 10, the town-clerk had already the statutory duty put upon him of acting as polling-clerk at the election.

Counsel for Petitioners—J. A. Reid. Agent—Henry Buchan, S.S.C.

Saturday, October 29.

#### FIRST DIVISION.

KEIR (PROVOST OF MUSSELBURGH) AND  
OTHERS, PETITIONERS.

*Burgh—Returning-Officer—Nobile Officium—Where Senior Magistrate declines to act—Acts 3 and 4 Will. IV., cap. 76, secs. 8 and 10; 3 and 4 Will. IV., cap. 76, sec. 12; 15 and 16 Vict., cap. 32, sec. 5.*

Where the senior magistrate remaining in office declined to act as returning-officer at the ensuing burgh election, as provided by 3 and 4 Will. IV., cap. 76, secs. 8 and 10, the Court appointed the next senior magistrate to act in his place.