as a school-house, reformatory, house of refuge, poorhouse, public lunatic asylum, town-house, sheriff, burgh, or justice of the peace court-house, town or county prison, police station or lock-up house, or house for religious worship or charitable purposes." But ministers' manses and glebes are not among the exemptions. It is impossible to hold the 51st section broad enough to cover the case of a manse and glebe. The minister, though not in a proper sense a *proprietor*, falls within the designation of a "person in receipt of rents."

Again, was there anything at the time the Act was passed to give the minister the benefit of the case of *Forbes* v. *Gibson?* certainly not.

I hold that there was no exemption of ministers at the time of passing the Act, and nothing in the Act exempting them. I therefore entertain no doubt, that under the Stewartry of Kirkcudbright Roads Act 1864 the pursuer is liable to be assessed in the manner in which he has been assessed, and that the Lord Ordinary's interlocutor should be recalled.

LORD DEAS and LORD ARDMILLAN concurred.

Agent for Pursuer—W. S. Stuart, S.S.C.

Agent for Defender—Hunter, Blair, & Cowan, W.S.

Friday, July 10.

FLETCHER *v.* FLETCHER CAMPBELL.

Entail—Destination—Construction of Clauses. A executed a deed of entail conveying her estate of P to B, second son of X, and the heirs-male of his body, whom failing to C, third son of X, and the heirs-male of his body, with the provision that, in the event of any of the heirs of tailzie succeeding to the estate of A, then the estate of P should forthwith devolve on the next immediate heir of tailzie, so that the estate of P should never be conjoined with the estate of A; and that the said heir succeeding to A should thereupon be obliged to denude himself of P in favour of the next branch of the *heirs* of tailzie; and that the estate of P should be redeemable from the said heir succeeding to A by the next immediate second or other son or brother, and the heirs-male of their bodies called to the succession of P, upon payment of ten merks Scots to the said heir succeeding to A at the first term of Whitsunday or Martinmas after his succession. B took P under the entail, but afterwards succeeding to A, devolved P on C. C also succeeded to A, but kept both estates till his death, when his eldest son D took A, and his second son E took P. In a subsequent action at the instance of D's eldest son, born after the partition of the estates between D and E, to have E ordained to denude himself of P in his favour—*Held*, (1) that on a sound consideration of the intention of the entailer, as expressed in the deed of entail, E had a preferable right to the pursuer in the estate of P; (2) that the eldest son of the heir in possession of P did not belong to a different but to the same branch of heirs of tailzie as his father; (3) that the branch of heirs on whom P devolved by the succession of the previous branch to A, acquired under the entail an indefeasible right to P, and could not afterwards be forced to denude in favour of a subsequently emerging heir of the former branch; and (4) that the words "next immediate second or other son or brother," in the devolution clause of the deed of entail, meant "next immediate second or other *younger* son or brother."

Question—Whether E had right to P in preference to D's *second* son?

Entail—Succession—Prescription. E succeeded to an entailed estate in 1806. E's elder brother D had a son born in 1827, who came of age in 1848, and in 1867 brought an action of declarator against E, claiming his estate. *Held* that the claim was not excluded by prescription.

This was an action of declarator, brought by Mr John Fletcher, eldest son of Mr Fletcher of Salton, against his uncle, Mr Henry Fletcher Campbell of Boquhan; and the object of the action was to have it found that, under the entail of the said estate of Boquhan, the defender is now bound to denude in favour of the pursuer.

The question arose out of the deed of entail of the estate of Boquhan, executed by Mrs Mary Campbell in the year 1759.

The estate was by this deed conveyed, under the fetters of an entail, "to and in favour of Lieutenant-Colonel Henry Fletcher, *second* son to Andrew Fletcher of Milton, one of the senators of the College of Justice, and the heirs-male of his body; whom failing, to John Fletcher, *third* son to the said Andrew Fletcher, and the heirs-male of his body; whom failing, to the *second* son of Andrew Fletcher, auditor in Exchequer, and the heirs-male of that second son's body; whom failing, to the *younger* sons of the said Andrew Fletcher, auditor in Exchequer, according to their seniority, and the heirs-male of their bodies; whom failing, to the *second* or *other* sons of the heir in possession of the estate of Salton, descended of the body of the said Andrew Fletcher of Milton and Elizabeth Kinloch, his spouse, according to their seniority, and the heirs-male of their bodies."

The deed afterwards declares, "that in case the said Henry Fletcher, and the heirs-male of his body, or any of the said heirs of tailzie who shall, in virtue hereof, be possessed of the lands and others before disponed, shall, at any time hereafter, succeed to the lands of Salton, or that the same shall devolve to any of them, then and in any such event, whensoever and how oft soever the same may happen, the lands and estate before disponed shall forthwith devolve to the next immediate heir of tailzie, and the heirs-male of his body, under the substitution before limited, so that the said lands and estate of Boquhan shall never be conjoined with the estate of Salton; and the said Henry Fletcher, and the other heirs of tailzie, shall, upon succeeding to the estate of Salton, be obliged to denude and divest themselves of the lands and others before disponed, to and in favour of the next branch of the heirs of tailzie; and the said lands and estate of Boquhan are hereby declared to be redeemable from the said Henry Fletcher and the other heirs of tailzie who shall succeed to the lands and estate of Salton, by the next immediate second or other son or brother, and the heirs-male of their bodies, called to the succession of the estate of Boquhan by the limitations of the succession above written, upon payment of ten merks Scots to the said Henry Fletcher, or any other of the said heirs of tailzie who shall succeed to the foresaid lands and estate of Salton, at the first term of Whitsunday or Martinmas, or any

subsequent term, after the succession of the said estate of Salton shall devolve on the said Henry Fletcher, or any of the other heirs of tailzie."

Of the persons called to the succession, the first-named Colonel Henry Fletcher took up the estate of Boquhan (assuming under the entail the surname of Campbell); and, afterwards succeeding to Salton, devolved Boquhan on his brother, General John Fletcher Campbell. General John, who added by a supplementary entail, and with an additional substitution, the lands of Glentirran and others to the estate of Boquhan, also succeeded to Salton in 1803 on the death of Colonel Henry without issue, and died in 1806. General John kept both estates vested in himself until his death, though he was not entitled to do so. He left two sons—Andrew, born in 1796, and so ten years old at his father's death; and the defender, Henry Fletcher Campbell, born in 1800, and so six years old at the date of that event.

Of these sons, Andrew the elder took up the estate of Salton. The defender, the younger son, made up a title to Boquhan; and from his father's death in 1806 down to the date of the present action, being for a period of more than sixty years, had remained in possession of that estate.

The defender's title to Boquhan was now challenged by the pursuer, Mr John Fletcher Campbell, in the following circumstances:—Andrew Fletcher of Salton, the defender's elder brother, was married in 1825, nineteen years after the allocation of the estates between the brothers. The pursuer was the eldest son of this marriage, and was born on 7th February 1827. He therefore attained majority on 7th February 1848, and is now more than forty years of age. During all these forty years, down to a very recent period, neither the pursuer nor any one on his behalf laid claim to the estate of Boquhan, or attempted to take it from the defender. But on 12th February 1867 the present action was brought, concluding for decree of declarator that the pursuer, and not the defender, was the true proprietor of that estate. The ground of action was shortly this—That under the entail of Boquhan the pursuer, as eldest son of Andrew Fletcher of Salton, and so the heir-male of his father's body, and called in the entail immediately after him, was entitled to succeed to Boquhan on his father's succeeding to Salton, and would have done so had he been in existence at the time of that event taking place; and that although, prior to his birth in 1827, the defender might be entitled to take up the estate as next heir of investiture, he became, as soon as the pursuer was born, bound to denude in the pursuer's favour as a nearer heir, and still continues so bound.

The Lord Ordinary (Kinloch), on 5th December 1867, found the pursuer had not established any legal right or title to the lands of Boquhan and others referred to in the summons, in competition with or in preference to the defender, and therefore assoilzied the defender with expenses. In the note to his interlocutor, after narrating the facts and the grounds of action as above set forth, his Lordship proceeds:—

"It appears to the Lord Ordinary that the question between the parties must be determined by a sound consideration of the entailer's intention and meaning, as expressed in the deed of entail. The question is not one concerning fetters. It does not fall under the principle of construction applicable to such a question. In the case of fettering clauses, the law, which always presumes for freedom, will construe the limitations rigidly, and will not impose them to any further extent than the words rigorously construed require. The present is not a question of limitations, but of destination. It is a question in which the public or creditors are, properly speaking, not concerned, but which lies exclusively between the entailer and his own heirs of entail. The only principle applicable to such a case is, that the due intention and meaning of the entailer are to be discovered and given effect to; the great canon of construction being always borne in view,—that intention is not to be made the subject of a mere probable guess, but to be gathered from the language employed, fairly and reasonably construed.

"For the entailer's purpose and will in the matter in question, reference must be made to the clause of devolution in the entail—in other words, the clause specially adapted to the case of one or other of the heirs succeeding to the estate of Salton, and providing in that case for a devolution of the estate of Boquhan. There is no question raised at present by the clause of destination, properly so called, which, considered by itself, is free from doubt. The clause may, however, be of use in clearing the entailer's intention.

"What the pursuer maintains is, that whenever the proprietor of Boquhan succeeded to the estate of Salton, the clause of devolution provided that the estate of Boquhan should pass to the individual, whoever he might be, standing immediately after him in the order of succession; and that thus, when his father succeeded to Salton, he himself, (if in existence), being his father's heir-male of the body, became entitled to take Boquhan. It is on this construction of the clause of devolution that the pursuer's whole case is founded. But the Lord Ordinary, after giving it his best consideration, cannot so construe the clause. It is true that the clause states Boquhan as devolving 'to the next immediate heir of tailzie, and the heirs-male of his body, under the substitution before limited,' and the case of the pursuer is rested on this portion of the clause. But, for a right apprehension of the words, the whole clause must be read, and its general framework considered. The principle on which the clause of destination was framed by the entailer, was to state successively a certain number of individuals, each of whom, and the heirs-male of his body, is successively to take the estate. Each of these individuals forms, with the heirs-male of his body, a different branch of the succession. The individuals who are thus successive *stirpes* are for the most part second sons, or sons still younger. The last or general devolution is on the second son of the laird of Salton, emphatically passing by the eldest. It is on 'the second and other sons of the heir in possession of the estate of Salton, according to their seniority, and the heirs-male of their bodies.' As the Lord Ordinary reads the clause of devolution, the transference of the estate of Boquhan thereby provided for is not from individual to individual, but from branch to branch. The condition of succession to the estate of Salton is not merely comprehensive of the individuals, but of the heirs-male of their body. The case contemplated in regard to the institute Henry Fletcher, who may be considered the prototype of the others, is 'in case the said Henry Fletcher, and the heirs-male of his body, shall at any time hereafter succeed to the lands and estate of Salton.' And it appears from the entail of Salton, which, at the request of the Lord Ordinary, has been put into

process, that this destination to heirs-male of the body is the leading destination in the disposition under which Andrew Fletcher, the father of the pursuer, at present holds the estate. With this contingency in view, the entailer, in the clause in question, declares that, in that event, the estate of Boquhan 'shall forthwith devolve to the next immediate heir of tailzie, and the heirs-male of his body, under the substitution before limited; and the said Henry Fletcher, and the other heirs of tailzie, shall, upon succeeding to the estate of Salton, be obliged to denude and divest themselves of the lands and others before disponed, to and in favour of the next branch of the heirs of tailzie.' This reference to 'the next branch' of the tailzie shows, as the Lord Ordinary thinks, that under the phrase 'the next immediate heir of tailzie and the heirs-male of his body,' is not designed the heir-male of the body of the immediate holder, as the pursuer maintains, but the head of 'the next branch,' who, and the heirs-male of his body, is called as comprising the branch. This is confirmed by the way in which the clause proceeds to provide for the formal redemption of the estate: 'and the said lands and estate of Boquhan are hereby declared to be redeemable from the said Henry Fletcher, and the other heirs of tailzie who shall succeed to the lands and estate of Salton, by the next immediate second or other son or brother, and the heirs-male of their bodies, called to the succession of the estate of Boquhan by the limitations of succession above written;' this being just another mode of designating the heads of the different branches previously specified. It is plain that the person thus entitled to redeem is the same with the person entitled to take Boquhan in the event of the previous heir succeeding to Salton.

"The inference which the Lord Ordinary draws is, that when Andrew Fletcher, the father of the pursuer, succeeded to the estate of Salton, the pursuer, his eldest son and heir-male of his body, and the immediate heir of Salton (supposing him to have been in life), was not the person in whose favour the devolution of Boquhan operated, but that this estate devolved on what the entail denominates the next branch—that is to say, on an individual, and the heirs-male of his body, who was neither the laird of Salton, nor stood in the position of immediate heir to that estate. In other words, what the Lord Ordinary conceives is, that both the laird of Salton and his eldest son, the heir of Salton, were equally excluded from the succession to Boquhan. If the Lord Ordinary is right in so conceiving, the pursuer, the heir of Salton, had no right to take Boquhan on the succession to Salton opening to his father, even supposing he had been in existence at the time of that event taking place.

"It does not follow (and the Lord Ordinary desires to reserve his opinion on the point) that the devolution in such an event might not take place on the *second* son of the laird of Salton. For although a second son is potentially an heir-male of the body, and as such is in the line of succession to the estate of Boquhan, yet in strictness of language he does not hold the place of an heir at all during the lifetime of his elder brother. He has as little of actual, considered as opposed to possible, connection with the estate as any third party. He might fairly, and within the reason of the case, be considered to constitute the next branch of the entail—that is to say, he is neither the laird of Salton, nor the laird of Salton's heir; and for aught that is certain the estate of Salton may never come, either to him or to the heirs-male of his body.—See *Leslie* v. *Leslie*, H. of L., 29th April, 1742, 1 Pat. 324. But there is no question before the Court in regard to any right, real or supposed, on the part of the second son of the laird of Salton. The only question which is raised regards the right of the pursuer, the eldest son and heir of Salton, to take the estate of Boquhan on the succession to Salton opening to his father; and when this is determined in the negative, nothing more is necessary for the decision of the present case.

"In arriving at the conclusion that, under the entail in question, the pursuer, as the heir of Salton, is as much excluded from the succession to Boquhan as his father the laird of Salton himself, the Lord Ordinary considers himself to be not only giving the only fair effect to the terms of the clause of devolution, but also to be following out the intention of the entailer, as reasonably gathered from the whole provisions of her deed. Her grand object, as she expressly declares, was 'that the said lands and estate of Boquhan shall never be conjoined with the estate of Salton.' With this object in view, it is presumable that on the succession to Salton opening to an heir of Boquhan, she would rather place the right to Boquhan in an independent, or probably independent, branch, than in the direct heir to Salton, who was sure to be Salton himself at no great distance of time. So completely was it her mind to exclude the heir of Salton, not less than the proprietor, from the succession to Boquhan, that in her last and general destination, with the family of Salton brought fully into view, the conveyance is 'to the second and other (evidently meaning younger) sons of the heir in possession of the estate of Salton.' The eldest son or heir is here directly excluded. It would be a strange result if this exclusion should hold good in the direct destination, and yet that, under the general words of the prior destinations, the excluded heir should be admitted.

"The Lord Ordinary has hitherto dealt with the case on the assumption that the pursuer had been born anterior to the time of his father's succession to Salton. But he must now advert to the all-important fact that the pursuer was not born till more than twenty years after that event, and after the defender had in consequence assumed possession of Boquhan, and retained it for the intervening time. It appears to the Lord Ordinary that this fact affords to the defender an additional and conclusive argument in his favour.

"At the date when Andrew Fletcher succeeded to Salton he was unmarried. There was no competitor for Boquhan with the defender, his younger brother. The devolution of Boquhan on the defender took place unobjected to, and was fully completed. What is to be the result of this, in right legal construction? It appears to the Lord Ordinary to be simply this, that the estate must remain and descend in the line of succession into which it was thus put, until one or other of the heirs succeed to Salton, and there arises room for a fresh devolution.

"The question is not one of succession, in the ordinary sense of the term. It is what must be held the fair import and effect of the written provision contained in the clause of devolution. The devolution of Boquhan on the defender was *ex hypothesi* rightly made at the time. Andrew Fletcher admittedly forfeited Boquhan; and being unmarried, there was no heir-male of his body interested in the matter. The estate of Boquhan went,

in terms of the devolution, to the defender, 'and the heirs-male of his body.' This was the new settlement of the estate, rightly made in terms of the clause of devolution. The Lord Ordinary can see no sufficient ground for holding that this settlement was to be broken by any other event than the succession to Salton of one or other of the heirs now called. The estate being rightly settled at the time on the defender, and the heirs-male of his body, the clauses of devolution, as the Lord Ordinary thinks, so left things to remain. There is no clause in the deed (such as often occurs in entails, and occurs in the entail of Salton) providing for a cession of Boquhan by the defender or his heirs-male, in the event of some one emerging who, if he had been born prior to the succession opening, would have had a preferable claim to the defender. Nor is there, as the Lord Ordinary thinks, any sufficient ground for implying such a result as contemplated by the entailer. On the contrary, it is more reasonable to presume that the estate, having gone into the new branch of succession, would be considered by her as there remaining. She had thereby obtained fulfilment of her wish that the estate of Boquhan should be kept entirely apart from that of Salton. It is not very probable that she would desire that many years afterwards (sixty years and more, as it has happened in the present case) the proprietor of Boquhan and his family should be turned out of doors in order to make way for a son of the family of Salton happening to be born in the interval. That they should be so expelled in order to admit to the possession of Boquhan the eldest son and immediate heir of Salton, seems to the Lord Ordinary a thing as alien from her presumable intention as is well capable of being conceived.

"The main ground of the pursuer's contention on this point was the authority supposed to be derived from the case of *Stewart* v. *Nicolson*, 2 Dec. 1859, 22 D., 72 (the *Carnock* case), as contrasted with the immediately preceding case of *Grant* v. *Grant's Trustees*, 2 Dec. 1859, 22 D., 53.

"In the case of *Grant* v. *Grant's Trustees* it was decided that, in the case of fee-simple property, the heir who is rightly served at the time becomes indefeasible proprietor, and is not bound to cede his right to one who, if he had then been in existence, would have had a preferable claim, and who has since emerged. This doctrine does not affect the case of an heir *in utero*, who is in the same position with a living heir; but it excludes any other emergence from affording a title of competition with the heir rightly served at the time. This point may probably be considered as conclusively ruled by this judgment. It appears to the Lord Ordinary to have been ruled in strict accordance with sound principles of policy; for nothing could exceed the confusion, the uncertainty, the crying hardship, which would prevail, if the true heir at the time was not held to remain such permanently, but was obliged, after an interval of indefinite length, to cede possession to a claimant coming into existence in the interval, with no better plea to urge, than that if he had been born previously things would have been different.

"But the pursuer contended that, although the point was thus settled in the case of fee-simple property, it was decided, in the immediately subsequent case of *Stewart* v. *Nicolson*, that the rule is different in the case of property held under entail; as to which the heir in possession is always obliged to cede the property to a nearer heir afterwards emerging, for whom, in that case, he is to be considered as having acted as mere trustee.

"The Lord Ordinary is not prepared to view the *Carnock* case as finally establishing this position. The opinions of the majority of the judges unquestionably go to this conclusion. But it was not indispensable to the decision of the case that the point should be so ruled. And one learned Lord, who concurred with his brethren in their result, refused to rest his opinion on this ground. It may still deserve judicial consideration whether, in this respect, there is any sound reason for distinction between one kind of real property and another.

"But, further, it appears to the Lord Ordinary, that although the present is the case of an entailed estate, yet it stands clear of the supposed authority of the *Carnock* case, inasmuch as the question at issue is not to be solved by the application of any general principle, but entirely by construction of the terms of a special provision. The present, as already said, is not a case of ordinary entail succession. It is a case arising on a clause of devolution, and to be determined by a sound consideration of the entailer's meaning and intention when framing that clause. The case is, in this respect, a special case, as every such case must be. And it is on its own specialities that the Lord Ordinary has decided it. Whatever may be the rule generally with regard to an heir in possession ceding an entailed estate in favour of a nearer heir emerging, the Lord Ordinary is of opinion that, under this entail, the defender, as proprietor of Boquhan, is not now bound to cede that property to the pursuer, the heir of Salton, however, in other circumstances, vested with a preferable claim.

"The Lord Ordinary had presented to him at the debate a great deal of elaborate discussion on the defence of prescription, as set up by the defender in protection of his right to Boquhan. The Lord Ordinary would have great difficulty in sustaining any plea of prescription in the defender's favour. The long prescription could not well be pleaded, without deduction of minority, and indeed of an additional period of *non valentia* or non-existence. And after the decision in the *Bargany* cause, the vicennial prescription could scarcely be made applicable to a retour conceived in such terms as here occur. But the Lord Ordinary has not found it necessary to mature his opinion on these points, considering the defender entitled to prevail on other grounds."

The pursuer reclaimed.

CLARK, LEE, and SHAND, for him.

YOUNG, GIFFORD, and DUNCAN for defender.

At advising—

LORD PRESIDENT—The defender, Henry Fletcher Campbell, is in possession of Boquhan as heir under an entail executed by Mrs Mary Campbell in 1759, under titles made up in 1821. The pursuer, John Fletcher, is nephew to the defender, being son of the defender's elder brother, who is in possession of Salton. The pursuer was born in 1827, and he says that on his birth he was entitled to take Boquhan as nearer heir than the defender, and that as such he is now entitled to oust the defender. It is remarkable the claim has not been advanced till now, but it does not appear to be excluded by prescription. The question depends on the interpretation of the deed of 1759, and its clause of devolution. Some things on the face of that deed are plain enough. The purpose of Miss Campbell was to settle the estate on the family of

Lord Milton, but she gives no right in any event to Lord Milton himself, nor to his eldest son, nor in any event to that eldest son's eldest son. Lord Milton had three sons at that time, Andrew, Henry, and John. The entailer first conveys the estate to Henry and the heirs-male of his body. Failing him, she calls John and the heirs-male of his body; and failing these, the second son of the eldest son of Lord Milton, thus excluding the eldest son of Lord Milton and *his* eldest son.

The expression in the destination clause, "to the second or *other* sons of the heir in possession of the estate of Salton," can mean nothing else than "second and *younger* sons of the heir in possession of" Salton. I think the entailer had it in her mind to create a succession in Boquhan which should not be coincident with the line of succession in Salton, and she would have accomplished this by this clause if the direct line of Andrew Fletcher had not failed. But not only might it fail, but at the date of the deed it had not begun, as Andrew Fletcher was then unmarried. She had therefore to make some provision for the case of the heir in possession of Salton succeeding to Boquhan. But before considering the clause of devolution, it is important to look at the facts.

On the death of the entailer, Lord Milton was still alive, and in possession of Salton. Andrew Fletcher was also alive. Henry took up Boquhan as institute, and continued in possession thereof till 1779. But in the interval, in 1776, Lord Milton died, and was succeeded by Andrew, who died in 1779 without issue. Then occurred the failure in the elder line. Henry succeeded to Salton, and the consequence was Boquhan devolved on John Fletcher, Henry having no family. In 1803 Henry died without issue. So John succeeded to Salton, and was bound to give up Boquhan to the next heir. But, in point of fact, John kept both estates till his death in 1806. But this he was not entitled to do, therefore no one's rights can be prejudiced by it. He had two sons—Andrew, the eldest, born in 1796, and Henry, born in 1800.

When John died, the eldest son (who was the father of the pursuer) and the defender were in a state of uncertainty with regard to the succession. In consequence, however, of John's death in 1806, a question does arise—who was then entitled to Boquhan?

But there is a still earlier question in the history of the succession which must be answered. It arose in 1803 when the pursuer's grandfather succeeded to Salton. Who was then entitled to Boquhan? The pursuer contends that his father had right to Boquhan in 1803 as eldest son of John who had succeeded to Salton, and that on the succession of the pursuer's father to Salton in 1806 Boquhan devolved on the defender (he concedes that), but conditionally, and only because no nearer heir was in existence. A nearer heir, however, was possible, the pursuer says, and actually did arise by the pursuer's birth in 1827, on which event the defender was bound to cede Boquhan to the nearer heir which had come into existence.

The defender maintains that in 1803 the father was bound to cede Boquhan to his second son, who was entitled to it on an absolute and indefeasible title. If the defender is right here it supersedes the necessity of considering any other question. But if the pursuer's contention is right, that the eldest son of him who succeeds to Salton is a nearer heir of Boquhan, he must make out that though the second son takes Boquhan it is a defeasible right.

Consider the clause of devolution. Its object is plain enough. The entailer expresses it distinctly that *Boquhan is never to be conjoined with Salton.* Take that in connection with the destination clause. The entailer first gives the succession to a line different from that of the succession to Salton. But she foresees that the direct line of succession to Salton may fail, so she puts into the deed the clause of devolution. I think, therefore, that when she says Boquhan and Salton are never to be conjoined she means that they must run in two different lines of succession. It is the same thing as saying that in the event of the elder line failing, and the second line becoming the elder, her estate shall not go in that line.

The clause of devolution does not furnish much additional argument on either side. But the two clauses that follow we must read along with it as one clause, a clause consisting of three parts. The first part prescribes in what event the devolution is to take place. The second part provides what obligation is to be incumbent on the heir succeeding to Salton. And the third part declares Boquhan to be redeemable from the heir succeeding to Salton by the next immediate second or other son or brother, and the heirs-male of their bodies. The expression used in the second part of the clause is, "the next *branch* of the heirs of tailzie." Suppose Henry Fletcher had had a son, his obligation here is to denude in favour of the next branch of the heirs of tailzie. Was his own son the next *branch* supposing he had had an only son? According to the obvious meaning of the clause, the next branch would have been John Fletcher and his heirs-male. Again, suppose Henry Fletcher has two sons. Is the next branch the elder or the second son? The elder son is the *same* branch as his father, not the next branch. Then, by the third part of the clause, the lands are to be redeemable from the heir succeeding to Salton "by the next immediate second or other son or brother." What does that mean? What is the meaning of the words "or other"? We must interpret them by the help of the clause of destination. The entailer there calls to the succession "the second *or other* sons of the heir in possession of the estate of Salton, descended of the body of the said Andrew Fletcher of Milton and Elizabeth Kinloch his spouse, *according to their seniority*, and the heirs-male of their bodies;" in other words, she calls to the succession the second or other *younger* sons. I think, therefore, we must construe in the same sense the words in the third part of the clause of devolution, and read them as if they were written "the next immediate second or other *younger* son or brother." Taking all the three parts of the clause together it was evidently the purpose of the entailer that her estate should descend in the younger line throughout.

Let us see what would be the effect of adopting the pursuer's construction of the deed of entail. He contends that when one of the heirs under the entail succeeds to Salton, Boquhan must go to the eldest son of that heir, and not to the second son. In short, Boquhan is to descend in the same line as Salton, but always a step in advance. The consequence is, Boquhan is made (according to the pursuer's argument) merely an appanage of Salton. That is a result totally opposed to the whole intention of the entailer.

This is all that is necessary for the decision of the present case, but in a matter of such importance

it would not be right not to notice another point brought before the Court. The pursuer admits that when the defender took the estate after his father's death in 1806, he was right; but he argues that the defender should have given it up to him when he came into existence in 1827. Now the rule of law thus appealed to is an important one. In an ordinary entail no individual of the second branch can take till after absolute failure of the first branch. It may be, however, that there is no existing heir of the first branch, and yet that one may be possible; and the rule of our law used to be that while an heir of the first branch is *in posse* no heir of the second branch can take, because, till then, the heir of the second branch cannot prove the failure of the first branch. But various considerations of expediency and feudal necessity modified the rule to this, that the heir of the second branch should be allowed to serve on the understanding that he was to give up the succession should an heir of the first branch afterwards emerge. This was settled in the case of *M'Kinnon* v. *M'Kinnon*, 15th June 1756, M. 6566; *M'Kinnon* v. *M'Donald*, 14th Feb. 1765, M. 5279; 15th Feb. 1765, M. 5290. The question is, does that rule apply to a case like the present? I humbly apprehend it does not. It assumes the intention of the entailer to be that no one in the posterior branch is to take till after absolute failure of the first branch; but if that is not the intention of the entailer then the rule does not apply. The entailer here says that in the event of any of the heirs succeeding to Salton the estate of Boquhan "shall *forthwith* devolve to the next immediate heir of tailzie;" that the heirs so succeeding shall "be obliged to denude and divest themselves of" Boquhan "to and in favour of the next branch of the heirs of tailzie;" and that the said estate of Boquhan shall be redeemable from the heir so succeeding "by the next immediate second or other son or brother, and the heirs-male of their bodies, upon payment of ten merks Scots" to the heir so succeeding to Salton, "at the first term of Whitsunday or Martinmas" after the succession to Salton has so devolved. Shall the person who is to receive an immediate disposition in favour of himself and the heirs-male of his body not succeed? To such a case as this the rule which has been appealed to has, in my opinion, no application.

The pursuer also appealed to the *Carnock* case (*Stewart* v. *Nicolson*, 2d Dec. 1859, 22 D. 72), in which it was found that a son born to Sir Michael Shaw Stewart during pending proceedings was found entitled to oust his uncle. But this was done under the following special clause of the deed of entail, (p. 76 of the report):—"For preventing any unnecessary lawsuits between him or his heirs and the next heir called to the succession of the estate of Carnock by the foresaid deeds of entail, he, the said Houston Stewart *alias* Nicolson, and his heirs, who shall succeed to the said estate of Carnock shall be obliged that in case he or they shall succeed to any other estate," to "denude in favours of the next heir" of tailzie: "*But always with and under the conditions and provisions of their again denuding in case of the after-existence of a nearer heir.*" It is difficult to conceive anything more in contrast with the clause in the Boquhan entail. The direction in the Carnock entail was to convey *in the meantime*, with a provision for subsequent denuding. I am for adhering to the Lord Ordinary's interlocutor.

Lord Deas—I concur. I am of opinion that though the pursuer had been alive in 1806 he would not have been entitled to the estate of Boquhan. And I further think that, even though he had been entitled then, he would not be entitled now, as he was not alive in 1806. Either of these grounds is sufficient.

Lord Ardmillan—The structure of the clause of destination in this Entail of Boquhan and the terms of the clause are both important. The structure is in this respect worthy of observation—that there is a peculiar arrangement in accordance with the clause of devolution which follows. The prescribed succession is to a series of "branches" of heirs, at the head of each of which is a separate stirps, the heirs-male of the body of each of these stirpes being called to the succession. Each stirps, with the heirs-male of his body, forms successively a separate "branch of the heirs of tailzie." From the terms of this clause of destination we next perceive that the estate of Boquhan is specially destined to a series of second and younger sons of the family of Fletcher of Salton. Each stirps or head to which I have alluded is a second or other younger son, and in the concluding part of the clause the ultimate destination is to the "second or other sons of the heir in possession of Salton. From this clause, even construed alone, I gather the intention of the entailer that Boquhan shall not be inherited by the proprietor of Salton or his eldest son. But this is made still more clear by the provision "that the lands and estate of Boquhan shall never be conjoined with the estate of Salton." Then there is the clause of devolution, on which we have had so much ingenious argument. Of that clause there are three parts, but all coherent and harmonious, indicative of one intention, framed to effect one purpose, viz., to prevent the conjunction of the two estates—to secure the succession of Boquhan to second or other younger sons.

The first of these parts or divisions of the clause is the declaration that any heir in possession of Boquhan succeeding to Salton shall forthwith devolve Boquhan to "the next immediate heir of tailzie and the heirs-male of his body under the substitution before limited, so that the estate of Boquhan shall never be conjoined with the estate of Salton."

The second part is the obligation of the heir so succeeding to Salton to denude and divest of Boquhan in favour of "the next branch of the heirs of tailzie." Now these "branches" appear plainly in the clause of destination, and at the head of each "branch" is a new stirps, to whom and his heirs-male the devolution takes place.

The third part of this clause is the declaration of the right to redeem. That right is given to "the next immediate second or other son or brother" called to the succession of Boquhan by the destination in the tailzie. I agree with your Lordship in the construction of this part of the clause, which to my mind leads, when read with the previous parts, to this result—that it is the *enixa voluntas* of the entailer that the estate of Boquhan shall never be merged or conjoined in the estate of Salton, but shall be a succession for cadets—an inheritance for the second sons of the family.

The whole deed—both the clause of destination and the clause of devolution in all its parts—must be read together; and so reading it I have really no doubt of its meaning.

The facts in this case, to which the provisions of the deed and the rules of law are to be applied, have been clearly stated by your Lordship, and are not disputed. I need not repeat them. It is enough to say that General John Campbell took Boquhan by devolution from his brother Henry, who succeeded to Salton. General John, on the death of Henry, succeeded to Salton in 1803, and died in 1806. He had two sons, the present Mr Fletcher of Salton, born in 1796, and the defender, Henry, born in 1800. On the death of General John, his eldest son took Salton, and Henry, his second son, took Boquhan, assuming the name of Campbell in terms of the entail. The defender has from that time possessed the estate of Boquhan. After a lapse of sixty years, the pursuer, who is the eldest son and heir of Fletcher of Salton, brings this action, claiming the estate of Boquhan under this entail. The pursuer was born in 1827—twenty years after the defender succeeded; and brought the action in 1867—sixty years after the defender succeeded. His right to prevail depends on the construction of the deed.

Two questions arise,—1st, If the pursuer had been alive when, in 1803, General John succeeded to Salton, how would the succession have passed? I am of opinion that Boquhan would then have devolved on the defender as the next branch of the heirs of entail. I am also of opinion that, on the death of General John in 1806, the estate of Boquhan would not have passed to the pursuer if he had been then alive, but rightly belonged to and was vested in the defender, Henry Fletcher Campbell, second son of General John Campbell, and heir of tailzie under this destination of succession.

If this view is correct the second question does not arise; but as the parties probably desire the opinion of the Court on that point also, I add that, even on the assumption that this pursuer, if born before 1803 or 1806, would have succeeded to Boquhan, still I am of opinion that the defender, having justly and lawfully succeeded to Boquhan and held it for sixty years, cannot be now extruded from his rights and possession at the instance of a gentleman born in 1827 and raising the action in 1867. I do not think that this claim of the pursuer is cut off by prescription or by long delay of action. And I am of opinion that the law would not have sustained this claim by an emerging heir—son of the proprietor of Salton—even if it had been made on the birth or on the majority of such emerging heir. But the fact of the possession by the defender for sixty years without challenge does create an equitable presumption in his favour.

The defender was, when his father succeeded to Salton in 1803, and also when his father died in 1806, the "next immediate heir of tailzie." Now, in so far as can be gathered from the terms of this entail, there is no condition of devolution, and no obligation to denude, except only in the event of his succession to Salton. Does the birth of a nearer heir, after the lapse of many years, operate as a divestiture of Henry? Does it receive effect under a resolutive condition of Henry's tenure of Boquhan? I answer both these questions in the negative. Henry having succeeded as undoubted heir of entail, we must find every qualification and limitation of his right either in the principles of the common law as applicable to all landed succession, or in the provision of this deed of entail.

It is settled in accordance with all our authorities by the decision in the case of *Grant*, in 1859, that the birth of an emerging heir does *not* divest a proprietor of an estate who has succeeded and possessed in fee-simple and *ab intestato*. The opinions of the Court, especially of Lord President Colonsay and of Lord Ivory, are conclusive. There is no rule or principle of common law which can sustain the pursuer's pleas. Then, is there any rule, different from the common law, applicable to this entailed estate? I say to this entailed estate; because I am clearly of opinion that, if there be no common law rule, then the qualification of this defender's right must be found within this deed of entail. I concur in the views expressed by your Lordship in regard to cases where there is the failure of heirs previously called to succession, and in regard to the case of *M'Kinnon* and to the case of *Carnock*. There is here no condition suspensive of the defender's right. All who had been called before him had failed. No doubt of that. No condition of devolution to an emerging heir is expressed, as it was expressed in the *Carnock* case, and on that express specialty the *decision* in the *Carnock* case depends, though some remarks *obiter* may have gone further. The law will not create by implication a condition resolutive of the right to a landed estate. I decline to seek for conditions or qualifications of the defender's right elsewhere than in the principles of the common law, or the provisions of this entail, and I do not find, either in the common law or in this entail, any resolutive condition, or any obligation to denude in favour of the pursuer as an emerging heir.

Lord Curriehill absent.

Agents for Pursuer—Tods, Murray, & Jamieson, W.S.

Agents for Defender—J. & H. G. Gibson, W.S.

Saturday, July 11.

M'ANDREW *v.* REID AND OTHERS.

Title to Sue—General Service—Heir—Apparency—Timeous Production—Action. In an action which concluded for (1) declarator that a certain *ex facie* absolute disposition granted by the pursuer's ancestor was truly only a security; (2) count, reckoning, and payment; and (3) reconveyance to pursuer of the subjects contained in the disposition — *Held* that a decree of general service of the pursuer as heir of his ancestor, the granter of the disposition—produced in process after the calling of the case, but before defences had been lodged—had been timeously produced.

This action was raised by William M'Andrew, weaver, Kirkintilloch, as "eldest surviving grandson and nearest and lawful heir, served and decerned, or to be served and decerned, to the deceased William M'Andrew." The summons concluded to have it found and declared that a certain disposition granted by the pursuer's grandfather to the grandfather of the defender, though apparently absolute, was truly granted only in security, and that the subjects were redeemable by the pursuer as heir foresaid. There were also conclusions for count and reckoning for the rents and profits of the subjects contained in the disposition, and for ordaining the defenders to remove from the said subjects. The summons was dated 5th May last, and called in Court on the 21st May. The decree of service serving the pursuer as nearest and lawful heir of his grandfather was dated the 22d May, the