procurator-fiscall, ye shall confirm them as executors surrogate in place of the procurator-fiscall."

Now, the archbishops and bishops were assuming the provinces of this Court in giving such instructions, and consequently they were ordered to be recorded in the books of this Court under protest not allowing them to encroach on their jurisdiction. But these instructions recognise that any person having an interest in the succession may be confirmed executor. There are certain classes to be confirmed, and it was at one time inferred that you could confirm no one outside these classes; but in the case of *Crawfurd* (M. 3818), general disponees, who are not a class mentioned in these instructions, came forward and were preferred to the next-of-kin as executors, and since that time it has always been held that general disponees, and not the next-of-kin, come first, and are entitled to be confirmed before anyone else.

That being so, and now that the father and mother have under the recent law become beneficiaries, the only ground on which they were not confirmed is done away with, and therefore I have not the least doubt that they may be confirmed *qua* father or *qua* mother. The only difficulty is in saying whether they can be confirmed *qua* next-of-kin. It is no very great stretch to say that they are among the next-of-kin; but the only thing necessary to say here is that she is to be confirmed *qua* mother. Nothing more need be asked for; that is enough.

Lord Mure—I agree with your Lordships in thinking that this petition should be remitted to the Commissary to amend. Prior to the Intestate Succession Act of 1854, the rule was that all those who had an interest were entitled to be confirmed unless those who had a preferable interest applied, and it was competent to conjoin persons having different interests if it was judged expedient to do so. Now, by that Act four new classes were introduced as having an interest in the succession, and I find that Mr Alexander, in his edition of 1859 of his Commissary Practice, had no difficulty in giving a form of application for the confirmation of the mother as executor.

Lord Deas—I may add, in consequence of the ground on which we have gone in this petition, that the executor-creditor is entitled to be confirmed by the Act of 1695, cap. 41, and the judicial factor by an Act of Sederunt of this Court.

The Court pronounced the following interlocutor:—

> "Recal the interlocutors of the Commissary-Depute and the Commissary, dated respectively the 27th April and 10th May 1876, and remit to the Sheriff of Renfrewshire, as coming in place of the Commissary under the authority of the 35th section of 39th and 40th Victoria, caput 70, to allow the appellant to amend the prayer of the petition, and thereafter to proceed as shall be just, and decern."

Counsel for Petitioner—Millie. Agents—J. & A. Hastie, S.S.C.

Wednesday, November 1.

SECOND DIVISION.

[Lord Curriehill, Ordinary.

JOHN ALAN M'DONALD *v.* ALASTAIR M'IAIN M'DONALD.

(*Ante*, vol. xi. p. 290; xii. p. 635.)

Approbate and Reprobate—Election—Marriage-Contract—Provision to Children—Power of Apportionment, Exercise of—Condition adjected—Intention.

By an antenuptial contract of marriage the wife's fortune was conveyed to trustees, with directions, on the death of the survivor of the spouses to "pay over or assign" the whole trust-funds to "the child or children of the marriage," in such proportions, and at such time, and under such conditions, as the spouses should by joint-deed appoint, and failing such apportionment, then in certain specified proportions. A portion of the wife's funds, amounting to £25,000, was advanced by the marriage-contract trustees on heritable bond over two estates purchased by the husband for £28,000, during the subsistence of the marriage. The parents, on the narrative that it was their wish to entail those estates, as well as the patrimonial estate of the husband, on the children of the marriage and their heirs before the children of any subsequent marriage of the husband or other substitutes, and that the husband had for that purpose agreed to alter the destination of his patrimonial estate, and to execute an entail of the whole estates, and had executed the same, proceeded in the exercise of their power of division to provide that the above-mentioned sum of £25,000, secured over the husband's estates, should be "settled on and belong to our eldest son and other members of our family in succession, being heirs in possession of the entailed estate," the said sum being the share of the trust-fund "which we do hereby allot and apportion as the share of our eldest son, or, failing him, of the heir of entail succeeding to the said entailed estate, it being our desire and appointment that the said trustees under our marriage-contract before narrated, or the survivors of them, should immediately on the death of the survivor of us renounce and discharge the said heritable bond, and disburden the said lands and estates" of the same. —*Held* that the eldest son was not put to his election between the entailed lands and the £25,000 in the marriage-contract, but that although he took the £25,000 absolutely (which he had been found entitled to do) he was also entitled to remain in possession of the entailed lands.

Opinion (*per* Lord Justice-Clerk) that in respect of the manifest intention of the granter of the entail, the eldest son was bound to pay off the debts affecting the estate, and could be compelled to do so, but not in respect of his taking the £25,000 under the appointment.

This was an action of declarator and denuding at the instance of John Alan M'Donald, second surviving son of the late General Sir John M'Donald

of Dalchosnie and Kinloch Rannoch, against his brother Alastair M'Iain M'Donald of Dalchosnie, colonel in the army, eldest son of the said deceased Sir John M'Donald. The case was the sequel to a previous action of multiplepoinding reported *ante*, vol. xi. p. 290 and H. L., vol. xii. p. 635.

The summons in the present action concluded for declarator (1) that under and by virtue of a joint-settlement and deed of division made and executed by the late Sir John M'Donald and his wife, dated 18th July 1837, and a relative deed of entail of the lands and estates of Dalchosnie, Loch Garry, and Kinloch Rannoch, in the county of Perth, of the same date, made and executed by the said Sir John M'Donald, the defender was bound to make his election whether he would take, absolutely and unconditionally, the sum of £25,000 sterling allocated to him by the said joint-deed of division, or take the entailed estates subject to the condition of the same being discharged and disencumbered of the said sum of £25,000; that he had elected and taken the said sum of £25,000 absolutely, and had thereby frustrated his father's intention in respect of the settlement of the said estates, and reprobated the the said joint-settlement and deed of entail; that he had forfeited his right therein, and that the lands had fallen, devolved, and accresced, and now belonged to the pursuer as next heir appointed to succeed under the deed of entail; (2) that the defender was bound to cede possession to the pursuer of the said estates, and to flit and remove therefrom, or to make compensation to the pursuer for the loss and damage which he had sustained, or might hereafter sustain, by the defender having reprobated the said deeds; or otherwise that the rents of the said lands should be collected and accumulated during the defender's lifetime in such manner as the Court should appoint, and held for the pursuer and the other heirs of entail, and applied in such manner for their behoof from time to time as the Court might direct; or otherwise for declarator that the right, title, and interest of the defender in the said lands was now extinct, and that the same had fallen, devolved, and accresced, and now belonged to the pursuer as the heir-at-law next after the defender of the said Sir John M'Donald.

An amendment of the summons was allowed to the effect of adding a conclusion for declarator that the defender was bound, as a condition of his retaining possession of the estates of Loch Garry and Kinloch Rannoch, to free and relieve the said lands and estate of and from the burden of the debt of £25,000 and all interest and penalties that might have accrued thereon, contained in a bond and disposition in security for £25,000, dated on 13th October 1828, granted by the said Sir John M'Donald in favour of parties named therein; or otherwise, that the defender, by having taken benefit under the said joint-settlement and deed of division and the said relative deed of entail—by his having obtained possession of the lands and estate of Dalchosnie immediately upon his father's death, and by his having taken possession of the estate of Loch Garry and Kinloch Rannoch upon his mother's death—was under obligation and was bound to free and disburden the said estates of Loch Garry and Kinloch Rannoch of the said sum of £25,000 affecting the same, and interest and penalties, and should be ordained to free and relieve the same accordingly, and failing his doing so within a month from the date of decree, or within such time as the Court should appoint, that he should be ordained to cede possession of the said estates of Loch Garry and Kinloch Rannoch to the pursuer, and to flit and remove therefrom.

The facts of the case are fully narrated by the Lord Ordinary in the following Note, appended to his interlocutor assoilzieing the defender:—

"*Note.*—In this action the pursuer, John Alan M'Donald, calls upon the defender, Alastair M'Iain M'Donald, his elder brother and heir of entail now in possession of the entailed estates of Loch Garry and Kinloch Rannoch, in Perthshire, to denude of said estates in favour of him (the pursuer), in respect that he was bound to elect between these estates and a provision of £25,000, appointed to him by his father and mother, the late Sir John and Lady M'Donald, under a deed of appointment and division executed *unico contextu* with the deed of entail, and that he has elected to take the money. The circumstances in which the action has been raised are as follows:—

"In 1826 Sir John M'Donald, then Lieutenant-Colonel M'Donald, of Dalchosnie, was married to the now deceased Adriana M'Inroy (afterwards Lady M'Donald), daughter of the deceased James M'Inroy of Lude. By antenuptial contract of marriage entered into between them, dated 8th September 1826, Sir John M'Donald, in contemplation of the marriage, disponed to himself and Lady M'Donald, in conjunct fee and liferent, but for her liferent use allenarly, in case she should survive him, and to the heirs-male of the marriage, whom failing the heirs-male of Sir John's body in any subsequent marriage, whom failing certain other heirs therein specified, all and whole his estate of Dalchosnie, in the county of Perth, reserving nevertheless full power to Sir John to execute a strict entail of the whole or any part of the said estate, providing only that he should in such entail first call to the succession the series of heirs specified in the contract, in the order therein narrated, and thereafter such other heirs as he should think proper; and should noways defeat or injure Lady M'Donald's liferent right. On the other hand, Lady M'Donald conveyed the whole share and interest of every kind and description in the estate of her father, the said deceased James M'Inroy, to certain trustees, who were to hold the same in trust for the conjunct liferent right and use allenarly of the spouses, and after the death of the spouses to pay over or assign the whole to the child or children to be procreated of the marriage, in such proportions and at such time and under such conditions as Sir John and Lady M'Donald should by any joint deed, or as Lady M'Donald, if the survivor, should by any deed or writing signed by her, direct or appoint; and failing any such direction or appointment, to hold the same after the death of the survivor of the spouses for behoof of the children of the marriage in certain shares and proportions specified in the contract. The shares were to be payable to the sons at the age of twenty-five, and to the daughters at that age or on marriage, but were not in any case to become vested interests until the death of the survivor of the spouses.

"It will thus be seen that in virtue of the con-

tract the eldest son of the marriage and his male descendants had, subject to his mother's liferent, a right of succession to the estate of Dalchosnie which Sir John M'Donald could not gratuitously defeat, but which he might limit by the fetters of a strict entail. On the other hand, an indefeasible right to the whole of Lady M'Donald's fortune was conferred upon the whole children of the marriage as a class—including the eldest son—the amount to be received by each being subject to appointment by the spouses, and the vesting being postponed till the death of the survivor of the spouses.

"Several children were born of the marriage, viz., four sons and three daughters. The defender, Colonel Alastair M'Iain M'Donald, is the eldest son, and the pursuer, John Alan M'Donald, is the second surviving son; the other two sons predeceased their parents. The three daughters are all alive. Sir John M'Donald died on 24th June 1866, and Lady M'Donald on 7th November 1872.

"Lady M'Donald's fortune derived from her father's estate amounted to upwards of £50,000, which was received by the marriage-contract trustees for the purposes of the trust. A few years after the marriage Sir John M'Donald purchased two estates, named Loch Garry and Kinloch Rannoch, adjoining Dalchosnie, at the price of £28,000, which, by expenditure or improvements, was increased to £30,000; for the purpose of paying which price he borrowed from the M'Inroy trustees a portion of Lady M'Donald's fortune amounting to £25,000, for which he gave them security in the form of a bond and disposition in security over the two estates so purchased. The securities were afterwards transferred to the marriage-contract trustees. The declared intention of Sir John in making the purchase was that these two estates, along with the family estate of Dalchosnie, should be permanently united as a family estate, and should descend in the first instance to the heirs-male of the marriage. This appears from the narrative of the deed of entail of the three estates executed by Sir John M'Donald on 18th July 1837, which begins by narrating the marriage-contract and the trust-conveyance therein of Lady M'Donald's fortune, and then proceeds as follows:—'And further, considering that the object of the said trust is to secure the liferent of the said funds to the said Adriana M'Inroy or M'Donald during her life, in the event of her having children, and the succession to the fee of the same to the children, if any, of the said marriage, in such shares and in such manner as we the said spouses, or the said Adriana M'Donald if the survivor, may direct; and that the objects of the said trust may be fully accomplished by the purchase of lands, to be entailed on the eldest son of the said marriage, and such provisions secured to the other children as I, the said John M'Donald and the said Adriana M'Donald, may now or afterwards direct: And further, considering that I, the said John M'Donald, soon after the marriage purchased the two estates of Loch Garry and Kinloch Rannoch, adjoining to Dalchosnie; and it being the desire of me, the said John M'Donald, and of the said Adriana M'Inroy or M'Donald, to settle definitely, onerously, irrevocably, and mutually, the said estates of Dalchosnie, Loch Garry, and Kinloch Rannoch, belonging to me the said John M'Donald, on ourselves and our family, and, failing our heirs-male, so far to alter the destination in the marriage-contract with regard to Dalchosnie as to settle it with the other lands, giving heirs-female of the present marriage a preference and priority to heirs-male of any subsequent marriage; and having of even date herewith, executed a deed of appointment and division of the whole estate belonging to the said Adriana M'Inroy or M'Donald, which deed and appointments therein contained are held as implement on her part of the mutual agreement between us for the settlement of our respective estates: Therefore, in implement on my part of the foresaid mutual agreement, I, the said John M'Donald, bind and oblige myself, my heirs and successors whomsoever, to entail and secure my whole lands and others particularly underwritten in favour of the persons and the substitutes after designed, and to make resignation thereof in due and competent form as effeirs.' And the deed then proceeds to dispone the three estates of Dalchosnie, Loch Garry, and Kinloch Rannoch, 'to and in favour of myself and the said Adriana M'Inroy or M'Donald, and to the survivor of us in liferent, and to the heirs aftermentioned in fee, namely, Alastair M'Iain M'Donald, my eldest son, and the heirs-male of his body, whom failing, John Alan M'Donald, my second son, and the heirs-male of his body,' whom failing, the other sons of the marriage *nominatim* and the heirs-male of their respective bodies, whom failing, the daughters of the marriage *nominatim* and the heirs-male of their respective bodies, whom failing, the heirs-female of their sons and daughters in their order. Lady M'Donald's liferent of the estate of Dalchosnie was restricted to the minority of the heir who should first succeed. The entail, which is dated 18th July 1837, was recorded in the register of entails in 1845. Soon after its date Sir John and Lady M'Donald and the defender Alastair M'Iain M'Donald, the institute, were infeft for their respective rights of liferent and fee in Dalchosnie, conform to instrument of sasine dated 18th July, and recorded in the General Register of Sasines at Edinburgh 4th August 1837; and the same parties were afterwards infeft for their respective rights of liferent and fee in the estates of Loch Garry and Kinloch Rannoch, conform to instrument of sasine dated 25th May, and recorded in the General Register of sasines 1st June 1838. The effect of these *inter vivos* deeds was from the date of the entail,—at all events from the date of the several sasines,—to give to the defender Alastair M'Iain M'Donald an immediate, irrevocable, and absolute right of fee in the three estates of Dalchosnie, Kinloch Rannoch, and Loch Garry, qualified only by his parents' right of liferent, and by the fetters of the entail.

"On the same day in which the entail was executed Sir John and Lady M'Donald executed a joint deed of appointment and division of the fortune which had come from her father's estate, and which was now held by the marriage-contract trustees. That deed, like the entail, fully narrates the marriage-contract and the purchase of Loch Garry and Kinloch Rannoch at the price (including subsequent expenditure) of £30,000, 'and that there was paid towards the purchase of these estates from the said Adriana M'Donald's estate the sum of £25,000, for which an heritable

bond over them was granted by me to her father's trustees, who were therein infeft, and who have since assigned the bond to the said trustees under the marriage-contract; and it being our desire to settle definitely, onerously, and irrevocably, and mutually, the whole of the estates of Dalchosnie, Loch Garry, and Kinloch Rannoch belonging to me the said John M'Donald, and also to divide, apportion, and settle the whole property, heritable and moveable, including the said sum of £25,000, secured over the said lands of Loch Garry and Kinloch Rannoch, belonging to me the said Adriana M'Donald, on ourselves and our family, and failing our heirs-male, so far to alter the destination in the marriage-contract with regard to Dalchosnie as to settle it with the other lands on heirs-female of the present marriage, giving them a preference and a priority to heirs-male of any subsequent marriage: And in order to effect that object, I, the said John M'Donald, have of this date executed a deed of entail of the said lands of Dalchosnie, Loch Garry, and Kinloch Rannoch, in favour of my said wife and myself, and the survivor of us in liferent, and to the heirs thereinmentioned in fee, and which deed of entail was granted by me in consideration of the declarations and appointment thereinafter made in regard to the property of the said Adriana M'Donald, my wife.' . . . 'That it is our will that the said sum of £25,000, secured over the said estates of Loch Garry and Kinloch Rannoch, shall be settled on and belong to our eldest son and other members of our family in succession, being heirs in possession of the entailed estate, the sum of £25,000 being the share of my (the said Adriana M'Donald's) property which we, the said John M'Donald and Adriana M'Donald, have allotted and apportioned and do hereby allot and apportion as the share of our eldest son, or failing him of the heir of entail succeeding to the said entailed estate, it being our desire and appointment that the said trustees under our marriage-contract before narrated, or the survivors of them, should immediately on the death of the survivor of us renounce and discharge the said heritable bond, and disburden the said lands and estate of Loch Garry and Kinloch Rannoch of the same.' The remainder of the funds beyond the £25,000 are then apportioned equally among the other children.

"After the death of Lady M'Donald, the survivor of the spouses, in 1872, various questions arose among the members of the family as to the distribution of the trust-estate, in consequence of which the trustees raised an action of multiplepoinding, in which the defender Alastair M'Iain M'Donald claimed that the £25,000 appointed to him should be paid to him absolutely, on the ground that the direction to apply the money in discharging the security over Loch Garry and Kinloch Rannoch was an illegal condition, and *ultra vires* of Sir John and Lady M'Donald. The pursuers, John Alan M'Donald and his sisters, on the other hand maintained that there had been no effectual exercise of the power of appointment at all, in respect that the £25,000 had virtually been apportioned to persons not the object of the power. It was ultimately decided by the House of Lords, reversing the judgment in the Court of Session, that the £25,000 was validly appointed to the defender, and that the qualifications attached to the appointment either imported a mere destination or conditional institution, leaving the defender still the absolute fiar, or amounted to a condition illegal and *ultra vires* of the granters, and therefore void unless agreed to by the defender. In pursuance of that judgment, the defender has demanded and obtained from the marriage-contract trustees an absolute assignation of the securities for £25,000, and has disposed of the same in whole or in part to sundry onerous assignees.

"The result of all this is, (1) That the defender Alastair M'Iain M'Donald, has for nearly forty years, and still is, infeft as fiar in the estates of Dalchosnie, Loch Garry, and Kinloch Rannoch, under a title absolutely unqualified except by the liferent of his parents and the fetters of the entail; (2) That in 1872 his right to a share of the marriage-contract trust-funds, to which he had from the day of his birth a *spes successionis* indefeasible except by his own death during the lifetime of the longest liver of his parents, became absolutely vested in him: (3) That by the deed of appointment and division, which did not, and could not, take effect until the death of Lady M'Donald, the share of the fund to which the defender was thus absolutely entitled was fixed by his parents at the sum of £25,000; (4) That the deed which so fixed it was not a settlement by Sir John and Lady M'Donald of any estate belonging to themselves, but was a mere appointment of a fund in which they themselves had a mere right of liferent, the fee being in the children: (5) That it has been settled by final judgment in a litigation in which the present pursuer along with his sisters appear to have keenly contested every point with the defender, that the defender is entitled to that £25,000 absolutely, and that the same is not to be applied in discharging the debt of £25,000 affecting the estates of Loch Garry and Kinloch Rannoch: and (6) That the defender has completed his title to the securities over Loch Garry and Kinloch Rannoch, on which the money is invested, and has received payment of the money in whole or in part.

"It is in these circumstances that the pursuer John Alan M'Donald, as the heir called to the succession of the entailed estates immediately after his elder brother, the defender, and the heirs-male of his body, has raised the present action against his brother, for the purpose of having it declared that under and by virtue of the deed of division and the deed of entail above mentioned the defender was 'bound to make his election as to whether he would take absolutely and unconditionally the sum of £25,000 sterling, allocated to him by the joint-deed of division, or take the said entailed estates, subject to the condition of the same being discharged and disencumbered of the said sum of £25,000 sterling, and that he has made his election, and has claimed and taken the said sum of £25,000 sterling absolutely, and that he has thereby defeated and frustrated the intention of his said father in respect of the settlement of the said estates of Loch Garry and Kinloch Rannoch under the said deed of entail, and has thereby in that respect reprobated the said joint-settlement and deed of division and deed of entail, and that his right, title and interest therein is now, and shall in all time coming, be void and extinct, and that the

said lands and others, with the rents, maills, and duties of the same, have fallen, devolved, and accresced and do now belong to the pursuer as next heir appointed to succeed by the said deed of entail.'

"It will be observed that the summons relates only to Loch Garry and Kinloch Rannoch, and not to Dalchosnie, the defender's right to enjoy the latter estate being admittedly indefeasible under the marriage-contract, and incapable of being affected by anything which his parents may have done in the deed of division and appointment. And the result of the pursuer's success in this action will be, that the entailed estate, which his parents intended to be a united family estate held by the male representative of the family, will be dismembered, Dalchosnie remaining with the defender, the eldest son, while Loch Garry and Kinloch Rannoch are carried off by the pursuer, a younger son and remoter heir. Nothing but the clearest evidence, not only of the power, but of the intention of Sir John and Lady M'Donald to put the defender to his election, could in my opinion warrant the present demand of the pursuer.

"The first question, therefore, to be answered plainly is, whether Sir John and Lady M'Donald had power to put the defender to his election between the entailed lands of Loch Garry and Kinloch Rannoch and the appointment of £25,000 of the marriage-contract free of all destinations or conditions? I confess that, notwithstanding the very able arguments of Mr Trayner and Mr Fraser on behalf of the pursuer, I have not much difficulty in answering that question in the negative. The pursuer rests his case, both on the record and in debate, on the ground that the deed of entail and the deed of division must be read together as forming the testamentary settlements of Sir John and Lady M'Donald. But I am of opinion that these deeds, which are said to raise this case of election, are neither of them testamentary in the proper acceptation of that term. The entail was in no sense testamentary. By it Sir John M'Donald voluntarily and during his lifetime, and nearly thirty years before his death, conferred upon his eldest son, the defender, the irrevocable and irredeemable right of fee in Loch Garry and Kinloch Rannoch, without any indication *ex facie* of the deed that by accepting the estate he was to become bound to apply towards the extinction of the debt affecting them any part of the marriage-contract trust funds which were indefeasibly settled upon the children of the marriage, and to a share of which the defender, as one of these children, had at all events a protected *spes successionis*. On the other hand, the deed of division was not testamentary of the granters, because the funds which were thereby divided by Sir John and Lady M'Donald belonged not to themselves but to their children, subject only to a power of appointment by the parents. Two considerations, therefore, are to my mind conclusive against the power of the granters to put the defender to his election. These are—(1) That long before the alleged case of election emerged, the defender had become, by an *inter vivos* deed of entail, the irredeemable proprietor of the entailed estates, so that he had not to choose between taking these estates and taking the appointed share of the trust funds; and (2) That the separate deed of division was not a testamentary settlement of the granters, conferring benefits on the defender to which he was not otherwise entitled. But further, and even if the entailed estates had been conveyed and the power of appointment had been exercised in one and the same deed, and both had been testamentary, the condition annexed to the appointment was illegal and void, and no case of election could arise. This point has been expressly decided in England by the Master of the Rolls (Lord Romilly) in the case of *Churchhill* v. *Churchhill*, 1867, L. R. 5 Eq. p. 44, in which all the previous decisions are fully considered and commented on. The rule of law which underlies that judgment, and indeed all the decisions as to election and approbate and reprobate, is, that although *res aliena scienter legata* in a testament bequeathing a legacy to the owner of the *res aliena* may put him to his election between claiming the legacy and taking his own property, yet if the testator made his bequest erroneously, believing that he had the power while he had it not, the legatee will not be put to his election. The rule is illustrated in the case of *Douglas' Trustees* v. *Douglas*, 1862, 24 D. 1191. Now, in the present case it is clear from the language of the deed of appointment that Sir John and Lady M'Donald believed that they were dealing with a fund belonging to themselves, or over which they had the uncontrolled power of disposal, but as that was an erroneous belief, and as their appointment of £25,000, in so far as restricted and qualified by conditions annexed, was illegally restricted, the presence of these conditions in the deed cannot put the defender to his election.

"The second question to be answered is, Whether, assuming that Sir John and Lady M'Donald had power to put the defender to his election, it was their intention to do so? No such intention is expressed, and I am clearly of opinion that none is implied, either in the deed of entail or in the deed of appointment. The terms of the latter deed, however, are founded upon by the pursuer as implying such an intention on the part of the granters. And there cannot be any doubt as to the desire of Sir John and Lady M'Donald that the defender's £25,000 should be applied for the benefit of the heirs of entail. But was that their leading and ruling motive and intention? I think not. In the first place, the words they use are precatory words, and these are not sufficient to raise a case of election. See *Blacket* v. *Lamb*, 14 Beavan, p. 482, as commented on by Lord Romilly in the case of *Churchill*, already referred to. But, in the next place, it is clear that the ruling motive and fixed intention of Sir John and Lady M'Donald in executing the deed of entail and deed of appointment, were that the three estates of Dalchosnie, Loch Garry, and Kinloch Rannoch, should, burdened or unburdened, descend to and be enjoyed by, the heirs male of the marriage in their order, as a united and important family estate. The language of the two deeds, whether read together or separately, is not in my opinion capable of any other construction. As I read these deeds it is not conceivable that the granters thereof intended or could have contemplated, as the possible result of the defender refusing to allow his share of the marriage-contract fund to be applied in

extinguishing the debt affecting Loch Garry and Kinloch Rannoch, that the united family estate which they were so anxious to found should be dismembered, and that Loch Garry and Kinloch Rannoch should be taken away from the heir of the marriage, and enjoyed as a separate estate by a remote substitute, while Dalchosnie remained with the institute of the entail. I am therefore of opinion that it was not the intention of Sir John and Lady M'Donald to put the defender to his election.

"If I am right in these views, there is an end of the case, and the pursuer having failed in maintaining his declaratory conclusions he is not entitled to prevail in his other conclusion for denuding and removing, or for compensation for the prospective loss or damage which he alleges he may sustain by the defender having claimed and obtained payment of the £25,000 absolutely for his own behoof. Indeed, even if a case of election had been made out, I could not have held that the defender had already made his election. He has already obtained possession both of the estate and of the £25,000; and if he was ever bound to make his election it is still open to do so.

"In conclusion, I have only to state that even if a clear case of election, such as that for which the pursuer contends, had been made out, I should have had great difficulty in sustaining any claim, either for denuding in favour of the pursuer or for 'equity of compensation,' seeing that the pursuer is at present only heir presumptive under the entail, that he may never succeed to the entailed estate, that in any view the defender is, during his life, the only person interested in the rents of the estate and in the annual income of the £25,000; and that any claim of damage at the pursuer's instance is too remote and contingent to admit of being *in hoc statu* estimated or assessed, or provided for.

"On the whole, I am of opinion that the defender is entitled to decree of absolvitor, with expenses."

The pursuer reclaimed.

Argued for him — Intention was that the £25,000 should be applied to disburdening the estate, and though the defender was not bound to respect that intention, if he frustrates it he cannot take any benefit under deed of entail. This is plainly a case of approbate and reprobate. Deed of entail and deed of apportionment must be read together. If defender has frustrated his parents' intention, he can take what he is legally entitled to, but nothing which he gets of their bounty.

Authorities—*Strathmore* v. *Clidesdale and Dundonald*, Feb. 20, 1729, Mor. 6377; *Breadalbane*, May 5, 1840, 2 D. 731; *Black* v. *Watson*, Feb. 9, 1841, 3 D. 522; *Earl of Glasgow*, Dec. 13, 1872, 11 Macph. 218; *Coutts* v. *Acworth*, 1870, L. R. 9 Equity 519; *Carver* v. *Bowles*, Jan. 19, 1831, 2 Russell and Mylne 301; *King*, L. R. 8 Equity 174; *Blacket* v. *Lamb*, Nov. 10, 1851, 14 Beavan 482; *Churchill*, L. R. 5 Eq. 44; *Cooper*, Nov. 14, 1870, 6 Chancery Ap. 19; *Woollaston* v. *King*, April 23, 1869, 8 L. R. Eq. 173.

At advising—

Lord Neaves—This case appears at first sight to be more complicated than it really is. When divested of superfluous matter, it seems to come to a comparatively simple question, and one which is affected by several plain principles of law.

M'Donald of Dalchosnie, who afterwards became Sir John M'Donald, was married to a daughter of M'Inroy of Lude, and their antenuptial contract of marriage is one of the documents requiring here to be specially considered. The contract disposed mainly of two matters. Sir John M'Donald settled his paternal estate of Dalchosnie upon himself and his intended wife in conjunct fee and liferent, but for her liferent use allenarly in case she should survive him, "and to the heirs-male of this present marriage." On the other hand, Miss M'Inroy conveyed to trustees her whole interest in her father's estate, to be liferented in manner there mentioned, and after the death of the survivor of the spouses then to be paid over to the child or children of the marriage in such proportions and at such times and under such conditions as the spouses should appoint by any joint deed, or as the lady should appoint, if she survived her husband. The other provisions as to their terms need not be here specified.

The marriage took place shortly after the date of the contract, which was 8th September 1826, and several children were born of the marriage, and among others the pursuer and defender in the present action. Several years thereafter two other deeds were executed, on which the case principally turns.

On 18th July 1837 the spouses executed a joint settlement and deed of division, which narrates the contract of marriage and the facts that Sir John M'Donald had purchased the estates of Loch Garry and Kinloch Rannoch, upon which, besides the price, he had expended a considerable amount in improvements. It was also stated that in the purchase of those estates a sum of £25,000 had been advanced from Lady M'Donald's funds, for which an heritable bond had been granted to her trustees, and which bond had been assigned to the trustees under the marriage contract. Upon this narrative, and the further narrative that it was their desire "to settle definitively, onerously, irrevocably, and mutually the whole of the said estates of Dalchosnie, Loch Garry, and Kinloch Rannoch, belonging to him the said John M'Donald, and also to divide, apportion, and settle the whole property, heritable and moveable, including the said sum of £25,000 secured over the lands of Loch Garry and Kinloch Rannoch, belonging to her the said Adriana M'Donald, on themselves and their family," the spouses proceeded to make the appointment contained in the deed, by which the said sum of £25,000 was settled upon the defender, their eldest son, and other members of their family in succession, being heirs in possession of the entailed estate. It was explained that this sum was alloted "as the share of the eldest son, or failing him of the heir of entail succeeding to the entailed estate;" to which allotment this addition was appended, "it being their desire and appointment that the said trustees . . . should immediately on the death of the survivor of them, the said spouses, renounce and discharge the said heritable bond, and disburden the said lands and estates of Loch Garry and Kinloch Rannoch of the same." The re-

mainder of Lady M'Donald's property was to be equally divided among the younger children, exclusive of the heir.

Of the same date, 18th July 1837, there was also executed by Sir John M'Donald the deed of entail referred to in the record, to the nature of which I shall afterwards advert.

A great deal of the discussion which we have had relates to the question of election or of approbate and reprobate. I think it doubtful whether those questions are properly raised in the present case.

It appears to me that the questions referred to resolve always into this position of things—That some party who is in the position of donor makes to another an offer of two different things, upon the footing, express or implied, that the party favoured may either take or reject the two things offered. This state of things implies a choice with a power of rejection or acceptance, and the two things are linked together in such a way as to be inseparable.

I am unable to discover that this state of things occurs here. No doubt there are two matters dealt with, but they are not so dealt with as to give rise to any election. The parents of the two parties—pursuer and defender—executed a deed of appointment and division, but this was not made the subject of a proper offer for their acceptance. It was a positive and valid deed of appointment, by which there was given to the defender, the eldest son of the parents, the sum of £25,000, which the parents alloted and apportioned as his share. The deed contains other matters, and, in particular, declarations or statements as to the debt of that amount constituted over the heritable estates in question, and which debt it was the wish of the father and mother to wipe off by payment.

Now, the introduction of this matter into the deed of appointment might be looked at in one or other of two ways; it might be meant as an inherent and imperative condition of the appointment that the £25,000 alloted to the defender should be specifically applied to the extinction of the debt constituted over the estates to that amount, or it might be considered as something falling short of that qualification. In the process of multiplepoinding previously brought to determine the rights of parties, the pursuer and the other younger children maintained that the appointment in favour of the defender was conditional and qualified, and consequently null, so that the whole divisible funds were to be divided equally among all the children. This Court sustained that plea, and set aside accordingly the whole apportionment. But upon an appeal to the House of Lords that judgment was reversed, and it was decided that the apportionment was good, that it was in itself an absolute apportionment, and what was said as to applying the £25,000 to the extinction of debt was merely the expression of a wish or desire that this should be done, but was not a condition of the apportionment so as either to make it null or to make the desire so expressed obligatory on the defender.

In so far, therefore, as regards the deed of apportionment, it was absolute and unqualified, and the defender was entitled to take the whole sum alloted to him without being under any obligation or restraint as to the application of the money.

But then the pursuer maintains that the deed of entail executed by the father on the same day imposed on the defender an obligation as to the use of the money allotted to him.

Now, it is true that the deed of entail thus executed by Sir John M'Donald was the voluntary deed, and that Sir John might have made it conditional if he had chosen. But the question is, whether he did so? He executed the entail as a *de præsenti* deed, but he inserted in it no condition as to the use of the money he apportioned. The form of the entail was that he gave the entailed lands to himself and Lady M'Donald, and to the survivor and to the heirs aftermentioned in fee. This was done upon the conditions, restrictions, and provisions after specified, but these were merely the usual conditions applicable to an entail. The deed then contains a procuratory and precept for infefting the defender and the other heirs of entail in the entailed lands, but there is no provision or condition either irritant or resolutive in connection with the alloted money.

Upon this deed of entail infeftment immediately followed in favour of the spouses in liferent, and the defender as the first heir of entail in fee. These infeftments took place in the years 1837 and 1838, now nearly forty years ago.

It is in these circumstances that the pursuer brings the present action, to have it found substantially that this entail binds the defender to apply the £25,000 allotted to him to the extinction of the debt forming a burden upon the lands in question.

It seems a complete answer to any plea of approbate and reprobate or of election that the defender was never put to any election by his parents. He got the allotment of £25,000, as the House of Lords found, absolutely and unconditionally, and was entitled to expend it or apply it as he pleased. It is said, however, that the entail executed in his favour was a conditional grant, which he could only accept upon the footing, said to be indicated in it, of applying his own £25,000 to the disburdening of the entailed lands to that extent. If this had been an offer by the father to put his son upon an election, it might have been expected that the defender would elect to take or reject the entail as he pleased. But no such option was given. His father gave him the estate at once, the fee of the estate, taking only a liferent to himself, and he immediately infeft the defender, then a mere boy, in the fee. The defender was thus left no option in the matter, and was not by the figure of the transaction placed under any necessity of election.

Accordingly, the House of Lords has found that the defender has an absolute and indefeasible right to the money. It was not pleaded, and at anyrate it was not found, that he was barred from taking the money by any condition or uncertainty as to the entailed estate. It was further held that all that was meant by the language of the apportionment was an expression of desire that the money should be applied in a certain way, but which did not amount to an imperative obligation.

If this was the meaning and effect of the language used in the deed of apportionment, it seems impossible to transfer that language to the deed of entail, and give it there a more stringent meaning. If it was truly meant to qualify

the entail, the place to do that was in the entail itself, along with other conditions, and certainly to infeft the defender in the entail was an absolute re-instating of him into full and absolute right to the entailed estate as the heir first called.

In these circumstances, it seems to me impossible to hold that this statement which occurs in the deed of apportionment can be read as being more imperative and more of a resolutive condition in the deed of entail, where it is not to be found. There seems no room for thus fettering the defender under either of the deeds, or of putting him to an option of election that was plainly never intended, and for which there is nowhere to be found any clear or unequivocal words.

Upon these grounds, I am for adhering to the Lord Ordinary's interlocutor. I may further state my doubts as to the pursuer's position for pursuing this action as a mere presumptive heir of entail, and also as to the propriety and suitableness of the conclusions of the action, even in their most amended form, but I think it better to deal with the action on its proper merits, so as to settle definitively the rights of the parties.

Lord Ormidale—Although this case was debated at great length, and very anxiously, by the parties, it does not upon full consideration appear to me to be attended with much difficulty.

The disputed question, as raised in the record and argued at the bar, is, whether the defender has in the circumstances been so put to his election, or in other words has so acted, that he must be held, on the principle of approbate and reprobate, to have lost all right to the entailed estates of Loch Garry and Kinloch Rannoch, and is bound to cede possession of them to the pursuer? Another question suggested in the course of the discussion, from the Bench, is, whether, independently of the principle of election or approbate and reprobate, a condition or obligation was by the deed of entail and relative deed of division and appointment imposed upon the defender, to the effect that he must discharge the £25,000 debt with which the estates are encumbered, and can be compelled to do so?

It is unnecessary to enter into a detail of the circumstances in which these questions have to be considered. They are set out in the record, and the Lord Ordinary has given a very distinct *resumé* of them in the note subjoined to his judgment, which is adverse to the pursuer.

It is essential, however, to bear in mind (1) that the deed of entail under which the defender holds the estates in question, and which is not said to be in itself objectionable in any respect, was executed and duly recorded, and infeftment taken in virtue of it, nearly forty years ago; (2) that it expressly bears that the object of the granters was to settle the estates on the defender and the heirs called in succession to him, "definitely, onerously, and irrevocably;" and (3) that since the death of his mother in 1872, his father having previously died, the defender has been in the full and, till the present action was raised in December 1875, unchallenged possession and enjoyment of the entailed estates.

And in regard to the sum of £25,000 which the defender derived from his mother in conformity with the marriage-contract between her and his father, and relative deed of division and apportionment, it is also very important to keep in view that he has been found entitled to payment of it absolutely and unconditionally by the Court of last resort, under an appeal from a judgment of this Court.

Notwithstanding of these facts, about which there is no dispute, the pursuer, who is the heir, next to the defender and the heirs-male of his body, entitled to succeed to the entailed estates of Loch Garry and Kinloch Rannoch, calls upon the pursuer now to denude of these estates in his favour, on the ground that he is not entitled both to the £25,000 and the estates, and that having taken payment unconditionally of the money he must give up the estate, in respect that having been put to his election either to take the estates or the money, but not both, and that having elected to take, and having got payment of, the money, he must surrender the estates to the pursuer. But why this should be the result, even supposing the pursuer had been put to his election, I do not very well see. He had got possession of the entailed estates prior to any question having been raised as to the money, and some years before he was found entitled to, and received payment of, the money. He must therefore, in the pursuer's theory, supposing it to be maintainable at all, have been held to have made his election when he took possession of the entailed estates, so that the only course left for the pursuer was on that ground to have opposed the defender getting payment of the money. But no such ground of opposition to the defender getting payment of the money was taken by the pursuer or anyone else, and the fact is undoubted, as has been already noticed, that he was found entitled by judgment of the House of Lords to payment of the money absolutely and unconditionally. Again, supposing the pursuer's present grounds of action to be maintainable at all, it may well be asked, Why should he, any more than the defender, be found entitled to the entailed estates free from the alleged obligation to discharge the £25,000 debt to which they are now subject? In no view can I see how any such result could be sustained, and yet were decree pronounced in favour of the pursuer in terms of the conclusions of his action, such would be the result.

But it is unnecessary longer to dwell upon these considerations, as in every aspect of the pursuer's action it appears to me to be quite untenable, that is to say, this pursuer's assumption that the defender was put to his election between the entailed estates and the £25,000,—or to put it differently, his assumption that the defender must by taking the money free from any obligation to free the entailed estates from the £25,000 debt, be held to have reprobated the deed of entail under which he took the estates—is ill founded, whether the matter is examined and considered in connection with the deed of division and appointment or the deed of entail, or both together.

In making the deed of division and appointment the granters were not dealing with their own monies, but with funds which they were bound to divide among Sir John and Lady M'Donald's children, although no doubt they had a discretionary power to make the division in such proportions as they might consider right.

They did accordingly appoint £25,000 of the funds at their disposal to be paid to the defender, who was one of the parties having right to a share. But they were not entitled to impose upon him, as the condition of his receiving payment of that sum, that he should apply it in payment of the debt with which the entailed estates were encumbered. And in point of fact, as was found in the House of Lords, no such condition was imposed upon the defender, although in the deed of division a desire was expressed that he should with the money pay off the debt on the entailed estates. If, indeed, it had been made an express or positive condition of his getting the money, the appointwould have been altogether bad, but just because there was no such condition the appointment was held to be good and unobjectionable, and the defender found entitled to payment of the £25,000 absolutely and unconditionally.

Thus standing the matter as regards the deed of division and appointment, it has next to be considered how far the question is affected by the deed of entail. It was assumed in the argument for the pursuer that it was made a condition in that deed, either express or implied, that the pursuer could not take the estates of Loch Garry and Kinloch Rannoch and also the £25,000, without applying that sum towards discharging the debt of that amount on the entailed estates, and that as he had done so he had approbated and at the same reprobated the deed of entail, or, to put it differently, that he must be held to have elected to take the money, and having done so must give up the estates to the pursuer. But, as has already been remarked, the defender having taken the estates before he got the money, must be held to have then made his election, if there was election in the case at all, and the objection, if there was any room for it, taken on the principle of election, ought to have been raised, and could only have been raised as against the defender's claim for the money. Irrespective of that consideration, the pursuer's ground of action appears to me to be in itself ill-founded. The deed of entail does not in itself contain any condition or obligation such as the pursuer relies upon. It is true that in the deed of entail there is a reference to the deed of division, but it being *res judicata* that what the pursuer calls an obligation to apply the money towards discharging the debt on the entailed estates, is not an obligation at all. The Lord Chancellor (2d vol. of 4th Series of Court of Session Cases, p. 131) makes this, I think, very clear. After quoting the portion of the deed of division which is said to constitute the alleged obligation or condition, his Lordship observes—"It is simply an expression of desire, which could only be carried into effect with the consent of the person who by the previous clauses was made, according to my opinion, the absolute owner of the £25,000. If he consented, the trustees might disburden the estate. If he did not consent, the estate had to remain burdened with this bond, and this expression of desire would not be held in any way of itself to take away from that ownership which was created by the former clause." And it is vain, I think, to contend that although the allusion to discharging the debt in the deed of division and nomination is not of the nature of an obligation to do so in that deed, it must be held to become an obligation in the deed of entail in consequence merely of its being there referred to in the most general way possible. To hold that to be so would, in my opinion, be contrary to the judgments pronounced in *Carver* v. *Bowles*, 2 Russell & Mylne's Reports, p. 304; *Blacket* v. *Lambe*, 14 Bevan's Reports, p. 482; and *Woolridge* v. *Woolridge*, Johnson's Reports, p. 63. All of these cases appear to me to be in point. Thus, in *Woolridge* v. *Woolridge*, it was held by Vice-Chancellor Page Wood, that where "there is an absolute appointment by will in favour of a proper object of power, and that appointment is followed by attempts to modify the interest so appointed in a manner which the law will not allow, the Court reads the will as if all the passages in which such attempts are made were swept out of it for all purposes, *i.e.*, not only so far as they attempt to regulate the *quantum* of interest to be enjoyed by the appointee in the settled property, but also so far as they might otherwise have been elied upon as raising a case of election."

In regard, therefore, to the election as between the entailed lands and the £25,000, I have no difficulty in holding that there is no sufficient ground for holding that it arises in the present case.

And in regard to there being otherwise an obligation on the defender to discharge the £25,000 debt, I cannot find it in the deed of entail any more than in the deed of division or appointment. There is certainly no such obligation expressly set out in the deed of entail. It is said, however, that it is in the deed of division and appointment, which being referred to in the deed of entail must therefore be read as part of it. But, as I have already explained, it having been decided by the House of Lords that what is said to be the obligation or condition in the deed of division and appointment is not an obligation or condition at all, a reference in the deed of entail to the deed of divison and appointment cannot, in my apprehension, effect the pursuer's object. The desiderated obligation or condition would indeed require to appear in very explicit and unambiguous terms in the deed of entail, and a general reference to the deed of division and appointment, which is all there is, would not, I think, be sufficient in any view that can be taken of the matter. Besides, the pursuer did not maintain such a ground of action, and it is not reconcileable either with his argument or any of the conclusions of his summons.

I have only further to remark, that were effect to be given to the pursuer's contention on any of the grounds which have been adverted to, the great object of the makers of the entail would be entirely defeated, for the inevitable consequence would be a separation of the estates of Loch Garry and Kinloch Rannoch from the estate of Dalchosnie, a result which I can find nothing in this case to warrant. In my opinion, therefore, and for the reasons I have stated, there is no ground for disturbing the interlocutor of the Lord Ordinary, which ought to be adhered to, and the pursuer's reclaiming note refused.

Lord Gifford—I am of opinion that the result reached by the Lord Ordinary in this case is right, and that the interlocutor under review should be adhered to, although I scarcely concur with the Lord Ordinary in some of the views

upon which he proceeds, and which are fully explained in the note appended to his interlocutor.

The object of the action is to have it found and declared that the defender, who is heir of entail in possession of the entailed estates of Loch Garry and Kinloch Rannoch, is bound to give up possession of the said estates and to hand them over to the pursuer, who is the defender's immediate younger brother, and who appears to be the next heir of entail now in existence. The purpose of the action—its sole purpose—is to put the pursuer in possession of these two entailed estates in place of the defender, his elder brother, and the pursuer claims the estates as next heir of entail, unconditionally and without offering to clear the same of the debts or heritable bond affecting the lands.

The ground of this demand is that by the terms of his father's settlements, consisting of, first, the deed of entail of the said estates, and second, a deed of apportionment and division of the same date, the defender was put to his election either to apply the sum of £25,000, allocated to him by the deed of division, in paying off the debt affecting the entailed estates, or to renounce his interest in the said estates, and that having elected to take the £25,000 absolutely the defender is now bound to give up his interest and right as heir of entail. At the debate before your Lordships an additional conclusion was tendered as an amendment of the summons, to the effect that if the defender was entitled even yet to retain the entailed estates, he was bound, as a condition of so retaining them, to free and relieve the lands from the debt and burden of £25,000. I do not think, however, that this amendment makes any difference in the disposal of the case.

The question raised in the action is of great importance, and in some of its aspects is attended with a good deal of nicety and difficulty. The circumstances in which the question arises are very special, and involve the very minute consideration of Sir John and Lady M'Donald's antenuptial marriage-contract, and of the deed of division and apportionment following thereon, as well as of the deed of entail under which the estates now in question were finally settled.

In this consideration we are aided, and must be regulated and guided so far as the judgment goes, by the final and authoritative decision pronounced by the House of Lords in the previous litigation between the same parties, and which of course is binding on all concerned. This judgment was pronounced by the House of Lords on 17th June 1875, and it related to the validity and effect of the deed of division and apportionment by Sir John and Lady M'Donald.

In explaining shortly the view which I take of the present case, I think it most convenient to begin with this judgment of the House of Lords, because it completely fixes and finally determines the rights of parties under one of the deeds in question—I mean under the deed of apportionment and division—and determines conclusively the meaning and effect of that deed as between the present parties. This being finally established, I do not find very much difficulty in determining the effect of the only other deed in question—I mean the only other deed which is said to put the defender to his election—the deed of entail of 18th July 1837.

By the judgment of the House of Lords it is finally fixed that under the deed of division and apportionment the defender takes, and is entitled to take, the sum of £25,000, contained in the bond for that amount secured over the entailed estates of Loch Garry and Kinloch Rannoch, as his own absolute and exclusive property, free from all conditions, obligations, or limitations of whatever kind. The money is his own—unfettered in any way—to dispose of and apply at his own pleasure. It was not in the power of Sir John and Lady M'Donald to impose upon the defender any binding condition whatever as to the mode in which the defender should employ or expend that £25,000. They could not require him to expend it in disencumbering the entailed estates, or in any other way whatever. They could not make a conditional appointment, and whatever was their desire or intention they could in no way compel the defender to carry it out.

It is no doubt quite plain from the terms of the deed of division and appointment what was the intention and desire of Sir John and Lady M'Donald. They wished the entailed estates of Loch Garry and Kinloch Rannoch to be freed and disburdened of this debt of £25,000, which formed so considerable a part of the whole value of the lands; and they wished the estates so disburdened to descend to the series of heirs called in the deed of entail. The Lord Chancellor and the other Judges in the House of Lords are agreed upon this point, and I do not think there is room for two opinions. The Lord Chancellor says—"Now there is not the least doubt upon the view which must be taken on the whole of the joint deed of division, coupled with the deed entailing these properties, that the spouses intended and desired that the estates of Loch Garry and Kinloch Rannoch, which had been mainly acquired by the £25,000 of trust-property, should go in the course of the entail under which they were limited, and should go without the encumbrance on them of the heritable bond securing the £25,000 to the trustees of the trust-funds. And there is not the slightest doubt, at least not in my mind, that if Sir John and Lady M'Donald had been asked, Is that what you desire—Do you desire to execute an instrument which shall say that Loch Garry and Kinloch Rannoch shall go in the course of the entail under which they have been settled discharged of the £25,000?—they would have said, By all means; that is exactly what we want; let that be done in whatever way it can be done." But then the Lord Chancellor goes on to say that the question under the deed of appointment is—"How have they given effect to that general intention, and have they given effect to that general intention in a way which is open to objection upon the ground of its complete invalidity?

The judgment of the Lord Chancellor—and the other noble Lords all concur with him therein—was that while the apportionment of the £25,000 in favour of the defender was valid and effectual, the expression of the wish and intention of Sir John and Lady M'Donald as to the application of that sum was altogether void and ineffectual as a condition, and the result of the judgment is that the appointment in favour of the defender of the sum of £25,000 is read as if it had been pure and simple, and as if the deed had contained no expression of wish or intention that it should be applied in disencumbering the entailed lands or

in any other way. Everything which could be read as imposing a condition or obligation upon the defender to apply the £25,000 in any particular way is struck out of the deed and held *pro non scripto*, as if the deed had contained no provision whatever excepting the appointment and apportionment of £25,000 to the eldest son.

The present case therefore starts with this, that the defender takes the £25,000 contained in the bond in question as his own absolute and unlimited property. It is as much his own as if it had been put into his pocket in coin or in banknotes, or as if he had saved it by his own industry. He takes it, and he holds it free of all condition or obligation whatever, and this narrows the case to the inquiry as to the entailed estates—Does the defender take these estates as heir of entail free from any condition affecting his own property, and free from any other fetters or conditions than those usually attaching to an entailed succession?

Now this, in my view, is the real question for decision in the present case—Was the defender called unconditionally as the institute in the entail, or was it made a condition of the entail that he should not take or should not hold as institute, or as first heir of entail at all, unless he applied certain independent property and money of his own in a particular way, that is, unless he took £25,000 out of his own pocket to clear off once and for ever the burdens affecting the entailed lands?

To put the question otherwise—but it is really the same question — Did the late Sir John M'Donald intend that if the defender, his eldest son, did not take his own money to the extent of £25,000 and pay off the burden affecting the entailed lands, then he, the eldest son, should not succeed as institute of entail at all, but that the entailed succession should thereupon devolve upon the pursuer, the entailer's second son, who most certainly would be under no obligation whatever to apply £25,000 of his, the pursuer's, own money, or any sum whatever, in clearing off the entailed debts?

Now, I am utterly unable to say that this or anything like this was the intention of the late Sir John M'Donald. On the contrary, I entirely agree with the Lord Ordinary that the intention of Sir John M'Donald, so far as we can gather it from his deeds, was that the whole estates should go to his eldest son in the first place, as the first heir of entail, disencumbered if possible of the £25,000 affecting the same, but that they should so go whether disencumbered or not. This appears evident from many considerations upon the face of the deeds. For example, it is clear that Loch Garry and Kinloch Rannoch were purchased because they adjoined the original family estate of Dalchosnie; and they were purchased in order that they might be united with Dalchosnie, and might form one entire and undivided estate. It was never the intention of the entailer that Dalchosnie should go to one set of heirs and Loch Garry and Kinloch Rannoch to another. But this separation would be the result if the pursuer's contention is well founded, for admittedly the defender as the eldest son is entitled to keep Dalchosnie, and the pursuer seeks to separate therefrom and appropriate to himself Loch Garry and Kinloch Rannoch, and thus utterly to defeat the indisputable intention of the testator.

Still further, the defender as institute of entail was actually infeft, that is, put in possession of Loch Garry and Kinloch Rannoch by the maker of the entail, Sir John M'Donald, so long ago as 1837. This infeftment was expede in the defender's favour by the orders of Sir John M'Donald himself, the defender, his eldest son, being then in minority; and the beneficial possession was no doubt postponed until the expiry of the liferent. But the very fact of Sir John M'Donald having 40 years ago executed an irrevocable deed of entail, and expede an absolute and irrevocable infeftment in favour of his son, shews in the clearest manner that the entail was not intended to be conditional, or to be either suspensive or resolutive in its effect, or to depend in any way upon what his son might long afterwards choose to do with his own separate and absolute money and property.

Yet again, not to dwell upon other indications, it would be absolutely futile and useless to impose such a condition on the first heir of entail, that is on the eldest son, when it was not imposed upon any of the subsequent heirs of entail, that is, when it was not imposed on the issue of the eldest son, who undoubtedly would take free from all such condition, or upon the pursuer as the second son, or on his issue, or on any of the subsequent heirs of entail. No doubt Sir John M'Donald wished the estates disencumbered; but if this could not be done—if he had no power to do it by means of the deed of apportionment—then there is not the slightest ground for supposing that he wished the encumbered estates, that is the estates charged with £25,000, to go so encumbered to his second son rather than to his eldest. But this is the effect of the pursuer's contention; but I think this contention is altogether unfounded. It would not better the condition of the estates, or of the family, or of the heir in possession, that the estates should go subject to all their burdens to a younger son rather than to an elder—to a remoter heir rather than to a nearer; and if Sir John M'Donald had been told, as he might have been told—You cannot compel your eldest son to apply that £25,000 in disburdening the estate, is there the slightest probability that he would have said—Then I will not give my estates to my eldest son at all, but I will separate them from Dalchosnie and give them to my youngest son as first heir of entail, although most certainly my younger son has neither the will nor the means to free them from the burden with which they are charged.

In truth, and what I think a sound construction of these deeds reading them altogether—for I quite assent to this as the sound mode of reaching a testator's intention—I think that the deeds do not raise a question of election at all. It was not the intention of the late Sir John M'Donald to put his eldest son to the election which the pursuer now seeks to impose upon him. I think such an idea never crossed Sir John M'Donald's mind, and if it had been put to him he would at once have repudiated it. If he had been told that he could not impose the condition upon his eldest son as a binding condition, what he most certainly would have said would have been—Well, then, I shall simply express my wish and desire and leave it there. My eldest son who has the £25,000, and has thus the means of clearing the estate, will be far

more likely to do so and thus fulfil my wish, than my second son who has no such money and no such means. To suppose any other intention in the testator—to suppose that he wished the burdened estates to be taken from his eldest son and handed over to his second, is mildly to guess at the testator's meaning, and to make a will for him which he has not chosen to make for himself.

For if the testator Sir John M'Donald had really intended that if his eldest son, the defender, refusing to apply the £25,000 towards clearing the estate, should thereupon forfeit his life interest in the estates, which should devolve upon the pursuer, nothing would have been easier for him than to have said so, and the proper place to have said so would have been in the deed of entail itself. It might have been made a proper condition of the entail, duly fenced with irritant and resolutive clauses; and this is very generally done when such an effect is intended. Even without fetters or irritant and resolutive clauses, it might have been made a personal condition binding upon the institute taking under the entail; but nothing of the kind is done here. All that we have in the deed of entail is the narrative of the deed of appointment and division, and from this simple narrative is sought to be inferred and spelled out so serious a condition against the defender, the institute of entail, as the forfeiture of his whole life interest. I cannot imply such a condition.

We were told that, estimated actuarially, the defender's life interest in the entailed estates is of much less value than the £25,000 which the pursuer demands that he should pay, and this may very easily be so. The defender's life might conceivably at least be a very precarious one—his prospect of possession might be short and uncertain, and as the whole rental does not exceed, or does not much exceed, the mere interest of the £25,000, it would be the hardest possible condition to make the defender pay the full capital merely for a precarious liferent. I cannot find such a condition or requirement in the deeds.

It is very remarkable—and I recur to this as an element in the question of intention—that the condition which the pursuer now maintains as an essential condition of the defender's taking under the entail is not found in the deed of entail itself, but only, if at all, in the deed of appointment, which I am quite willing to call, as the pursuer's counsel did, the relative or counterpart deed. But, then, it is somewhat serious for the pursuer's argument that the expressions in the deed of appointment have been finally held by the highest authority—by the Court of the last resort—in a question between the same parties, not to be proper conditions at all, but merely expressions of desire, and where directed to the marriage-contract trustees to be expressions of desire which could not be carried out without the consent of the defender—a consent which he was not bound to give. It is very awkward and very difficult for the pursuer to maintain that what in the deed of appointment itself is a mere expression of desire shall be held in another deed, which simply narrates the deed of appointment without incorporating it to be a proper and obligatory condition inferring forfeiture of the entailed estates. I do not say this is conclusive, for it is possible that a thing may be made a condition in a pure beneficium which cannot be made a condition annexed to what is really payment of a debt. But although not conclusive, the obstacle is very formidable to the pursuer, and I do not think he has overcome it. I think he has neither words nor materials to enable him to do so. The strong presumption is, reading the deeds together, that the words must have the same meaning and effect in both.

Questions of election, such as this is said to be, always resolve into the will and intention of the testator. If the intention can be gathered that the party favoured shall take the benefit, even although he resist the testator's wishes in certain other respects, then he is not put to his election; and it seems to me that this is the fair result of the whole testamentary expressions of the late Sir John M'Donald. Still further, election is always, or almost always, of the nature of compensation, and followed by compensatory effects. The legatee or beneficiary who will not comply with the testator's intention forfeits his legacy, and then the legacy is applied so far as it will go in carrying out the intention. The child who, repudiating his provisions in a universal settlement, claims legitim, must give up these conventional provisions, and the amount thereof goes to the other children, or to the residuary legatee who suffers by the claim of legitim. But here, if election were held to apply, it would be a very anomalous case of election, for there is no room for compensation. No sum is set free which might go so far at least to fulfil the testator's intention. The testator's intention is no more carried out under the one alternative than under the other. The only difference is, according to the pursuer's contention, that the estates, which are not to be disencumbered, instead of going to the eldest son, who has the means, and may very likely fulfil his father's wish of sending them down free of debt, are to go to the second son, who, whatever his wish may be, has not the means of carrying out his father's desire. I do not think that this is an election either contemplated or implied by Sir John; and on this main ground, while concurring in other respects with Lords Neaves and Ormidale, I am for adhering to the Lord Ordinary's judgment.

Lord Justice-Clerk—I agree with so much of what has fallen from all your Lordships who have delivered your opinions, and indeed with so much of the result also, that it might perhaps be unnecessary that I should even express the shade of difference in the opinion which I hold from those that I have heard. But that difference goes so deep into the reality of the rights of the parties to this litigation, that I shall endeavour succinctly to state the ground on which it proceeds.

The parties to this case have changed, and indeed reversed, the positions which they held when they were last before us. In the former case—in the multiplepoinding—it was maintained by the younger children that the apportionment made to the eldest son of £25,000 was a breach of, and in fraud of, the power which was possessed under the marriage-contract, and they endeavoured to frustrate the unquestionable intention of the spouses by maintaining that plea. It was maintained in that action for the eldest son that there were no conditions attached

to the appointment, that the appointment was absolute and good, but he stated in argument that he was perfectly willing to fulfil the expressed wish of his parents, and to clear off the debts which encumbered the estate. It was found in this Court that the appointment was conditional, but the House of Lords reversed that judgment, and they found that Colonel M'Donald was right in pleading that there was no condition attached to the appointment; and accordingly they decided that he had an absolute right, and this absolute right has been since given effect to by an application to this Court, and an order on the trustees to deliver up the bonds affecting the estate. These bonds apparently have been transferred, to a certain extent at all events, for value, and are now in the hands of third parties.

That being the condition of the first action, the present suit has been brought by the defender, who is the heir-presumptive under the entail; and, stated roundly, the object if it is to have the right of Colonel M'Donald to the entailed estates irritated and declared to be forfeited on the ground, and *medium concludendi*, that by the effect of these deeds he was to elect between taking the £25,000 absolutely and taking the entailed estate. That is the ground on which the action proceeds, and although the amendment has a declaratory conclusion that he should be found bound to discharge the £25,000 debt, that even, as expressed in the amendment, seems to result in the same thing, because it is a declared condition of his retaining the estates. Against that Colonel M'Donald now says,—The judgment of the House of Lords gave me this £25,000 absolutely, and I am not bound to clear the estate; I am entitled to hold the £25,000 and to hold the estate—notwithstanding what appears to me to be the very clear expression of intention on the part of his parents.

I had no sympathy with the pleading in the former action, because it was an attempt to frustrate and defeat the manifest and reasonable intention of the parents of the parties who were pleading. I thought the plea unsound, and it was found to be unsound,

Neither have I the slightest sympathy with the plea in this action on the part of the defender, because I think he is endeavouring to obtain an advantage that no one who reads these deeds could ever believe he was intended to have. But I do not disguise that I am greatly fettered and hampered in giving effect to that view by the form in which this action is presented. I find very great difficulty in doing so. I do not think it necessary, in order to explain my views, to go at any length into the details of the deeds that have been very thoroughly commented on, but there is only one matter that I think it necessary to premise, because it lies at the root of the whole of the argument, and that is, that these two deeds are not merely deeds in which the other is narrated. The two deeds together form the settlement of the property of the two spouses. They not only refer to each other, but they are granted in consideration of each other, and the provisions in the one are substantially imported into the other. This is made perfectly clear by the terms of both of them. In the deed of appointment Sir John M'Donald says that in order to effect the object of an alteration upon the destination, "I, the said John M'Donald, have of this date executed a deed of entail of the said lands of Dalchosnie and Loch Garry in Kinloch Rannoch," and so on, "which deed of entail was granted by me in consideration of the declarations and apportionment hereinafter made in regard to the property of the said Adriana M'Donald, my wife: Therefore, in consideration of the said deed of entail and of the powers possessed by us under the contract of marriage" they proceed to make the apportionment. And the deed of entail, which was executed on the same day, after narrating this deed, proceeds—"Which deed and appointment therein contained are held as implement on her part of the mutual agreement between us for the settlement of our respective estates; in implement on my part of the foresaid mutual agreement, I, the said John M'Donald bind myself, &c, to entail and secure," &c, Therefore these two deeds make, when combined, one settlement, and if intention is to be looked for, it must be looked for by reading it all together.

The intention I do not suppose is doubtful in the slightest degree. The Lord Chancellor and the other noble Lords in the House of Lords had no doubt about that. The intention was simply this, that the eldest son should take these unentailed lands which were now to be settled, and should clear off the debt, and thereby hold the unentailed lands under this new entail free of all burden, and that they should so descend to the other heirs of entail. There cannot be any doubt about the intention to do that, because the trustees in the deed of appointment were directed to do it. Now, that was what the spouses intended; but what question arises under the conclusions of this action? The conclusions of the action are substantially that the defender has forfeited his right to the entailed estates, and that on the principle of approbate and reprobate he must elect between the money provision and the entailed estate. That is what the pursuer contends. On the other hand, the defender contends that he is not bound to pay off these debts; and as a counterpart he must maintain that he is entitled to keep them up against the entailed estate. Now, in so far as this action proceeds upon the doctrine that the defender has elected, and was put to his election to take one or other, I am of opinion that there is no foundation whatever for that contention. No case of election can by possibility arise here, for this simple reason, that Colonel M'Donald has done nothing but act upon these two deeds according to their terms. He takes the money which was appointed unconditionally, because it was given to him unconditionally. It is now finally found that no condition was attached to it. He takes the estates of Kinloch Rannoch and Loch Garry because they are conveyed to him. They are not conveyed to him conditionally, but absolutely. But it is a totally different question, whether, although they are not conditionally conveyed, the conveyance infers such an obligation on the heir taking under the disposition? That is a totally different matter. And therefore, while expressing my entire concurrence in the opinions that have been delivered to that effect, I now go on to consider another question which is involved in the conclusions of this action, although avoided on the part of the pursuer for very obvious reasons—I mean, Whether, although

the defender must retain, and is entitled to retain, the £25,000 absolutely, and the estates entailed by Sir John M'Donald, he is not bound by the declared intention of the party from whom he took to clear off these debts, and whether he is not prohibited from keeping them up against the estate?

The reason why the pursuer is so unwilling to raise that question in its pure form is obvious enough, viz., that he will get no benefit by the estate being cleared unless—what is not at all certain to happen—Colonel M'Donald has no children. If Colonel M'Donald has a family, or if the pursuer predeceases him, he will get no benefit at all by a declarator that Colonel M'Donald is bound to clear these debts. And therefore he chooses to put it upon the doctrine of approbate and reprobate. In my opinion no question of election can by possibility arise in the circumstances of this case, and therefore, as far as these conclusions of the action are concerned, I am of opinion that the judgment which your Lordships propose is entirely well-founded.

But while I am very clear that by taking the £25,000 absolutely the defender has raised no question whatever of election, there remains the other—and to my mind the only point involved in the conclusions of the summons which the case presents—whether, apart from election, he can take these estates which were entailed on him by Sir John M'Donald, and yet keep up these debts against the entailed estate? I mean to express my opinion on this point as your Lordships have, but I have doubts how far, even if my views are sound, they can receive effect in this action. This point does not depend on any of the defender's actings in regard to the apportioned fund, but entirely on the injunctions or obligations laid upon him by the granters of the settlement, either directly or by clear implication. It is maintained by the pursuer that the deed of division, while it attaches no condition to the appointment, does yet clearly indicate the will and the intention of Sir John and Lady M'Donald, that the defender should pay off these debts, and that Sir John M'Donald, as the fee-simple proprietor of these lands, was entitled to attach this obligation to his settlement by any probative writing expressive of that intention.

On this subject I am of opinion—first, That Sir John M'Donald might effectually impose this condition on his eldest son by words expressive of this intention in the deed of division. It can be of no moment that the obligation did not enter the investiture or the formal conveyance. Any purposes, conditions, or alterations may be effectually adjected to a formal conveyance by any probative writing, contemporaneous or posterior, expressive of the granter's intention. The destination itself may be so altered, and much more may conditions be so annexed to the gift.

I should consider it a matter of law not admitting of dispute that if Sir John M'Donald had distinctly said in the deed of division that his eldest son should pay off these debts, the direction must have received effect, and that it would not signify that the clause did not enter the conveyance.

In the second place, I do not think that any light is thrown on this question by the series of English cases commencing with that of *Caron* v. *Brooks*. It was argued, that in conformity with these cases the words in the deed of division which indicate the intention of the parties that the defender should pay off these debts, however clear, cannot be read, but must be blotted out of the deed. I have carefully studied these cases, and I am very clearly of opinion that the argument founded on them proceeds on a misapprehension of their true import. They decide no more than this, that where in the exercise of a power of appointment an attempt is made ineffectually to attach limitations to the appointment, the appointee may both take the fund absolutely and other gifts contained in the same deed, without giving force or vitality to the inoperative directions on the principle of election. That seems to be the inevitable result of holding that these superadded directions were not conditions of the appointment, and so I am inclined to hold in this case. Such was the case of *Caron* v. *Brooks*. Lord Hatherley in the recent case of *Woolridge* makes the observations which Lord Ormidale has quoted. He says that the words must be blotted out of the deed, not only to the effect of denying them operation in limiting the appointment, but also of excluding any question of election. It was to this effect only that Lord Hatherley held that the words were to be considered as blotted out of the deed. Holding, as I do, that no question of election can be raised in this case under the judgment of the House of Lords, the decisions in question seem to be entirely in conformity with my opinion. If a testator leaves a legacy out of his own proper estate, and at the same time appoints to a fund under a power, and superadds words of limitation applicable to both, these may fail as regards the sum appointed, but they must receive effect as regards the legacy.

The question therefore is whether the defender is bound to clear off these debts, or is entitled to keep them up? and that depends entirely on whether Sir John M'Donald, who was absolute proprietor of these lands, has validly expressed his intention that the defender in accepting this gift of the lands should take them under the burden of this obligation.

This intention can only be gathered by reading these two instruments in combination, and, so reading them, while I am strongly impressed with the difficulties suggested by your Lordships, I cannot persuade myself that there is any doubt at all of what Sir John M'Donald intended. He beyond all question meant that his heir should pay off these debts and should not keep them up against the estate. It is, I think, of no moment that the special manner in which payment was to be made neither was, nor was intended to be, imperative; nor that in order to enable his heir to pay these debts he and his wife allotted to the heir an equivalent from his mother's estate. He was quite entitled both to impose the obligation and to give the means of discharging it; and in construing this *mortis causa* gift effect must be given to the avowed intention of the granter, even although the words in which it is expressed are the same as those which failed to limit the appointment. It is here, no doubt, that the apparent difficulty arises. The words which express the intention are used with reference to a special mode of giving it effect, which the granters could not enforce. But this does

not touch the substance of the settlement, which did not limit this obligation to the use of the special fund. No doubt the obligation was only laid on the eldest son, because he only had funds out of which he could fulfil it. But the intention that he should clear off these debts and not keep them up, when he took £25,000 under the appointment, is plain enough.

The conclusion at which I should have been inclined to arrive had the summons been framed for that purpose would have been to have found that the defender is bound to pay off these debts, not in respect of his taking the £25,000 under the appointment, but in terms of the manifest intention of the granters of the entail. The conclusions for irritating the right of the defender are in any view untenable, and from these the defender ought to be assoilzied.

The Court adhered.

Counsel for Pursuer—Fraser—Trayner. Agents —Dewar & Deas, W.S.

Counsel for Defender — Dean of Faculty (Watson) — M'Laren — Balfour — Mackintosh. Agent—A. P. Purves, W.S.

Thursday, November 2.

SECOND DIVISION.

[Lord Young, Ordinary.

BURD *v.* CATTO AND OTHERS.

Act 1617, *c.* 13—*Vicennial Prescription of Retours—Singular Successor—Fraud.*

A party sought to reduce a retour after the lapse of 57 years, on the ground that it had been obtained by fraud, perjury, and subornation of perjury on the part of the person retoured, from whom the property had passed to a singular successor. Deducting the minorities of the pursuer and her father, the full period of the long prescription had not elapsed.—*Held* that the action was barred by the vicennial prescription.

This was an action of reduction, count, reckoning, and payment raised by Mrs Jessie Burd, wife of Antonio Rocca, confectioner, Perth, against Robert Catto, surgeon, Peterhead, and others. The pursuer concluded for reduction of (1) an extract decree of general service expede before the bailies of Aberdeen in favour of Peter Burd, dated 22d May 1819, and retoured in Chancery; (2) disposition and assignation by Peter Burd in favour of Patrick Kilgour, dated 6th October 1820; (3) instrument of sasine, dated 17th and recorded 23d October 1820, in favour of Patrick Kilgour. Further, the defenders were called upon to convey to the pursuer the property in Peterhead to which the retour applied, and to account for the rents thereof since 1816. The pursuer alleged that she was the great-granddaughter of John Burd, thread manufacturer, Peterhead, who died in 1792, and was proprietor of the subjects in question. John Burd left a will, dated 14th June 1791, and recorded 21st January 1793, b which, after providing a liferent to his wife, he divided his whole means equally among his seven children—James, Charles, Thomas, William, Margaret, Peter, and Benjamin. All these fiars survived the testator, and they obtained a charter of confirmation from the superiors of the subjects in question on 21st October 1797. Thomas Burd, the testator's third son, died about 1815, leaving, it was averred, two children--George, who was never married, and Thomas, the pursuer's father, who was born about 1802, married 18th March 1851, and died 17th February 1855. The pursuer, his only child, was born 24th May 1851. Peter Burd, the sixth son, on 22d May 1819 obtained decrees of general service of himself as nearest and lawful heir of his brothers Thomas and William, both before the bailies of Aberdeen, and these decrees were duly retoured to Chancery. The pursuer asserted that Peter Burd "knew quite well that his brother Thomas had left issue, and the pretended service in his favour was obtained by fraud, perjury, and subornation of perjury;" further, that the bailies of Aberdeen had no jurisdiction, and that the pursuer's father, then a minor, was not called as a party to the process. Peter Burd sold the subjects to Patrick Kilgour on 6th October 1820, and Kilgour, it was alleged, knew the seller had no good title. From Patrick and Robert Kilgour (who together came to be vested in the whole property of the Burd family) the present defenders acquired the property through various transmissions, and were duly infeft. It was also alleged by the pursuer that her father at the time of his death had instituted proceedings to recover his rights.

The pursuer pleaded—"(1) The pursuer being the nearest lawful heir of one or more of the parties favoured by the last settlement of John Burd, is entitled to decree as concluded for, with expenses in the event of expense being caused. (2) The defenders having no right to the share of the properties libelled, which is claimed by the pursuer, ought to be decerned to cede possession in her favour. (3) The defenders' pleas of prescription are inapplicable because of the minorities of the pursuer and her father falling to be deducted from the forty years. (4) The pretended service and retour of 1819 being wholly null or invalid, cannot be set up by any prescription. (5) The defenders having drawn the rents of subjects belonging to the pursuer, are bound to count and reckon with her."

The defenders pleaded—"(1) The action falls to be dismissed in respect the pursuers have no title to sue. (2) The action is excluded in respect of both the positive and negative prescription, or one or other of them. (3) The action is barred by the Act 1617, c. 13, establishing the vicennial prescriptions of retours. (4) In no view can the defenders be called upon to account for more than the rents of the subjects in question during the respective periods of their possession; and that possession having been *bona fide*, they are not even liable to account for these. *Separatim*, the pursuer's claim for bygone rents is barred by taciturnity and *mora*."

The Lord Ordinary sustained the plea founded on the vicennial prescription of retours, and assoilzied the defenders.

The pursuer reclaimed, and argued — The vicennial prescription is a plea personal to the heir served. It is a mere limitation of action.

The defenders argued—The fraud of authors