stranger in the matter. On the other hand, how did the principal titulars waive any objections of this kind, or allow things to go on in a manner inconsistent with them? They continued to let these teinds. They exercised their right of titularity by letting them from time to time, at such tack duties, and at such *grassum*, whether right or wrong, as they thought convenient, or expedient for themselves; and we have not very much knowledge of what the teinds from the pasture lands of these parishes would at that time have yielded, suppose that they had wanted to draw their teinds. They enter into such contracts, as they were entitled to do from time to time for convenience sake, believing perhaps that the Buccleuch family being there, it might save them a great deal of trouble to do so, rather than that they should go and attempt to draw their teinds from parties in a part of the country, where perhaps they might not always have had the ready and available use of the arm of the law, if there was much objection made, and where many obstacles might have been opposed to them, which would have been a very different thing in the family of the local magnate, who were here selected, with great propriety, to draw the teinds. After '48, it cannot be said that any negative prescription could arise, and as little do I see any acts of approbation and homologation in the knowledge of all the circumstanees that can amount to a bar against these parties. On these grounds, I concur with the minority.

The LORD JUSTICE-CLERK adopted the opinion of Lord Ormidale.

The Lord Ordinary's interlocutor was therefore adhered to in accordance with the opinions of the Judges.

Agent for Pursuers—James Allan, S.S.C.

Agents for Defenders—Mackenzie & Kermack, W.S.

Tuesday, Feb. 19.

BOTH DIVISIONS.

PAUL *v.* HENDERSON (*ante*, p. 179.)

Arbitration — Judicial Reference — Exhaustion of Matters Submitted. Circumstances in which a reason of reduction of a decreet-arbitral on the ground that the arbiter had not exhausted the reference, in respect he had not disposed of a sum of money consigned by one of the parties in the course of the proceedings, was repelled.

In this action of reduction and count and reckoning three grounds of reduction were previously repelled, and a fourth was reserved to be argued before the Second Division and three Judges of the First Division—there being a division on the point among the Judges of the former Division of the Court. The question arises out of the management by the defender of a small property to which Mr Andrew Walter Paul, of New York, succeeded in 1838, as an heir *pro indiviso*. The action was originally brought by Mr Thomson Paul, W.S., commissioner for Mr Paul, for the purpose of calling the defender to account for his intromissions. The summons in that action was signeted Nov. 3, 1856. It was called in Court, and appearance was entered for the defender; but no further proceedings took place, the parties having agreed to the following submission :—

"We, Thomson Paul, writer to the signet, factor and commissioner for Andrew Walter Paul, designed in the foregoing summons, and having authority to enter into the submission for and in name of the said Andrew Walter Paul and myself, as his factor and commissioner, pursuers in the foregoing summons, and David Henderson, also therein designed defender, have submitted and referred, and do hereby submit and refer, to the amicable decision, final sentence, and decree-arbitral to be pronounced by John Maitland, Esq., accountant of court, as sole arbiter chosen by them, the foregoing summons, with the whole conclusions thereof, and all defences thereto competent to the said David Henderson, with power to the said arbiter to consider the premises, hear parties thereanent, and take such probation as to him shall seem necessary; and whatever the said arbiter shall determine in the premises betwixt and the , or betwixt and any other day to which he shall prorogate this submission, we bind and oblige ourselves, our heirs, executors, and successors, to implement and fulfil to each other, under the penalty of £20 sterling, to be paid by the party failing to the party observing or willing to observe the same over and above performance. In witness whereof," &c.

The pursuer made the following statements in support of the ground of reduction that the decree of the arbiter sought to be reduced did not exhaust the reference :—

"On 27th November 1858, the defender, at his own hand, and without any order or pretence of an order in the pretended submission, lodged in the Bank of Scotland the sum of £15, 8s. 9d., the sum represented in his said account to be the balance due on 8th September 1856 on his intromissions with the pursuer's share of said rents. For that sum he took a deposit-receipt in the following terms :—'Bank of Scotland, 27th November 1858. £15, 8s. 9d. Received for the Governors and Company of the Bank of Scotland, from Mr David Henderson, draper in Linlithgow, the sum of fifteen pounds eight shillings and ninepence sterling, the said sum to be subject to the orders of John Maitland, Esq., accountant of the Court of Session, sole arbiter in the action at the instance of Andrew Walter Paul, residing in New York, and Thomson Paul, writer to the signet, his factor and commissioner, against the said David Henderson.' This receipt was lodged in the said pretended submission."

The pursuer then sets forth that the decreet-arbitral was issued on 27th June 1863, and he narrates several of its findings. He then says—"By the fourth finding, the pretended arbiter professed to find that the defender 'is indebted and due to the said Andrew Walter Paul and his said commissioner and attorney the balance brought out on his account of intromissions, amounting to fifteen pounds eight shillings and threepence three farthings (should be £15, 8s. 9d.), and the said sum of four pounds eleven shilling and sevenpence halfpenny, making together the sum of £19, 19s. 11¾d., with interest thereon at the rate of five per cent., from the 8th September 1856 to the 15th of May 1863, under deduction from principal of the sum of fifteen pounds eight shillings and threepence, consigned on the twenty-seventh of November eighteen hundred and fifty-eight, by the said David Henderson, in the Bank of Scotland, *in my name, as arbiter in this submission, and subject to my orders*, and under deduction from interest of interest corresponding to the balance so consigned, at the rate foresaid, on which date the sum of principal and interest due by the said David Henderson, as on the said fifteenth of May

eighteen hundred and sixty-three, amounts to seven pounds sixteen shillings and fourpence, as per state following this award, signed by me as relative hereto, which accumulated sum I find due, with interest thereon, from said fifteenth of May eighteen hundred and sixty three, at five per cent. until paid; and accordingly I decern and ordain the said David Henderson to make payment to the said Andrew Walter Paul and his said commissioner and attorney, or to either of them, of the said sum of seven pounds sixteen shillings and fourpence, with interest thereon, at the rate of five per cent. from the said fifteenth of May eighteen hundred and sixty-three till paid, saving always and reserving to the said David Henderson all right he may have to set off or retain said sums against the expenses hereinafter found due to him, and which sum deposited as aforesaid, and bank interest accrued thereon, will be paid by me accordingly to the party legally entitled to the same.'

"In this decree the sum of £15, 8s. 9d. (erroneously stated in it to be £15, 8s. 3d.) is not disposed of. By the terms of the deposit-receipt, the sum is consigned subject to the orders, of John Maitland, Esq., Accountant of the Court of Session, sole arbiter, &c.' It is not consigned in Mr Maitland's name, as erroneously set forth in the pretended decreet-arbitral, and he has no right under the receipt to uplift it. It is only by orders pronounced by him as arbiter that the bank became bound to pay the money. The decreet-arbitral contains no order for uplifting or paying said consigned sum, and the pretended arbiter being *functus* of any power as arbiter to pronounce thereupon, this sum is left undisposed of in any way, and cannot be now reached under the submission or by any orders therein, and so cannot be uplifted by the pursuer or made available to him. The said John Maitland has since died, without having made any order for uplifting or disposing of said sum.

"The effect is this—The balance of the whole rents belonging to the pursuer intromitted with by the defender from Whitsunday 1845 to Whitsunday 1854, both inclusive, confessedly amounts to £64 2 5

of principal, without including interest. Of this sum all that the pursuer has received or can receive in consequence of the pretended decreet-arbitral, is—

1st, Payment on 22d August, 1856, . .	£20 0 0	
2d, Sum allowed by decreet-arbitral, .	4 11 7½	
		24 11 7½
Leaving,		£39 10 9½

which represents the sum of which the pursuer is deprived by the decreet-arbitral, taking it on its own terms.

The Lord Ordinary (Ormidale) had repelled this defence.

PATTISON (F. W. CLARK and ARTHUR with him) was heard for the pursuer.

DEAN of FACULTY (ORR PATERSON with him) for the defender.

At advising,

Lord CURRIEHILL—This action concludes for reduction of a decreet-arbitral pronounced by the late Mr John Maitland on 27th June 1863, in a submission to him by the parties to this action. Several grounds of reduction were pleaded by the pursuer, but with one exception all of them were decided by the Second Division of the Court. The only ground of reduction, which we have now to decide, is founded on the allegation of the pursuer that the decreet-arbitral does not exhaust the matters which were submitted to the arbiter. I am of opinion that that ground of reduction is relevant in law; and that therefore the question we have now to determine is whether or not all the matters which were referred by the submission have been decided by the arbiter. This question has given rise to a difference of opinion. I do not wonder that this is the case, because the decreet-arbitral is not clearly expressed; and the question whether or not it exhausts the submission depends upon what may be found to be its true meaning.

The difficulty in construing that document arises chiefly from the manner in which the arbiter has dealt with a consignation of a sum of money which took place during the dependence of the proceeding in the circumstances I shall presently mention.

The subject of the arbitration consisted of a claim by Mr Paul, the pursuer of the present action, against the defender, Mr Henderson, to account for the rents and produce of house property in Linlithgow, which belonged to the pursuer, Andrew Walter Paul, and had been managed for several years by the defender. The submission is dated 29th June and 1st July 1857, and was accepted of by the arbiter on 1st December following. In the course of the following year, as appears *ex facie* of the decreet-arbitral itself, the defender lodged accounts in which he admitted that there was a balance owing by him to the pursuer upon his intromissions amounting to £15, 8s. 3¾d. The pursuer insisted that the balance was of much larger amount. After the litigation had gone on in the submission for about a year, the defender, on the 27th November 1858, consigned the sum of £15, 8s. 9d. (being a few pence more than the balance admitted to be due by him in the accounts) in the hands of the Bank of Scotland. The deposit-receipt sets forth that "the said sum to be subject to the order of John Maitland, Esquire, Accountant of the Court of Session, sole arbiter in the action at the instance of Andrew Walter Paul, residing in New York, and Thomson Paul, W.S., his factor and commissioner, against the said David Henderson." The first remark I make as to this proceeding is, that the pursuer had thenceforth a *jus quæsitum* in the consigned fund. It confessedly consisted of the balance of funds belonging to him and for which the consigner was accountable to him. If, after making that consignation, Henderson had become bankrupt, this consigned fund could not have been claimed by his creditors as part of his effects, but would have belonged to the pursuer, unless it should be found that Henderson had acquired some subordinate right of retention or lien over the same. But, in the second place, it does appear from what is set forth in the decreet-arbitral, that he claimed such a right, in reference to the expense of the litigation under the submission which was going on. And, thirdly, the condition upon which that consignation was made was that the money should be held by the bank, subject to the "order" of Mr Maitland himself. But the words as used in the bank's deposit-receipt did not mean a decerniture to be embodied in the decreet-arbitral, which was ultimately to be pronounced by Mr Maitland. It meant an order to be made by him upon the deposit-receipt itself. If he had endorsed upon that receipt at any time an order upon the bank to pay the money to

either of the parties in the submission, or, indeed, to any other party, the bank would not have been bound or even entitled to have withheld payment of the money on the ground that that order was not pronounced in, and did not form part of, a final decreet-arbitral in the submission. Mr Maitland's position in reference to that consigned fund was such as entitled himself personally to go to the bank and uplift the money and to pay it to either of the parties whom he might find entitled to receive such payment.

The discussion in the arbitration appears to have proceeded for several years subsequent to the date of that consignation, the decreet-arbitral being dated 27th June 1863; and let us now see what is truly its import.

The first three heads relate to the procedure which had taken place in the submission during its dependence. The fourth head is the one which contains the findings as to what was due by the defender to the pursuer; and their import and meaning appear to me to be this—1st, It finds that according to the defender's own account he was addebted and due to the pursuers the sum of £15, 8s. 3¾d. 2d, It finds that in addition to that admitted sum, the defender was addebted and due to the pursuer £4, 11s. 7⅛d., making, together with the admitted sum, £19, 19s. 11¼d., but "under deduction from principal of the sum of £15, 8s. 3d., consigned on the 27th November 1858, by the said David Henderson in my name, as arbiter in this submission, and subject to my orders." 4th, It finds that on these *data* the balance owing by Henderson on 15th May 1863 amounts to £7, 16s. 4d., and accordingly the defender was decerned and ordained to make payment of that sum with interest from 15th May 1863 to the pursuer. But, 5th, these findings were made under a *salvo* and reservation to the defender of "all right he may have to set off, or retain, said sums, against the expenses hereinafter found due to him; and which sum, deposited as aforesaid, and bank interest accrued thereon, will be paid by me accordingly to the party legally entitled to the same." The meaning of these findings is elucidated by the states which are therein referred to for that purpose in this decree itself, and which are accordingly annexed to the decree and subscribed by the arbiter.

This head of the decreet-arbitral concludes thus:—"And I repel all other claims made in the process *hinc inde*."

The fifth head of the decreet-arbitral is that which is referred to in the *salvo* above quoted as containing the finding of expenses in favour of the defender. Under that head the arbiter decerns and ordains the pursuer to make payment to the defender of £59, 15s. 5d. of expenses besides the expense of recording the decreet-arbitral and certain other expenses to the Clerk to the Submission.

The decreet-arbitral having been pronounced in these terms, and recorded in the books of Council and Session, was final, and could not afterwards be altered by the arbiter. But it is said that he had failed to exhaust the submission—that is to say, that he had left undecided some matter which the parties had referred to his decision. Although there is ambiguity in the decreet-arbitral, yet in construing its terms, it is to be presumed that the arbiter at least intended to decide all the matters submitted to him. Indeed, in the present, it is a matter not merely of presumption, but of certainty, that such was Mr Maitland's intention, as appears from his expressly repelling all the claims *hinc inde* beyond those he expressly dealt with. He could not have used more exhaustive words. And hence any ambiguity in the special findings falls to be construed in conformity with that intention, if the language fairly admits of this being done. And I think that this is the case as to this decreet-arbitral. On carefully comparing the submission and the decreet-arbitral, I discover no claim on the part of the pursuer nor any defence on the part of the defender which has been left undecided. The arbiter under the fourth head has settled the amount of the debt owing to the pursuer, and a condition by which their right thereto is qualified. Under the subsequent head he has decided the amount of the sums claimable as expenses by the defender from the pursuer. And he has in express terms repelled all other claims made in the process by either of the parties.

As I understand the argument of the pursuer, what he maintains is, that the arbiter has omitted to insert in the decree any order in his favour by means of which he can obtain payment of the consigned money from the bank. But is there anything in the submission or in the decreet-arbitral itself which rendered it necessary or proper that such an order should be embodied in that decreet-arbitral? In my opinion, this question must be answered in the negative. I think that such an order not only was not necessary, but could not with propriety have been made in the decreet-arbitral; for although the finding under the fourth head truly imports that the £15, 8s. 3d. deposited in bank as well as the £7, 16s. 4d. remaining in the defender's hands belonged to the pursuer, yet it also imports that the right to both these sums was subject to a lien or right of retention in security *pro tanto* of the £59, 15s. 5d. in which the pursuer was found to be indebted to the defender, and the right of the pursuer to obtain payment of the two former sums was conditional on his making payment of the latter sum.

Secondly, Even if the pursuer had tendered payment of the full amount of these expenses after the decreet-arbitral was pronounced, and if an order from the arbiter had been necessary to enable him thereafter either to use execution against the defender for the £7, 16s. 4d., or to obtain payment of the consigned money from the bank, it would have been quite competent to him still to grant such order, because his doing so would not have been an act in the submission itself, but merely an act carrying into execution what had been finally decided by the submission. According to the final decreet-arbitral, the right of the pursuer to the consigned money was a conditional one, the condition being that he should implement the decerniture against him for expenses contained in the final decreet-arbitral, and his performance of that condition of the decreet-arbitral was a matter which related to the *execution* of the decree after it was pronounced. And the manner in which that condition was to receive effect—whether, on the one hand, it should be performed by the pursuer, or, on the other hand, should not be performed by him—was also settled by the final decree; inasmuch as the decree provided that the arbiter himself would pay the money to the party who might eventually be entitled to it; that is to say, to the pursuer, in the event of his paying the full amount of the expenses to the defender, or to the defender himself, in the event of his failing to do so. And a condition in the decreet-arbitral that what is thereby finally decerned for shall be afterwards carried into execution by means of the arbiter himself, does not fall under

the category of objections that the submission is not exhausted. The case of Erskine, July 30, 1714, Mor. p. 649, is a clear authority to that effect.

And, thirdly, The pursuer is mistaken, as I think, in maintaining that any such order required to be granted by the arbiter after the date of the decreet-arbitral; for, as already mentioned, he himself, according to the terms of the deposit-receipt, was authorised to uplift the consigned money from the bank, and to pay the amount to the party who might, in either of these alternatives, be entitled to it. And accordingly, this was what, according to the express terms of the decreet-arbitral, was thereby appointed to be done; for, as already stated, what the arbiter thereby provided was, that the deposited money "will be paid by me accordingly to the party legally entitled to the same."

It only remains to be mentioned that, although the arbiter has died since the date of the decreet-arbitral, that event cannot affect its validity, which must be judged of according to the state of matters as at the time when it was pronounced. That event will probably create no practical inconvenience to the parties. But should it do so, the blame would be with the pursuer himself, for the arbiter survived the date of the decreet-arbitral a considerable time; indeed, he was still alive when this action of reduction was instituted, and he appears to have been examined in the course of the proceedings.

The result is that, in my opinion, the reason of reduction embraced in the 4th and 6th pleas, that the decreet-arbitral does not exhaust the reference, and is therefore ineffectual, ought to be repelled.

The Lord President and Lords Cowan, Benholme, and Ardmillan concurred with Lord Curriehill.

Lord Neaves—I regret that there should be a difference of opinion in a case involving so small a sum, but the amount does not affect the principle, and I am unable to concur in the judgment proposed.

I am of opinion that this decreet-arbitral is invalid from its not exhausting the matters submitted. There can be no doubt of the relevancy of that objection. The only question is whether it is well-founded in fact.

The matters referred to the arbiter, as set forth in the minute of reference, were the summons therein mentioned, "with the whole conclusions thereof and all defences thereto." The summons sought for a count and reckoning at Paul's instance against Henderson, and for a decree of payment of the balance that might be held due on Henderson's intromissions with Paul's property.

The proper fulfilment of this submission obviously was to ascertain if a balance was due, and if so, to give decree for the balance so ascertained.

An investigation of accounts took place in the submission, and in the course of it this procedure took place. Henderson admitted a balance to be due by him, and consigned in bank the sum of £15, 8s. 9d., to be subject to the order of Mr John Maitland, "sole arbiter in the action" in question. This receipt was lodged in process, and the payment of the consigned sum became the subject of discussion in the submission, but was not disposed of.

The decreet-arbitral was ultimately issued, and the question arises if it is a complete exhaustion of the matters in dispute, or if it leaves anything unsettled between the parties.

I have no doubt that the arbiter, if he had chosen, might have disregarded the consignation altogether, which had not been made by his orders; and which, moreover, as things turned out, was not a full tender of what was due. In that view it was the arbiter's duty to bring out the balance due to Paul (irrespective of the consignation), and to decern for the amount. But if the arbiter chose to recognise the consignation as judicially made, and he was entitled to do that also as a natural and competent incident to a litigation, he was bound, in my opinion, to deal with the consigned money on the footing on which it had been deposited, and for that purpose to make such an order as arbiter as would certiorate the bank as to the party who was entitled to uplift the money. What the bank might or may do upon its own risk, or on guarantees given to it is a different thing; but according to the express terms of the deposit receipt, that money was in their hands subject to the order of the arbiter and they were neither bound nor entitled to pay it to any one who could not show the arbiter's order to pay it to him.

Let us attend now to the terms of the decreet-arbitral; and first of all to that part of it which regards the ascertainment of the balance due to Paul. This is summed up in the fourth head—[Reads.] It is plain that, apart from the consigned sum, the true balance found due to Paul is £19, 19s. 11d., with interest, but the arbiter does not decern for that balance. He decerns only for £4, 11s. 7d., with interest, which is the difference between the full balance and the consigned sum.

But he does nothing as to the consigned sum. He makes no order whatever about it. He does not do anything which will make the deposit receipt operative in favour of either party. Justice required that as he diminished the balance decerned for by the amount of the consignation he ought to have given the consigned money to Paul to make up his full debt. But he does not do so. The decreet-arbitral contains nothing that in any event would have enabled Paul to get the deposited money from the bank.

It is equally true that the arbiter does not give the consigned money to Henderson. If he had done so he would have exhausted the reference. He would no doubt thereby have committed the grossest injustice; because nothing could be more iniquitous than to make a consignation play the part of a payment to account, and then give it back on any pretence to the party who had paid it in. The arbiter saw, perhaps, the injustice of this, and had not the courage to perpetrate it; but in this way he has been led to do the very thing now complained of—viz., to leave the money *in medio* without an order of any kind.

It seems to have been supposed, by the course taken in this process, that the arbiter found that Henderson had some lien or right of set off as to the consigned money for the expenses found due under the fifth head. But this is not so. He does not find anything to that effect. But he reserves the question.—[Reads.]—He leaves this question to lie over for after determination, and on that ground apparently abstains from giving that order as arbiter which, by dealing with the consignation at all, he was bound to do, and which I conceive he could not do after the submission had terminated.

But how and where was this reserved question to be decided? It could not be decided in any action for a decree-conform; for it is clear that this Court, if called upon to give such decree,

could not have added one jot or tittle to the decreet-arbitral pronounced. It could only give executorials to carry it out *tantum et tale* as it was.

How, then, was this money to be ever got by any party? Was a multiplepoinding to be raised in name of the bank in which Paul and Henderson were to compete as to the reserved right? That would be a new litigation about a matter that might and ought to have been decided by the arbiter, and which, therefore, would all the more prove that the submission was not exhausted.

But, further, how could a Court decide upon right to a fund under a deposit-receipt which defined the disposal of the fund to depend on the order of this very arbiter. No doubt, if the consignation had been rejected and thrown aside, Henderson might have got back his money. But it was not so treated. The arbiter recognised it and held it to be in his control, and yet he refuses to give the order required, and leaves to another tribunal to determine the rights of parties in the fund. It was as arbiter that he was to say, and not otherwise, to whom the money belonged, just as if the order of the Lord Ordinary had been mentioned in the receipt. He who ought to have decided that refuses to do so, and says he will give an order or give the money, not according to his own views, but in obedience to some other tribunal to which he was to defer, but which tribunal could never arrive at the means of so deciding. Execution may lie over, but the rights of parties must be fixed.

It appears to me, therefore, that this fund, though made a part of the submission, was left *in medio* and in suspense, and consequently that the decreet-arbitral is objectionable for thus leaving that question undisposed of.

The Lord Justice-Clerk concurred with Lord Neaves.

In accordance with the opinions of the majority, the Court found that the reference was exhausted, and therefore adhered to the Lord Ordinary's interlocutor.

Agent for Pursuer—Thomson Paul, W.S.
Agents for Defender—J. & A. Peddie, W.S.

Wednesday, Feb. 20.

FIRST DIVISION.

CONNELL *v.* GRIERSON.

Entail—Destination—Heirs-Female—Nearest of Kindred. 1. Held that heirs-female in a deed of entail meant heirs-female general, unless it was obvious from the deed that the entailer meant the expression to have a more limited meaning. 2. Circumstances in which held that it meant heirs-female of the body. 3. Held that under a destination to an entailer's nearest of kindred the person entitled to succeed was his heir in heritage.

These are two actions in regard to the right to succeed as heir of entail to the two estates of Over-Kirkcudbright and Auchenchain, under deeds of entail executed by William Collow in the year 1779. The defender, Miss Grierson, has made up her title as heir of entail, and the pursuer challenges her right on the ground that he is the nearer heir. The defender objected to the pursuer's title to sue, on the ground that she is the true heir. This preliminary defence raised the question, which under the entail is the nearest heir?

The destination of the entail of Over-Kirkcudbright is in these terms—viz., "to my grandson John Collow, and the heirs-male descending of his body; whom failing, to Gilbert Collow my grandson, and the heirs-male descending of his body; whom failing, to any other heir-male which shall be procreate betwixt my son Thomas Collow and Helen Grierson his spouse; and, in default of all these, to the heirs-female of the said John Collow, my said grandson; and failing of his heirs-female, to the heirs-female of the said Gilbert Collow; and in default of such, to the heirs-female of the male heirs to be procreated hereafter betwixt my son Thomas Collow and his said spouse; and failing of all such heirs male and female, to and in favours of William Collow, my grandson, and the heirs whomsoever, male or female, descending of his body; and in default of all such issue, to and in favours of William Collow, eldest son of the deceased Mr John Collow, late minister of the gospel at Penpont, my brother-german, and the heirs-male descending of his body; whom failing, to Thomas Collow, second son of the said Mr John Collow, and the heirs-male descending of his body; whom failing, to John Collow, third son of my said brother, and the heirs-male descending of his body; whom failing, to James Collow, youngest son of my said brother-german, and the heirs-male descending of his body; whom failing, to Mr William Grierson, present minister of the gospel in Glencairn, and the heirs-male descending of his body (he is the lawful son of Jean Collow, my sister, deceased, and James Grierson her husband, also deceased); whom all failing, to any person or persons as shall be called and nominated to the succession of the lands and others aftermentioned, by a writing under my hand, at any time hereafter; and in case of no such nomination, to my own nearest of kindred, and their heirs and assignees and disponees whomsoever, absolutely and irredeemably."

The pursuer contended that he was entitled to succeed as heir-female of John Collow, the grandson of the entailer, under the second branch of the destination. The defender conceded this, provided the destination was to be read as meaning heirs-female in general; but she maintained that the destination, rightly construed, meant heirs-female of the body of John Collow. If this were so, the pursuer could not succeed under this branch of the destination because John Collow left no issue.

The pursuer, however, contended, in the second place, that, assuming the estates to have now devolved on the entailer's "own nearest of kindred," he was entitled to succeed, because he was the entailer's heir-at-law in heritage. But the defender contended, on the other hand, that she was the entailer's nearest of kindred, because she was nearest to him in blood. She is the entailer's grandniece, while the pursuer is his great great grandnephew.

The Auchenchain entail was somewhat different in its earlier branches and the first question did not arise under it; but it also contained an ultimate destination to the entailer's nearest of kindred, and therefore raised the second question which was raised in regard to the Over-Kirkcudbright entail.

The Lord Ordinary (Kinloch) held (1) that heirs-female meant heirs-female of the body; and (2) that the pursuer was not the nearest of kindred to the entailer or one of his nearest of kindred. He therefore sustained the defence that the pursuer had no title to sue, and dismissed the action with expenses. In his note he observed—