masters, and it was very apt to suffer from transshipment; from hot weather; and from various other contingencies. In the present case the cargo was trans-shipped; and, undoubtedly, when it arrived in this country it had suffered a good deal. It had run together, so that it had to be broken up before it could be got out of the hold, and it had got mixed up partially with cargo shipped by another house, for which the Gladstones were not responsible. The cutch, on its arrival, was examined, and the suspenders' witnesses say it was bad, and they say, moreover, that it was bad independently of the damage arising through the voyage. That might be so; but it was more satisfactory to have evidence of the quality of the goods when shipped at Rangoon, and such evidence as there was was favourable to the shippers. But then there was a report by Mr Baker, for the suspenders, on the quality of the cutch after arrival; and the impression left on the mind after reading this report, and seeing the value put upon the several piles of cutch, after making allowance for sea damage, was decidedly favourable to the respondents. And this favourable impression was confirmed on considering these valuations, together with what one of the suspenders expected to be the value of the cargo on its arrival here. There had been some misapprehension as to the nature of the liability of the respondents. It was not the liability of a mere seller of goods under an ordinary contract of sale, in which the seller undertook to furnish goods of a particular quality manufactured by himself, or by some one else, but then in his hands. This was the liability of a commission agent, and was a question in the law of agency; and the question was, whether the agent had failed in the performance of his duty. It did not appear that he had so failed. Cutch was a very peculiar kind of article, and an agent acting under an order such as here was vested with a considerable discretion to do the best he could, and there was no evidence to show that he did not do the best possible in the circumstances. As to the sale by the respondents, no doubt the goods realised less than they might have done if they had been sold otherwise; but if the rejection of the goods was unwarrantable, the suspenders must bear the loss. They said, no doubt, that the sale was unwarrantable, because it was without judicial warrant. If the proceedings had taken place in Scotland, there might have been a good deal in that objection, for it was the practice here to have a warrant of the Judge Ordinary before sale, in order that the other party might have due notice to attend to his interests. But this all took place in England, and it was not proved that the sellers were not following the usual course in acting as they did. If the chargers would restrict the charge for the balance now due to them, after deducting payments already make, judgment would be given in their favour.

The other Judges concurred, and the charge, as restricted, was found orderly proceeded, and the suspenders found liable in expenses.

Agents for Suspenders—H. & A. Inglis, W.S.
Agent for Respondents—A. Howe, W.S.

Friday, March 27.

SECOND DIVISION.

MULLER *v.* BOLLAND.

Sale—Repetition—Over-payment—Fraudulent misrepresentations. Circumstances in which *held* that there had been an over-payment upon a transaction of skins, and action of repetition sustained.

This was an action of repetition brought by Hermann Magnus Muller, residing at 34 Cockburn Street, Edinburgh, against Patrick Bolland, skin-dealer, Hawkhill, Dundee, and the summons concluded for the sum of £66, 13s. 4d., alleged to have been over-paid by the pursuer's wife to the defender in settling for the price of certain skins. The pursuer's allegation was that he bought a quantity of skins from the defender on 19th December 1866; that on counting them over, in the presence of his own servant, and the defender, the number was found to be 441 dozen; but that, on the defender coming to the pursuer's shop to receive payment, he represented to the pursuer's wife that the number was 841 dozen, and received payment as for that number. The defender's allegation, on the other hand, was that the number of dozens, as counted over in his presence, was truly 841, and that the pursuer's allegation that he had only received 441 dozen was false and fraudulent.

After a proof, the Lord Ordinary (KINLOCH) found for the pursuer.

The defender reclaimed; but the Court adhered.

Counsel for the Pursuer—Scott and Brand. Agent—D. F. Bridgeford, S.S.C.

Counsel for the Defender—Gifford and Balfour. Agent—Henry Buchan, S.S.C.

Monday, March 30.

FIRST DIVISION.

THOMS *v.* THOMS.

(4 Macph. 452; *ante*, iii, 35; i, 254.)

Conveyance—Entail—General Disposition and Settlement—Special Destination—Proof—Intention. A party holding an estate as institute under a deed of entail which was defective in the prohibitions, executed a general conveyance of his whole property, heritable and moveable. *Held*, by majority of whole Court, that the estate was carried by the general conveyance, that deed being habile and effectual to carry it and evacuate the special destination in the deed of entail, provided such was the true intention of the conveyance, and, there being here no proof of an intention on the part of the testator, to exclude the estate from the general conveyance.

The late Mr Alexander Thoms possessed the estate of Rumgally as institute under a deed of entail executed by his father in 1805. In this deed the prohibitions against sale and alienation were not directed against the institute. In 1861 Mr Thoms executed a general disposition and settlement in favour of his natural daughter, Miss Robina Thoms. In 1864 Mr Thoms died, and Miss Thoms made up a title to Rumgally on the assumption that the entail was invalid, and that the estate of Rumgally was carried by her father's general disposition and settlement.

John Thoms, brother of Alexander, who would have succeeded Alexander in the estate if the entail had been valid, brought an action against Miss Robina Thoms, concluding for reduction of the conveyance by Alexander, so far as it affected or might be held to affect the estate of Rumgally, and for declarator that the general conveyance did not comprehend the estate of Rumgally, and that the

pursuer had right to the estate under the said deed of entail. The pursuer alleged that Alexander Thoms did not intend to convey Rumgally by his general disposition and settlement, and that he believed the estate to be under the fetters of a strict entail; and further contended that the settlement, so far as it might be held to convey heritage, was reducible on the ground of essential error and fraud and circumvention. The Court, on 19th December 1865, disallowed issues, proposed by the pursuer, of the testator's belief and essential error, and allowed an issue on fraud. On that issue the case was tried; and a verdict was returned for the defender. The case was next argued on the declaratory conclusions. Cases were ordered, and were sent to the Judges of the Second Division, and to the Lord Ordinary.

The consulted Judges returned opinions.

Lord Justice Clerk—The question for consideration is, Whether and how far the pursuer, John Thoms, is entitled to prevail in the claim made by him under the declaratory conclusion of his action?

That claim of the pursuer arises from his being an heir of provision to his deceased brother, Alexander Thoms, under a deed executed by his grandfather, by which he conveyed the estate of Rumgally to Alexander as institute, and a series of substitutes. The deed contains all the fetters of an entail; but these fetters, by the conception of the deed, are not imposed upon the institute, but on the heirs of entail only.

Alexander Thoms died infeft in the estate under investitures which, as they stood at his death, contained a destination in favour of his brother and the heirs-substitute of entail. He had while in minority completed a title under his father's deed of entail, and he had continued to possess the property under the title so completed, until his death. At his death the state of the titles to the estate was such as to open to the pursuer the right of taking up the property as an heir of provision in special. Unless these titles are to be held as set aside, to the effect of evacuating the destination in his favour, in the titles on which his brother held the estate, the pursuer's right is clear.

The deceased had an undoubted right to have evacuated the subsisting destination in favour of the substitutes. He is said to have done so by executing a general disposition in favour of the defender. The question is, Whether this general disposition operates as a recal and rescission of a subsisting destination, and the creation of a right in others to the estate?

The proper mode of altering investitures is by executing a procuratory for resigning the subjects in the hands of the superior, in order to its being for the future held according to a new line of succession. At an early period of the feudal law the consent of the superior was necessary to alter the line of succession. It is still the proper form of accomplishing the change. The subject may be specially conveyed, and such a special conveyance in favour of the disponee as a direct exercise of the right of property in the subject by the proprietor, will have effect given to it. But where there is a mere general disposition of the heritable and moveable estate of the granter, there is not only nothing done directly to alter the state of the investitures, but there is not even any expression of intention as to the special subject from which such an intention may be gathered. There is no procuratory and no disposition by which the subject may pass,—there is nothing more, according to the principles of the feudal law, than the constitution of an obligation against the granter's heir to make up titles and to execute the very deeds which the granter himself had the power, but failed, to grant, having the full right and title to have done so. The deceased was vested in the fee of the estate, and was in a condition to have granted a procuratory for resigning the subjects in the hands of the superior, or to have executed a special conveyance of the subjects. Nothing could have been easier or simpler than to have done so had he really entertained the intention of altering the investiture.

The act of altering the line of succession to the family estate of Rumgally was one which, if intended, might have been expected not only to have been plainly set out and intimated, but to have been carried out formally and according to known and practised forms of conveyancing. Unless intention is to be deduced from the execution of a general settlement, which has been held confessedly under various circumstances to leave special destinations untouched, there is nothing to lead to the notion that he had any purpose to deal with it. There is, as I read the decisions, no single case recorded in which the general words of a general disposition and settlement have been held to evacuate a special destination. Independently of the argument deducible from that fact otherwise, it certainly suggests the great improbability of a party who is supposed to have had such a purpose in view, failing to adopt the plain course by which his object would have been certainly accomplished, and resorting to one the efficacy of which could not be said to be otherwise than experimental. The absence of any reference to the important purpose which is said to have been in contemplation, is another feature of the case which renders it difficult to assume the existence of any intention.

The defender no doubt maintains that the very point of the efficacy of a general disposition to alter a subsisting destination was settled in the case of *Leitch*, as decided in the House of Lords; and, if it is truly so, the adoption of a course sanctioned by such authority, would not only meet the observation as to the course followed, but rule the judgment to be pronounced in this case.

I am very clear that the case of *Leitch* forms no precedent by which our decision in the present case can be effected favourably for the defender.

It seems sufficient to say, that in the case of *Leitch*, where the question arose to the valid transmission of a right of Andrew Leitch to the estate of Kalmardinny by a general disposition, that Andrew was not infeft in that subject, and could not have executed a procuratory, or granted a conveyance of it as proprietor. He had no right in the estate. His only right was a *jus crediti* against trustees to denude when the proper period should come, in terms of a trust under which he was a beneficiary; and he could only transmit his right by an assignation of this *jus crediti*. He could only ask the trustees to execute a conveyance by which he might complete his title to the estate. This was the measure and extent of his right, and the *habile mode* of transferring such a right is by assignation. A general conveyance of all rights, real and personal, where there is a personal right to a real subject in the party conveying, and the change of a subsisting feudal investiture where there is a feudally complete right of the granter, are wholly different things. In assigning a right of *jus*

crediti to the defeasance of parties who might have taken after the party assigning, the only thing which can be done by the holder of the *jus crediti* in the view of completing his purpose has been accomplished.

There is, moreover, a separate ground, which seems to me conclusive. There was no subsisting destination to be evacuated.

It seems to me that the trust-deed was so framed as to make Andrew Leitch, in the event of the predecease of his two brothers, a direct disponee or institute, and that, if he were to take at all, he and his heirs-general were to do so.

After directions by the truster, that the trustees should hold the lands for two elder brothers of Andrew Leitch, if they should survive a liferentrix, they "were appointed to hold the lands for behoof of Andrew Leitch;" whom failing, for behoof of two sisters; and further, they were to dispone the lands "to Andrew; *whom failing to Christian and Mary.*" They were not to dispone the lands to Andrew, with any substitution in the deed to be so executed in which Christian and Mary were to be substitutes to Andrew. If they were to dispone to Andrew, the failure would not occur on which they were to dispone to the two sisters. They were to dispone to Christian and Mary failing their disponing to Andrew Leitch. Such was the expression of the deed. A conveyance to Andrew Leitch imported a conveyance to Andrew Leitch and his heirs-general; the fee was to be vested to him; and the succession to the fee so vested was not appointed to be transmissible to a series of heirs substituted to him as institute. Christian and Mary were conditional institutes of Andrew, in event of his predecease without the fee vesting in him. They were to be disponees of the trustees, not heirs of provision to Andrew. The trustees, giving effect to the *jus crediti* which was in Andrew Leitch, were bound to have conveyed the estate to him, or, what was the same thing, to him and his heirs-general. It is a mistake, therefore, to view the case as involving the question of an evacuation of a subsisting destination. There was no subsisting destination to be evacuated, and therefore no case in which the question of the effect of a general disponee to alter such a destination could be determined.

No doubt the Lord Ordinary, Cringletie, proceeded on a different assumption, and stated, as the ground on which he went, that a general disposition could not defeat a subsisting destination. This opinion was fortified by a decision to which he referred, but which is not in the reports, which at the time were less carefully collected than now, that such a general disposition would not defeat a subsisting destination. Independently of the authority of the decision to which he refers, and in which it was found that a general disposition, including teinds in favour of the general disponee, Mrs Westenra, a natural daughter of the granter, did not evacuate a destination of certain teinds which stood destined to heirs-male under former titles; the opinion of so practical and well-informed a Judge on such a question is valuable, and cannot be held to be affected by the judgment ultimately pronounced in the case; for the facts of the case did not raise a case for the application of the principle. In the face of such an opinion and authority, it cannot well be said that a general disposition can be regarded as a known or recognised method of evacuating an actual destination under the law or practice of conveyancing. In the absence of such usage or recognition, it seems difficult to believe that the deceased Mr Thoms, had he intended to destroy the entail, would not have adopted a different method of accomplishing the purpose.

The view of Mr Duff, in his excellent work on Conveyancing, goes clearly to negative alterations of subsisting destinations without an *express* alteration; and Mr Erskine supports the doctrine.

Mr Duff says (p. 331)—"A simple destination in defeasible. . . . Such alteration must, however, be expressed. . . . The *spes successionis* of the heirs of provision can only be defeated by a direct conveyance to another, or by the fiar's resignation in favour of himself, completed by charter from the superior, since until altered by one having the power of disposal, the appointment of the former proprietor controls the ordinary law of succession." Mr Erskine, in stating that "heirs whatsoever" in posterior settlements of subjects which, by antecedent destination, are limited to a particular order of heirs, are to be understood as referring to the heir of investiture, states that this arises from the rule "that a destination once made is not easily presumed to be altered or innovated."

I do not find here any express alteration—any deed carrying out the alteration according to the rules of conveyancing—or anything else than a general settlement of the deceased's estate, which is quite consistent with a settlement of such property, as is not under special destination.

The view of the pursuer seems supported, not only by the case referred to by Lord Cringletie, but by the case of *Campbell* in the House of Lords. I should say that, unless that decision is to be disregarded, it must be held to be ruled that a general disposition will not by its own power operate as an alteration of a destination and a conveyance to the disponee of a subject under special destination.

The deceased John Campbell had executed a general disposition in favour of William, his eldest son, under burden of certain provisions to his other children.

It happened that, prior to his death, a son Daniel had left a will leaving all his property to his father, "and, in case of John's decease, to Margaret his beloved sister." This, though the property was moveable, was then held to operate as a substitution to the sister, and the question came to be, whether the general disposition by which all the property belonging to the father, as at his death, defeated the substitution? The judgment of the Court of Session was, "that the substitution in favour of the defender Margaret in her brother Daniel's will does subsist, notwithstanding the institute John Campbell, his father, did survive the said testator;" and found "that the general disposition in the year 1734, granted by the said John Campbell to the pursuer several years before the said will, does not evacuate the said substitution, but that the same does still subsist." The judgment of the House of Lords affirmed that of the Court.

There is, unfortunately, no trace of the opinions expressed by the Judges who proposed the judgment of affirmance in the House of Lords, or of what passed in the advising of the case in the Court below; but the *ratio* of the judgment may be gathered from the pleadings framed by the best lawyers of that day. The respondent stated in his case in the House of Lords, two reasons for affirming the judgment of the Court of Session, which are as follows:—

"2. Because the settlement made by John Campbell in 1734 can only operate upon that part of his estate of which there was no particular assignment

or limitations; and the *limitation over* in the testator's will is to be considered in the same manner as if the father had made an express assignment of the testator's effects, according to the uses of the will, since the father had done no act to change the *limitation over* contained in the will under which he was to be entitled to these effects.

"3. Had the father been apprised of the death and *will* of the testator before his own death, it cannot be presumed that he would have made a disposition of the testator's effects contrary to the testator's intention to benefit the appellant, who, by the testator's death, has the advantage of having the father's estate now discharged of the incumbrances with which it was to have been affected as a provision for the testator had he survived his father."

The first of these pleas raises the very question now before the Court. If it can be held as decided that a general settlement will leave the portion of the deceased's estate held under particular limitations unaffected, the destination of the entail of Rumgally is subsisting.

The second plea is rested upon the view that, had the granter of the special disposition been aware of the will, with its destination, there was nothing to presume that he would have made a destination contrary to the intention of the testator. In this case the subsisting destination formed a part of the investiture of the general disponee, and, knowing the destination, he made no special disposition of the estate contrary to the intentions of his author, to benefit the heirs of entail, but left it untouched. What was presumption in that case was certainty in this. If a mere general disposition had been held to operate as by itself a cutting off of a line of substitutes, presumption as to what would or would not have been done by the granter, had he had the particular case in view, was out of place.

It cannot be said that the general disposition failed to operate in favour of the disponee, because the granter did not know of the gift in his favour. As *mortis causa* dispositions contemplate rights acquired or to be acquired down to the period of death, they affect such acquisitions just as much as subjects in the possession of the granter at the time when he executed the deed, and his knowlege or ignorance of a subject having vested in him is immaterial. The efficacy of a general disposition to evacuate a substitution is, therefore, precisely the same whether the granter knew that he had the right vested in him or not. If a general disposition was found unavailing in one case, it must be equally so in the other; and, if so, the case of *Campbell* is directly applicable to the present.

The inefficacy of a general disposition to alter a special destination in a subject which had been acquired by the granter of the general disposition, though that general disposition is posterior to the acquisition of the other, may be held as fixed by the decisions referred to in the pleadings. Mr Duff says, "The general disposition does not operate as a revocation of a prior special destination, unless where the intention of the granter is manifest from the terms of the deed."

Mr Duff, though expressing himself in terms which seem to extend to all general dispositions, may be held to have stated the doctrine as applicable to cases where the special and general dispositions were acts of the same party. In this view the argument deducible from that principle is simply from analogy; but if general words of conveyance have no virtue to defeat a substitution where it exists in a conveyance executed by the granter, or where a right is taken by him under a deed executed by another with a special destination, there is much reason for saying that the same effect, and no other, should be given to the very same words used in feudal conveyances in all cases.

No doubt it may be said that deeds executed by the granter in the one case must be read together as forming a part of his testamentary intentions, and that a general expression shall not be held to vary a special provision because intention may be inferred to adhere to a special destination to which the granter himself was a party.

The doctrine, as settled by decisions, is not, as I understand it, limited to the case of deeds, special and general, coming into operation at the same time—viz., the death of the granter. There is much plausibility in the view that two deeds, both of a *mortis causa* character, and falling naturally to be read together, should be construed as a single deed, and so general and special destinations be read together, and in this way consistently. In the case of *Fleming* (M. "Implied Will," App. No. 1), a lease destined to the heir of the marriage in a deed in favour of the deceased, which had been long acted on, was held to go to that heir, notwithstanding of a general disposition in favour of that heir in conjunction with two sisters. And the decision of the Court is rested on the doctrine "that a special destination of a particular subject is not affected by a posterior general settlement." I hold it to be clear that a property acquired at any period of the life of the granter of a general disposition, whether the general disposition is executed before or after the execution of the special disposition, will still be regulated according to the special destination of the deed affecting the special subject. If the destination is introduced in the deed of sale by which the property is acquired, and infeftment immediately taken, and the property enjoyed by the purchaser for many years on the title, the heirs of provision will unquestionably succeed. They will do so, not because of any proper question of testamentary intention or construction of different deeds operating together as expressing testamentary purpose, but because an investiture once completed in the person of the granter, with substitutions, has remained unaltered. The law is not limited to the case of *mortis causa* deeds.

If a general disposition does not affect a subject specially destined, when the special destination has been the act of the granter, shall it be held to have the effect of altering the destination when the investiture has been adopted and acted on by the granter, though not his immediate act?

Alexander Thoms was served as heir under the deed of entail, and held the estate under titles so completed, so long as he lived. He might have made up titles as heir-general of the deceased, but he or his guardians chose to complete a title as heir of provision under the deed of entail. If the entail had been his own deed, the general disposition would certainly leave it unaffected. Is there any intelligible reason for giving a different effect to the same general disposition when used under circumstances so slightly differing from each other? The principle that general dispositions do not touch special destinations, when resulting from acts of the granter himself, because it is not thought that general words should affect a special destination of the granter, should equally apply when the granter had voluntarily adopted the deed granted by an-

other, and completed his title under it. The law, that general conveyances shall not affect particular destinations, seems to apply equally in point of principle; and the same construction would seem to follow naturally from the use of the same words.

It is represented that much hardship would follow if effect should be refused to a general disposition in this and other cases. The question of hardship arises only if the law and practice are in favour of the defender; and, as it occurs to me, consequences would follow the adoption of the law, as contended for by the defender, which would more than counterbalance any such inconvenience.

The present case is that of an institute under a deed of entail to whom, as such institute, the fetters do not apply; but the same principle must rule in the case of a substitute heir possessing under a title defective in some one particular of one of the fettering clauses. If a general disposition be read as evacuating subsisting destinations in subjects over which the granter has a right of disposal, every entailed proprietor possessing on a defective entail, by granting a general disposition of his property, would, unless an intention could be shown to the contrary from the context of the deed, be held to carry away the family property to general disponees. The case of *Hepburn* was disposed of on the special ground of intentions apparent on the face of the deeds—that general words of disposition were not meant to be extended to the entailed estate. Had there been nothing but a general disposition of heritable and moveable estate, and so no elements for determining from the contents of the special intention as to the special subject, it would seem to follow, from the principle contended for by the defender, that the entailed estate must pass to the general disponee. In the case of a minute flaw as to one of the fettering clauses, the power of disposal on the part of the heir in possession is as ample as in the case of a failure to apply the fettering clauses. One of two results must follow from adopting the views of the defender—either that the execution of a general disposition will carry away a tailzied estate, where a flaw, however minute, is discovered in an entail on which possession had continued, it may be, for thirty-nine years after the granter's death; or that the efficacy or non-efficacy of the deed must depend upon the conjectures which may be made as to the knowledge or ignorance of the granter as to the existence of the flaw. In the former case there would be introduced a source of peril to the tenure of many estates, and a defeature of actual intention; in the latter, the security of land-rights would depend, not upon plain rules of conveyancing, but upon conjectures as to the use of known legal terms, not construed by other parts of the deed in which they are introduced, but by conjectures as to intention drawn from extrinsic sources, as unsatisfactory, or more so, than results that would be derived from a proof of intention *prout de jure;* for the admissibility of which at the present day, though allowed in the case of *Weir*, no one will now contend.

A general settlement of the granter's estate, expressed in general words for purposes of convenience, would destroy an entail on which the family may have held the property for ages, without the slightest real intention of the granter to touch it.

In considering the question, I have regarded it without special reference to the effect of the Titles Act of 1858.

For facilitating the completion of titles, the necessity of adjudications in implement upon general dispositions as defective conveyances, is in certain circumstances done away with. I do not consider that the form now introduced is meant to alter the legal rights of parties, or really to give to such deeds any greater inherent efficacy than before. The case must, I think, be judged of as it would have been before this Statute.

Holding the case of *Campbell* to have, in effect, determined that a mere general disposition will not evacuate a special destination—that no intention to alter the destination of Rumgally is to be found legitimately expressed—and that there is no counter authority to the case of *Campbell*, and strong considerations from analogy supporting its application to the present case—I come to the conclusion, though not without difficulty, that the pursuer's claim here should be given effect to.

Lord Cowan—I concur in the opinion which has been returned by the Lord Justice-Clerk; but to explain the grounds on which more especially I have arrived at the conclusion—that the estate of Rumgally, held by the deceased Mr Thoms, was not intended to be, and has not been, conveyed away from the heirs of the destination by the general disposition and settlement found in his repositories on his death—it is necessary that the more material circumstances in which the question arises should be kept in view.

The estate had been purchased in 1781, and was settled in 1805 by the deceased's father upon a series of heirs—his eldest son, the deceased Mr Thoms, being called as institute. The succession opened to him in 1809, when he was yet under age; and titles were completed in his person in 1809-10. He thereafter possessed the estate for upwards of fifty years, without showing, by any act or deed on his part, that any doubt existed of the validity of the entailed destination set forth in the feudal title. This estate is admitted to be of considerable value, £25,000. Although, therefore, it is free of doubt that from certain of the prohibitions not being properly fenced, the destination was not protected against the debts and deeds of the deceased, yet it does not appear—either that Mr Thoms was acquainted with this defect in the entailed fetters as regarded his powers—or that, if he was, he ever entertained the intention of altering the special destination of this family estate.

Besides the property of Rumgally, Mr Thoms was in possession of other property; and, in particular, of the lands of Ceres, said to be worth about £1600. The defender was his illegitimate daughter, and lived in family with him at Rumgally. And with the view of providing for her, he executed the general disposition and settlement in 1861, by which he assigned and disponed in her favour, and to the heirs of her body, and her disponees and assignees whomsoever, whom failing, to his own heirs whomsoever, the whole property, heritable and moveable, of every kind then belonging, or that should belong, to him at the time of his decease. Among other clauses usual in deeds of the kind, the deed contains a reservation of the granter's liferent and a revocation of all former settlements.

The question is, Whether, in these circumstances, the special destination in the father's deed, embodied in the feudal title under which the deceased possessed the estate throughout his whole life, has been affected by the general conveyance in favour of his daughter? Had the special conveyance been contained in a deed of which the deceased himself was the granter, it is certain that, according to the

true import and effect of the decisions of the Court referred to in the pleadings, his general disposition and settlement would not have been held an effectual recall of that special destination. All the property of the deceased, other than the estate which he had conveyed by special destination to a series of heirs, would have been carried to the disponee by the general settlement. But under the mere general words of such a deed the legal presumption would be, that the granter did not intend to affect the succession to the estate specially destined by him. This presumption will be all the stronger, when the granter has completed feudal titles to the estate, the succession to which he has thus by his own act regulated, and has secured that succession by the fetters of a strict tailzie. And even when the deed thus intended to take effect at his death in favour of the heirs called to the succession, reserves in express terms the granter's power to alter and revoke, and it is thus within his power to alter the special destination—the subsistence of the deed will not presumably be held destroyed by the execution of a general disposition and settlement. Both deeds will be held to subsist to the effect of regulating his succession on his death, in the absence of declaration to the contrary in his settlements.

The only distinction between the class of cases now mentioned and the present is, that the special destination of Rumgally is contained in a deed which was executed by Mr Thoms' father, and in which he was institute. By the act of completing feudal titles under the entail, however, and of his possession under that title during his lifetime, it appears to me that he adopted that destination, and made it as effective to regulate the succession to him in the estate, as if the destination had been originally fixed by his own deed. And the very fact of his not being bound by the entailed fetters, whether he knew this or not, brings the actual case all the nearer to the class of cases referred to, in which the legal presumption is, that a mere general conveyance will not supersede or destroy the special destination. Some express declaration or clear indication of intention to do so must be established to rebut the presumption.

Entertaining these general views, I do not think it enough for the defender to say that the general disposition and settlement was, in form, a deed *habile* in law to carry the estate of Rumgally, had this been the declared intention of the granter. That may be quite true; and yet it may not have that effect owing to the want of satisfactory ground for holding that it was the granter's wish it should so operate in his succession. The revocation of former settlements executed by himself does not touch the subsistence of the deed which regulated the succession to Rumgally. The clause to that effect rather indicates to my mind that, in executing this general settlement, the granter could not have imagined that he was doing more than regulating the succession to his property other than Rumgally,—the destination of which, on his death, was regulated and fixed by his father's deed, and which, if he desired to alter, could only, according to usual practice, be done by special conveyance to those heirs whom he wished to take the place of the heirs of investiture.

In so far as I can discover, the important question for decision in this case has not previously occurred for the judgment of the Court. It has incidentally been pleaded; and was so especially in the case of *Lindsay* v. *Oswald*, decided in this Court, 11th December 1863, and affirmed in the House of Lords in 1867. The question was not there decided, but it will serve to show the extensive operation of the principle on which parties are at issue, to note that the argument maintained for the defender was there pleaded, to the effect that the entailed estate of Auchencruive, of the value of £8000 or £10,000 a-year, was to be held carried to the disponees of the heir of entail in possession, under a general disposition and settlement expressed in similar terms with the deed in this case. The entail fetters being so defective as to have left the heir with full power to sell the lands, although there was no evidence of this being intended by the granter, or even of his knowing of the defect—the general deed, it was contended, was efficacious to destroy the investiture succession. I cannot but look with some jealousy on a principle whose operation is to be of such extensive application. The true view appears to me to be, that unless it be clearly shown to have been the granter's intention to alter the subsisting investiture by the general deed, the special destination of the estate will remain undisturbed.

That the defect in the deed as regards the institute did leave the estate free to be disposed of by the late Mr Thoms, had he chosen to have altered the destination provided by the entail executed by his father, cannot be disputed. But as regards all the other heirs called to the destination, the deed was in all respects effective. The deceased having died without legitimate issue, the succession opened to the pursuer as his immediate younger brother under the substitution to the heirs-male of the granter's body, and he can only take the estate as effectually entailed. The destination in the deed fixed the succession to the deceased, failing heirs of his body, to the descendents of the granter's body, in the order in which they are called, as effectively as if the deceased Mr Thoms had executed an entail to the same series of heirs, after succeeding to the estate under his father's deed. In this respect the father's deed and the destination therein, when adopted by the deceased, fixed the heirs on whom successively the estate should devolve, failing him and heirs of his body. On completing his title under his father's deed, he possessed the estate subject to the special destination contained in it. And from 1810 till his death in 1864, Mr Thoms never possessed the estate under any other title. He never attempted to disturb the course of tailzied succession, and, so far as appears from his acts, never imagined that he had power to do so, because of the defect in the application of the fetters to him as institute.

This being the state of the case, I am unable to hold that the general settlement executed by Mr Thoms has destroyed or recalled the special destination of Rumgally. Such a deed has no effect in itself on the feudal investiture, whereby the granter is vested with the heritable subjects, as to which there exists no doubt of his intention that they should be carried by its terms to his general disponee. All which the deed does is to create an *obligation* in favour of the disponee against the heirs of the granter to convey the subjects to him. And this obligation may be enforced by an action of adjudication in implement directed against the heir entitled to succeed to the subjects, and to take them up by service to the granter. In this way the succession is affected by the general disposition, the heir is displaced, and the disponee feudally invested. The mode of attaining this end has been simplified by

the "Titles to Land Acts," but this simplification, in the form of completing a title feudally, does not touch the principle on which the general disponee is held to have right to the subjects. It is as *creditor* in the obligation created by the granter of the deed against his heirs, that he gets himself vested in the feudal right. And this being so, the question to be considered is, whether it can be held to have been the intention of Mr Thoms by his general deed to create an obligation against the pursuer, as the heir entitled to serve in special to him in the estate of Rumgally, so as to divest himself of that estate in favour of the defender.

Had there been evidence of such intention on Mr Thoms' part, or even of his having known that he had power to dispose of that estate, it might have been otherwise. But as the case is presented for judgment without such evidence, I think it would be productive of consequences altogether unexpected and perilous in the extreme, to give such sweeping effect as that contended for by the defender to deeds of this description.

Had the case of *Leitch*, so much dwelt upon in the defender's argument, been to the effect represented, the important question for decision now must have been held to be already decided. But I entirely concur in the view taken of that case in the opinion of the Lord Justice-Clerk, whose remarks on it render it unnecessary for me to say more than that, in my opinion, the case, rightly viewed, gives no aid to the argument of the defender.

I also concur in the observations of the Lord Justice-Clerk on the important case of *Campbell*, and its effects in this argument.

The other authorities which have been referred to in the pleadings, do not appear to me to have much bearing upon the question at issue, with the exception of the decision in the case of *Farquharson*. The destination in that case, which was held not to be affected by the terms of the general disposition and settlement, was contained in a deed not executed by the granter, but by his predecessor in the estate. The intention to leave that destination undisturbed, was held to be the only justifiable presumption in the circumstances. It was not held that the mere execution of a general disposition and settlement of all lands belonging to the granter at his death, could operate the destruction of the special destination, in the absence of express declaration that the deed should have that effect. The case was, no doubt, in some respects peculiar, but regard was had to the circumstances as demonstrative that the generality of the dispositive terms in the deed could not be held to have been intended to destroy the special distination.

Lord Benholme and Lord Neaves—We are of opinion that the pursuer is not entitled to prevail in the claim made by him under the declaratory conclusions of the summons.

It is certain that a general disposition of heritable and moveable estate, without any specification of particulars and without any warrant for infeftment, is a valid and *habile* mode of transferring to the disponee a personal right to every heritable subject belonging to the granter. This is true as to such deeds, both when granted *inter vivos* and when granted *mortis causa*. A disposition *ominium bonorum*, containing dispositive words and an explicit reference to heritage, is a good deed, *inter vivos*, and a general disposition and settlement *mortis causa* is a good deed to regulate the granter's whole succession.

The mode of completing a feudal title under such deeds is another matter. Formerly the title was usually completed by a special adjudication in implement, which presupposed the validity of the deed as a conveyance, and merely supplied the machinery for rendering the right real and feudal. By recent amendments of the law, this part of the process had been simplified, so that where there is a general conveyance of all heritages belonging to the granter, the notary who now gives what is equivalent to infeftment, may give specific infeftment in any lands which can be shown to have belonged to the granter under existing titles. The very fact that the legislature has allowed infeftment to be thus given, implies that the general grant was well known as an essentially valid conveyance of the radical right as to all the granter's heritable estate; and the effects given by the new Act to this mode of making up a title ought not to be defeated except upon the clearest and most precise grounds.

As a mode of regulating succession, such a form of conveyance is not merely a great convenience, but any denial or abridgment of its validity and effect would be a serious evil. Many a Scotch proprietor of lands may have occasion to settle his affairs when in a foreign land, where there can be no skilled conveyancer at hand. He may even be in a similar situation in his own country, where he is in a locality which removes him from access to his title-deeds. If he carries with him the simple form of a general disposition and settlement, his object may be easily and effectually accomplished wherever he is; and if he must enumerate and describe specially the subjects that he means to convey, this may be a delicate and difficult matter, and unless the description tallies exactly with the terms of his title-deeds, there may be room for many errors and ambiguities that may ultimately defeat his intentions. A deed, then, of the nature of which we speak, is obviously to be favoured rather than discouraged by the law.

It is true, however, that a deed of this kind, though containing a dispositive clause in general terms, is not always held to be universal in its application. Special subjects have sometimes been exempted upon special grounds, and the question here is whether good grounds exist for such an exemption of the lands of Rumgally, in the conveyance in question.

We have carefully considered the authorities and precedents upon this subject, and we are of opinion that none of them apply to the present case.

It will be observed that the question here is, whether a substitution of heirs-male to the deceased, in a conveyance or entail executed by his predecessors, has been evacuated, or has been left untouched, by the general conveyance which the deceased executed. It is not disputed that the deceased had power to evacuate that substitution. It is not disputed that the lands of Rumgally belonged to the deceased in fee-simple, and it cannot be disputed that the general conveyance in question executed by him of all his heritable property includes the estate of Rumgally, if that conveyance is to receive its natural interpretation, and to have its logical effect; but the question is, whether there are any and what grounds for refusing to give that meaning and effect to this general conveyance.

In considering the authorities on this subject, the first remark that occurs is, that although they are numerous, it is nowhere laid down that a substitution

in special lands can never be evacuated by a general conveyance executed by the institute. It is nowhere laid down that such a general conveyance is an *inhabile* mode of evacuating a substitution. A general rule of that kind would be clear and intelligible, but no such general rule can be alleged. The authorities only go to this extent; that in certain special cases the pre-existing substitution is not evacuated, and in this way the question comes to be whether any such special circumstances here exist, or any that can be considered as of an equivalent nature.

Some of the cases relied on by the pursuer are obviously inapplicable, and may be very shortly disposed of.

1. Wherever the general conveyance contains *in gremio* of its expressions which indicate that, notwithstanding the general words used, the granter meant to exclude from their operation some particular estate, the intention thus disclosed on the face of the deed will receive effect according to those rules of law by which the construction of such deeds is always regulated. The conveyance in that case would not truly be a general conveyance, but would be limited by certain exceptions discoverable from the deed itself. It cannot be said that any such specialty exists here, and consequently, all that class of cases may at once be dismissed from consideration.

2. Another class of cases is of this nature: There is a pre-existing substitution in favour of special heirs in a special estate. There is then a new deed containing a general conveyance of the party's whole heritage in favour of another set of special heirs, such as heirs of a marriage, and failing them, there is a final substitution of the granter's "heirs and assignees whomsoever." Now, in such a case, it has been held, not that the special estate was excluded from the general conveyance; for it would have been carried by that conveyance to the special heirs of the marriage, had they existed; but the view has been taken that, failing those heirs altogether, the final substitution of "heirs and assignees whomsoever" in the new deed shall be referred to the old substitutes, and not held as intended to displace them. This rule is illustrated by the case of *Weir* v. *Steil*, M. 11,359; but such a state of matters is wholly different from that which here occurs, and indeed that case is an authority in favour of the defender, who is a special and *nominatim* disponee, and thus stands, in that respect, in the situation occupied by the heirs of the marriage in the case of *Weir*. The pursuer here could only have benefited by that case if the defender and the other special heirs and disponees in the general disposition had failed, and if the succession had then opened to the granter's nearest heirs and assignees whomsoever. In the class of cases now noticed there is no restriction of the effect of the dispositive words in reference to their generality of application as comprehending every subject belonging to the granter: the general conveyance is held to be complete, and universal as to the subject of it, but a principle of construction is adopted as to the substitutes favoured by the grant under the flexible term "heirs and assignees." The case of *Farquharson* v. *Farquharson* seems to come under the same catagory. A party conveyed all his estates to his brother and his "heirs and his assigns whatsoever." Certain special lands were at that time vested in the brother and his "heirs-male," which was the long-prevailing destination of the family estates. The one brother then succeeded to the other; but the general destination to heirs and assigns was not held to displace the special destination of heirs-male. These cases also, therefore, must be discounted from the authorities which are said to effect the present case.

3. In the next class of cases that may be noticed, the question arises as to the effect of two or more deeds executed by the same granter: one of them, for example, a disposition of a special subject in favour of one disponee, and another, a general conveyance in favour of a different disponee, both of the deeds being granted *mortis causa*. Cases of this kind or of an analogous character may occur, both in moveable and in heritable succession. Now, here a general rule comes into play, that where there are two *mortis causa* conveyances or bequests to different donees, the first special and the second general, the general grant is not presumed to import a revocation of the special grant, but both are read together; and the second is held to affect the succession, *minus* the subjects given in the first. The grounds of this rule are plain and obvious. A gift *mortis causa* left in a man's repositories is effectual on his death, unless *revoked*, either expressly or by implication. A second gift or conveyance, if inconsistent with a first, is in general an implied revocation; but that implication is not made in the circumstances above supposed. There is in that peculiar case no such clear incompatibility as to make the one deed destroy the other; and the two deeds, both flowing from the same granter and both preserved as subsisting, can both receive effect in a way that is not an unnatural interpretation of them. Deeds *mortis causa* are, as a general rule, combined as if they were all of the same date, or contained in the same deed; and if this last were the state of the case, it is clear that a special conveyance in the first part of a deed would not be cut down by a general conveyance to another donee in a subsequent part. The gift of a special house or estate or article to A, and then a general conveyance in the same deed of the succession to B, would stand together, and both receive effect. The chief cases here relied on by the pursuer fall under this rule.

But it will be observed that this is applicable only where there is a supposed competition between two deeds by the same granter, and where the question is as to presumed revocation. The circumstances that exist, and the principles applicable, are quite different where the conflict is between one deed by an ancestor or author, more or less remote, and another deed which is the sole deed of the present or last proprietor. A substitution of a series of heirs by an ancestor does not require or admit of revocation by the heir in possession. He has no occasion to *revoke* what he never granted. He does not revoke, he *evacuates* the substitution; and the appropriate, or at least a perfectly good or valid, way of doing so is to execute a conveyance in favour of a new disponee. If it could be said that no such evacuation could ever be effected by a general conveyance that would be intelligible. But, as already said, that proposition cannot be maintained. It is not supported either by principle or by precedent. There is no authority to that effect, and there is not the same reason for stretching a point to make a man's own act subordinate to the arrangements of an ancestor, as there is for reconciling two deeds executed by himself, and left by him, side by side, as the expressions of his will.

The principal, if not the sole, case which has the appearance of affording any countenance to the pursuer's plea, is that of *Campbell*, decided in the

House of Lords in 1743. That is certainly a remarkable case; but we do not think that any aid can thence be derived for the decision of the present case. A father there made a general settlement in favour of his eldest son, with the burden of provisions to his other children, Matthew, *Daniel*, and *Margaret*. Daniel afterwards made a will at sea, bequeathing his money and effects to his father (John), and in case of his decease "to Margaret his beloved sister." Daniel died at sea the same month (May), and in June following, John the father died also without having heard of Daniel's death, or of the will which had been made by him. The Court here held that there was a substitution in Daniel's will, and "that the general disposition in the year 1734, granted by the said John Campbell to the pursuers *several years before* the said will, does not evacuate the said substitution, but that the same does still subsist." An appeal was taken by the eldest son, but the interlocutors appealed from were affirmed. It appears to us that this is no precedent for the present case, for various reasons:—

1st, The will of the father, which was held not to evacuate the substitution, was a *previous* will. This may be a good or a bad ground of decision, but it is expressly embodied in the judgment as being the ground on which it rests. The father's general disposition, which was held not to evacuate the substitution in Daniel's will, is, in the judgment, explicitly described as "*granted several years before the said will;*" words which are obviously introduced, not as mere descriptive words, but as setting forth the quality of the deed which led to its not receiving effect in that matter.

2d, It was a certain fact in the case, that in making the will, and even in preserving it, the father had no intention to deal with his son Daniel's succession. Daniel made his will, and died at sea; and the father died "without having heard of Daniel's death, or of the will which had been made by him." He could not, therefore, intend to evacuate the substitution, and the words of his deed ought not to be pressed beyond his plain intention. It does not follow that the same decision would have been given in different or opposite circumstances. Supposing the fact had stood so as to justify such a judgment, it does not follow that the Court of Session would have pronounced, or that the House of Lords would have approved of, a finding to this effect:—"Find that the substitution in Daniel's will is not evacuated by the general settlement executed by John the father, after hearing of Daniel's will, and succeeding under it." The presumption is that in that very different condition of things the very opposite judgment would have been given.

3d, The general settlement of the father in that case contained *in gremio* of it elements of a very special nature tending to exclude its operation as an evacuation of Daniel's arrangements. The father's deed was expressly in favour of *Daniel* himself to a certain extent, as well as in favour of the other children, including Margaret. It proceeded, therefore, on the footing that Daniel was alive, and consequently no succession coming from him could be meant as the subject of it. This was the express will and understanding of the testator, both in making the deed and in preserving and leaving it. It is no great stretch of principle to hold that a deed made on the footing of a certain son being alive, shall not be held to interfere with the testamentary arrangements of that son, who dies in the meantime unknown to his father. The presumption, as well as the truth, is, that the deed has been framed in reference to the position of the family, as then supposed to exist, and that it affords no proof of what the father's arrangements would have been if this material alteration of circumstances had become known to him. The deed may thus fairly be construed as not dealing with that part of the father's succession which afterwards came to him on a special destination from the son, whom at his own death he believes to be alive, and whom he introduces expressly as one of his legatees, anticipated and believed to be surviving himself.

Whether the decision in *Campbell's* case is in all respects sound, or would now be repeated if such a peculiar case should again occur, is not here the question. The question is, whether such a very singular and almost unique case is a precedent to be followed here. It seems impossible to say so with any reason. The facts here are in direct contrast to those in *Campbell's* case. Here the deed that is said to evacuate the substitution was executed, not before, but after the date of the substitution, here the existence of that substitution and the events on which it depended were not latent or unknown, but necessarily well known to the testator. Here it is impossible to say that the testator could not intend to effect such evacuation. On the contrary, it was quite possible that he meant to do so, and there were strong motives, and it may be a full justification, for his pursuing that course. The question here is thus quite a different one from that which was raised in *Campbell's* case.

It has been suggested that in the present case the pursuer's claims are supported by an important element in the form of the title which the deceased made up when he succeeded to the estate. He recorded the deed of entail and executed the procuratory contained in it by taking out a crown charter of resignation, and being infeft thereon. It is argued, that as the deceased might have made up his title by service, the course taken by him was such an adoption of the entail as to require a subsequent special evacuation of the substitution. We consider that this view is unsound. With regard to the recording of the entail, that step could foreclose nothing. Until the entail was evacuated it stood upon the deed of the ancestor as a subsisting regulation of the succession; and if the institute had died without executing any other deed, the entail would have taken effect, and would have been binding, seeing that the prohibitions were effectual against the substitute heirs. As to the course followed by the deceased in making up a title under the entail, it is clear that it could not in any way affect his powers as to regulating his succession; and we do not understand that this is disputed. But it is maintained that it affected the mode of his exercising those powers; so that, in consequence of what he had done, he could not exercise them in the same manner or with the same facility as if he had followed the other course competent to him. The only way in which it could do so is by introducing such a presumption of intention as to his succession as the testator could only overcome by executing a special instead of a general conveyance. But it seems to us to be an established rule of law, that where a party has the choice of two ways of making up his title, the preference which he may give to one of these indicates no fixity of intention that can create a presumption such as would preclude him from executing with effect by

a general conveyance the same regulation of his succession that would have been competent to him if he had made up his titles in another way. It is wholly, in our opinion, an unauthorised view that the necessity for a special conveyance, or the sufficiency of a general conveyance, can depend upon the question in what manner the party's title has been made up—whether by connecting himself with his ancestor's standing infeftment by service, subject always to the personal title under the separate conveyance, or whether by taking direct infeftment on that conveyance, which on its face infers the most absolute powers of disposal in any legal manner. The property, however it came into his person, stood liable and attachable for all his debts, and for all his acts and deeds, whether *inter vivos* or *mortis causa*.

It seems to us that the condition of the question here for decision is of this nature. There is no fixed rule of law to the effect that a substitution cannot be evacuated by a general disposition and settlement. The state of the titles here was and must have been known to the deceased when he executed his deed. The words of that deed are capable, in their natural and legal meaning, of carrying this estate as well as every other subject of which he was fiar. There is nothing *in gremio* of the deed incompatible with its general and universal character as a conveyance. It is quite possible that the testator intended to do what his words are capable of doing; and there are some considerations that even render that intention probable. But the question is raised, whether the natural construction or effect of the deed is to be controlled by facts and circumstances of an opposite tendency extraneous to the deed, and requiring to be weighed as leading to the more probable inference that he did not intend to do what, in its widest construction, his deed is competent to do? However it may be disguised, this seems to us to introduce a pure *jury question*, involving a balance of probabilities and counter-probabilities as to a testator's mental purpose, such as seems to be highly anomalous and extremely perilous. It is true that the solution of this question is to be left to the Court, and not to a jury; but this does not alter the nature of the inquiry, and perhaps for such a question, if it be competent, the Court are not necessarily the best tribunal. On the one hand, it is conceived, consideration must be had of the affection of the deceased for his brother, or his respect for his father's arrangements; and, on the other hand, of his affection for his natural daughter: or, to state the matter generally, an attempt must in such cases be made to fix the comparative preponderance of the party's feelings towards the heirs of entail, and towards those whom he has made his disponees. Such a course of loose and indefinite conjecture seems to us to involve our system of deeds in a degree of uncertainty directly at variance with the principles of our law, which has always been desirous to exclude such vague and slippery inquiries, particularly in connection with landed rights.

Lord Kinloch—I am of opinion that the pursuer is not entitled to prevail in the claim made by him under the declaratory conclusions of the summons, and that judgment should pass in favour of the defender.

The question, though it be one of great importance, lies within a narrow compass. The late Alexander Thoms held the estate of Rumgally under a deed of entail executed by his father in 1805. Mr Thoms was institute in this entail, under which, after his father's death, a title was completed in his person, whilst he was still in minority. It appears, from the face of the entail, that the prohibitions against sales and alienations are not directed against the institute. Therefore, though in form the deed was an entail, Mr Thoms, the institute, truly held the lands with the power of disposal of a proprietor in fee-simple. About three years before his death in 1864—that is, in the year 1861—he executed a general disposition and settlement, *mortis causa*, in favour of the defender, Miss Robina Thoms, his natural daughter. The deed so executed runs thus:—"I, Alexander Thoms, Esquire of Rumgally, near Cupar-Fife, for the love and favour I have to my daughter Robina Thoms, residing with me at Rumgally aforesaid, and for certain other good causes and considerations, do hereby give, grant, assign, and dispone to and in favour of the said Robina Thoms, and to the heirs whomsoever of her body, and to the disponees and assignees whomsoever of the said Robina Thoms, whom failing, to my own nearest heirs and assignees whomsoever, heritably and irredeemably, all and sundry the whole property, heritable and moveable, real and personal, of whatever kind or denomination soever, at present belonging or that shall belong to me at the time of my death." It is declared "that these presents are granted under the burden of payment by the said Robina Thoms of all my just and lawful debts." The question now raised is, whether this general disposition carries to the defender, Miss Thoms, the estate of Rumgally?

The first observation which naturally occurs is, that this general disposition is, to use a well-known Scottish law phrase, a *habile* deed to convey Rumgally. In other words, it is a deed which would be competently and effectually used for such conveyance by a party intending to effect it. It has been argued on the part of the pursuer that, where lands are held under a special destination, they can only be effectually conveyed by a deed containing a specific description of the property. I conceive that for this position there is neither principle nor authority. The power of the general disposition extends with equal comprehensiveness to all lands whatsoever held in fee-simple by the granter. The mere variance of the title under which he himself holds them, creates no legitimate exception from the general category of "all lands and heritages." There is no reason for holding that, because the *heirs* are specially described in his title the *lands* must therefore be so in his disposition. The two things are not correlative. Whether the lands are held on the general destination to heirs and assignees, or under a special substitution to individuals named, makes no difference whatever in the legal efficacy of the general disposition, provided only the granter had the unfettered power of disposal. If the general disposition can effectually convey lands held under a conveyance to A, his heirs and assignees, it will convey with equal efficacy lands held under a conveyance to A, whom failing, to B; A being unfettered fiar. I conceive this doctrine to be indisputable. The fact of the lands being held under a special destination may be an item of evidence in the question whether they were intended to be comprehended in a more general disposition. But assuming the intention to be undoubted, the *competency* of so conveying the lands appears to me beyond all controversy.

Nor is there any difficulty in making up a title under such a general disposition even where, as

here, the next heir in the lands may be fully under the fetters of an entail, so as, it is said, to be unable to grant a *voluntary* conveyance to the disponee without contravening the entail. There is still no legal objection to an adjudication against such an heir (supposing such a step necessary) any more than there would be to an adjudication on an entailer's debt, or an adjudication to render effectual a conveyance by the entailer under reserved powers. But the necessity for such an adjudication is superseded by the provisions of the Titles to Land (Scotland) Act 1858, under which a notarial instrument, taken by the disponee, applying the general disposition to the specific lands, becomes equivalent to infeftment in these lands. It was in this way the defender Miss Thoms completed her title to Rumgally under the general disposition; and if the lands are held to be comprehended in that disposition there cannot, it is thought, be any doubt as to the validity of the title.

I have alluded to the comprehensiveness of the general disposition *mortis causa*, with reference to all lands held in fee-simple, by whatever variety of title. But it is not unimportant in the present case to remember its comprehensiveness in other particulars also. This may almost be said to be unlimited. Its efficacy is not confined to property belonging to the granter at its date. It will equally comprehend all property subsequently acquired. Nay, it is not even necessary that the granter should have been in the knowledge of the property to which the disposition is sought to be made applicable. A property may belong to him without his knowledge, and yet fall under the general disposition, by force of its comprehensive terms. There is no hardship in so holding. It is known, or presumed to be known, to every one, that such is the import of the general disposition. By the execution of such a disposition, he encounters the legal consequence. If he does not desire such consequence to follow, he must take steps to prevent the result, by an explicit declaration of his intentions, or the employment of the special, not the general, disposition.

I think it follows as a necessary inference from these considerations, that, wherever any specific property is shown to have belonged to an individual, with full power of disposal, it is *prima facie* to be presumed included in his general disposition; and that the *onus* lies on the party who claims the property, in opposition to the general disposition, to establish sufficient grounds for holding it excluded. The true question at issue is not whether it is *included* in the general disposition:—it is the legal presumption that it is so:—the question is whether it is *excluded* from the general disposition, with the *onus* to establish such exclusion lying on the party who avers it. And in order to make out the exclusion, it will not be enough to say that it is shown with great probability, or even with reasonable conclusiveness, that the property was not specifically in view of the granter at the time of the execution of the settlement. From the nature of the general disposition, this circumstance is by no means conclusive against the inclusion of the property. By the very execution of the general disposition, the granter presumptively declares his intention to comprehend *every* property within his power of disposal, whether known to him at the time or not. He must be shown, therefore, on satisfactory evidence, neither actually nor potentially, to have comprehended this specific property. If his fairly presumed will should appear to be that the property was to be included, provided it should turn out that he had full power to dispose of it, this would be conclusive against the alleged exclusion. To execute the general disposition was in that case just the fitting mode of giving effect to such intention. What the party alleging the exclusion must establish to the satisfaction of the Court, is, that the granter, at the time of executing the general disposition, knowingly and deliberately intended the exclusion of this specific property, as much as if inserting in the deed an express clause declaring it to be excluded.

It must now be held finally ruled that, if the Court be satisfied of such an intentional exclusion, it is entitled and bound to declare judicially that the property is not carried by the general disposition. This result is exemplified in a series of decided cases. I conceive that the principle is a sound one, because, except for such judicial control over the terms of a general disposition, it may happen that such a disposition is made the instrument of great injustice, and of frustrating, not promoting, the true intention of the granter. On the other hand, the greatest care must be taken that the due legal effect of a general disposition is not lightly interfered with. Nothing would be more perilous than, on mere surmises or probabilities, to give to legal phrases other than their obvious and recognised interpretation. To do so would introduce into the law an uncertainty and arbitrariness of application, which are the worst characteristics of any judicial system. Hence, as I conceive, the alleged intentional exclusion of the specific property must be proved by the clearest and most conclusive evidence, and be the subject of full conviction in the mind of the Court, as strong as if the deed contained an express clause of reservation.

The most recent case in the books bearing reference to the subject in discussion is that of *Collow's Trustees* v. *Connell*, 23d February 1866, M. 4, 465. In that case the question was raised by the trustees under a general disposition *mortis causa*, granted for the purpose of paying certain special legacies, and dividing the residue of the trust-funds amongst the legatees *pro rata*. The trustees under the trust-disposition claimed, as comprehended within the disposition, an entailed estate of which their deceased constituent had been heir in possession, and which it was said he had become entitled, before his death, to dispose of, in consequence of all the substitute heirs dying out, so as to devolve the estate on heirs and assignees. It appeared, however, that at the date of the general disposition the entail was in entire efficacy, there being at least one heir-substitute alive, who might possibly be the germ of many more; and it was not disputed that the fettering clauses were fully operative. The entailed estate was therefore, at the date of the general disposition, an estate in which the granter had clearly nothing but a liferent interest,—over which he had no power of disposal,—and any attempted alienation of which would have been not only an act of intromission with property not his own, but an act of contravention of his own title, inferring an irritancy of his right. The particular provisions of the general disposition were also strongly opposed to the idea of the entailed estate being dealt with as the fund for payment of these legacies—indeed, were such as made this a thing wholly incredible. In deciding the case as Lord Ordinary, I considered the entailed estate as much excepted from the general disposition as if a special exception had been in-

serted,—thinking, at the same time, the express insertion of such an exception as little called for as would be a declaration that a man's disposition was not intended to comprehend his neighbour's property. The Court, in reviewing my interlocutor, found it unnecessary directly to decide the point, being of opinion that the entailed estate had *not* devolved on heirs and assignees prior to the party's death, and so had never come within his power. But a majority of their Lordships expressed an approval of the view which I had taken on this subject.

In the case of *Hepburn* v. *Hepburn*, 10th Feb. 1860, 22 D. 730, the question at issue was, whether the estate of Rickarton, in Kincardineshire, was contained in a *mortis causa* disposition by the previous proprietor. This estate had been held by him under a deed of entail, containing a destination to heirs-male; and the claimant, his only daughter, now offered to show that the fettering clauses were ineffectual, though it does not appear that their validity had ever been controverted during her father's lifetime. The leading peculiarity of the case was, that the *mortis causa* deed was not exclusively a general disposition; it commenced with a special conveyance of a piece of land held in fee-simple, situated close beside the entailed estate and which this entailed estate was set forth in the *mortis causa* disposition as one of the boundaries. It conveyed after this "all other lands and heritable estate of every description *which shall belong to me at the time of my death*," a form of expression not very likely to be used in regard to an estate actually then belonging to the granter. And the conveyance was declared to be "in trust for the use and behoof of Helen Hepburn, my only child now in life, and any other child or children which may be born of my present marriage, *exclusive always of any son who may succeed as heir of entail to the estate of Rickarton.*" This reference demonstrated beyond dispute that the granter was not dealing in this deed with the estate of Rickarton, but with the other property belonging to him, which he intended as a provision for his daughter or younger children. The Court, accordingly, while not thinking it necessary to pronounce on the alleged invalidity of the entail, held, and I think held rightly, that the terms of the deed clearly showed its inapplicability to the entailed estate.

I have alluded to these recent cases on the point now in discussion, in order to bring clearly out the principle by which I think the Court should be guided in every such question—the principle, to wit, that, in order to warrant the exception of any specific property from the operation of a general disposition, there must be clear and conclusive evidence that the granter intended to exclude it. It is unnecessary to advert in detail to the other cases on the subject. Except in so far as these import a recognition of the general principle, each case is circumstantial, and ruled by its own specialities. It may be that in some of these cases the principle was not well applied; but it remains the undoubted principle notwithstanding.

I am of opinion that in the present case there is no such evidence before the Court as to warrant the conclusion that the lands of Rumgally must be held excluded from the operation of the general disposition. And, in regard to this matter, it is important, in the outset, that the general disposition contains nothing in its own terms calculated to throw doubt on its universal operation. The case, in this respect, presents a marked contrast to that of *Hepburn;* in which the estate of Rickarton was excepted *in gremio* of the disposition, by an implication almost as strong as an express clause of reservation. The general disposition in the present case, contains no qualification, or limitation, nor any suggestion of such. It conveys, unlimitedly, "all and sundry, the whole property, heritable and moveable, real and personal, of whatever kind or denomination, at present belonging, or that shall belong to me at the time of my death." Any evidence for the exclusion of Rumgally must be sought, therefore, outside the deed. Such evidence must be peculiarly strong to overcome the terms of the deed, used without exception or qualification.

The next consideration of importance is, that Rumgally then stood upon a title which very clearly gave Mr Alexander Thoms full power of disposal. In this respect the case stands contrasted with that of *Collow's Trustees*, in which, at the date of the general disposition, the property was effectually tied up by the fettering clauses of an entail, so as not so much as to suggest the possibility of alienation. There cannot be a doubt, in the present case, that the prohibition against alienation did not affect the institute, Alexander Thoms. It is said that Mr Thoms did not know his own powers in this matter, but believed himself tied up by the entail. There is no proof that this was the position of Mr Thoms: and I do not think it can be assumed. Speaking generally, every one is presumed to know his own legal condition. The case has this peculiarity, that the power of disposal did not hang on any nice construction of ambiguous clauses; it arose out of the not obscure fact that the prohibition was not directed against that particular individual. But whether it may be considered more probable that Mr Thoms knew, or was ignorant of the defect in the entail, I cannot rest my opinion on his assumed ignorance as a fact in the case. To say the least, the point is not cleared up one way or other; and I am left to the general presumption applicable to every granter of a deed, that he knew what he was dealing with, and his own capacity to deal with it.

So standing matters, Mr Thoms is found executing a general disposition of the most unlimited description, in favour of one who stood to him in the relation of daughter, and, so far as appears, only child. It is true she was an illegitimate child; but he bore towards her all a father's affection, and had given her a daughter's place in his house. The deed is executed in terms which apparently give her all in the granter's power to give. Admittedly it gives her all the granter's moveable estate. Indisputably it also carries certain lands belonging to the granter in Ceres Muir, of which the pursuer says on record, "These lands were contiguous to Rumgally, and were possessed by the deceased in connection with, and as forming part of the entailed estate; and although held upon a fee-simple title, the deceased always regarded them as part of the estate of Rumgally, and desired that they should descend together to the heirs of entail of Rumgally." On what ground is it to be held that the general disposition did not equally carry to this daughter the lands of Rumgally, clearly at the time within the power of disposal of the granter, and which its terms competently comprehended? I confess I cannot lay my finger on any tangible or distinct ground for holding these lands excluded. Even supposing the state of mind of the granter not to go beyond a desire and purpose to convey Rumgally to his daughter, provided he had it in his power effectually to do so, this would be suffi-

cient to throw the lands effectually under the conveyance. I do not think it possible to hold as a fact that no such desire or purpose existed in the mind of Alexander Thoms. As a matter of probability such an intention is, to say the least, as probable as the reverse. But I do not think the case is determinable on a mere balance of probabilities. The lands must be held to be comprehended within the general disposition, unless there is evidence, clear and conclusive, of the granter having intended to exclude them from its operation. And such evidence I cannot discover in the case.

The leading argument urged for the pursuer is somewhat to the following effect. He assumes it to be a settled doctrine in our law, that wherever an individual has himself, at a prior period, executed a deed with a special destination, his after execution of a general disposition is to be considered not to revoke or affect the prior destination. The pursuer proceeds to draw the inference, that there is no difference in principle between a deed of special destination executed by the individual himself, and the same deed executed by a predecessor, under which he is proprietor in possession. Applying the principle to the present case, the pursuer assumes that, if the late Alexander Thoms had himself executed the entail of Rumgally under which he possessed, his after general disposition must have been considered not to affect the entail, nor to comprehend the lands contained in it; and this being assumed, he contends that the like result must hold, although the entail of Rumgally was not Alexander Thoms' own deed, but the deed of his father, under which the property came to him.

I am not prepared to admit the proposition, as laid down absolutely and without qualification, that wherever an individual executes a deed of special destination, any general disposition which he may afterwards execute is to be held not to affect the prior destination, nor to comprehend the subject to which it applies. But I do not question that in many cases there will arise a reasonable presumption in favour of the subsisting validity of the special destination. More especially in the case of moveables, and in regard to testamentary arrangements *mortis causa*, he who grants a legacy by a special writing will be fairly presumed not to take it away by the after execution of a general disposition. The reason is, that as a legacy is in its nature a burden on a general disposition, the subsistence of the two rights involves no inconsistency; and so long as the writing by which the legacy is conferred is preserved uncancelled, the granter is to be fairly held to maintain the burden; equally as if it was expressed in the general disposition itself. The question is, in this view, still a question of intention, with no absolute and unvarying rule laid down by the law, but only a presumption reasonably arising out of the nature of the case. So, accordingly, the best authorities have dealt with the matter. In the case of *Thomson* v. *Lyell*, 18th November 1836, 15 S. 32, a lady had executed a deed settling certain bank stock on her brother. She afterwards executed a general disposition and settlement of her whole estate, "dispensing with the generality hereof, and declaring the same to be as valid and effectual as if every sum and subject belonging to me had been herein specially made over." The question was raised whether the special settlement of the bank stock was affected by the after general disposition; and the Court found it was not. But they reached their conclusion, not by the application of any inflexible rule, but by a sound inference as to the presumable intention. Lord Balgray said, "It appears to me that the cases referred to by the creditors are much in point, and prove it to be well established in our law that a general settlement will not derogate from a previous special provision, where it satisfactorily appears that it was not the intention of the testator to revoke it." Lord Mackenzie admitted "that it is a principle in our law that, in cases of strong and conclusive circumstances, a general settlement will not evacuate a previous special disposition; and the cases referred to as precedents were cases of that nature." Lord Gillies said, "It is purely a question of intention; and on considering all the circumstances, and the strong real evidence of the facts of the case, I incline to hold that the general settlement was not intended to recall the previous special assignation by the testator in favour of her brother." The Lord President added, "In such cases as this, parties are sometimes apt to confound the question of power with the question of intention, which are very different things. The power of the testatrix was undoubted; but I think it was not her intention to revoke; and accordingly, that being a fair construction of her last will, we cannot hold her to have revoked the previous provision."

Even, therefore, in the case where an individual has himself previously executed a deed of special destination, there is no absolute and unqualified rule, excluding the subject contained in it from the operation of an after general disposition. The question is always one of circumstances. But I proceed to observe, that although it had been otherwise, I would consider it a fallacious analogy to place in the same legal category the case in which no such deed is executed by the individual, but all that happens is that he holds under a deed of special destination executed by a predecessor. The two cases seem to me wholly different. In one case there is something done by the individual himself, and which must therefore be of great value in estimating his intentions. In the other case there is nothing done by him; and the mere fact of his holding under a special destination is comparatively of little weight in the question what he intended to do. The special destination in the one case represents his act, in the other his condition. His own act may speak volumes, his condition little or nothing one way or other. The fact of his holding under a special destination may be an item of evidence (perhaps a very small one) in the question whether he intended to comprehend the property in the general disposition. But it is at best no more. The argument of the pursuer, however, goes further. He pleads, and must do so to be consistent, that in every case whatever in which the individual holds under a special destination,—that is to say (for the argument must go that full length), in every case in which his title is not simply to heirs and assignees—there is a fixed rule of law, that the special destination is not to be held altered by a general disposition. For this position there appears to me to be not the slightest foundation.

The pursuer has referred to no decision sanctioning the doctrine, that a subject held under a special destination is not competently or effectually conveyed by a general disposition, or even sanctioning the minor alternative that, *presumptione juris*, such a subject is excepted from its operation. He has presented, indeed, a great show of autho-

rity; but of the greater part of the cases brought forward, I think it is to be said that they are inapplicable to the question truly before the Court. I would instance the introduction into his argument of an allusion to that class of cases in which it is said a deed taken to heirs and assignees has been held to carry the property, not to the legal heirs, but to those of the previous investiture. Here again the pursuer commits the error of rearing into a general rule what is, after all, a mere deduction of intention in the individual case. There are not a few cases in the books in which a disposition to heirs and assignees has been held not to follow out, but to alter, the previous investiture, so as to bring in by preference the legal heirs. See *Duke of Hamilton* v. *Douglas*, 9th December 1762, Mor., 4369, 4375, H. of L., Paton's Appeals, 2, 449; *Rose* v. *Rose*, 10th March 1784, Mor., 14,955, Paton's Appeals, 3, 66; *Molle* v. *Riddell*, 13th December 1811, Paton's Appeals, 6, 168. But it seems to me foreign to the present inquiry to enter on a discussion of the point. I find it somewhat difficult to discover how the judgments of the Court on the meaning of the flexible term "heir" can be made to bear on the present question as to what is comprehended in a general disposition of lands and heritages. There seems to me, logically, no room to argue from the one case to the other.

In opposition to the pursuer the defender has referred to a case, which I consider of undoubted authority, and of direct application—the case of *Leitch's Trustees* v. *Leitch*, 2d June 1826, S., 4, 659; H. of L., 3 W. and S., 366. In that case the lands of Kilmardinny were conveyed in trust to certain parties, to be held for behoof of the owner's widow in liferent, and in fee successively for George and James Leitch, provided they survived the widow; whom failing, for Andrew Leitch, without this condition of survivance being expressly imposed; whom failing, certain other substitutes. George, James, and Andrew Leitch, all predeceased the widow; but Andrew Leitch left behind him a general disposition of all lands and heritages. The main point of contention was, whether the condition of surviving the widow was not necessary to vest the right in Andrew as much as in the others; and this was determined in the negative. But the question was also raised, whether the right of fee vested in Andrew was effectually conveyed by his general disposition; and the Court found that it was by a judgment affirmed in the House of Lords. I consider this judgment to be expressly in point as to the competency of a general disposition to carry a right standing on special destination in the person of the granter. For the circumstance that the right of Andrew was a right of claim under a trust-disposition, against trustees holding for his behoof, does not make a different case from what the case would have been had the right stood on a direct disposition *with the same substitution expressed in it.* Of the two cases, perhaps the former was rather the more difficult to deal with. The point does not seem to have created any difficulty. The Lord Chancellor, after noticing the main point of contention, observes:—"There were two other points made in the course of the argument—one was as to whether it was competent to Andrew Leitch to dispose of this property during the lifetime of the widow; and if it were so competent to him, in the next place, whether the disposition he made of it was a valid and substantial disposition. Upon these two points no doubt was entertained by the Judges of the Court below. Indeed, they are too clear for argument. I am satisfied, in the first place, that Andrew Leitch did make a disposition of the property; and I am satisfied that the property passed by the instrument by which he disposed of it." I do not think this freedom from doubt at all detracts from the value of the authority.

I would only notice, in conclusion, the reference made by the pursuer to a letter of 15th January 1862, written by the deceased Alexander Thoms, the terms of which, the pursuer argues, show that he did not at that time consider himself to have conveyed Rumgally to his daughter by the general disposition.

If this letter were received in evidence it would be equivalent to holding that parole testimony was admissible to prove the testator's meaning in his written deed. For on the same principle on which the letter is admissible the evidence of anything which the testator may at any time have said to anybody on the subject of his settlement would be receivable to interpret that settlement. The statement made in a letter is no better evidence than any oral statement made by the deceased, to whomsoever made.

I am of opinion that parole evidence of a testator's meaning, or generally of the granter's meaning in any written deed, is incompetent by our law. The peril of interpreting written deeds by such evidence does not require to be pointed out. In one well-known case, quoted by the pursuer, *Weir* v. *Steel*, 7th Feb. 1745, Mor., 11,359; Brown's Supplement, 5, 224; Elchies, *voce* "Presumption," No. 17, such evidence was received by the Court. But the proceeding was reprobated at the time by the best authorities; and the decision has been held uninfluential on this point. In the after case of the *Duke of Hamilton* v. *Douglas*, 9th Dec. 1762, Mor., 4358, mentioned above, the competency of such proof was again brought into discussion; and the Court, by an express finding in their judgment (which was affirmed on appeal), declared the proof incompetent. So I hold the law at present to stand.

I would add, that, even if admissible, I would hold the evidence of this letter not conclusive. There are several suppositions which may explain the words used by Mr Thoms, without its necessarily being the case that he did not intend the estate of Rumgally for his daughter, if it was within his power to give it. At the best, the letter would go no farther than to raise a surmise that Rumgally was not intended to be conveyed to her. But the case cannot be determined on mere surmise. It must be judged of on legal principles, far more important than the issue, one way or other, of any individual case. So much of property now passes by means of the general disposition *mortis causa*, that I think it would be full of danger to many vested interests to cast any doubt on the effect or comprehensiveness of that instrument. If at any time a subject is carried by it not intended to be conveyed, the fault is that of the granter himself, who did not take the obvious means of excepting it.

Lord Barcaple—I am of opinion that the pursuer is not entitled to prevail in the claim made by him under the declaratory conclusions of the summons.

The prohibitions of the entail of Rumgally not being directed against Alexander Thoms, the institute, there can be no doubt that he had power to convey the estate, or alter the succession. I am of opinion that his general disposition and settlement in favour of the defender is a deed *habile* and effec-

tual to carry the estate and evacuate the special destination in the entail and the investiture following on it, provided that is the true intent and meaning of the deed. In construing such a deed, as to its true intent and meaning in this respect, I am of opinion that it must be held to include all property, of every kind, belonging to the maker at the time of his death, except in so far as it can be shown in regard to special subjects that it was not his intention to comprehend them. The recent case of *Hepburn*, 22 D., 730, is an instance of a class of cases in which a limited construction has thus been put upon the deed as to the subjects which it has been held to comprehend. Another class of such cases relate to destinations created by the maker of the general disposition himself, in regard to which the presumption is that the subjects so destined are not intended to be carried by a general disposition. I am further of opinion that in the present case the circumstances founded upon by the pursuer as indicating that it was not the intention of Alexander Thoms to comprehend Rumgally in his general disposition, are insufficient for that purpose. The *prima facie* meaning of such a deed is, that the maker intends to convey the whole property belonging to him at the time of his death which it shall be in his power to convey. In this view it is of no consequence whether he knows that he has power to convey any particular subject, or even that he has succeeded to it. The grounds for holding that any subjects are not comprehended in a general disposition, are ordinarily and most properly to be derived from the terms of the deed itself, construed, if they are ambiguous, by the surrounding circumstances, or from the acting of the maker himself in creating or adopting the prior destination. But I think the Court has, in special cases, gone beyond both the deed and the acts of the maker in dealing with the investiture, and has given effect to strong circumstances which were held to indicate clearly that it could not have been intended that the general disposition should convey certain subjects. It is unnecessary for me to consider particularly within what limits such extraneous facts can be admitted to control or construe the meaning of the deed. For, assuming that regard can be had to all the circumstances founded on by the pursuer, I am of opinion that they are quite insufficient to show that it was the intention of Alexander Thoms not to include Rumgally in the general conveyance of his whole property to the defender.

The important question in the present case is, whether a general disposition is by the law of Scotland a *habile* and sufficient mode of evacuating a prior destination, either existing in a deed of conveyance or bequest, or embodied in a feudal investiture? I have never entertained any doubt that it is. I entirely concur in the views as to this general question of law expressed by Lord Kinloch in his Opinion, to which I beg to refer. In addition, I have only to offer some observations on the decisions which have been referred to as bearing more directly on this question.

I agree with Lord Kinloch in holding that the case of *Leitch's Trustees*, 4 S. 665, H. of L. 3 W. & S. 366, is an authority in favour of the defender. It is true that the question of difficulty, and on which alone the Judges in this Court differed, was as to the construction of the trust-deed, whether it conferred a vested right to the fee of the estate on Andrew Leitch. But by holding that the right did vest in Andrew Leitch during the life of the widow, it was necessarily implied that the provision in favour of the truster's sisters and nieces, equally among them, was not a conditional institution, but a substitution of heirs to Andrew Leitch. Accordingly, the second and alternative view of the case maintained for the truster's sisters and nieces was, that, supposing the right of fee to have vested in Andrew Leitch, his general conveyance was not sufficient to carry it and evacuate the substitution in John Leitch's trust-deed. The argument for that view was disregarded in this Court, apparently without any observation from the Bench. It appears from the report of the case in the House of Lords, that it was there renewed, it being contended that "Andrew's general conveyance, *not referring specifically to the lands of Kilmardinny*, cannot exclude the subsequent substitutes in John's (the truster's) disposition of that estate." That is just the point involved in the present case; and the House of Lords decided that the right of the substitutes was effectually excluded by the general disposition, holding the point to be too clear for argument. I do not think that it at all invalidates the authority of this decision in the present argument, that it regarded the right of a beneficiary under a trust-deed. The first point decided in the case was, that he had a vested right to the fee of the landed estate held by the trustees, who were to hold for and dispone to him, whom failing, the truster's sisters and nieces. This was as effectual a destination of the estate in favour of the substitutes, as if it had been contained in a direct conveyance to the institute. But it was liable to be evacuated by him, and the question was whether that was well done by Andrew Leitch's general disposition. I know of no reason for holding that a destination subsisting in a trust-settlement, while the estate is still held by the trustees, is liable to be defeated by the institute in any mode which would not be equally effectual to evacuate a similar destination contained in a direct conveyance in his favour, followed by infeftment.

Two other cases, which appear to me to require notice, are brought forward, as I understand, in support of the doctrine that a general disposition is not a competent mode of evacuating a special destination, or that there is at least a presumption of law that the granter did not intend his general disposition to have that effect, even where the prior destination was not of his own creating. I do not think that either of these cases give countenance to such a doctrine.

The earliest of these is the case of *Campbell* v. *Campbell*, in 1740; M. 14,855, H. of L. Cr. and St. 343. In that case, Daniel Campbell, a younger son of John Campbell, while at sea in 1739, made a will bequeathing his whole effects, which were moveable, to his father, and in case of his decease, to his sister Margaret. He died immediately afterwards at sea. His father survived him, but died without hearing of his son's settlement. The father left a general settlement made some years before Daniel's will, by which he settled the whole effects that should belong to him at the time of his death upon his eldest son William, with the burden of provisions to his other children, including Daniel. It could not be discovered from Kilkerran's report of the case that there was any question raised, except whether the provision to Margaret Campbell was a proper substitution, or a conditional institution, which would be evacuated by the mere survivance of her father, the prior institute. It was held to be a substitution which

subsisted notwithstanding the institute's survivance of the testator. But from Kame's second report of the case, and from the interlocutor of the Court, as it is given in the House of Lords' Report, it appears that it was also decided that the father's general disposition, executed several years before his son's will, did not evacuate the substitution in favour of Margaret. The ground of the decision is not stated, unless it is to be inferred from the notice in the judgment of the fact that the general disposition was executed before the son's will. It is clear that that fact could only be received as showing that the father, when he made his settlement, could have no special intention of cutting off the substitution in favour of his daughter, which was not then in existence. The reference in the interlocutor to the circumstance that the general disposition was executed before the will, shows that it was considered material to the judgment, in a case which was otherwise very special, and extremely favourable for the claim of the daughter founding upon the terms of her brother's bequest. There is no such specialty in the present case; and looking to the terms of the interlocutor in the case of *Campbell*, it seems to me to imply that when, at the date of the general disposition, the destination is in existence and known to the disponer, it will be evacuated by that deed. At all events, I am clearly of opinion that it cannot be taken as an opposite decision. This being so, it is not necessary for the purposes of the present case to determine the precise import of the judgment. But in so far as can be gathered from the somewhat unsatisfactory reports of the case, it seems to have been held, with reference to its peculiar circumstances, that it was to be presumed that if John Campbell, the father, had contemplated the bequest in his favour by his son Daniel, with a substitution to his daughter, he would not have defeated the right of the latter; and that, therefore, his settlement was not to be construed and receive effect in a way contrary to what would have been his intention if he had known of his son's will. It may be doubted whether the same judgment would have been pronounced if the substitution had been in favour of a stranger.

The only other case to which I think it necessary to refer, is *Farquharsons* v. *Farquharson*, in 1756, M. 2290, House of Lords, 6 Paton, 724. The decision there was adverse to the parties, daughters of Patrick Farquharson of Inverey, who sought to take the estate under the general disposition of their uncle, Charles Farquharson. But it appears to me that the case, when examined, strongly confirms what I have always understood to be the recognised doctrine of the law of Scotland on the subject.

The family estates of Inverey and Tullich were held by Patrick Farquharson, the elder brother of Charles, as a male fee. Patrick had only daughters by his first marriage. On the second marriage, in 1714, he executed, *with consent of his brother Charles*, a marriage-contract, by which he settled the estates on the heirs-male of that marriage, whom failing, heirs-male of his body of any other marriage; whom failing, his other nearest heirs-male. He died in 1737, leaving two sons of his second marriage, who successively succeeded and made up titles under the existing investiture. On the death of the youngest son in 1738, his uncle Charles took up the succession by service as heir-male to him, and was infeft upon precepts of *clare constat*. Charles possessed a separate property of Auchlossen, which he had purchased many years before. In 1739, immediately after succeeding to Inverey and Tullich, he changed the investiture of Auchlossen by resigning in the hands of the superior for new infeftment to himself and the heirs-male to be procreated of his body, whom failing, his other heirs-male, being the same series of heirs who were called under the investiture of Inverey and Tullich. Such was the state of the title and investitures at the death of Charles Farquharson in 1747. It then appeared that in 1721, when he was proprietor of Auchlossen, but long before he converted it into a male fee, he had executed a general *mortis causa* disposition of his whole estate, heritable and moveable, in favour of his brother "Patrick Farquharson of Inverey, his heirs and assigns whatsoever." The daughters of Patrick Farquharson, as his heirs whatsoever, claimed the estates of Inverey and Tullich under this deed, as against James Farquharson, the brother and heir-male of Charles. The details of the case are most fully given in Mr Paton's appeal cases.

The first observation to be made upon this case is, that it does not appear that, either in this Court or in the House of Lords, it was maintained for James Farquharson, the heir of the old investiture, that Charles' deed of 1721, being only a general disposition, was not a *habile* deed to evacuate the existing investiture. If the views urged for the defender of the case of *Campbell*, decided in the House of Lords only thirteen years before, were well founded, that should have been a conclusive answer to the claim of the heirs whatsoever of Patrick, founding upon the general disposition in his favour. The argument, and it must be presumed the ground of judgment, in favour of the heir of investiture, rested solely upon the circumstances of the case, and especially upon the acts of Charles Farquharson in regard to the destination both of Inverey and Tullich and of Auchlossen, as going to show that he did not intend his general disposition to carry Inverey and Tullich. There were abundant grounds for so holding. In the first place, as appears from the House of Lords Report, Charles was a consenting party to the marriage-settlement of Patrick, by which the estates were destined to heirs-male, thereby indicating his will and intention in the matter at the date of that deed. Then, when he made his own general settlement, he had no immediate or very probable prospect of ever succeeding to Inverey and Tullich. And lastly, when he succeeded to these estates not only did he do nothing to change the investiture as to them during his life, but he immediately altered the investiture of Auchlossen, so as to prevent it being carried by his general disposition, and send it to the same series of heirs-male who were then the heirs of investiture of Inverey and Tullich. With such strong grounds for holding that it never was the intention of Charles Farquharson to include these estates in his general disposition, it would, in my opinion, be quite an unwarranted construction of the judgment which should rest it upon a view of the law as to the inefficiency of a general disposition to alter a special destination. The real importance of the case appears to me to consist in the fact that no such limitation of the legal effect of a general disposition appears to have been contended for on behalf of the heir of investiture.

Lord JERVISWOODE, Lord ORMIDALE, and Lord MURE concurred with the majority.

At advising—

LORD PRESIDENT concurred with the majority.

Lord Curriehill—The parties to this action are competing for the estate of Rumgally, in the county of Fife. The pursuer claims it in respect of his being the heir to whom it stands destined by the feudal investiture thereof. The defender claims it in virtue of a general *mortis causa* settlement, which the former proprietor executed in 1861. In order to decide this competition, I shall consider in the first place what is the import and effect of that feudal investiture upon which the pursuer founds; and, in the next place, what is the import and effect of the general disposition upon which the defender founds.

The feudal investiture of the estate was expede in the year 1810. The estate then belonged to Alexander Thoms senior; and it appears to have been vested in his person in fee simple. On 6th February 1810, he executed a deed of entail thereof, whereby he conveyed to Alexander Thoms, his eldest son, and the heirs of his body; whom failing to the heirs-male of the entailer's own body, and the other substitutes therein set forth. That deed, having been a *mortis causa* settlement, took no effect during the lifetime of the granter.

That, while it imposed the usual fetters upon the *substitute heirs of entail*, did not impose these fetters upon the *institute*, Alexander Thoms junior. Hence that institute was left as absolute owner of the estate as the entailer himself had been.

Nor was this all. The entailer, besides withholding from the persons whom he proposed to substitute to the immediate disponee any *jus crediti* as against that disponee, did not himself take the usual steps for introducing these substitutes into the feudal investitures, but left it entirely in the option of the fee simple institute to determine whether or not *he*, the institute himself, should do so. As these heirs become his vassals by succession they can be introduced into the investiture only by its being renewed by him in their favour. As stated by Lord Stair, ii, 3, 41,—"They must be constituted by the superior, being part of the infeftment granted by him either originally in the first constitution of the fee or thereafter by resignation or confirmation." Mr Thoms himself, who granted the deed of entail, never obtained or applied for any charter thereon from the superior. And at the time of his death the heirs in the feudal investiture were, as I understood, his own heirs at law, and Alexander Thoms jun., his eldest son, was himself the person who was in that position. If, indeed, the fetters of that entail had been imposed upon him as well as in the heirs of entail, he would have been bound to have made up his titles in that deed of entail, because in that case he would have been under an obligation to the substitutes (of which they could have inforced performance) to have rendered real the *jus quæsitum* acquired by each of them, and for that purpose by expeding such a new investiture. But as the entailer left *him* an *unlimited fiar* of the estate, he was empowered to frustrate the entail, and to dispose of the estate as he might think proper.

In the exercise of that option Alexander Thoms junior elected to make up his title under the deed of entail. He was not disabled from doing so by nonage, for although he was only about sixteen years of age, and could not have gratuitously *altered* the order of succession in the former investiture, yet, as his ancestor from whom he derived the estate had left the personal *mortis causa* deed of entail above mentioned, his son, as the institute or immediate disponee under that deed, had power, with the concurrence of his curators, although he was under no obligation to make up his title under that deed.

The proceedings by which Alexander Thoms junior himself thus effected the introduction of the heirs of entail into the feudal investiture were the following. In the first place, as Alexander Thoms senior had inserted in his deed of entail a procuratory of resignation for expeding such an entry with the superior, and as in virtue of the statute 1693, c. 35, such procuratories of resignation remained in force after the granter's death, Alexander Thoms junior, in virtue resigned the lands into the hands of the superior (who was the Crown) for new infeftment to be given to himself as disponee and to the heirs of entail as substitutes; *Secondly*, he thereupon obtained from the Crown a charter of resignation, dated 3d February 1810, whereby the estate was disponed to himself as institute and to the heirs whomsoever of his body, *whom failing to the heirs-male of the body of his father*, and to the other substitutes therein set forth; *Thirdly*, on 24th September 1810, he obtained himself infeft in the estate in the precept of sasine contained in that charter under the investiture, also the right of Alexander Thoms junior himself to the estate was of course absolute and unlimited. But as he also intended that the rights of all the substituted heirs of entail should be limited by the fetters of the entail, he for that purpose accordingly, *Fourthly*, farther obtained the completion of this entail so far as regards the restrictions of the rights of these heirs of entail, in as much as he recorded the entail in the Register of Tailzies under the usual warrant which he with concurrence of his curators obtained from this Court.

Thus the constitution of this entail was the act of Alexander Thoms junior, the institute, as well as of that of his father. The part which Alexander Thoms junior performed in that proceeding was quite different from that which is performed by heirs of entail in the cases where the statutory fetters are imposed upon the institutes as well as upon the heirs of entail, for in these cases the renewal of the feudal investiture, whether by the institute or by a substitute, is not a voluntary act on his part, but the performance of an indispensable obligation imposed upon them as a condition of his own rights. Alexander Thoms junior, when he executed these proceedings by which the entail was constituted, not only was carrying into effect what no doubt had been the intention of his predecessor, but was also *executing* his own intention in a matter which had been left entirely to his own option.

Nor was this all. By so completing the feudal investiture upon the entail he rendered it impracticable for even himself thereafter to make an alteration of the succession of the heirs of the feudal investiture *otherways than through the superior*. As Lord Stair adds in the section formerly quoted, —"Talzies also being constituted *are broken or changed* by consent of the superior accepting resignation in favour of other heirs, whether the resigner resign in favour of himself or of his heirs whatsoever, or in favour of any other and their heirs." And although in modern times superiors can be compelled on certain conditions to grant renewals of feudal investitures, yet, still excepting through the superiors, the heirs of the investiture cannot be altered. One of the practical effects of this principle is this. While such an entail is a mere personal deed in the hands or under the power of the

granter himself alone, he can undo it by destroying it, or even by another deed merely revoking it. But after a feudal investiture is completed upon it, this cannot be done. Even a deed of revocation of it would not *per se* have that effect although it were granted by the entailer himself; and *a fortiori* would it not have that effect if granted only by a disponee or a substitute heir? It is not even competent for the superior himself to make such an alteration of the order of succession without an appropriate warrant for that purpose granted either voluntarily by the party who was vested at the time with the right to the estate under the old investiture, and was of course then the superior's vassal, or by a decree of adjudication against him or his heir-apparent under that old investiture. Alexander Thoms junior had it in his power to execute the intention of himself as well as of his father to obtain a removal of the feudal investiture at once by availing himself, as already stated, of the procuratory of resignation which his father had executed while the estate was duly vested in his person.

Alexander Thoms junior himself continued to possess the estate in virtue of the investiture which he then expede in 1810 for more than half a century thereafter. He lived until the year 1864 without any alteration of the destination in that investiture having been made by him during his lifetime, or without his having left any procuratory of resignation with a view to an alteration thereof being obtained after his death by any party. Hence the real right to the estate has, since his death, been *hereditate jacente* of him; and the pursuer of this action, who is next substitute heir to him under that investiture, is the party who is now in the position of being his heir apparent in the estate. And accordingly, were the superior in the existing state of matters to institute an action of declarator of non entry, the pursuer, as being in that position, is the party whom he would call as defender in such action. He also is the party who *in hoc statu* is directly liable, as representing *passive* the last entered vassal liable to the superior for the feu-duties which may be falling due.

Such is the import and effect of the existing feudal investiture of the estate upon which the claim of the pursuer is founded. I proceed next to inquire what is the import and effect of the general disposition upon which the defender's claim is founded.

She is an illegitimate daughter of the late Alexander Thoms junior, and she claims right to the estate in virtue of a *mortis causa* settlement which was executed by him on 23d January 1861. That settlement does not mention the estate of Rumgally. It is a general disposition of all property, heritable and moveable, which then belonged to him, or that should belong to him at the time of his death. And the question is, Whether or not that general disposition has the legal effect of evacuating the destination in the feudal investiture under which the granter held the estate of Rumgally at the time of his death, and of preferring his general disponee to his heir of provision under that investiture?

There is no doubt that the late Mr Thoms had *power* to settle the estate upon the defender or any other person in respect the fetters of the entail had not been imposed upon him. And accordingly, if he had made it clear by that deed that he truly intended to include the entailed estate of Rumgally in the general description of the subjects thereby generally disponed, effect would be given to that intention; for although that was not the direct or appropriate mode of altering the order of succession in a feudal investiture, yet in that case the pursuer himself, as his heir under the investiture, would have been liable *passive, first*, to have made up a title to the estate in his own person under that investiture, and thereafter to have granted a procuratory of resignation in the defender's favour, to enable her to obtain a renewal of the investiture in her favour. But the estate of Rumgally is not mentioned in that document as being included among the subjects thereby disponed. Nor has any evidence been adduced beyond the mere words used in the document itself to show that such was truly the granter's intention. Hence the decision of this question depends upon the legal meaning and construction of that general disposition.

General dispositions of this kind have, from an early period, been used in Scottish conveyancing as a variety of a deed of settlement. In the conveyancing of Scotland, and, I believe, of all countries where there has been a long-established system of conveyancing, writings often have come to be used for purposes, and have meanings different from the literal meaning of the language in which they are expressed. A general disposition, when it is merely a testamentary settlement, or a part of such a settlement, is in that predicament. It is of an artificial character, and, according to inveterate usage, its true meaning has not been in accordance with the literal reading of its language. Thus, as in the example of it now under consideration, the document begins by setting forth that the granter *per verba de presenti* disponed to the grantee property of every kind which belonged to the former at its date, under the reservation of his liferent. According to the literal reading of that grant it would be a direct conveyance *inter vivos* of all the estates and effects which belonged to the granter at its date; and he would thereby be left destitute of the *ownership* of anything whatever. Then the disposition proceeds to describe the subjects thereof, all that should belong to the granter at the time of his death. What the effect of that as an *alternative* grant might be if the document were to be read *literally* it would not be very easy to conjecture. But, according to inveterate and established usage, the settlement does not operate according to the literal meaning of the language, and is entirely a *mortis causa* settlement, taking no effect as to anything during the granter's lifetime, or as to any estate or effects other than what may happen to be left by him at his death without having been settled otherways.

Even as to the estate and effects which may be left by him at his death, such a general disposition is presumed to be intended as merely a part of the general settlement of the granter's succession, and to carry only such estate and effects then belonging to him as may not have been disposed of by other settlements. When, indeed, in the writing itself, or in any other competent form, there is a distinct indication of a different intention, that intention receives full effect. It would have been sufficient, for example, if, in the description of the subjects conveyed, he had such an expletive as "including the lands of Rumgally." But there is no indication whatever of such having been the granter's intention; and the question is, what is the effect of such a general disposition in the system of Scotch conveyancing; the answer, in my opinion, is, that it has always been held to be of the qualified meaning, and to have been granted for the limited

purpose I have mentioned. And if we are now to begin to read, not in that sense, but in their literal meaning, all the settlements of this class of persons already defunct, I fear we would be regulating many successions very differently from what was intended by the granters of these documents. Hitherto such a general disposition is presumed (when there is no distinct indication of a contrary intention) to *leave* in full effect all other settlements of particular subjects, and to be merely *supplementary to them*, so as to regulate the succession to any of the granter's estate and effects which may not have been otherways settled. This has been the established construction and effect of such general dispositions in the conveyancing of Scotland for time immemorial. This legal presumption was held to be established more than two centuries ago in the case (reported by Durie) of *Traquhair*, 8th March 1626, Mor. 3591, in which a testamentary provision of certain goods having been made by Thomas Traquhair to his brother James, and the granter having at a subsequent period granted a general testamentary conveyance of all his effects to other persons, it was maintained that that general conveyance imported a revocation or defeasance of the prior special testamentary provision; but the Court found that the general conveyance had not that effect, "but only that he (the testator) left his goods and gear generally to his executors, *which behoved to be understood only of such goods as were* not disponed before." Then, half a century later, the Court again found this to be the true construction of such a general testamentary conveyance in the case of *Aikman*, 19th January 1679, Mor. 11,346, where two *mortis causa* assignations of certain sums had been granted, and the granter had afterwards granted such a general disposition in favour of a different party; and, as Lord Stair's report of the case states, "the Lords found the *assignations effectual and not derogate from by the universal legacy* seeing there were moveable goods and sums besides both assignations." Then, twenty years afterwards, in the case, reported by Lord Fountainhall, of *Handyside*, 7th February 1699, Mor. 11,349, in which a revocable bond having been granted by a party, he at a future time also granted a general testamentary settlement in favour of a different party, the former special grant was found not to have been revoked, and the principle of this decision is stated in the report to be, that "obligements and special legacies require a special revocation to take them away." Decisions to the same effect continued to be pronounced on the same principle during all the eighteenth century. The series will be found in Morrison's Dictionary *voce* "Presumption," between pages 11,351 and 11,379. The series of authorities to the same effect has likewise been continued during the present century as appears from the case of *Thomson* v. *Lyell*, 18th November 1846, S. & D. 15, p. 37, and several other cases to which I am presently to advert.

Such, then, is the construction established by immemorial usage in Scottish conveyancing of such general dispositions as a testamentary instrument when there is not a clear indication of the granter having intended them to have any farther operation. There is no indication of any such thing in the present case.

The only questions remaining appear to be, whether a different meaning is to be attributed to the general dispositions in question either because the subject of the separate special provision is a *feudal one*, or because the special provision *originated* in a deed which had been granted not by the late Mr Thoms himself, but by his predecessor in the estate?

The former of these questions must clearly be answered in the negative, the legal presumption operating *a fortiori* when the subject of the separate and special provision is a feudal one. As I have already mentioned, the evacuation of the destination or alteration of the order of succession, prescribed in a feudal investiture, can be effected only by obtaining a renewal of that investiture from the superior; and, as the superior requires a warrant from the owner to make such change, that warrant, according to the inveterate and universal practice in Scottish conveyancing, consists of a simple procuratory of resignation. And if the change of destination is intended to operate only on the owner's death, that procuratory is made a *mortis causa* deed in the usual manner. And accordingly, if the late Mr Thoms had actually intended to evacuate or alter the order of succession contained in his own title of his estate of Rumgally, the execution of such a simple procuratory would have been the means which, by the advice of the professional conveyancers who framed his settlement, he would naturally have used for effecting the purpose. But he never did grant any such procuratory. The defender never obtained any warrant from him for effecting an evacuation or alteration of the destination in the feudal investiture under which he himself had always possessed this estate. This fact corroborates the presumption which the law itself creates that the mere general disposition which alone was executed by him was not intended to evacuate or alter the destination which he left standing in the feudal investiture which he himself had expede, and under which he possessed the estate during his long lifetime.

This presumption is still farther strengthened by the consideration that, even if he had truly intended to frustrate that destination, his intention could not have been carried into execution in virtue of such a general disposition without an elaborate, circuitous, and expensive course of proceeding. If that had been the case—and even supposing the pursuer to have been willing to aid the defender in obtaining the estate vested in her person—two different renewals of the investiture would have been requisite, one in favour of the pursuer himself as the heir of the still subsisting investiture, and another in favour of the defender proceeding upon a procuratory of resignation to be granted by him in her favour. And unless the pursuer, as heir-apparent under the old investiture, had so assisted in such proceedings, they must have consisted of actions of constitution and of adjudication in implement proceeding upon implied general and special charges, and a charter of adjudication and infeftment. The elaborate course of procedure required for such a purpose is detailed in Menzies' Lectures on Conveyancing, p. 753. It cannot reasonably be believed that the late Mr Thoms, if he had truly intended to include the entailed estate of Rumgally in his general disposition would have left the defender exposed to such a cumbrous and expensive, as well as indirect, mode of obtaining a title to the property, when the appropriate mode of effecting such a purpose was so simple, and yet was not adopted. All this tends strongly to corroborate the legal presumption that the mere general disposition which alone was granted by him had no other meaning than that which is attached to such documents according to the established usage in Scottish conveyancing.

Nor is this corroboration of the legal presumption obviated by the enactment in the late statute that infeftment may be given by a Notary Public directly upon a general disposition, because, in the first place, such an infeftment has still no effect whatever in changing the destination in the feudal investiture unless it be *confirmed* by the superior. No change can possibly be effected upon the succession of the superior's vassals without a deed containing his concurrence; and secondly, the superior has no right or power to confirm an infeftment of any subject as being contained in a general disposition unless it be quite certain that that subject was truly intended to be contained in the disposition. And when not only does the disposition not mention the subject in question, but the presumption of law is that it does not contain that subject, the superior would not be entitled on his own authority to confirm such a conveyance.

And accordingly, the defender in her elaborate argument has not quoted to us a single case in which a general disposition has been held to have the effect of evacuating or altering the destination in the granter's investiture of a feudal estate; and yet the question has repeately occurred, and been tried and decided, Whether or not the legal presumption applies to feudal subjects which the granters held by investiture with tailzied destination? And in every *one of the cases of this class appearing in the reports, the presumption against a general disposition having such an effect has been* sustained. Without quoting this series of cases further, I shall merely mention the names of some of them.—*Farquharson*, 2d March 1756, Mor. 2290; *Dundas*, 21st May 1783, Paton's Appeal Cases, 618; *Logan*, 13th December 1797, Mor. 11,379; *Callow's Trustees* 23d February 1866, 4 Macph., 465.

The only question remaining to be considered is, Whether general dispositions have not the same limited construction when the destination of the special subjects has been made, not by the granter of the general disposition himself, but by another person from whom he has derived his own right to that subject? Even if the destination in the present case were in that predicament, the legal presumption would, as I think, be at least equally applicable. Since the owner of an estate is not presumed, by merely granting such a general disposition, to alter a destination of it which did not affect his own title, it is at least equally probable that he did not thereby intend to defeat a destination of the property which does qualify the title to it on which his own right depends. Since such a document, according to its established meaning in Scottish conveyancing, is presumed not to be intended to prevent a new order of succession from being established in the particular subject, it is difficult to discover any good reason for presuming it to be intended to have the effect of destroying an order of succession which has already been established, and which has always qualified the title of the granter of such general disposition himself. The destination is certainly not founded upon principle.

Nor is it supported by a single authority. On the contrary, it has been repudiated in every one of a series of cases in which the question has been raised. In the case of *Campbell*, 12th June 1740, Mor. 14,855, it was adjudged that where the destination of a special subject had been made, not by the granter of a general disposition, but by another party from whom his own right to that subject had been derived, the general disposition did not alter a substitution of that subject made by his author. And that judgment was affirmed by the House of Lords, 1 Paton's App. 343; and the same principle has been given effect to in numerous cases, whether the subjects of the special settlements were allodial or feudal. See the case *Flemings*, 3d Dec. 1800, Mor. Appx. "Implied Will" No. 1; and the cases already mentioned—*Farquharson* in 1756, and *Callow's Trustees* in 1866.

But it is not necessary to advert to that class of cases as if the granter of the general disposition in the present case had not himself been a party to the special destination upon which the pursuer founds.

But as I have already shewn, the destination upon which the pursuer founds was constituted and introduced into the feudal investiture of the estate by the voluntary act of the very party by whom the general disposition in question was afterwards granted. It was the voluntary act both of himself and of his predecessors. And hence this is a case to which the legal presumption in question appears to be applicable *a fortiori*.

The only authority upon which the defender founds is the case of *Leitch's Trustees* in 1829, and if in that case either this Court or the House of Lords had intended to decide that a general disposition should thenceforth be presumed to extend farther than it had been held to do so for time immemorial, there would have been some allusion to such an important change in the law. But there is not a syllable to that effect to be found in the reported opinion of any judge in either of these tribunals. On the contrary, the only Judge (Lord Cringletie) who appears to have thought that the party who in that case disputed the effect of a general disposition to carry the subject of a special settlement in favour of a different party, held clearly that the general settlement had only the limited effect I have mentioned. No contrary opinion was expressed in any quarter. In order to make that decision available as an authority in her favour, it would be necessary for the defender to show that the judges held that in that case there had been a *substitution* created in favour of four sisters and nieces of a truster, as heirs of provision of Andrew Leitch, the party who was the granter of the general disposition in that case. But it does not appear that any of the judges except Lord Cringletie held that the destination which was there in question imported a substitution. On the contrary, although there were four successive branches in the destination of the estate of Kilmardinny in the trust-deed of a former proprietor, these parties were not thereby directed to be placed in the relative positions of institute and substitutes under a deed of entail. There was no intention or direction to create an entail or a substitution of heirs. The direction imported *merely a series of conditional* institutions; and although the trustees are themselves to retain and hold the estate for behoof of that individual of the series who might be alive in the contingency therein specified, yet the individual who might eventually take under these directions was to take as a conditional institute, without the title which was to be given him being qualified with a destination to substituted heirs of tailzie and provision. And hence, when the *jus crediti* under the trust did eventually vest in one of these parties there was no other destination which could prevent a general disposition by that party from carrying the *jus crediti* vested in him to the trust-estate.

In my opinion, therefore, the general disposition upon which the defender founds must be construed,

in conformity with immemorial usage and an unbroken series of authorities, extending backwards for more than two centuries, as not including the estate of Rumgally; and the pursuer, as heir of the investiture thereof, ought to be preferred.

Lord Deas—In this case it appears that Alexander Thoms the elder executed a deed of tailzie in 1805, by which he conveyed the lands of Rumgally to Alexander Thoms, his eldest son, and the heirs whomsoever of his body, whom failing, to a great variety of substitutes whom I need not enumerate. This deed contained all the clauses of a proper tailzie, subject to this observation, that the institute and the heirs of entail were mentioned, sometimes the one and sometimes the other, in a way which opened it up to the objection that in the fettering clauses, or at least in some of the fettering clauses, the institute was not comprehended under the denomination of an heir of entail. That was an objection which, after the case of *Duntreath* and other cases, would have led a lawyer well acquainted with entail law to see that the institute might, if he chose, evacuate that destination. But it is not a deed from which a proprietor not a lawyer looking at it would naturally or at all imagine that he had a power to interfere with that destination. Alexander Thoms, the son of the entailer, succeeded in 1810, and made up his titles under that tailzied destination. He was in minority at that time, but he acted with the approbation of his curators, and he possessed upon that title till his death on 15th of August 1864, his father having died in 1809. Whatever the state of the fact may be, it would not be the least surprising that the late Alexander Thoms in the course of his lifetime had no idea that he could interfere with or evacuate this destination, unless he had taken advice on the subject, which it is not said that he ever did. The title, therefore, stood just in the position which is common enough in Scotland, of their being a flaw in the entail which might or might not be discovered by the heir in possession. We know quite well that many of the chief estates in Scotland have been possessed for very long periods on deeds of entail in which, when the subtlety of lawyers was set to work to find out objections, objections were discovered, and the deeds evacuated after the estate had passed down through a number of generations, without any suspicion of such a flaw existing. I see no difference between this case and these other cases, unless it may be that if advice had been taken about it, this flaw might have been more easily discovered by a lawyer than some other flaws have been. Alexander Thoms, the heir in possession, died in August 1864, and he left a general disposition and settlement by which he conveyed to the defender, his natural daughter, "All and sundry the whole property, heritable and moveable, real and personal, of what kind or denomination soever at present belonging, or that shall belong, to me at the time of my death." There was a separate codicil afterwards executed, but it merely made an alteration on the guardians, and does not at all affect the present question.

The important general question of law which arises here is, Whether a deed expressed in the general terms which I have now read, necessarily evacuates a subsisting destination under an imperfect entail? If by the mere production of such a general deed the destination is evacuated, there is of course, an end to the pursuer's case. The first question, and a not unimportant question in this case, is, Whether the mere production of that deed is sufficient for that purpose? Now, whatever might be the result of this particular case, I cannot come to that conclusion. I think it impossible to say that the mere production of a deed in these terms necessarily evacuates the subsisting tailzied destination which the granter had the power to evacuate.

The express words of the deed do not necessarily imply that. There is a plain distinction between the position of heritable property which belongs in fee simple by the terms of the titles to the party who grants the general deed, and the position of an estate which he has a power to deal with if he chooses. There are many things that a man has it in his power to do with reference to an estate, although that estate is not, generally speaking, reckoned part of the property belonging to him. There is a sense in which every entailed estate, where there is a flaw in the entail, belonging to the heir in possession; that is to say he may make himself proprietor, and deal with it as proprietor by evacuating the destination. But the entailed estate in that position does not naturally and necessarily fall under the denomination of property heritable and moveable, or property real or personal, belonging to him; and these words may be used, and have very often been used in deeds of this description, without importing any such meaning. The deed we are speaking of we call in ordinary language a general disposition—strictly and correctly speaking it is not a disposition at all. It dispones nothing. A disposition, properly speaking, must have a specific dispositive clause; it dispones all and whole a certain subject, and then goes on to describe it. A full and perfect disposition also contains procuratory and precept, or the means of giving infeftment. It may not be essential to make it a disposition that it has a specific dispositive clause, but when we speak of a disposition of heritable estate we mean a disposition that dispones that particular estate in express terms. What we call a general disposition is truly nothing more than an obligation to convey the estate of the granter at the time of his death, and that I take to be the reason why a different construction may be given, and given upon definite grounds, to a deed of that kind from what can be given to the disposition of a specific subject. If he had made a disposition of an heritable estate which is described in the deed, there is no room for any injury whatever as to what was the intention of the granter. It is conclusive. But I think nobody will dispute that that is not the case with a general disposition. There is a whole series of cases quoted in the printed case for the pursuer here, of general dispositions which bear to convey everything that belonged, or that should belong, to the granter at the time of his death, and yet were held not to touch the specific subjects which he had the power to convey. I do not need to go into these cases, because their existence and their soundness is conceded on all hands. None of the consulted judges call in question that if you have a specific destination made by a man himself, and then a general conveyance of all that may belong to him at the time of his death, that general conveyance does not necessarily, or does not in the general case, evacuate the previous special destination. Now why is that. Simply because the general deed is not a disposition in the proper and strict sense, but is a mere obligation to convey, and consequently is to be construed, not upon the rules by which you construe a proper disposition, but upon those other

and more liberal principles which are applicable to wills and *mortis causa* deeds of settlement. And consequently in all these cases there is an inquiry into whether it was or was not the intention of the maker of the deed to convey the particular estate which he had the power to convey if he had chosen. This matter of law is so correctly laid down by Mr Duff in his work upon conveyancing that I shall content myself with reading what he says about it, which I take to be perfectly accurate. At page 314 he says,—"The general disposition is employed when it is the intention of the granter to convey his whole property," Now that obviously imports something more than the words of a dispositive clause on the words which occur in this deed, because that is the very kind of dispositive clause of which Mr Duff is speaking. It does not satisfy the condition of the despositive clause that it is all that may belong to him at his death; there must be something more on the face of the deed in order to show that his intention was to convey estates which he could have conveyed if he had thought proper. And again, he says in another passage, p. 331, "A simple destination is defeasible by the institute or the substitute heir in possession who has the power gratuitously to alter the law of the succession, such alteration, however, must be express. Thus, a party who is both heir of line, and heir of provision under a simple destination, although he may validly complete a title in either character, does not by service and infeftment as heir of line vacate the destination. The *spes successionis* of the heirs of provision can only be defeated by direct conveyance to another, or by the fiar's resignation in favour of himself, completed by charter from the superior, since, until altered by one having the power of disposal, the appointment of the former proprietor controls the ordinary law of succession." Now that being the principle, and it being conceded that if the destination is made by the man himself, it is defeasible only by an express act, what difference is there in principle between the case of a destination made by another man who had the power to make it, and the case of a destination made by the man himself. Is it not clear that in neither the one case nor the other does the deed itself necessarily import an evacuation. The question occurs in both cases, Did he intend to evacuate? and the moment you put that you open it up to inquiry, which, as I said before, there would be no place for in the case of a special disposition. If upon the face of the deed it appears that the party intended to evacuate, that would have been conclusive. The moment you have it fixed that the words of the deed, although in general terms, are not conclusive, you must inquire in every case what was or what was not the intention of the party. Now I agree with Lord Curriehill that if a decision were necessary upon the question whether the same law applies whether the destination is by the man himself or by his predecessor, we have a decision strictly in point in the case of *Farquharson*, decided in this Court, and affirmed by the House of Lords. That was the case of a destination to heirs-male, not made by Charles, the man who granted the general deed, but made by his predecessor. Charles had executed a general disposition and settlement conveying all that belonged to him or might belong to him at his death, in a particular way, and I need hardly say that when a man executes a deed of that kind it operates as at the date of his death. He subsequently succeeded as heir-male to the estates of Inverey and Tullich, and made up his titles as heir-male. The question came to be whether his general deed, which bore to convey everything that should belong to him at his death, conveyed these estates of Inverey and Tullich, which most unquestionably he had the power of conveying if he had chosen; but it was held that, although he had the power to convey these estates if he had chosen, and although the destination was not made by him but made by his predecessor, the effect of the general deed, notwithstanding that that general deed must be held to operate at the date of his death, was not to evacuate that general disposition but to leave it standing. That appears to me to be a decision precisely in point, if a decision were necessary on the matter, in the cases of destination by a man himself, where I think the principle is clearly and inevitably the same. I am of opinion, therefore, that the production of this general disposition is not conclusive in favour of the defender. But when I get this length the only other thing that I am clear about is, that there ought in this case to have been an inquiry into the facts and circumstances which might tend to show whether that general disposition was meant to evacuate that destination or not. I think it inevitably follows when the rule is fixed that the general disposition don't necessarily of itself evacuate, and that it depends on whether it was intended to evacuate it, that although it is *habile* in one sense, it is not *habile* to convey the lands,—there is a looseness of expression about that; it is not *habile* to convey the lands; it is a *habile* obligation which will be enforced, provided it was intended to have effect. It necessarily implies that there must be an inquiry into the facts and circumstances in order to see whether it was intended to evacuate it. If you take any other view of it you must take the view suggested by Mr Duff, that unless it appears upon the face of the deed that it was so intended—appears by something else than the general words of the dispositive clause—it is not held to be so intended at all. There is no alternative between these views. You must take the one or the other. My humble opinion is, that the sound view is that the deed is not conclusive either way, but you must inquire into the facts and circumstances, and ascertain whether it is to be inferred, by the real evidence of those facts and circumstances, that the man did or did not intend to convey. The case of *Weir* v. *Steel* is referred to, and I am not prepared to say that that case is not an authority to be considered on that point.

It was a case in which Mr Weir left a general disposition and settlement in favour of his nephew of all which he had or might have at his death; he entered into a marriage-contract afterwards, not a *mortis causa*, but an *inter vivos* deed, by which he provided to himself and the heirs of the marriage, whom failing to his own heirs and assignees whomsoever. There were no heirs of the marriage, and the question ultimately came to be between the the destination in the marriage-contract to his own heirs and assignees whomsoever, and the destination in the general disposition and settlement in favour of his heirs *nominatim*. The nephew offered a condescendence of facts and expressions of the deceased, from which he said it would plainly appear that it was not intended by the destination in the marriage-contract to evacuate the previous destination in the deed. A proof was allowed, and the interlocutor pronounced in the case contains various findings, and then it goes on to say,—"And that

the defendant's intention not to alter the former settlements were supported and confirmed by the proof adduced." There is no doubt that proof was allowed there and this appears by the very terms of the interlocutor. It is said that that case has been repudiated ever since. I am not aware of that. I am quite aware that Lord Elchies, a very eminent lawyer do doubt, who was in the minority, dissented from that, because he said he was opposed to proof by parole, "which our law had justly distrusted because of the corruption and degeneracy of the age in which we live as well as of the age of our immediate ancestors." That was his reason applicable to that particular age. Now I may be allowed to doubt whether that is a very sufficient reason. I suppose one age would be very near as corrupt and degenerate as another, and if that was applicable to that age it ought to be applicable to other ages. But he did not think so, and with all respect—and my respect is very great, as that of every lawyer must be, for the authority of Lord Elchies—I cannot go the length of holding that that is a decision of no authority in the question whether proof of the same description may be allowed in cases of this kind.

Then there was the case of *Aberdeen*, 13th December 1756, Mor. 6958. It does not appear from that report that proof was allowed, but it was quite clear from the report of the case of the *Duke of Hamilton*, to which Lord Kinloch refers, Mor. 4358, and that appears at the foot of 4372, and the top of 4373. It is quite plain from that report that in that case proof had been allowed as to the instructions given by the Provost of Aberdeen with reference to the preparation of a disposition which was held to rule the destination of the property, although it had never been delivered. The provost had bought a property in the neighbourhood from Farquharson of Invercauld, under missives, and he had written to Mr Farquharson that he wished a disposition of it to be granted in favour of his only son and the heirs of the marriage. The draft of the disposition was prepared by his agent in Aberdeen, and the disposition was extended and sent by him to Invercauld. Invercauld signed it and sent it off to Aberdeen, but before it got to Aberdeen the Provost was dead, so that it was never delivered. The question came to be whether the son of the second marriage, whom he wished to get the property, should get it, or the eldest son of the first marriage should get it, and a proof was allowed as to whether the Provost had given instructions to his agent in Aberdeen to prepare that disposition in the terms in which it was or not. Now it has appeared to me throughout this case that there ought to be no difficulty in ascertaining some things here in favour of the defender if they were true. I do not by any means mean to say that in a case of this kind parole testimony of all sorts is to be admitted, but it appears to me that parole testimony to the effect of establishing facts and circumstances, the real evidence of which will tend one way, is and must be competent.

In the case of *Campbell*, which is an important authority in this case, where the father left a general deed which was not held to evacuate a destination made by the son to his father, whom failing, his daughter Margaret, in respect that the father did not know and could not have known that he had that succession at his disposal. If it had not been clear that he did not know and could not know that, I do not suppose that an inquiry could have been excluded into the fact whether he did know that that property was in his power. I think the decision necessarily implies that, and it is therefore an authoritative decision, both in the question of competency of proof and in the matter of law involved in this case. Suppose it had been denied here that this old gentleman knew or believed that this lady was his natural daughter, is it conceivable that a proof would not have been allowed as to whether he did or did not know that she was his natural daughter. Many other instances might be given of facts and circumstances quite competent to be ascertained by parole testimony, and from which an inference is to be drawn as a matter of real evidence as to the intention of the parties. It is very difficult for me to suppose in this case that it was not a fact that might have been inquired into, whether this gentleman did or did not know that he had the power to deal with the estate. If he did not know that he had the power to deal with that estate, the case of *Campbell* would apply in express terms, and the whole root and branch of the defender's case would be cut away; because it appears to me a very extravagant proposition to say that any man who is in possession of an entailed estate, and there happens to be a flaw in the entail that he knows nothing about, and he executes a general disposition at any time of his life—it may be a disposition *omnium bonorum* to his creditors—and who has not the most distant idea that he has the power to deal with the estate, and who dies without discovering that; and, after it has gone down two or three other generations, somebody produces this disposition *omnium bonorum* or a general deed of settlement, made in a previous age altogether, by a man who had the power to evacuate the entail, and then it is maintained that the entail is evacuated. That appears to me to be a very startling view. I cannot imagine that that could be listened to without its being made to appear in some way or other that he knew he had that power, and I should rather think that an additional circumstance might be necessary to be proved—namely, that he meant to exercise it. I think, therefore, that it was quite competent for the defender in this case to have proved, if she could, that this old gentleman knew that he had the power to evacuate that destination, and moreover that he meant to do it. What I meant to say is, that what I think clearly competent is, that she might have proved that he knew that he had the power, and that he believed that this general deed was a sufficient exercise of that power, and there comes in to the same extent the case of the Provost of Aberdeen giving instructions to his agent. If this old gentleman knew of the flaw in the entail, and if he meant to evacuate it by the general disposition, it is very difficult for me to suppose that his instructions to his agent did not import these things, and if it had been proved that his instructions to his agent imported these things, I should not have doubted the competency of that, and I should not have doubted the conclusion at which I was to arrive. But in this Division we pressed on the defender again and again the propriety of clearing up this case by evidence, but unsuccessfully, I am sorry to say. She never absolutely renounced probation, but there were repeated orders from time to time upon her to state what she would undertake to prove, and she would not undertake to prove anything, and at the end of the chapter there was that equivocal minute put in, in which she says that if the Court think proof necessary

she still proposes to lead proof, but that she offers none. If the whole matter had depended on my opinion I would have ordered a proof nevertheless, but that was not the view of the Court, and I am not prepared to say that it ought to have been the view of the Court. The great difficulty, therefore, which I have in coming to a conclusion in favour of the defender lies there — that she had it in her power to have led proof which would have been conclusive of her case if her case is true, and she has not done it. On the other hand, I have very great difficulty—as I have said already the only thing I am clear about is that we should have insisted upon proof—but passing from that and coming to the question as the case stands, which party is to prevail, I never had more difficulty in any case. But while there is that which I have stated against the defender, there are very peculiar circumstances here tending the other way, and more particularly the nature of the averments which the pursuer makes on this record. They are contained in art. 6 and 7, and in the last half of art. 8 of the condescendence. In art. 6, the pursuer says, "By the said alleged" [*reads*]—and again, "he treated the pursuer as the next heir of entail" [*reads*]—and in the next article he says, "he executed the general conveyance" [*reads*]. Now, wherever the onus of proof lay there is a plain undertaking there to prove these averments. They are made in the most specific terms, and they are averments that might have been quite capable of being proved by a proof of facts and circumstances. But when ordered to state what proof he proposed to lead, he puts in a minute in which he states that his proof consists of certain deeds and of certain things in the record, and he offers no other proof whatever. I think that was taking up a position very unfavourable for him in a case of this kind. Then, again, I cannot lay out of view that his leading averment, upon which he went to issue in this record, was an allegation that the deed, in so far as it related to the lands of Rumgally, was obtained by fraud, and upon that issue he failed. We have no access to know what the evidence upon that trial was. I suggested to the parties whether they would not consent that we should have that evidence, but they would not consent to that. But we know what the issue was, and what the verdict was; and I cannot help thinking that, having made an averment of that kind and gone to trial, it bears very closely on the result of the case as we are now dealing with it. It is very difficult to understand how the fraud in obtaining the disposition could be disproved if the old gentleman had not the least idea that he had the power to evacuate that destination and meant to do it. It is very difficult to see how the same question in a different form is not to some extent at least involved in that matter. And as we are left in the dark upon both sides, and can only find out the intention of the deceased in the way we best can, I am not upon the whole prepared to differ from the result at which the majority of Court arrive in the particular circumstances which we have here. Having no proof of facts and circumstances, we must look to the facts and circumstances as we see them arise upon this record in the case before us. Now I arrive at that conclusion with the greatest possible difficulty. The only thing which I omitted to say has reference to the previous branch of it, namely the law of the case. So far as the law is concerned it goes a considerable way to shake my confidence in the opinion of the majority of our consulted brethren, that so many of them, three or four of them, rest as they do upon the case of *Leitch* v. *Leitch's Trustees*. I am most clearly of opinion that that case has no application to this whatever. That was a case where there was a destination to various parties, whom failing to Andrew Leitch, and so on; and it is perfectly plain that the question there came to be whether the fee had vested in Andrew Leitch unqualified with any substitution whatever. When it came to Andrew Leitch he had a *jus crediti* to the fee of the estate; so that if he had died the estate would have gone not to any substitute but to his own heir at law. That is perfectly clear. I had occasion to point this out in the case of *Campbell* of Melfort, on 21st December 1866, 5 Macph. 213. That was a case very similar in some respects to the case of *Leitch* v. *Leitch's Trustees*. There were substitutions there, and there was a *jus crediti* in favour of a young gentlemen who was found to have the fee of the estate with certain substitutions. He executed a general disposition in favour of his mother, and the question we had to decide was, whether the estate was carried to his mother; and we decided that it was, but upon the principle that when the estate came to him it vested in him absolutely notwithstanding of the substitutions, and I think I expressly stated, with the authority of the rest of the Court, that when it came to him if he had died without executing that general disposition it would have gone to his own heir; and, referring to the case of *Leitch* v. *Leitch's Trustees*, I took occasion to say this—"If the views I have just stated are correct" [*reads to* "I am not here to give any opinion."] I read that because I could not more distinctly state the view which I take of the case of *Leitch*, and because that was a case in which I delivered the opinion of the Court, and in that opinion all the judges then in this Division concurred. It is quite plain that if we had taken a different view of the case of *Leitch* we could not have done what we did in that case, and neither the one nor the other has the slightest bearing on the question whether a general disposition will or will not evacuate a substitution which otherwise would take effect. They are both cases in which the substitution would not have taken effect, in which the party became absolute fiar, and the thing would have descended to his own heirs though he had left no deed whatever. If there be anything clear in this case on the matter of law, it certainly is that the case of *Leitch's Trustees* has no application whatever to the present. Now, although I came to the conclusion in favour of the defender with difficulty, I have thought it necessary, at the same time, to state my clear opinion as to the matter of law, because, though the case is important in matter of amount, it is still more important in the question of general law, though, perhaps, that arises more for observation than for absolute decision.

Lord Ardmillan—The granter of the deed which has given rise to the present dispute, was institute under the entail of Rumgally; and on examination of that entail it appears, and is now not matter of question, that the fetters of the entail do not apply to the institute. The entailed investiture only commenced in the person of the next heir succeeding after Mr Thoms; and he himself held the estate free from fetters. He was the proprietor in fee-simple. He could have sold the estate or given it away. His power to do so is beyond a doubt, and his deed, if habile as a conveyance or an ob-

ligation to convey, and if clear in its terms, is assuredly effectual. There is no question of power.

He has executed a general disposition and conveyance of all his property, heritable and moveable, real and personal, in favour of Miss Robina Thoms, his illegitimate daughter; and this action of reduction has been brought to set aside that conveyance.

The pursuer, the brother and heir of Alexander Thoms, came into Court alleging that the disposition was intended to convey only personal estate, and that it was fraudulently impetrated from the granter by the defender and her agent Mr Welch, on the false pretence that the deed did convey nothing but personal property, and that, on that assurance and in that belief, the late Mr Thoms signed the deed. It has now been ascertained by the verdict of a jury that these averments are without foundation. It is no longer disputed that a small heritable property was conveyed. We must now hold that there was no essential error, and no fraud, and that the granter did intend to convey some heritage,—thus contradicting the pursuer's plea that only personal property was meant to be comprehended. But notwithstanding the verdict, the pursuer insists on the declaratory conclusions of the action. He maintains (1st), that the general disposition was inhabile as a conveyance of the estate or an obligation to convey the estate of Rumgally; that the deed could not convey the estate, even though it were clear that it was the granter's intention to include it: And (2d), that from the terms of the deed, and the evidence afforded by the surrounding facts and circumstances instructed by the record and the documents in process, it plainly appears that the late Mr Thom did not intend to include the estate of Rumgally in his general conveyance. On the first of these points I concur in the opinion of Lords Benholme and Neaves, and also in the remarks of Lord Barcaple. I do not think that the argument of Lord Curriehill on the state of the titles and the feudal difficulties of procedure is well founded. On the second point I am of opinion that there are no sufficient grounds for limiting the comprehensiveness of the general disposition. I gather the intention from the words of the deed, and I see no reason to doubt that the granter meant what he has said, and did not mean to make an exception which he has not expressed. In regard to the allowance of proof, I have only to say, 1st, that proof of the expression of intention otherwise than by the deed, is out of the question; and 2nd, that proof has not been offered or craved by either party. In the absence of proof I look to the clear words of the deed.

Even if I felt at liberty to speculate as to the probable intention of Mr Thoms, I do not think that I could arrive at the conclusion that he intended to exclude this landed property from his general conveyance. I see nothing to support that inference. It is now clear that the pursuer's plea, that the granter meant only to convey personal estate, is not well founded. He meant to convey, and did convey, one heritable estate. The deed bears to be a conveyance of all his heritable estates. I see nothing unnatural or unreasonable in believing that he meant to do so. He had educated this daughter, who was living in family with him, and for whom it is obvious that he entertained affection, and it may truly be said, that there is nothing improbable or unnatural in his giving her this estate. But I enter on no such speculation. The words of the deed are clear and wide. It is impossible to gather from its terms any materials for presuming an intention contrary to its terms; and there is nothing in the state of the titles, or in what we see of the surrounding facts and circumstances, which can justify me in construing the deed otherwise than according to its own terms. I retain the views which I expressed on the question of intention in the case of *Hepburn*, and in the case of *Chisholm*, and I do not think that I am in any way departing from these views in now expressing an opinion, which to my own mind is clear, in favour of the defender in this cause.

Agent for Pursuer—A. J. Napier, W.S.

Agents for Defender—Hill, Reid, & Drummond, W.S.

Monday, March 30.

SANDERSON AND MUIRHEAD *v.* MACFARLANE AND OTHERS.

Church—Presbytery—Heritor—Assessment—Minister—Cautioner. Tradesmen employed to execute repairs on Parish Church, sued the parish minister and the presbytery, conjunctly and severally, for payment. The minister died, and the action was transferred against his representative, between whom and the pursuers the action was litigated, no decree being taken against the presbytery, although they lodged no defences. The Lord Ordinary gave judgment against the representative of the minister, on the ground that the minister was proved to have been the direct and immediate employer of the pursuers, but the Court recalled, and remitted to the Lord Ordinary, to give the pursuers an opportunity of following out the action as against the presbytery. Observations as to the duty of the presbytery in recovering payment, from the heritors, of the assessment for the repairs.

This action was originally brought by Messrs Sanderson & Muirhead, wrights and builders, Edinburgh, against the late Rev. Dr Macfarlane, minister of Duddingston, as an individual, and the Presbytery of Edinburgh, as a body, and the individual members of the Presbytery, concluding that "the defenders, viz., the said Rev. James Macfarlane individually, and also he and the other members of the Presbytery of Edinburgh, at least such of them as authorised the repairs to be made on Duddingston Church, referred to in the account thereof aftermentioned, ought and should be discerned and ordained, by decree of the Lords of our council and session, conjunctly and severally, to make payment to the pursuers of the sum of £959, 18s. 9¾d., being the amount of an account for materials furnished and work done by the pursurers, on the employment of the defenders," with interest. Dr Macfarlane having died after the execution of the summons, the action was transferred against Mrs Macfarlane, his widow and executrix, and, no defences being lodged, decree in absence was taken against Mrs Macfarlane, but no decree was taken against the Presbytery. Thereafter the decree against Mrs Macfarlane was opened up, and a record was made up between her and the pursuers. After a proof, the Lord Ordinary (Ormidale) found, as matter of fact, that the work for which the pursuers' account was charged was duly performed by them, and that no objection had been taken to the