

and I do not see how any argument to the contrary could be maintained. If it had happened that he had survived, it would have gone to him, and as he has not, it goes to his son.

LORD KINNEAR—I am of the same opinion. I think the fund of £2500 now in question was not property subject to a limited or defined power of disposal in Mrs Montgomery, but was her own absolute property which she might dispose of as she pleased by virtue of her right of ownership. She had placed it in trust for the protection of certain contingent interests, but these interests depended on conditions which were never purified, and the moment it was ascertained that the contingencies had not arisen, and that the interests dependent on them had not emerged, it was ascertained at the same time that the fund had continued to belong to her as it had done previously to the trust, and remained her property up to the moment of her death. I agree with Lord M'Laren that the direction to the trustees to pay it over in the event which happened to and in favour of the "assignees, executors, or nearest of kin of the said Eleanor Anstruther Thomson," has precisely the same meaning and effect as if she had directed the trustees, in that event, to pay to herself, her heirs, executors, and assignees. The result of it is that nobody can claim except through her. If it had appeared during her life, as might well have happened, that all the contingent interests to be provided for by the marriage-contract had been effectually excluded—if her husband had died without children having been born of the marriage, or if he had died, and all the children born of the marriage had died also leaving her surviving, so that there was no interest to be protected under the contract except her own, then I think it clear she would have had the same right to compel the trustees to convey to her as she would have had if she had inserted her own name in place of the designation of her heirs, executors, and assignees. The money was hers and belonged to her absolutely, although the fact that she had this absolute right of ownership could not be ascertained until the death of all her children. That being the nature of her right, I entirely concur with Lord M'Laren and Lord Adam as to the effect of the will and conveyance. I do not say that the construction of the will would have been different if the question had related to a fund of which she had nothing more than a definite power of disposal by testament. But that question does not arise. I see no reason to doubt that the will carries all the property that belonged to the testatrix at her death.

The LORD PRESIDENT concurred.

The Court pronounced this interlocutor—

"Recal the said interlocutor (of 27th March 1895): Remit to the Lord Ordinary to rank and prefer the said reclaimers in terms of the first alternative conclusion of their claim: Find the

respondents jointly and severally liable to the reclaimers in the expenses of the competition," &c.

Counsel for the Claimants J. F. Montgomery's Trustees—Dundas—C. K. Mackenzie. Agents—Dundas & Wilson, C.S.

Counsel for the Claimant, the representative of J. C. Montgomery—Mackay—Dudley Stuart. Agents—Henderson & Clark, W.S.

Counsel for the Claimant John Anstruther Thomson—Rankine—Neish. Agents—Henderson & Clark, W.S.

Tuesday, July 2.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.]

SCHANK v. SCHANK.

Succession—Entail—Destination to Heirs of Entail in Possession or Having Right to be in Possession of Another Entailed Estate—Disentail of that Estate.

A testator disposed his whole heritable estate to his sister for her liferent use allanarly, and after her death to his nephew, H. A. S., Esquire of Castlerig, also in liferent. The deed proceeded—"And after his death I hereby give . . . such liferent use and enjoyment as aforesaid to the heirs of entail who may be in possession or have right to be in possession" of the entailed estate of Castlerig under deeds of entail specified.

The testator's nephew, H. A. S., disentailed the estate of Castlerig, and died in 1886, predeceasing the testator's sister.

In an action brought after her death, held (rev. judgment of Lord Kyllachy) that the destination to the heirs of entail "who may be in possession, or have right to be in possession," of the entailed estate of Castlerig had become inoperative owing to the disentail of that estate, and that the testator's heir-at-law was accordingly entitled to the fee of the lands disposed by the testator.

Inglis v. Gillanders, January 19, 1895, 22 R. 266, aff. May 30, 1895, 32 S.L.R. 478, distinguished.

James Schank, Esquire, barrister-at-law, of 62 Gloucester Place, London, died upon 16th December 1871. He left a disposition and settlement by which he disposed to his sister, Lady Scott, wife of Sir James David Scott of Dunwald, in case she should survive him, "for her liferent use allanarly," his whole property in Laurencekirk, commonly called "The Villa," and after the death of Lady Scott he disposed the property of the villa to his nephew, Henry Alexander Schank, Esquire of Castlerig, also "in liferent, for his liferent use allanarly." The deed then proceeded—"and after his decease I

hereby give, grant, assign, and dispoſe ſuch liferent uſe and enjoyment as aforeſaid to the heirs of entail who may in ſucceſſion and for the time be in poſſeſſion, or have right to be in poſſeſſion, of the entailed eſtates of Caſtlerig and Gleniſton, in the county of Fife, under and in virtue of a deed of entail executed by the deceased Alexander Schank, Eſquire of Caſtlerig, dated 18th March 1769, and an additional deed of entail executed by him, dated the 31ſt day of Auguſt 1771.”

In 1866 Henry Alexander Schank ſucceeded to the entailed eſtates of Caſtlerig and Gleniſton. He diſentailed the lands in 1871 and died in 1886, leaving a truſt-diſpoſition dated May 22, 1879, by which he diſpoſed the lands formerly under the entail to his younger brother, William Edward Alexander Schank, who, however, made up his title, not under the truſt-diſpoſition, but as heir-at-law to Henry Schank.

Lady Scott, the liferentrix, died on the 9th of April 1894.

In November 1894 William Schank brought an action againſt his younger brother, Lionel Arthur Vansittart Schank, to have it declared that he was entitled to hold the lands formerly held under the entail, and which were deſcribed in the ſummons, as unlimited fiar.

He averred—“Had ſaid eſtates of Caſtlerig and Gleniſton not been diſentailed by the ſaid Henry Alexander Schank, the purſuer would now have been heir of entail in poſſeſſion of ſaid eſtates, and the defender, who is aged 35, and who is the immediate younger brother of the purſuer, would have been the next ſubſtitute heir entitled, on the death of the purſuer without iſſue, to ſucceed thereto.”

The defender averred—“In terms of the deeds above referred to, the purſuer’s enjoyment of the lands and others deſcribed in the ſummons is limited to a fiduciary liferent allenerly. The beneficial fiar and diſponee is the firſt heir under the ſaid deed of entail of the eſtates of Caſtlerig and Gleniſton, born, who, after the death of the ſaid James Schank, would have ſucceeded to and been in poſſeſſion of the ſaid eſtates had they not been diſentailed, as above referred to.”

The purſuer pleaded—“(1) The ſaid eſtates of Caſtlerig and Gleniſton have been diſentailed by the ſaid Henry Alexander Schank, and the deſtination in the ſaid diſpoſition and ſettlement of the ſubjects deſcribed in the ſummons having become thereby inoperative, the purſuer as heir-at-law in heritage of the ſaid James Schank and Henry Alexander Schank is entitled to decree of declarator as concluded for.”

The defender pleaded—“(1) The deſtination in the ſaid diſpoſition and ſettlement of the ſubjects deſcribed in the ſummons has not become inoperative, and decree of declarator ſhould be reſused, with expenſes. (2) The ſaid Henry Alexander Schank was not entitled gratuitouſly to defeat the right of ſucceſſion to the ſaid ſubjects conferred by the ſaid truſt-deed

and diſpoſition on the heirs of entail of the ſaid eſtates of Caſtlerig and Gleniſton. (3) The ſaid Henry Alexander Schank, as fiduciary fiar of the ſaid ſubjects, was truſtee for the ſucceeding liferenters and the beneficial fiar and diſponee, and was bound, and the purſuer as his repreſentative and heir-at-law is bound, to protect their intereſts.”

On February 1ſt, 1895, the Lord Ordinary (KYLACHY) pronounced this interlocutor:—“Finds that, on a juſt conſtruction of the diſpoſition and ſettlement of the late James Schank, the deſtinations in liferent therein contained have not ceaſed to be operative, by reaſon of the diſentail of the eſtates of Caſtlerig and Gleniſton: Finds, therefore, that the purſuer is not entitled to poſſeſs the ſubjects in queſtion in fee-simple as heir-at-law of James Schank: Aſſoiliſes the defender from the concluſions of the ſummons; of conſent finds no expenſes due, and decerns.”

“*Opinion.*—The queſtion in this caſe is whether a certain deſtination of a property in Laurencekirk, contained in a diſpoſition executed by the late James Schank, has failed and become inoperative, ſo that the property now reverts to the purſuer as James Schank’s heir-at-law.

“The deſtination in queſtion is contained in the diſpoſition and ſettlement of James Schank, dated 24th June 1869—The property is firſt diſpoſed to Lady Scott, the diſponer’s ſiſter, in liferent for her liferent uſe allenerly, and after her death to the teſtator’s nephew, Henry Alexander Schank, Eſquire, of Caſtlerig, in liferent for his liferent uſe allenerly, and after the deceaſe of the ſaid H. A. Schank the teſtator ‘gives, grants, assigns, and diſpones ſuch liferent uſe and enjoyment as aforeſaid to the heirs of entail who may in ſucceſſion and for the time be in poſſeſſion or have right to be in poſſeſſion of the entailed eſtates of Caſtlerig and Gleniſton, in the county of Fife, under and in virtue of a deed of entail executed by the deceased Alexander Schank, Eſquire, of Caſtlerig, dated 18th March 1769, and an additional deed of entail executed by him, dated the 31ſt day of Auguſt 1771, both recorded in the Books of Council and Seſſion at Edinburgh on the 10th day of June 1801, and in the Register of Tailzies the 23rd day of June 1860.’

“The facts which give riſe to the queſtion are theſe—Lady Scott, the firſt liferentrix, died in 1894. She was predeceaaed by the ſecond liferenter, Harry Alexander Schank, who died in 1886. He (Harry Alexander) was heir of entail in poſſeſſion of the eſtates of Caſtlerig and Gleniſton, but had in 1871 diſentailed that eſtate, and at the time of his death held it in fee-simple. He was ſucceeded by the purſuer, who was his brother, and made up his title as heir-at-law, the deſtination in the entail having been previously evacuated by a truſt-diſpoſition executed by the diſentailer, to which it is unneceſſary for the preſent purpoſe to refer.

“The poſition therefore is, that there is, and was when Lady Scott died, not only no ſtrict entail of the eſtates of Caſtlerig and

Gleniston, but no operative taillied destination of that estate. In other words, the deed of entail referred to in James Schank's disposition is and was no longer in existence as an operative deed.

"The question is, whether it is, in these circumstances, possible that anybody can now answer to the description of 'heir of entail in possession of the entailed estates of Castlerig and Gleniston' under the deed of entail mentioned. If not, the liferent in favour of Lady Scott exhausted James Schank's disposition, and the pursuer is entitled to decree. If, otherwise, the liferents in question continue at least until they reach an heir of entail of Gleniston, born after the date of the disposition as provided in the 48th section of the Rutherford Act.

"The question thus raised is one of difficulty. Literally there can, of course, be no heir in possession, or having right to be in possession, under an entail which has ceased to exist. But, on the other hand, the disposition of the Laurencekirk property falls to be construed on ordinary principles, and it cannot, I think, be said that its language does not admit of construction. In other words, it is not impossible to hold that the disponent (not contemplating the event of disentail) used the words in question not as adjecting to the succession a condition depending on the possession of Castlerig and Gleniston, but simply as describing the person who, assuming the entail of that estate to remain in force, had right to the succession under it. What I have to decide is whether I am entitled to take such a liberty with the words which the disponent employs, words which, as I have said, taken literally, have a sufficiently definite meaning.

"I confess that I should have hesitated to do so, however likely I thought the suggested construction to be in accordance with the disponent's intention, were it not for the recent judgment of the Second Division of the Court, in the case of *Gillanders' Trustee v. Gillanders*, decided on 22nd December 1894. But I think that that judgment, of which I have been furnished with a report, goes a long way to support the view which I have mentioned. It is true that the actual decision proceeded on a separate and special ground. But the opinion expressed in the later paragraphs of the Court's judgment appears to me to deal with words of destination, substantially identical with those here in question, and I think I am entitled, if not bound, to follow that opinion, which I accordingly propose to do.

"I propose, therefore, to find, that on the just construction of Mr James Schank's disposition, the destinations in liferent therein contained have not ceased to be operative by reason of the disentail of the estates of Castlerig and Gleniston, and that therefore the pursuer is not entitled to possess the subjects in question in fee-simple as James Schank's heir-at-law, and that the defender is, for the same reason,

entitled to be assozied from the conclusions of the summons."

The pursuer reclaimed, and argued—The Lord Ordinary had misread the case of *Inglis v. Gillanders*. In that case, as shown by Lord Watson's opinion in the House of Lords (32 S.L.R. 479), there were two distinct substitutions separated by the word "and." The first substitution depended on the possession by the heir of entail of the estate of Highfield, and as that estate had been disentailed there could be no heir of entail in possession, and the substitution was therefore void. But the second substitution only provided that the heir should show that he possessed the character of an heir-substitute designated in the deed of entail under which Highfield was held at the date of the trust-deed, and it was upon that substitution being effectual that the House of Lords founded their judgment. The terms of the destination in the first substitution were very much the same as the terms employed here by the truster, and the House of Lords held that such a substitution would have been void in the circumstances which had occurred here. The case of *Gillanders* was therefore a direct authority for the pursuer.

The defender argued—The Lord Ordinary was right. In the case of *Gillanders* the Court held that the trustees of the testator had not acted *ultra vires* in making the destination of the estate of Newmore to the heirs of entail of Highfield under the terms of the deed, and that that destination did not become inoperative when the estate of Highfield was disentailed. The destination in that case was much the same as the destination in the present case and the same result must follow; and consequently the destination in liferent to the heirs of entail in possession or who might have right to be in possession of the entailed estates of Castlerig and Gleniston had not become inoperative.

At advising—

LORD TRAYNER—The question for decision in this case, and the circumstances under which it has arisen, are very clearly stated by the Lord Ordinary in his opinion, and it is unnecessary here to repeat the details which his Lordship has given. In the result which he has reached I am unable to concur. Where a testamentary settlement is open to construction, that construction will be adopted which seems to be most in accordance with the intention of the testator, as that intention can be gathered from the language he has used, and the circumstance in which he used it. But, as Lord Rutherford Clark said in the case of *Gillanders*, "we cannot proceed on conjecture, and the language of the trust-deed must be the only exponent of his (the testator's) purpose." In the clause before us, I think the language is not open to construction, for it expresses a certain purpose or intention in language which is not ambiguous or doubtful. The language used is quite fitted to express the view which the pursuer maintains; and expresses no other. It is possible, if con-

jecture and speculation were admissible, to believe that the testator may have had some such intention, as the Lord Ordinary has, with hesitation, extracted from it, in giving effect to the argument for the defender. But, in my opinion, such conjecture is excluded in dealing with language so precise and unambiguous as that used in the clause before us. It appears to me that what the testator provided for was, that a certain liferent right should be enjoyed by the heirs under a certain entail in succession, as and while each heir was in possession or had right to be in possession of the entailed estate. No benefit is conferred on anyone who is not so in possession or entitled to possession. It is the essential quality of the person claiming the liferent that he shall be in possession, or be entitled to the possession of the entailed lands. The defender does not, and no other person now can, possess that quality, for the entail is no longer in existence. The Lord Ordinary thinks "it is not impossible to hold that the disponent, (not contemplating the event of disentail) used the words in question, not as adjecting to the succession a condition depending on the possession of 'the entailed lands,' but simply as describing the person who, assuming the entail of that estate to remain in force, had right to the succession under it." If I could adopt that view, I would assent to the Lord Ordinary's conclusion. But, on the contrary, I think it is impossible to hold that the disponent had any such intention or purpose, unless some conjecture is resorted to, not authorised, or to my mind even suggested by the disponent's language. And it is just there that the distinction, in my opinion, lies between the present case and the case of *Gillanders*, to which the Lord Ordinary refers as the authority on which he proceeds. In the present case you have the person who is to be benefited specially designated by the possession of a certain character or quality—he is to be the heir in possession or entitled to the possession of entailed lands under a certain entail. No benefit is conferred on any person, except the one for the time being possessed of the qualification. In *Gillanders'* case the benefit was conferred on certain persons named, one of them being "the heir in possession" of an entailed estate, "and to the other heirs-substitute in the said entail, in the order set down in the same entail successively." Now, there the Court regarded the reference to the entail practically as a reference to the source from which the trustees would learn who were the persons intended to share in the benefit, and the order in which they were to succeed to it. It was regarded as the means which the truster used to designate the heir, and not as denoting a quality necessary to his succession. And this destination is emphasised by Lord Watson in the opinion delivered by him in *Gillanders'* case, when that case was decided in the House of Lords.

I am therefore of opinion that the interlocutor of the Lord Ordinary should be recalled, and the pursuer found entitled to decree.

LORD YOUNG and the LORD JUSTICE-CLERK concurred.

LORD RUTHERFURD CLARK was absent.

The Court recalled the Lord Ordinary's interlocutor, and granted decree in terms of the conclusion of the summons.

Counsel for the Pursuer—Dundas—Craigie. Agents—Mackenzie & Black, W.S.

Counsel for the Defender—Macphail—Blackburn. Agent—J. C. Couper, W.S.

Tuesday, July 2.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.]

BELFORD v. RANKIN.

Right in Security—Bond and Disposition in Security—Sale—Sale by Posterior Bondholder—Right of Posterior Bondholder to Pay off Prior Bondholder—Premonition—Titles to Land Consolidation (Scotland) Act 1863 (31 and 32 Vict. c. 101), esp. sec. 122.

The holder of a posterior bond and disposition in security sold the security-subjects upon 10th August 1894, in virtue of the power of sale contained in the bond. On the same day he gave notarial premonition to the holder of a prior bond and disposition in security that payment would be made to him of the sum due under his bond at the next term of Martinmas. The premonition bore to be granted with the consent of the debtor in the bond, but was signed only by the postponed bondholder.

Held (rev. judgment of Lord Stormonth Darling) that the prior bondholder could not refuse to accept payment, in respect (1) that the postponed bondholder was entitled, under the provisions of the Titles to Land Act 1863, to give him premonition, and insist on his accepting payment and discharging his bond; and (2) that in any view the premonition was valid, as it had been granted with the consent of the debtor.

Upon February 18th 1893 the estates of Hugh Adair, writer, Stranraer, were sequestrated. Among his assets was found a bond and disposition in security for £400 by the firm of Adair & Thorburn (of which he was a partner), and the individual partners thereof, over certain heritable subjects in Stranraer, dated 13th and recorded 14th December 1877. William Gibson Belford, writer, Stranraer, as his trustee, made up a title to this bond. The subjects were burdened by a prior bond and disposition in security for £1000 dated 28th and recorded 29th June 1877, granted by the firm in favour of the trustees of the late John Kerr, and after-