[Heard, 29*th June*, 1840.—Judgment, 15*th March*, 1842.]

SIR NORMAN LOCKHART, Baronet, *Appellant.*

The Honourable MARY JANE LOCKHART MACDONALD; and the Honourable HENRY AUGUSTUS MORETON, M.P., her Husband, for his interest; and Dame EMELIA OLIVIA MACDONALD, *Factrix loco Tutoris* for EMELIA OLIVIA LOCKHART MACDONALD, *Respondents.*

Tailzie.—Destination.— Under a destination to "heirs-male of the "body, and the heirs whatsoever of the body of the said heirs-"male," *found* that the heirs-male did not require to be exhausted, before the heirs whatsoever of the body of the first heir-male of the body could take.

ON the 17th August, 1762, John Macdonald, in the contract of marriage of his only daughter, Elizabeth, with Charles Lockhart, bound himself to settle his estate of Largie "In favours of "himself, and the heirs-male to be procreate of his body of his "present marriage, and the heirs whatsomever of the body of "the said heirs-male; whom failing, to the heirs-male to be "procreate of his body in any subsequent marriage, and the "heirs whatsomever of the body of the said heirs-male; whom "failing, to the said Mrs Elizabeth Macdonald, and the heirs-"male of her body of this present marriage, and the heirs what-"somever of the body of the said heirs-male; whom failing, to "the heirs-male of the body of the said Mrs Elizabeth Mac-"donald in any subsequent marriage, and the heirs whatsomever "of the body of the said heirs-male; whom failing, to the heirs-"female of the said Mrs Elizabeth Macdonald of this present mar-"riage; whom failing, to such other heirs as he, the said John

" Macdonald, shall think proper to nominate and appoint in the " said disposition, or in any other writing to be made and sub- " scribed by him at any time in his lifetime."

On the 5th of April, 1763, John Macdonald executed an entail of Largie in terms of the marriage-contract, which contained the following destination: — " Therefore, in implement " of the said obligation, and in exercise of the power reserved " thereby to me, I hereby sell, annailzie, and dispone, under the " reservations, provisions, conditions, powers, and faculties, and " clauses prohibitive, irritant, and resolutive underwritten, to and " in favours of myself and the heirs-male to be procreate of my " body of my present marriage with Mrs Elizabeth M'Leod, " lawful daughter of Mr John M'Leod of Muiravonside, advocate, " and the heirs whatsomever of the body of the saids heirs-male; " whom failing, to the heirs-male to be procreate of my body in " any subsequent marriage, and the heirs whatsomever of the bodys " of the saids heirs-male; whom failing, to Mrs Elizabeth Mac- " donald, my only lawful daughter, and the heirs-male of her body " of her present marriage with Mr Charles Lockhart, second law- " ful son to George Lockhart of Cairnwath, Esquire, and the " heirs whatsomever of the bodys of the saids heirs-male; whom " failing, to the heirs-male of the said Mrs Elizabeth Macdonald " in any subsequent marriage, and the heirs whatsomever of the " bodys of the saids heirs-male; whom failing, to the heirs " female of the said Mrs Elizabeth Macdonald of her present " marriage; whom failing, to such other heirs as I have nomi- " nate, or shall think proper to nominate and appoint, by any " writing already made and subscribed, or to be hereafter made " and subscribed by me, at any time in my lifetime; whom " failing, to my heirs-male whatsomever; whom all failing, to " my heirs and assignees whatsomever, all and haill my lands " and estate of Largie," &c.

And on the 15th of April, 1763, the entailer executed a deed

of nomination, giving seventeen additional substitutions of heirs, each of them coupled with a substitution of "the heirs-male of "the body" of the substitute, and the whole concluding in these terms, — "which failzeing to my nearest and lawful heirs-male "whatsomever, which failzieing to my heirs and assignees what-"somever."

The entailer died in 1771, without issue male. Upon his death, his daughter, Elizabeth, succeeded to his estate, in virtue of the destination in the entail.

By her marriage with Charles Lockhart, she had four sons,— 1. John, who predeceased his mother, without issue; 2. James, who on his mother's death in August, 1787, succeeded to the estate of Largie, and continued in possession till the 6th of September, 1793, when he died without issue; 3. Alexander, who on James's death succeeded to Largie, under the entail of 1763; 4. Norman Lockhart, writer to the signet.

Sir Alexander, the third son, died in 1816, leaving three sons and several daughters. His sons were,—1. Sir Charles Macdonald Lockhart, who succeeded him in the estates; 2. Norman, the appellant; and, 3. Alexander Macdonald Lockhart. Sir Charles died in December, 1832, without issue male, but leaving two daughters, the respondents.

Upon the death of Sir Charles three actions of declarator were commenced in the Court of Session. 1. At the instance of Lady Macdonald Lockhart, the widow of Sir Charles, as *factrix loco tutoris* for her youngest daughter, the respondent, Emelia Olivia Lockhart Macdonald, claiming that the entail of 1763 was at an end, and that the estate of Largie belonged in fee-simple to the two sisters, as coheiresses; 2. At the instance of the elder sister the respondent, Mary Jane Lockhart Macdonald, claiming to be sole heiress of entail under the destination in the deed of 1763: 3. At the instance of Norman, now Sir Norman Macdonald Lockhart, claiming that he was the preferable heir of entail.

LOCKHART *v.* MACDONALD, — 15th March, 1842.

These actions were conjoined; and on considering revised cases for the parties, the Lord Corehouse, Ordinary, on the 28th of June, 1836, pronounced this interlocutor: "The Lord Ordi- " nary makes *avizandum* with the revised cases for the parties, " and whole process to the Lords of the First Division, and " appoints the record and revised cases to be boxed to their " Lordships, *quam primum.*"

On the 19th of January, 1837, the Court pronounced the following interlocutor: "The Lords having advised the three " conjoined actions of declarator, Find, that the succession to " the estate of Largie, under the deed of entail thereof, descends " to the heirs whatsoever of the body of the late Sir Charles " Macdonald Lockhart, in preference to Sir Norman Macdonald " Lockhart, claiming as heir-male; and therefore sustain the " defences to the action of declarator at his instance, assoilzie " the defenders from the whole conclusions thereof, and decern; " but reserve all questions between the daughters of the said Sir " Charles Macdonald Lockhart, relative to the said succession; " and remit the process of declarator at their instance to the " Lord Ordinary, to proceed therein as shall be just."

The opinions delivered by the Judges at pronouncing this interlocutor were as follows: —

Lord Gillies. — It is certainly an odd question, at the same time a very important one for the parties; but how long is the construction which one of the parties wishes to put on the clause to last? I don't know; I certainly think, however, there is only one way of settling it, viz., by giving the clause just the common understood interpretation which would be put upon it by any one.

Lord President. — I am of the same opinion. I see no other way. It is exactly the same case with the Rothes one, which is precisely in point. I think the names of the parties were Leslie. The curious circumstance here is, that the destination carries the

property to daughters in one place, and it ends with daughters, as if they were never previously mentioned.

Lord Mackenzie. — I hold the same view with your Lordships. If the clause mean any thing, it must mean that heirs-female are to succeed. I know of no other rule of interpretation which would be good. Indeed, there is nothing in any of our styles which could authorize any other meaning to be put upon it. I certainly see no reason for preferring a lot of heirs-male, then a lot of heirs-female, and again heirs-male, and then heirs-female. I cannot arrive at that conclusion.

Lord President. — I know Lord Balgray's opinion, who is absent from illness, to coincide exactly with your Lordships, from a conversation I had with him on the subject.

The appeal was taken against the interlocutor of 19th January, 1837, with the leave of the Court. At giving that leave, one of the Judges expressed himself in these terms, — " this was under-" stood to be an amicable suit, and the Court has accordingly " not thought it requisite to give their opinions at length."

The appeal came on to be heard on the 27th August, 1839, when the following observations were made by

The Lord Chancellor, (*Cottenham.*) — My Lords, In this case, the question raised is one of pure Scotch law, upon which it does not appear that any decision has ever taken place in the Courts of Scotland. The limitation upon the marriage of the settler's daughter was to the daughter and the heirs-male of her then marriage, and the heirs whatsomever of the bodies of the said heirs-male. Alexander, a son of the marriage, succeeded to the estate in question, and to him, Sir Charles Lockhart, his son. Sir Charles Lockhart left no son, but two daughters, the respondents. Sir Norman Lockhart, another son of Alexander, and brother to Sir Charles, is the appellant; and the question is, whether, under this limitation, the daughters of

the heir-male of the body succeed in preference to the next heir-male.

It unfortunately happens, that notwithstanding the novelty and difficulty of this case, we have not the benefit of the reasons upon which any of the Judges below proceeded in deciding against the appellant. Indeed there appears to have been some misapprehension as to the character of the suit, which may have led to this result; it being represented, that one of the learned Judges, upon the petition for appeal, stated that this had been understood to be an amicable suit, and that the Court had accordingly not thought it requisite to give their opinion at length.

It was stated by the Lord President, that the case was exactly the same with the Rothes case, which was precisely in point. Upon examining that case, it appears to me, that there are very essential distinctions between the two, although it certainly affords strong analogical arguments; but on the other hand, what took place in this House upon the claim to the Polwarth Peerage is entitled to the highest consideration, and does not appear to have been adverted to by any of the learned Judges below.

We are therefore called upon to decide upon the effect of certain limitations in a Scotch settlement, which seem not to be of unfrequent occurrence, but upon which there is no direct decision, but as to which two cases before this House, that is, the Rothes case and the Polwarth case, are represented as strong authorities, but on opposite sides; and yet, owing probably to the circumstance I have alluded to, the case does not seem to have received that consideration below which would no doubt, under other circumstances, have been given to it; and we have not the benefit of the grounds of the judgment of any of the learned Judges.

In such a case, this House must be desirous of having all the assistance which it can derive from the full consideration of a question of purely Scotch law by the Court of Session; and in

order to obtain that assistance, I propose that the case be remitted to the Court of Session, to be again argued before all the Judges of that Court.

It was then "Ordered and Adjudged, That the cause be "remitted back to the said First Division of the Court of "Session in Scotland, with directions to the Judges of that "Division to order the said cause to be heard before themselves and the whole of the other Judges of the Court of "Session, including the Lords Ordinary; and farther to do "therein as may be consistent with this judgment."

Under this remit the following interlocutor was pronounced by the Court below, upon the 24th January, 1840: — "The "Lords of both Divisions of the Court, and the Lords Ordinary, "having met under the remit from the House of Lords, and "heard counsel for the parties in the three conjoined actions of "declarator, adhere to the interlocutor appealed from; and "find, that the succession to the estate of Largie, under the "deed of entail thereof, descends to the heirs whatsoever of the "late Sir Charles Macdonald Lockhart, in preference to Sir "Norman Macdonald Lockhart, claiming as heir-male; and "therefore, of new sustain the defences to the action of declarator at his instance, assoilzie the defenders from the whole "conclusions thereof, and decern; reserve all questions between "the daughters of the said Sir Charles Macdonald Lockhart "and the other heirs of entail relative to the said succession; "and remit the processes of declarator at their instance to the "Lord Ordinary, to proceed therein as shall be just."

The opinions of the Judges at giving this judgment are too voluminous to be inserted here, but they will be found in 2 *D. B.* and *M.* 377.

Lord Advocate (Rutherfurd,) Sir W. Follet, and Mr Maconochie, for the appellant. — By the entail of 1763, the heirs-male

of the body of Mrs Elizabeth Macdonald by her then marriage were called as a class. It is only after failure of the whole of these heirs-male, that any heir whatsomever can take. Each heir-male is not called as a *stirps* which must be exhausted before the next can take, but the whole are called as one class; so the destination to the heirs whatsomever is to them generally, and not to the heirs whatsomever of the body of *each* heir-male respectively and successively.

[*Lord Brougham.* — To what antecedent do you refer the relative "*whom?*" Must you not refer it to the whole antecedent clause, and not to the last limb of the clause?]

We do refer it to the whole antecedent classes of heirs.

[*Lord Brougham.* — You say heirs-male of the body must be exhausted before heirs whomsoever can take?]

Yes. If the clause had been simply to Elizabeth Macdonald, and the heirs-male of her body by her then marriage, the second brother would have taken to the exclusion of the daughters of the elder brother; and if the term "whom failing," had been introduced before the "heirs whatsomever of the body," instead of the word "and," there could not have been any doubt as to the preferable right of the second brother.

[*Lord Brougham.* — That was discussed in the Polwart case.]

But in the clause as it exists, it is not the first son of the marriage that is called, and the heirs whatsomever of his body, but the heirs-male in the plural, and the heirs whatsomever of the bodies of the said heirs-male; to bring in the heirs whatsomever of each heir-male before the next heir-male can take, would in truth be to limit the construction of the term "heir-male" to "son" of the marriage, a construction which it has never received. It is sufficient to embrace a general class of heirs, and has always been received in that sense.

It is said the word "and" couples the "heirs whatsomever"

with each heir-male successively; but in doing so the term "and" necessarily receives the same effect as the words "whom failing;" or even if it be used disjunctively, still it receives the same effect. In the Polwarth Peerage case, the interpretation put upon the term "and" was, that it was equivalent to "whom failing;" so in Richardson *v.* Stewart, 1 *S.* and *D.* 105; Kerr *v.* Innes, 13th November, 1810, 13 *F. C.* 1. To give it the same interpretation here, is evidently to carry out the intention of the entailer. By the entail, heirs-male, not only of the then existing marriage, but of any future marriage, are preferred to heirs-female of the existing marriage; this is destroyed if the destination to heirs-male of the body is satisfied so soon as an heir-male takes, and the heirs whatsomever are admitted on his death; the effect in that case is to admit the heirs-female before the other heirs-male. So in the Polwarth case, if "and" had not received the effect there given to it, the title might have gone out of the family of Home altogether by the death of the first heir-male of the patentee, leaving daughters only; but there it was held that the heirs-male as a class must first be exhausted before females could come in under the destination to "the heirs of the said "heirs."

Here, after the destination to the heirs-male of successive marriages, the destination is carried on to the heirs-female of the existing marriage, that is, just to heirs-at-law, or heirs whatsoever, according to the construction ordinarily put upon such a destination, *Ersk.* III. 8. 48. The intention of the entailer was evidently to preserve the estate in his family; but if the construction given by the Court is sustained, the estate might pass in the third generation out of the entailer's family to that of the husband of one of his grand-daughters.

[*Lord Brougham.* — You would thus bring in the females in two characters, for they are heirs whomsoever, and also heirs-female.

LOCKHART *v.* MACDONALD, — 15th March, 1842.

Lord Chancellor (*Cottenham.*) — Suppose the appellant should succeed, and die without issue, who, do you say, would take.]

We are not prepared to say; that would depend on the construction put upon heirs whomsoever. There is an inconsistency in the use of the term heirs-female; for if it should apply to daughters, and there should be more than one, which is to take?

[*Lord Chancellor.* — If daughters can come in as heirs of the marriage, then they cut off the effect of heirs-female.]

Mr Attorney General (*Campbell*) *and Mr Pemberton, for the respondents.*—The respondents are the heirs-portioners and heirs-at-law of Sir Charles, the last heir in possession, and the entail under which they claim was made in implement of a contract of marriage recited in, and thereby imported into, the entail; unless, therefore, there be a clear disposition of the estate otherwise, they must be preferred, *in dubio pro hærede presumendum*, Craigie *v.* Stewart, 11th July, 1738, *Elchies.*

Under a destination to heirs-male of the body, the whole do not take together, but they each take successively; but here the right of each heir taking is enlarged to let in the heirs whatsomever of his body. On the same principle that each heir-male takes successively, so must the heirs whatsomever of his body. The entail itself shews the meaning which is to be put upon the word "and;" it is only used where there is an intention to qualify a right already granted; if a new substitution is to be created, "and" is not used, but "whom failing." The use of the limitation to "heirs-female" was evidently to let in the daughters of the marriage of Elizabeth Macdonald with Sir Charles Lockhart, because they could not have come in, as the respondents do, as "heirs whatsomever" of the body of the heirs-male.

[*Lord Chancellor.* — Heirs-female, you say, are daughters of Elizabeth Macdonald?]

Yes.

[*Lord Brougham.* — That is not the meaning of "heir-"female."]

In this case we think it is, or rather, that it means daughters, and the descendants of daughters. The intention of the entailer was to adopt the legal order of succession, so far as regarded the immediate descendants or sons of himself and his daughter, Mrs Lockhart, but not to preserve the legal course in the collateral succession among these descendants themselves, so that a full sister by a first marriage might not exclude a half brother by a second marriage; reverting, however, to the legal course of succession among the heirs of the descendants, by bringing in the heirs whatsomever of the body of each descendant before the next immediate descendant is entitled.

LORD COTTENHAM. — When this case came first before this House, it appeared to me to be one of novelty and difficulty, and finding very little information as to the grounds upon which the decision of the Court below had been founded, I thought it expedient that this House should have the assistance of all the Judges of the Court of Session before it came to a decision upon it, a course not unusual, and most important in cases which, like the present, involve questions of purely Scotch law, and of very general application, and as to which the decisions most nearly in point appeared to be at variance. When such cases occur with respect to questions of English law, this House never fails to call for the personal attendance of the English Judges. It has not the means of obtaining in that way the assistance of the Judges of Scotland: It therefore endeavours to secure to the suitor the same advantage, as nearly as possible, by a remit to all the Judges. The result of the remit in the present case has been to prove beyond all doubt the great difficulty and novelty of the question; and although a large majority of the Judges have expressed opinions in favour of the former judgment, to which

this House is disposed to pay the utmost attention, yet it is the duty of this House to exercise its own judgment as to the propriety, under all the circumstances, of adopting the opinions so expressed.

To many of the learned Judges of the Court of Session your Lordships are indebted, for the great care and labour with which they have investigated and discussed this case, and for the learning and talent they have brought to bear upon it. The difficulty may not be palpable to a superficial observation, but to those who have bestowed the most attention to the law, and to the authorities which have been referred to, it has become most apparent.

The principle upon which the law of England and of Scotland, upon questions of limitation, is founded, are so different, that the decisions of the former can have no analogy to the present question.

By the English law, terms of inheritance, such as "heirs," or "heirs of the body," in general are descriptive of the estate which the ancestor takes; but by the law of Scotland they are generally descriptive of the class of persons who are to be called to the enjoyment of the estate upon some particular event happening; and when different classes are to be so called in succession, that event is generally the failure of the class immediately preceding, and is most aptly described by the words "whom failing." When these words are used, no difficulty can arise, but here the words are, "to Elizabeth Macdonald, and the "heirs-male of her body, and the heirs whatsomever of the "bodies of the said heirs-male; whom failing, to her heirs-female "of the body;" and the question is, whether the daughters of a senior heir-male of the body take before a junior heir-male of the body; the daughters claiming as heirs whatsomever of the body of the heir-male of the body who first took, and the heir-male insisting that all heirs-male of the body must be exhausted

before any heirs whatsomever, or heirs-general of the body, can take; and for this purpose contending, that the word "and" is to have the same meaning attached to it as the words "whom "failing;" not that it is necessary to import the words "whom "failing" into the sentence, in substitution for the word "and," for any other expression, shewing that all heirs-male must be exhausted before any heirs-general of the body were called to the succession, would equally exclude the claims of the daughters; so that if the words had been the "heirs-male of her body," and "*then* the heirs whatsomever of the bodies of the said heirs-"male," the intention of postponing the succession of females until all the heirs-male of the body had been exhausted, would have been sufficiently apparent, and the question is, whether the words used do or do not sufficiently express such an intention.

It is impossible to read the very learned and able judgment of Lord Meadowbank without being struck with the reasons he suggests for adopting his construction of the words used. If the settler had intended that in the event of there being an eldest son who should have daughters, the younger sons should be for ever excluded, he would not have described such eldest son by the words "heir-male of the body;" and it cannot be supposed that he intended that the daughters of Elizabeth Macdonald should be preferred to her younger son, in the event of her eldest son leaving only daughters, and those afterwards dying without issue.

If, therefore, it could be established that the consequence of holding that the eldest son took, with remainders upon his death to his daughters, if he had no son, would be, that upon the failure of the line of such daughters, the estate would never return to the younger sons, or their issue, as Lord Meadowbank thinks would be the case, I should feel the greatest difficulty in adopting a construction which would lead to such a result; but I have come to the conclusion that such would not be the consequence of the construction adopted by the majority of the Judges.

LOCKHART *v.* MACDONALD, — 15th March, 1842.

When any description of heirs are called, the term "heirs," though used in the plural, is construed to mean individuals who, from time to time, and in succession, may answer the description; the argument against the construction in favour of the daughters assumes that this would be so; but if the gift to heirs may be so divided as to give the estate to every individual heir in succession, why may not the next gift to heirs whatsomever of the body be also construed distributively, so as to apply to the heirs-general of the body of each successive heir-male who might be added to the succession?

The Roxburgh case, though not a direct authority for the present, shews how freely the expressions used in a settlement may be dealt with, for the purpose of giving effect to the apparent intention of the author of it. When, indeed, it was held that the limitation to the eldest daughter, with the other expressions used, amounted to a limitation to the four daughters in succession; and it became necessary to decide upon the effect of the next limitation, "and their heirs-male," a case very similar to the present was presented, for if "and" was to be construed "whom failing," there would be a gift to a class, "whom "failing," to another. If, therefore, in that case the heirs-male of each daughter took immediately after such daughter, why should not the limitation in this case "to the heirs whatsomever "of the body of the heirs-male of the bodies," operate so as to give the estate to the "heirs whatsomever" of each heir-male who should come into possession?

It is not disputed that in general the word "and" means the same as "whom failing." I cannot, however, but think that this case would have been very different if "whom failing" had stood in the place of the word "and." It would have marked a precision with respect to the event upon which this gift to the "heirs whatsomever" was to take place, which it would have been very difficult to get over; whereas the word "and," whilst

it shewed that the "heirs whatsomever of the heirs-male" were to take, left the sentence so imperfect as to the mode in which that was to take place, as to give greater latitude to the adoption of any construction which seemed best calculated to effect the object of the settler.

If the noble and learned Lord's observations upon the Polwarth case are to be understood as having laid it down that the word "and" must in all cases have the same effect as the words "whom failing," I should feel the greatest difficulty in reconciling the decision in this case with such opinions, but I do not so understand the expressions attributed to them. I think, therefore, that in this, as in the Roxburgh case, we are at liberty to construe and expand the condensed expressions of the settlements, so as to introduce a limitation to the heirs-general of the body of each heir-male of the body immediately after the estate of such heir-male, if such shall appear upon the face of the deed to have been the intention of the settler; and of this I think there is sufficient proof from the circumstances commented upon by the several learned Judges of the Court of Session, and which it is therefore unnecessary to discuss in detail; but of those, what has operated most upon my mind is, the consideration that this construction provides for all the events which could have happened, whereas, if the heirs-general of the bodies of the heirs-male are not to take until all the heirs-male are exhausted, there would be an absolute failure in the deeds as to any provision regulating in what manner such heirs-general of the bodies were to take, whether all together, or whether the heirs of the first heir-male, or of the last.

I cannot, also, but think that the form of the expression used leads to the same conclusion, for although the gift to the "heirs-male of the body" may include many in succession, the probability was, that it would never operate in favour of the eldest, and with this view the limitation is to such eldest heir-male of

the body, and the heirs whatsomever of the body of such heir-male. The same principle which divides the gift to the heir-male of the body so as to include several in succession, must operate to divide the gift to the heirs whatsomever of such heirs-male, so as to give it in succession to the heirs whatsomever of each heir-male.

Nothing can be more distressing than to have to dispose in this House of a decision upon a question of pure Scotch law, when it is found not to be possible to concur in the reasons upon which it is rested by a great majority of the Scotch Judges. I am happy to say that such is not the case in this instance. The assistance now afforded by the learning and observations of many of the learned Judges has enabled me to come to a conclusion satisfactory to my own mind, that the interlocutor appealed from ought to be affirmed.

I regret the expense which the remit must have occasioned to the parties. The circumstances under which the case in the first instance came before us, and the apparent inconsistency in such authorities as were submitted to our consideration, and the general importance of the question, to which this House is bound to look, as well as to the interests of the parties litigant, rendered this indispensable.

I move your Lordships, that the interlocutor appealed from be affirmed, but without costs.

Lord Brougham. — My Lords, I entirely agree with my noble and learned friend, after much consideration of the question, and after feeling the difficulties that were thrown in our way by the very able and learned arguments of one of the learned Judges below, as well as by other considerations which arose in the course of the discussion which this matter underwent at your Lordships' bar, I nevertheless with him have come to the conclusion that this judgment ought to be affirmed.

My Lords, with respect to the Polwarth case, reference has

been made to what passed in this House upon that case, and to some observations supposed to have been made by a noble and learned friend of mine, not now present, the Lord Chancellor, and myself. I have only to state, that my noble and learned friend is perfectly right in what he has stated, that considerable misapprehension has prevailed, both in the Court below, and also in the course of the argument at your Lordships' bar, as to the meaning and import of the words "whom failing;" what we there said has not been accurately represented, but even if it had been accurately represented, those remarks made by my noble and learned friend and myself in the Polwarth case, were extra-judicial in regard to the matter decided in that case, and consequently, if no mistake had arisen with respect to the tenor of those remarks, if they had been accurately represented both below and here, the present judgment of the Court below, which I hope your Lordships are about now to affirm, would not have been at variance with any thing that was decided in the Polwarth case. I perfectly agree with my noble and learned friend, that if, instead of the word "and," the words "whom failing" had been used here, it would have made a very great difference, and the question could hardly in fact have arisen.

Ordered and Adjudged, That the petition and appeal be dismissed this House, and that the interlocutors therein complained of be affirmed.

ALEXANDER DOBIE — SPOTTISWOODE and ROBERTSON, Agents.