Wednesday, July 26.

(Before Lords Blackburn, Watson, and Fitzgerald.)

GORDON *v.* GORDON'S TRUSTEES.

(*Supra*, p. 33, and 9 R. 50.)

Entail—Instructions to Trustees—Destination—Heirs Whomsoever—Writ—Reference to Previous Writs.

A truster conveyed his estates to trustees with directions to entail them upon a person named, "and his heirs whatsoever," whom failing to another person named, "and his heirs whatsoever," whom failing to any persons that might subsequently be named by him, and then to his own heirs whatsoever and their assignees. This deed revoked eight previous deeds, "in so far as the same are or may be inconsistent with these presents." No deed of nomination was executed, and the second person named in the deed predeceased the truster. The trustees executed a deed of entail conveying the estates to the person first-named, and his heirs whatsover, whom failing to the heirs whatsoever of the truster and their assignees. The institute having on his death disposed of the estates as belonging to himself in fee-simple, the truster's heir of line sought to reduce the deed of entail, and have a new deed executed, on the grounds that by "heirs whatsoever" of the truster was meant, looking to the tenor of the truster's intentions as shown in the series of deeds previously executed, the pursuer, who should have been substituted *nominatim*, and the heirs of his body. *Held* (*aff.* judgment of the Court of Session) that no such meaning could be put upon the term "heirs whatsoever" of the truster—on the grounds, first, that it was inadmissible to refer to previous deeds for an interpretation of well-marked words of technical conveyancing; and second, that a reference to these deeds did not support the contention of the heir of line—and that therefore the estates belonged to the institute in fee-simple.

This was an appeal from an unanimous judgment of the Court of Session (Second Division) of Oct. 28, 1881, *supra*, p. 33, and 9 R. 50. The previous decisions as to the various deeds affecting the destination of these estates were:—March 1, 1862, 24 D. 687; December 1, 1864, 3 Macph. 148; March 2, 1866, 4 Macph. 501.

The pursuer Colonel Gordon now appealed to the House of Lords.

The respondents' counsel were not called on to reply.

At delivering judgment—

LORD BLACKBURN—My Lords, I do not think it necessary to call upon the respondents' counsel in this case, for I think that one point which is fatal to the appellant's case is perfectly clear.

If it had been necessary to decide whether the trustees of Colonel Gordon have executed a deed which either ought to be construed as entailing the lands on John Gordon and the heirs of his body—in other words, whether your Lordships should review the decision in *Macgregor* v. *Gordon*—or whether, if the trustees have not done so, the deed should be reformed so as to produce that effect, I should have wished to hear further argument. On these points I pronounce no opinion, leaving the authority of the case alluded to neither strengthened nor shaken by anything I now say.

But John Gordon never had heirs of his body, and even if the deed were read or reformed as meaning that the entail was on Captain John Gordon and the heirs of his body, "whom failing then to the heirs whomsoever of the said deceased Colonel John Gordon and their assignees," Captain John Gordon was competent to dispose of the estates as he has done. The pursuer must make out that for these words there ought to have been substituted a clause entailing the lands on him and the heirs of his body, or rather, that before these words there should have been inserted a clause to that effect.

The property at stake is very large, but this point, on which the whole depends, is not, I think (and I believe all your Lordships who heard the case think not), either doubtful or difficult.

Colonel John Gordon commences his general settlement by a narrative that he had previously executed eight different deeds, and after disposing of everything to his trustees on the trusts after mentioned he inserts a revocation in these terms—"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 other 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 and equity, anything herein contained to the contrary notwithstanding, it being my express will 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 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 secured or settled on her."

The Lord Ordinary says—"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 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." I think it was competent to read the deeds for the first of those purposes, and having done so I agree with, I think, all the Judges who have heard this case that none of these deeds are consistent with the settlement of 1853. What would have happened if the provision which immediately follows had come into operation I need not inquire; as it is, they are all revoked *simpliciter*.

I do not think that it was competent to read them for the second purpose, but perhaps that question does not now arise, as the Lord Ordinary does not go further than to say that it was not incompetent to refer to those deeds as showing that the truster has used the term "heirs whatsoever" in connection with John and Charles Gordon in such a manner as to show clearly that he has used it, not in its ordinary significance, but in the limited sense of "heirs whatsoever of the body." Even if this were competent and established, it would have no bearing on the question whether before the final caduciary clause "to my own heirs whomsoever and their assignees" there was to be interpolated a clause in favour of the pursuer, either *nominatim* or by some apt description, and the heirs of his body.

Reliance was placed on the declaration that the truster's sister Charlotte and the descendants of her body should be excluded from the succession of the said entailed estates. It certainly shows that he had not forgiven her whatever offence it was which she had given him, and not very amiably wished her to know it. But it would be a very startling thing to hold this equivalent to a direction to settle the estates on her brother's children, though her exclusion would thereby be more marked.

If therefore your Lordships agree with me, I think that the judgment should be affirmed and the appeal dismissed with costs.

Lord Watson—My Lords, the late Colonel Gordon of Cluny, who died on the 16th July 1858, by trust-disposition and settlement dated the 28th May 1853 conveyed his extensive landed estates in Scotland to trustees, with directions to them to execute a strict entail of the larger portion of those estates "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." The truster directed the remainder of his estates to be settled in strict entail upon the same series of heirs, with this variation, that his younger son Charles and his heirs whatsoever were to be called to his succession before the elder son John and his heirs whatsoever.

Captain John Gordon and his younger brother Charles were illegitimate sons of the truster. Charles, who never married, predeceased his father, and he and his *stirps* being extinct, his elder brother became institute in both of the entails directed by their father's trust-deed. Colonel Gordon did not exercise the reserved faculty of nominating heirs of tailzie, and his trustees accordingly executed a deed of entail, dated 4th and 9th April and 7th May 1859, comprehending the whole lands and estates which had been conveyed to them, the clause of destination being an exact counterpart of that which I have already quoted from the deed of trust, with this exception, that the words "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," were omitted from it.

Captain John Gordon, the institute under the deed of entail executed by his father's trustees, died without issue on the 31st of March 1878, leaving a trust-disposition and settlement dated 4th January 1869, by which he disposed of the whole estates comprehended in the entail on the footing that they belonged to him in fee-simple. The respondents in this appeal are the trustees and beneficiaries under that trust-deed. The appellant, who is the nephew and heir of line of Colonel Gordon, has brought the present action for the purpose of vindicating his right as an heir of tailzie and provision to the whole landed estates directed to be entailed by his uncle's trust-deed of the 28th May 1853. In order to make good that claim he must establish that the fetters of the entail directed by his uncle applied not only to the deceased Captain John Gordon, but to himself as one of the substitute heirs of entail.

If it be assumed that the clause of destination in the entail of 1859 is framed in accordance with the directions of the truster, there are certain legal results which appear to me necessarily to follow from the terms of that clause, and these the appellant's counsel did not venture to dispute. In the first place, it is trite law that if the destination to Captain John Gordon and his heirs whatsoever is not to be read as a destination to him and the heirs whatsoever of his body, Captain John Gordon was a fee-simple proprietor. In the second place, assuming that the expression "heirs whatsoever" did mean "heirs whatsoever of his body," Captain John Gordon being the last of the *stirps*, was proprietor in fee-simple, unless the destination was continued by the substitution to him of other heirs under the fetters of the entail. In the third place, the only ulterior destination being to the truster's "own heirs whatsoever and their assignees," the entail came to an end in the person of Captain John Gordon, and he could dispone or settle the entailed estates as he chose.

The appellant cannot therefore make good his claim unless he can show, first, that by the terms of the entail which Colonel Gordon directed his trustees to make, the first *stirps* called to the suc-

cession was his son Captain John Gordon and the heirs of his body, and that he himself was to be called, not as one of the heirs whatsoever of the truster, but as a *nominatim* substitute, or as one of the members of a *stirps* of which his father was the head. The appellant cannot succeed if he fails in establishing either of these propositions.

By the conclusions of his action the appellant seeks to set aside the entail executed in 1859 by his uncle's trustees, and all that has followed thereon, including Captain John Gordon's trust-disposition in favour of the respondents, and to have a new deed of entail executed in terms of what he maintains to be the directions of his uncle's trust-deed. His contention is, that in order to bring the deed of entail into conformity with his uncle's directions, the dispositive clause ought to be altered to the effect of limiting the destination to Captain John Gordon and the "heirs whatsoever of his body," instead of his "heirs whatsoever," and of inserting a substitution to the appellant *nominatim* and the heirs of his body before the destination to the heirs whatsoever of the truster and their assignees. Alternatively, the appellant maintains that the destination in the deed of entail executed by his uncle's trustees must be read as if such limitation and substitution had been actually expressed in it.

The appellant endeavoured to establish, by reference to the terms of a series of *mortis causa* deeds executed at various prior dates, that Colonel Gordon intended in his trust-deed of 1853 to limit the class of heirs whatsoever of his son John to heirs of the body, and also that by the term "my own heirs whatsoever" he intended to designate his nearest heir of line, and the heirs of the body of such heir, whom failing his own heirs whatsoever. I have no hesitation in saying that in construing such a deed as that of the 28th May 1853 it is as a general rule altogether incompetent to refer to deeds previously executed by the same maker with the view of showing that he was in the habit of attaching a particular meaning to certain words and phrases. The deeds may, however, be so closely connected with each other as to let in the reference; and such a connection is said to exist in the present case. The deeds which the appellant seeks to bring in are all enumerated in the preamble of the trust-deed of 1853, but the truster revokes and recalls them in so far as they are inconsistent with that deed, subject to the declaration that they are to constitute his settlement in the event of the trust of 1853 becoming from any cause ineffectual. I agree with the Lord Ordinary that it is competent to read all these enumerated deeds for the purpose of ascertaining how far any of them are to stand or receive effect along with the final trust-settlement. That process involves the necessity of determining, first of all, what is the meaning, according to its own terms, of the trust-deed of 1853, and of then considering how far, consistently with that meaning, effect can be given to the prior deeds. But what the appellant proposes to do is to refer to these prior deeds, not for the purpose of showing that they contain provisions which must still receive effect notwithstanding the deed of 1853, but in order to impose upon certain words occurring in that deed a meaning which they do not bear if the deed be construed by itself. Any reference for such a purpose to the deeds in question appears to me to be altogether incompetent, and I cannot assent to the view of the Lord Ordinary that it is matter of legitimate inquiry "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 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."

Laying aside these previous deeds, it is in my opinion a very nice and difficult question whether in the trust-disposition of 1853, and also in the entail of 1859, the expression "heirs whatsoever" of Captain John Gordon ought not to be read as "heirs whatsoever of the body" of the Captain. The appellant with great plausibility argues, that had the destination been "to my illegitimate son Captain John Gordon, and his heirs whatsoever," it would have been equivalent to a destination in favour of heirs whatsoever of his body, because the heirs whatsoever of a bastard are by plain legal necessity also heirs of his body, and the addition of the words "of his body," however important in other cases, could not in his case have the effect of limiting the class designated as his "heirs whatsoever." And he further argues, that although the trust-deed and deed of entail do not describe the late Captain John Gordon as the bastard son of his father, a Court of law is not only entitled but bound in construing these deeds to assume the fact of bastardy as a circumstance which must have been present to the mind of the truster when he executed the deed of 1853. But I am of opinion, with the noble and learned Lord on the woolsack (Lord Blackburn), that the question does not necessarily arise for decision in this case; and that it is therefore unnecessary and inexpedient to express any opinion as to the decision of the Court below in the cases of *M'Gregor* v. *Gordon* (3 Sess. Ca., 3d Series, 148) and *Gordon* v. *Gordon's Trs.* (4 Sess. Ca., 3d Series, 501), to which the appellant was not a party. I am of opinion with my noble and learned friend that the appellant has utterly failed to establish that he either possesses or is entitled to claim the character of an heir of provision and tailzie under the entail directed by the trust-deed of 1853. That being the case, the appellant being an heir whatsoever of the entailer, and not an heir of entail, has no right or title to enforce prohibitions and fetters which are only designed to protect the interest of heirs of entail.

I do not think it necessary to explain in detail the grounds upon which I conceive that it is well nigh impossible, consistently with any known principle of law, to expand a direction to settle an estate upon the heirs "whatsoever" of the truster by the last branch of a tailzied destination, into a direction to make one or more *nominatim* substitutions in favour of certain members of the class, with a destination-over to the remaining "heirs whatsoever" of the entailer. I do not say that such a case is impossible, but I am very clearly of opinion that the trust-deed of 1853 contains no indication of the intention of Colonel Gordon that the appellant should take under it in any other character than that of his "heirs

whatsoever." I refer to the judgment of Lord Young in the Court below, whose reasoning is to my mind entirely satisfactory, and I agree with his Lordship in thinking that the appellant's claim to be considered an heir of provision and tailzie is a hopeless contention.

Lord Fitzgerald—My Lords, at the close of the clear and most able argument of the learned Lord Advocate we were all agreed in opinion, but having regard to the magnitude of the stake we took time to consider the authorities which had been referred to, and also to see whether there was any question in the case necessary for our decision which we might require to be debated by the counsel for the respondents. My Lords, our further consideration has raised no difficulty, and we are all of opinion that the interlocutor of the Lord Ordinary of the 25th June 1881, sustained by the interlocutor of the Lords of the Second Division of the Court of Session was correct in law, and ought to be affirmed, and that the appeal to your Lordships' House should be dismissed.

My Lords, I entirely concur in the opinions which have been expressed by my noble and learned friends, and in the reasons which they have given for their conclusions. There is but one matter on which I desire to add a word to what has fallen from my noble and learned friends. My Lords, I am desirous for special reasons to avoid entanglement on the technical expressions of Scotch law; but divested of technicality it appears from the pleadings that the object of the pursuer was to obtain the reduction of the deed of entail of 1859, and a declaration that in implement of the directions of Colonel Gordon, the truster, contained in the trust-disposition of 1853, the trustees should execute a deed of entail in favour of the pursuer and the heirs whatsoever of his body.

The learned Lord Advocate admitted that in order to sustain the pursuer's contention he was bound to establish two propositions—first, that in the interpretation of the first disposition of 1853 we should read the destination to John Gordon as a destination to him and the heirs of his body, for otherwise a destination to him as institute and his heirs whatsoever would not be a good tailzied destination, and he would take in fee; and secondly, that according to what he alleged to be the true intention of the truster, we should interpret the disposition of 1853 as if it contained a declaration "*tertio*" that after the words "and failing such nomination, or of the persons so to be named and their heirs whatsoever," and between those words and the limitation "then to my own heirs whomsoever and their assignees," there should be a series of limitations in accordance with the settlement of 1833, or at least a limitation to the pursuer and his heirs whatsoever.

The necessity of establishing this second contention was manifest, for otherwise, following the exact words of the trust-disposition of 1853, a destination terminating in the heirs whatsoever of the entailer, and not limited to any particular description, would operate to close the entail, and the last substitute John Gordon would be enabled to dispose of the fee. It is on the second proposition alone that I desire to make an observation, as it seems to me to raise a question of construction, to be determined not by any rule of law confined to Scotland, but by a rule of law applicable to every part alike of the United Kingdom.

My Lords, I confess that I was somewhat startled by the second contention of the pursuer, so ably and perseveringly insisted upon by the learned counsel. My Lords, I quite agree that if it is necessary in order to effectuate the intention of the truster, we should apply to the trust-disposition that flexibility of interpretation so often followed in cases of executory instruments. But there is another rule applicable to trust-dispositions of an executory character, and which in my judgment ought to govern us in the construction of the trust-disposition of 1853, and that rule is, that where the truster (as in the present instance) has used terms of art, that is to say, technical terms, which have a known technical and settled meaning, we are bound to give them that settled and technical meaning, unless by necessary implication or some declaration of intention it is manifest that the truster intended them in some other and different sense.

My Lords, it could not be alleged that Colonel John Gordon of Cluny was inexperienced in Scottish conveyancing, or unused to technical terms, and I have not been able to lead myself to think that there is any reason why we should not give effect to the technical terms which he has used in the trust-disposition of 1853, according to their technical and established sense.

My Lords, in agreeing with your Lordships' judgment in a cause in which the subject of litigation is of such magnitude, it is gratifying to know that we are following a long train of Scottish decision, and that we are echoing the opinions of four most learned Judges who at present shed lustre on the Scottish bench.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Counsel for Pursuer—Lord Advocate Balfour—Benjamin, Q.C. Agents—A. P. Purves, W.S., and A. Beveridge.

Counsel for Defenders—Solicitor-General Asher—Davey, Q.C. Agents — Skene, Edwards, & Bilton, W.S., and Martin & Leslie.

Wednesday, July 26.

(Before Lord Chancellor Selborne, Lords O'Hagan, Blackburn, and Watson.)

INGLIS *v.* THE SHOTTS IRON COMPANY.

(*Ante*, vol. xviii. p. 653, and 8 R. 1006.)

Nuisance—Property—Interdict—Nuisance from Sulphurous Fumes.

The calcining operations of a mining company were found to have damaged the plantations belonging to a proprietor whose estate adjoined their works. It was *held* (*aff.* the judgment of the Court of Session) that the proprietor was entitled to protect himself by interdict, and that, in the whole circumstances of the case, the operations complained of should not be allowed to take place within one mile of the complainer's