LORD GIFFORD and LORD YOUNG concurred.

The Court adhered.

Counsel for St Cuthberts—Solicitor-General (Balfour, Q.C.)—Burnet. Agent—J. M'Caul, S.S.C.

Counsel for City Parish—Dean of Faculty (Fraser, Q.C.)—J. A. Reid. Agent—Curror & Cowper, S.S.C.

Counsel for City of Edinburgh—Lord Advocate (M'Laren, Q.C.)—Mackay. Millar, Robson, & Innes, S.S.C.

Friday, December 10.

SECOND DIVISION.

STUDD *v.* STUDD'S TRUSTEES AND OTHERS.

Succession — Settlement Couched in Technical Terms of Foreign Law—Titles to Lands Consolidation (Scotland) Act (31 *and* 32 *Vict. c.* 101), *secs.* 19 *and* 20.

An Englishman having heritable property both in England and Scotland, executed an English deed whereby he directed his estates, including his estate in Scotland, to be settled on his son and a series of heirs, according to the conditions and restrictions of an English settlement in tail male. *Held* that this direction should receive effect, that effect being, in terms of Scottish conveyancing, as agreed upon by the parties, to confer a liferent only of the estate in Scotland on the testator's son, with a destination in fee to the heirs-male of his body and the persons called in the deed of direction—*diss.* Lord Justice-Clerk, who held that the restrictions of an English settlement in tail male could not be made to affect the estate in Scotland, and that that estate must be held to be undisposed of, and therefore fall to the testator's eldest son in fee-simple as heir-at-law.

Major-General Edward Mortlock Studd of Oxton, in the county of Devon, died on 6th October 1877 leaving a last will and codicil dated in April and December respectively of the same year, and registered in the district registry attached to the Probate Division of the High Court of Justice at Exeter the 19th January 1878, whereby he appointed his widow Emma Bayly or Studd, Frederick Joliffe Bayly, and Edward Osborn Williams to be his trustees. Major Studd was a domiciled Englishman. Some years before his death he had acquired the lands, teinds, and shooting estate of Banchor in Inverness-shire. His will contained this clause:—"I devise all such and such parts of my manors, messuages, lands and hereditaments, situate in the counties of Devon, of Inverness in Scotland, of Stafford, and of Warwick, and of my estates called The Four Dwellings, The Quinton, and The Farm at 'Bell End,' whether in Worcestershire or Staffordshire, or elsewhere, as consist of freehold of inheritance (which several hereditaments are hereinafter called 'Edward's Freehold Estate'), to the use of my elder son Edward Fairfax Studd and his assigns, for his life, without impeachment of waste; and after the death of the said Edward Fairfax Studd, to the use of the first and every other son of the said Edward Fairfax Studd successively according to their respective seniorities in tail male, with remainder to the use of my trustees during the life of my younger son Alnod Ernest Studd, upon the same trusts as hereinafter declared concerning the real estate next hereinafter devised to my trustees, and called 'Alnod's Freehold Estate;' and after the death of the said Alnod Ernest Studd, to the use of the first and every other son of the said Alnod Ernest Studd successively according to their respective seniorities in tail male, with remainder to the use of the first and every other son of the said Edward Fairfax Studd successively according to their respective seniorities in tail, with remainder to the use of the first and every other daughter of the said Edward Fairfax Studd successively according to their respective seniorities in tail, with remainder to the first and every other son of the said Alnod Ernest Studd successively according to their respective seniorities in tail, with remainder to the first and every other daughter of the said Alnod Ernest Studd successively according to their respective seniorities in tail, with remainder," &c. The will also provided "that my trustees shall have the fullest powers of determining what property passes under any specific devise or bequest contained in this my will or any codicil hereto, . . . and generally, of determining all matters as to which any doubt, difficulty, or question may arise under or in relation to the exercise of the powers or the execution of the trusts of this my will or any codicil hereto."

The expression "freehold of inheritance" was by joint-minute of the parties to this case, who consulted English counsel as to its terms, declared to denote an estate or right in lands which (as is the case with all lands in England) are held in fee of the Crown or of a subject-superior (to the exclusion of copyholds and leaseholds), and such that the estate or right is not merely for life or a term of years, but on the death of the holder without having received such power of disposition as the law allows him, will descend to his heir-general or the heir of his body, according as the estate is a fee-simple or an estate tail. "Without impeachment of waste" was declared by the same joint-minute to mean that the person so holding "may cut timber in a husbandman-like manner for his own benefit, and open mines, quarries, and the like, as well as work existing ones, and permit buildings, fences, and the like to dilapidate with impunity; but may not wantonly pull down houses or fell ornamental timber, or commit other injury of a like nature."

The Titles to Land Consolidation Act 1868 (31 and 32 Vict. cap. 101), sec. 20, provides that a conveyance of heritage shall not from and after the commencement of that Act be invalid by reason of the absence of the word "dispone" or other words of *de presenti* conveyance; "and where such deed or writing shall not be expressed in the terms required by the existing law or practice for the conveyance of lands, but shall contain with reference to such lands any word or words which would if used in a will or testament with reference to moveables be sufficient to confer upon the executor of the grantor, or upon the grantee or legatee of such moveables, a right to claim and receive the same, such deed or writing, if duly executed in the manner required or permitted in the case of any testamentary writing

by the law of Scotland, shall be deemed and taken to be a general disposition of such lands within the meaning of the 19th section hereof by the granter of such deed or writing in favour of the grantee thereof, or of the legatee of such lands, and shall be held to create, and shall create, in favour of such grantee or legatee an obligation upon the successors of the granter of such deed or writing to make up titles in their own persons to such lands and to convey the same to such grantee or legatee; and it shall be competent to such grantee or legatee to complete his title," &c.

Edward Fairfax Studd, the testator's eldest son, raised this action of declarator against (1) Edward Arthur Studd and Gladys Studd, his own pupil children, to whom Mr Charles Cook, W.S., was appointed *curator ad litem*; (2) his father's trustees; and (3) his brother Alnod Studd, and the trustees under the trust for his behoof in his father's will; (4) a number of nephews and nieces of the truster, being the whole parties interested in any way in his father's estate. He concluded for declarator (1) that the lands and teinds of Banchor "have vested in the pursuer absolutely, and without any restriction or limitation whatsoever, in virtue of the conveyance or destination thereof contained in the last will and testament of his father Edward Mortlock Studd;" or otherwise (2) that the said lands and teinds fell under the residuary clause of his father's will as property not otherwise disposed of; or otherwise (3) that the said Edward Mortlock Studd, his father, died intestate *quoad* the said lands and teinds, and that the same now belonged to the pursuer as his father's heir-at-law. All the defenders compeared.

The pursuer pleaded—"(1) The devise or conveyance of such of the testator's manors, messuages, lands, and hereditaments, situate in the county of Inverness, as consist of freehold of inheritance, being habile and sufficient to carry the said estate of Banchor with the teinds thereof, the destination thereof is not such as by the law of Scotland imports any restriction or limitation of the pursuer's right, and he is therefore entitled thereunder to the said estate absolutely in fee; or (2) *Separatim*, the language of the said special devise or conveyance being incapable of interpretation according to the law of Scotland, the said estate of Banchor, with the teinds thereof, falls to be dealt with as part of the residue of the testator's estate, and the pursuer is entitled thereto under the residuary bequest in his favour contained in the said will; or (3) *Separatim*, the said estate of Banchor and the teinds thereof are intestate succession of the said deceased Edward Mortlock Studd, and fall to the pursuer as his heir-at-law."

The defenders pleaded—"(1) The defenders, the trustees of the late General Studd, are bound under the provisions of his last will to make up a title in their own names to the estate of Banchor, with the teinds thereof, and thereafter to execute a deed of strict entail, settling the estate on the series of heirs prescribed in the said last will; or (2) *Separatim*, the right of the pursuer in the estate of Banchor, with the teinds thereof being limited by the terms of the said last will to a right of liferent only, he is not entitled to decree in terms of the first conclusion of the summons. (3) The terms of the special devise or conveyance of the lands in Inverness-shire being effectual to convey the estate of Banchor, it does not fall to be dealt with under the residuary clause of the will, or as part of the testator's intestate succession."

The Lord Ordinary pronounced this interlocutor:—

"The Lord Ordinary having considered the cause, Finds (1) that according to the sound construction of the last will of the deceased Major-General Edward Mortlock Studd of Oxton, in the county of Devon, dated 21st April 1877, and codicil thereto, dated 14th November 1877, the lands of Banchor, in Inverness-shire, belonging to the testator at the time of his death, were destined by him to his eldest son Edward Fairfax Studd, and to the heirs-male of his body in fee, whom failing to the testator's trustees during the life of the testator's younger son Alnod Ernest Studd, and after his death to the heirs-male of the body of the said Alnod Ernest Studd, whom failing to the heirs-female of the body of the said Edward Fairfax Studd, whom failing to the heirs-female of the body of the said Alnod Ernest Studd, whom failing to certain other persons named: Finds (2) that the said bequest imports a right of fee in said lands in the person of the said Edward Fairfax Studd: Therefore decerns and declares in terms of the first conclusion of the summons."

He added this note:—"The difficulty in the present case arises from the not uncommon practice of a person ignorant of the rules regulating the conveyance of real property in one country, attempting to settle such property by means of an instrument prepared according to the rules of another country in which the rules of conveyancing are entirely different.

"The late General Studd was proprietor of estates in various counties in England, and also of the estate of Banchor in Inverness-shire in Scotland, the succession to all of which he regulated, or attempted to regulate, by his last will and testament, which is in the English form, and is dated 21st April 1877, and codicil thereto, dated 14th November 1877. Although by that will he appointed trustees, he did not devise these estates to the trustees, but he devised them directly to his eldest son Edward Fairfax Studd, and other parties, in the following terms, viz.:—'I devise all such and such parts of my manors, messuages, lands, and hereditaments situated in the counties of Devon, of Inverness in Scotland, of Stafford, and of Warwick, and of my estates called The Four Dwellings, The Quinton, and the farm at 'Bell End,' whether in Worcestershire, or Staffordshire, or elsewhere, as consist of freehold of inheritance (which several hereditaments are hereinafter called 'Edward's Freehold Estate') to the use of my elder son Edward Fairfax Studd, and his assigns, for his life, without impeachment of waste; and after the death of the said Edward Fairfax Studd, to the use of the first and every other son of the said Edward Fairfax Studd successively according to their successive seniorities in tail male, with remainder to the use of my trustees during the life of my younger son Alnod Ernest Studd, upon the same trusts as hereinafter declared concerning the real estate next hereinafter devised to my trustees, and called 'Alnod's Freehold Estate;' and after the death of the said Alnod Ernest Studd, to the use of the first and every other son of the said Alnod Ernest Studd successively according to their re-

spective seniorities in tail male, with remainder to the use of the first and every other son of the said Edward Fairfax Studd according to their respective seniorities in tail, with remainder,' &c., to a succession of persons specified or named.

"Now, the first question that is raised in the record is, whether the estate of Banchor is truly and within the sense of this settlement a 'freehold of inheritance?' This is a technical English term; but the parties have concurred in stating in the joint-minute that its meaning by the law of England is 'an estate or right in lands which (as is the case with all lands in England) are held in fee of the Crown or of a subject-superior (to the exclusion of copyholds and leaseholds), and such that the estate or right is not merely for life or a term of years, but on the death of the holder without having exercised such power of disposition as the law allows him, will descend to his heir-general or the heir of his body, according as the estate is a fee-simple or an estate tail.' The estate of Banchor, with the teinds thereof, was acquired and held by General Studd in fee-simple, and by the ordinary feudal tenure of land in Scotland, and I have therefore no hesitation in holding that it passed under the devise as a 'freehold of inheritance.' And if I had had any doubt upon the point, it would have been removed by the fact that the trustees of the will have the fullest powers of determining what property should pass under any specific devise or bequest in the settlement, and have in the record expressly declared that they hold the estate of Banchor to have been effectually carried by the devise now under consideration. But a much more important and difficult question is, whether the estate passed under this devise to Edward Fairfax Studd as his absolute property, or is devised to him merely as tenant for life, and after his death to the other persons specified in the will, as under a settlement of strict entail? And he has brought the present action for the purpose of having it judicially declared that the subjects in question are vested in him in fee absolutely and without any restriction or limitation whatsoever. The parties who are called as defenders are the trustees of the will, and his own pupil children, to whom a curator *ad litem* has been appointed.

"These defenders stated in the record a plea to the effect that the devise is truly a devise to the trustees, and that they are bound under the provisions of the will to make up a title in their own names to the estate of Banchor, and thereafter to execute a deed of strict entail thereof, settling it on the series of heirs described in the will. But the defenders now admit in the joint-minute that the estate passed under the devise to Edward Fairfax Studd and the other heirs without the intervention of the trustees. The other plea stated by them, and which is now to be disposed of, is to the effect that whatever may be the nature of the ulterior destination, the right of Edward Fairfax Studd is strictly limited to a right of liferent. In support of this plea it is urged that the will must be construed according to the law of England, and that the same effect must be given to the devise of the Scotch estate of Banchor as would be given by the Courts of England to the devise of the estates in that country. Now, there seems to be no doubt, and indeed the parties are agreed, that by the will the English estates are virtually settled in the terms of a strict entail—that is to say, that they pass in the first instance to Edward Fairfax Studd as tenant for life, or, as we should term it, for his liferent use allenarly, but with more extensive powers of administration than are usually enjoyed by a liferenter in this country; and after his death to the heirs-male of his body in succession, whom failing to the parties specified in their order, all under the rules of strict entail according to the law of England.

"Now, I need hardly say that an entail of lands in Scotland cannot be constituted according to the law of this country except in strict compliance with the statutory rules which regulate entails. It is true that where an estate is conveyed to trustees with directions to them to entail it upon a certain series of heirs, the trustees would be bound to obey these directions, and to impose upon the beneficiaries under the trust the fetters of a strict entail, although the settlement containing these directions does not in the general case specify the restrictions, and is not itself prepared in the form of a deed of entail. But where, without the intervention of a trust, the estate is directly conveyed either *inter vivos* or *mortis causa* to a series of heirs, it will, although effectual as a conveyance of land, be wholly ineffectual as an entail, unless the prohibitory, irritant, and resolutive clauses required by the Entail Statutes are expressed at length in the deed, or unless under the provisions of recent legislation the conveyance contains a clause expressly authorising registration of the entail in the Register of Taillies. Now, there is nothing of that kind in the present case, and the will is wholly inoperative as an entail of the estate of Banchor; and whatever may be held to be the nature of the right to that estate conferred by the will upon Edward Fairfax Studd and his sons, and the other parties called to the succession, it is not a right which is limited by the fetters of a Scotch entail.

"But it is said that it is apparent upon the face of the will that whatever effect may be given to other parts of the devise, the only right which Edward Fairfax Studd was intended by his father to take under this will was a right of liferent, 'without impeachment of waste,' the effect of the addition of these words being, according to the admission of parties, to confer upon him various extensive powers of administration. These are stated in the joint-minute to be, *inter alia*, power to take possession of the estate, both natural and civil, to let leases for agricultural occupation for twenty-one years, to cut down timber in a husbandmanlike manner for his own benefit, and open mines, quarries, and the like, as well as work existing ones, and permit buildings, fences, and the like to dilapidate with impunity, but not wantonly to pull down houses, or fell ornamental timber, or commit other injury of a like nature.

"Now, assuming this to be the true construction of the devise according to the law of England, the question to be decided is, whether this Court is bound to give effect to that construction, or is entitled to construe the terms of the will as if it had been a Scotch instrument settling the succession of the Scotch estate? I am of opinion that, as the subject is a landed estate in Scotland, it must be construed with reference to the rules of conveyancing in operation in Scotland. I think

this doctrine is pretty clearly recognised in the cases of *Weir*, 1 S. 192, and of *Mitchell & Baxter*, 2 R. 208. And it humbly appears to me that if this devise is read with the aid of the explanation of its technical terms contained in the joint-minute, it simply resolves itself into a conveyance or bequest of Banchor by General Studd to his eldest son Edward Fairfax Studd in liferent, and the heirs-male of his body in fee, and thereafter to a series of heirs, subject to the restriction of an English entail, to which, as I have explained, effect cannot be given in this country. But according to a long series of decisions from the case of *Newland*, such a destination to A and his children, born and to be born, but unnamed, even although followed by a destination to other parties, truly imports a fee in A, although the interposition of a trust might have the effect of restricting A to a bare liferent. Upon that point I think it only necessary to refer to the case of *Macintosh* v. *Gordon*, 4 Bell's App. 105, as contrasted with the case of *Ross* v. *King*, 9 D. 1327, and to the earlier case of *Seton*, Mor. 4219, as contrasted with *Robertson*, Mor. Fiar Absolute and Limited, App. 2.

"But it is maintained that although such is the rule now universally applied in Scotland in interpreting destinations in these terms, it will not be extended to cases where it clearly appears from other considerations that the testator meant to limit the right of the father to a bare liferent, or at all events to something considerably less than a right of fee. Now, undoubtedly, it may be said that in the present case General Studd obviously intended and expected that the same effect would be given to his wishes regarding his Scotch estates as he knew would be given to them as regards his English estates, and as Edward Fairfax Studd was undoubtedly to be limited to a liferent in England as regards the English estates, he should not have any higher right in the Scotch estates. But I do not think that that is the sound view of the case. The parties have admitted that the will of General Studd contemplated a deed of strict entail of the whole of these estates, not only upon Edward Fairfax Studd as tenant for life, but also upon the heirs-male of his body and the other parties specified. Yet it is quite certain that so far as the entail is concerned the will cannot receive effect in Scotland, and to that extent at all events the will of General Studd cannot receive effect. But if I were to hold that Edward Fairfax Studd is merely to take a right of liferent, then on his death the heirs of his body would, contrary to the will of General Studd, take the estate in fee-simple. Now, this would, I think, be making for General Studd a will entirely different from that which he clearly intended to make. How is it possible for this Court to say that if General Studd had contemplated such a result in the case of his grandsons he would still have limited his son to a bare liferent? It therefore appears to me that it would be a mistake to construe one part of this devise according to the English rules, and the remainder according to our own rules; and that, on the whole, the only safe and satisfactory course to follow in dealing with this devise of a landed estate in Scotland is to construe the whole according to the well-known rules of Scotch conveyancing, and to hold that it is truly a destination of the estate to the pursuer in liferent and to the heirs of his body in fee, whereby he is entitled to the fee of the property. He will thus obtain decree in terms of the first conclusion of the summons, and as in consequence the other conclusions become unnecessary, these may be dismissed."

The curator *ad litem* for the pursuer's pupil children reclaimed, and argued—The intention of the testator plainly was that the trustees should make an entail of the estate, and that the pursuer should only have a life interest. The terms of this deed formed a good entail in English law, and the trustees had simply to use the appropriate terms to make that a Scotch entail. At all events, the pursuer was only a liferenter. The language used was technical, but not applicable to Scotland, so that it did not fall under the rule that technical words must be construed technically, but on the contrary it required translation, and when translated was found to import liferent. The rule that a liferent to a father and fee to children unnamed imported a fee in the father had no application to cases where a testator had plainly expressed, in language to which that rule of conveyancing did not apply, that he intended to give a liferent and not a fee. The pursuer might himself make up a title under sec. 46 of the Conveyancing Act of 1874, which, after providing that trustees or executors may complete a title to lands not directly conveyed to them, provides thus—"Provided always that nothing herein contained shall prevent any disponee, grantee, or legatee, to whom such land may be expressly conveyed, granted, or bequeathed by such *mortis causa* conveyance, grant, or testamentary deed, from completing a title thereto in terms of the Titles to Lands Consolidation (Scotland) Act 1866, where the completion of such title shall not be at variance with the purposes or directions of such *mortis causa* conveyance, grant, or testamentary deed or writing."

Authorities—*Richmond's Trustees* v. *Winton*, Nov. 25, 1864, 3 Macph. 95; Ross' Leading Cases (L. R.) i. 406.

Argued for pursuer—This being a deed dealing with Scotch heritage, it was incompetent to translate the language used, which applied to English heritage—Lord Brougham in *Yates and Thomson*, 1 S. and M'L. 797. Popular language might indeed have been translated, but to technical language technical effect must be given. Now, the incidents of an English tenure such as was referred to by the deed were very different from those of a Scotch liferent, and effect could not therefore be given to the testator's intention under any Scotch tenure, even though they were translated—Stephen's Comm. i. 240 (8th edit.); Bell's Comm. p. 60 (7th edit.); *Wardlaw*, 2 R. 368. It would be impossible to give the pursuer an estate to be held subject to the peculiar restrictions of the law of England. In a disposition of heritage subject to restrictions the question is not merely as to intention to restrict, but as to the efficacy of the restriction imposed.

At advising—

Lord Gifford—This is an interesting case, involving the consideration of principles which have a very wide and general application. In particular, it involves the question, How far the law of Scotland, dealing with heritable estates in Scotland, will give effect to an English will de-

vising or disposing of Scotch heritage and settling it as an English estate tail might be settled, so as to carry out in Scotland, as nearly as possible and by means of appropriate Scotch deeds, whatever can be shown from the will to have been the real intention of the testator in reference to his heritable estate in Scotland, such intention not being contrary to the law of Scotland, or such as the law of Scotland will refuse to recognise or enforce?

In the present case the Lord Ordinary has so far given effect to the late General Studd's English will as to hold that it effectually conveyed his Scotch estates of Banchor and others in Inverness-shire to his eldest son Edward Fairfax Studd, the present pursuer, but he has refused to give effect to the English will in so far as it imposed or might be held to impose limitations or conditions upon that conveyance, and that although such limitations or conditions would have been quite effectual if the estate of Banchor had been situated in England. Accordingly, the Lord Ordinary has pronounced decree of declarator finding that the pursuer Edward Fairfax Studd is under his father's will absolute and fee-simple proprietor of the said estates of Banchor and others, and that "without any restriction or limitation whatsoever;" that consequently he may dispose of these estates at pleasure, either onerously or gratuitously, and may disappoint all hopes of succession thereto which either his own children or his brother Alnod Ernest Studd or his issue, or the other persons named in General Studd's will, might have had to the said Scotch estates. The Lord Ordinary has reached this conclusion although he assumes that it is contrary to the intention of the late General Studd as expressed in his last will and testament, and this on the ground that the rules affecting the conveyance of Scotch heritage do not admit of effect being given to the limitations and conditions which General Studd intended should be applicable to his Scotch as well as his English estates.

The result of the Lord Ordinary's judgment is, that while the pursuer Edward Fairfax Studd must take the heritable estates in England devised to him by his father's will, under all the conditions, restrictions, and limitations provided by the will, yet he takes the estate of Banchor and others, in Inverness-shire, Scotland, free from those conditions, restrictions, and limitations, although he takes the estate in Scotland as well as in England under the same will and under the same words of the same will, and although his father, the testator, intended that the same conditions, restrictions, and limitations should apply to the estates in Scotland as to the estates in England. Thus the pursuer would take the estates in Scotland under his father's will, and yet might defeat his father's intention in relation to these estates, while he must give effect to the father's intention in relation to the English estates. The father's will will receive effect as to the lands in England devised to the pursuer, while as to the lands in Scotland the devise will be effectual, but the conditions upon which it is made will be disregarded and will receive no effect.

Now, I do not say that a result like this may not sometimes be inevitable, for conditions or restrictions which are lawful in one country may sometimes be unlawful in another, or they may not have been effectually imposed according to law, or there may be no machinery applicable or appropriate in Scotland for enforcing conditions which may be easily rendered effectual in England. There may possibly be such cases, but I think I may say that a result like this is always to be regretted, and should only be admitted if it can be shown to be inevitable. A court of equity —and in the interpretation and carrying out of wills and of *mortis causa* settlements equity and the effectuation of the true intention of the testator is always a paramount consideration—will always be unwilling to refuse effect to what is plainly a testator's intention, reasonable and legal in itself, and it will be especially averse (the testator's words being the same) to give one effect to these words in Scotland and a different effect to these words in England, according as the estates devised are situated in the one country or in the other.

Now, I am of opinion that in the present case the result reached by the Lord Ordinary is not inevitable. I think that the will of the late General Studd, according to its true import and meaning, can be given effect to in Scotland, and in reference to the Scotch heritable estate in the same way as it will receive effect in England in regard to the English heritable estate—that in both countries the legal will of the testator can be made effectual in nearly the same degree and with substantially the same result—although it may be that appropriate deeds or procedure may be required according to the conveyancing rules of the two countries, so that the pursuer Edward Fairfax Studd shall hold and shall be required to hold the estate of Banchor and others in Inverness-shire on substantially the same terms, and in substance under the same limitations and conditions, as he holds the English estates in Devonshire, in Staffordshire, and elsewhere in England, consisting of "freehold of inheritance," all which estates, both in Scotland and in England, are devised to him in the same words and by the same breath and with the same intention under his father's will.

I have therefore come to be of opinion, and latterly without much difficulty, that the Lord Ordinary's judgment should be recalled in so far as it gives the pursuer an absolute and unlimited fee in the lands of Banchor and others "without any restriction or limitation whatsoever," and that instead thereof it should be declared that the pursuer has only right to the said estate for his own liferent use only, and after his death the same to descend to the other parties called in General Studd's will, and in the manner therein mentioned. There may be, and there is, some nicety in expressing in the language of Scottish conveyancing the precise legal effect which is attained in England by the words of General Studd's will, but I have no doubt it can be done so as to place the Scotch estates in substantially the same position as the English ones. This will carry out the true intention of the testator, and as there is no illegality in that intention—nothing contrary either to law or to statute, and nothing unreasonable or even unusual,—I think this is what must be done.

The steps by which I reach the conclusion now indicated may be stated in a very few words.

Prior to the passing of The Titles to Land Consolidation Act 1868 (31 and 32 Vict. c. 101, 31st July 1868) the last will of General Studd

now before us would not have carried heritable estate in Scotland, and General Studd would have been held, so far as his Scottish real estates were concerned, to have died intestate. The Act of 1868, however, in accordance with the clearest principles of equity and expediency, altered this, and provided (sec. 20) that no *de presenti* words or words of conveyancing style shall be necessary in *mortis causa* deeds of settlement, and that every testamentary writing purporting to convey or bequeath lands in Scotland shall be effectual provided it is executed and expressed in a manner sufficient to convey or bequeath moveables. I am expressing the clause shortly instead of quoting its somewhat anxious provisions. I think in reference to wills it puts heritage on precisely the same footing as moveables, it being always shown that this was the intention of the testators. Now, in virtue of this enactment, and without the aid of the broader and more comprehensive provisions of the Conveyancing (Scotland) Act 1874, I am of opinion that the last will of General Studd is amply sufficient validly to settle the testator's estate of Banchor in Inverness-shire, Scotland, quite as effectually as it validly settles his other estates in England, which are devised to his eldest son, and the heirs and others substituted to him in manner therein mentioned. I think this is the very meaning of the enactment of 1868. It expressly provides that "it shall be competent to any owner of lands (that is, of land and real estate in Scotland) to settle the succession to the same in the event of his death not only by conveyances *de presenti* according to the existing law and practice, but likewise by testamentary or *mortis causa* deeds or writings," and then it proceeds to describe what wills shall be sufficient to carry heritage, the substance being, as I have already said, that provided only intention be clear a deed that would settle moveables in Scotland may settle heritage also. I hold it clear therefore that General Studd's will effectually settles his heritable estate in Scotland.

The next question is, How, and in what manner, to what effect, and with what legal consequences, does General Studd's will settle his Scotch estates? Now here I think the only difficulty is that General Studd in his will has used only English technical terms, having, as I understand it to be admitted, a precise and definite technical meaning and effect in England, but which words are not technically used and have not a known and definite technical meaning in Scotland, and as applicable to Scottish real estate. There seems to be no doubt whatever that General Studd in his will used these technical and legal words in their strict and technical legal sense according to the law of England, and read in that country as such they have a perfectly definite and legal meaning and effect. So read, and read with the effect which the law of England would give to them, they convey with definiteness and with accuracy General Studd's true intention and meaning; and it appears to me that if this be so, all that the law of Scotland has to do in reference to the Inverness-shire estate is to carry that meaning and intention into effect so far as it can possibly be done, unless it can be shown to be contrary to law or statute, or opposed to the policy of the law of Scotland.

In other words, all that the Courts of Scotland need in order to enable them to carry out General Studd's will in reference to his Inverness-shire estates is a translation of the technical words of the will, so that the Court may be informed of their true meaning and effect. When this is obtained, the Court will then consider, First, whether there is anything illegal in the will so translated, and, Second, if not, how is it to be expressed in Scotch conveyancing language so as to complete the title to the lands, and enter the records of real rights.

We might have obtained a translation of the technical words of General Studd's will from English counsel or from English Courts under statutory provisions made for that purpose, but in the present case the parties themselves, by the joint-minute, have given us the translation required. They have agreed as to what the technical meaning according to the law of England is of the technical words used in the will, and also as to the legal effect which such words have according to the law of England, and I am of opinion that this joint-minute is enough to enable us to effectuate the will in Scotland according to its true intent and meaning. For according to the law of Scotland there is nothing illegal or incompetent in the wishes and intentions of General Studd so reached and so explained. He merely wished to settle his estates in Scotland according to the same tailzied settlement and destination which he applied to his estates in England. The joint-minute makes it clear what sort of settlement he has effectually made of his English estate. There is nothing illegal in making a similar settlement in Scotland, if only it can be done by appropriate words. I think the appropriate words may be found by the exercise of reasonable care and discrimination, and possibly by the use of certain declarations and conditions which may be expressed with greater or with less detail, but when so expressed I think it is impossible to say that they will be illegal or incompetent, or in any degree contrary to the spirit and policy of the law of Scotland. It is impossible to say that a proprietor of lands in Scotland cannot legally settle his estate in the same way and with substantially the same effect as he might settle an estate tail in England. In truth, there is not very great difference in substance and in effect between the law of England and the law of Scotland in regard to the powers of entailing lands. The difference is very wide as to the modes in which entails must be made, and how and according to what forms lands are to be entailed or disentailed; but when we consider not form but substance, the differences are by no means great, and I should be very sorry indeed to be compelled to hold that a proprietor who wished his Scotch estate to descend under the same tailzied destination with his English one, and distinctly expressed his wishes in his will made in England, could not possibly accomplish his purpose.

In the present case I read the last will of General Studd simply as his last will, that is, simply as the last expression of his wishes and desires in reference to his estates both in England and Scotland. I am of opinion that such expression of desire or of will is effectual to settle his Scotch heritage, and I think that there is nothing to prevent this expression of will or of desire from receiving effect. I think that we can give the will effect, and that we should do so. I

should regard it as a misfortune if we found ourselves compelled to defeat and disappoint the will instead of carrying it out.

The present declarator raised sharply in its first conclusion the main question in which the pursuer is chiefly interested, namely, whether under his father's will the pursuer is absolute fiar of the Scotch estate of Banchor—that is, out and out proprietor, without any restriction or limitation whatsoever—and whether as such he may dispose of it at pleasure, either onerously or gratuitously by himself alone, and without any consent of any other party whatever. The other conclusions are alternative, and I think do not apply. Now, I decline to give the pursuer decree in terms of his first conclusion, because I think that that is and would be directly contrary to the father's will, under which alone the pursuer can claim the lands. I think the defenders are entitled to absolvitor from this conclusion and from the other conclusions of the action.

As to the terms of the formal title to be completed to the estate of Banchor, the Court is not required to adjust these terms. That is a matter for the private conveyancer who may be consulted or employed by the parties.

Lord Young—It is clear and undisputed that the testament in question contains a declaration of the testator's will with respect to the disposal of his lands of Banchor in Scotland. It was indeed suggested that the word "devise" is according to English law a word of conveyance. I believe that it is a testamentary word which is used only in wills to declare testamentary intention, and although by construction of law it vests on the testator's death an actual freehold in the devisee, yet this is not from any technical virtue in the word devise, but from respect to the will, the same result following from any words expressive of the testator's will and intention. Indeed, the testator's will, when only collected by necessary or highly probable implication, is given effect to in like manner. If the point were material, we should require further information as to the law of England. But I think it is clearly immaterial, for, whatever the law of England, a devise in an English will cannot with respect to land in Scotland operate as a conveyance, or otherwise than as a declaration of testamentary intention. Prior to the Conveyancing Act of 1868, a declaration of testamentary intention was as to Scotch heritage altogether inoperative, the common law requiring absolutely a *de presenti* conveyance even in a *mortis causa* deed intended to take effect on the maker's death. The rule of the common law was altered by the statute, and the law now is, that a will has effect upon land as fully and completely as upon moveables. This is the meaning and effect, in my opinion, of sec. 20 of the statute, the language of which I think it unnecessary to consume time by commenting on. It would have been against the general scheme and policy of our system of titles and registers to take the will as a deed of conveyance, and accordingly a method is provided of making a registrable conveyance in harmony with our system of titles, to carry into execution the intention which the will declares. This is done by sec. 21 of the statute (1868).

I do not dwell on this topic, for the parties were agreed, and the Lord Ordinary has decided, that the will must have effect upon the lands in Scotland "according to the sound construction of it." The pursuer's leading plea is to this effect, and the Lord Ordinary has "no hesitation in holding that it (the Scotch land) passed under the devise."

The only question then is, What is the meaning of the will? and the Lord Ordinary has decided that "according to the sound construction of the will the Scotch lands were destined to the testator's eldest son and the heirs-male of his body in fee." But the parties are agreed that this is not the meaning of the language of the instrument according to the law and practice of England, where it was made, and that the law of England imputes a quite different meaning to any testator using that language in an English testament, which this is. Now, it is, at first sight at least, a paradoxical proposition that Scotch heritage shall pass under the devise of an English testament only quite otherwise than the testator confessedly intended, or, in other words, that the will shall have effect, but not according to the admitted meaning of its language and intention of the testator. The language here is indeed such that we require to be furnished with an authoritative translation. But such translation has been furnished, and I cannot say that I have any difficulty in understanding it. If I had, I should require further assistance, assuming, as I should, that any given devise or declaration of will in an English testament respecting Scotch heritage admits of being made intelligible to us so that we shall know what the testator meant to be done with it. The language here is apparently technical, and at all events it is admitted to be quite familiar to English conveyancers and lawyers, and the meaning is stated to us without a suggestion that there is any doubt about it. There is, indeed, in the minute of the parties a variety of superfluous (as I think) information, with which we have no occasion to concern ourselves, at least in this action. The material thing is that the language according to its admitted meaning declares it to be the testator's desire that his eldest son (the pursuer) shall have the lands for life, and that his (the son's) male issue, or the heirs-male of his body, shall have the fee. According to my view of the case, and having regard to the conclusions of the summons, this is enough to entitle the defenders to absolvitor, provided the will is to have effect according to the admitted meaning of it.

But the Lord Ordinary has declared that "the sound construction" of the will differs from the admitted meaning of its language, and gives the fee of the lands to the pursuer, with only a *spes successionis* to his heirs-male. His Lordship arrives at this conclusion by applying to this English testament, made in England by an Englishman, a very special and peculiar Scotch law rule of construction applicable to Scotch deeds of conveyance. That rule is, that a conveyance to a parent in liferent and his unborn issue in fee, confers a fee on the parent, unless a contrary intention appears. The rule has been condemned as unreasonable by Lord Corehouse and other eminent Judges, and it owes its continuance only to the consideration that it has been so long fixed and known that Scotch testators, and certainly Scotch conveyancers, may and ought to be presumed to use the language to which it applies

in the sense or with the meaning which the rule attaches to it. In accordance with this view, the word "allenarly" or "only," or anything whatever in the deed satisfactorily showing that a liferent and no more was intended, excludes the rule. This has not been doubted for a long while. To apply this rule of construction to an English testament, and so defeat the testator's intention, according to the sense and meaning of his words as admitted by the parties, or expounded to us by those versed in the language used, is to misapply it, I think, grievously. An English testator must, on clear and familiar principle, be held to have used the words of his English will, prepared by an English conveyancer, in the sense and meaning which the law of England attaches to them, and this in the present case is distinctly negative of an intention to give the fee to the pursuer, to whom he devised the estate for life. I have already pointed out that even in a Scotch conveyance any satisfactory indication of intention to give a liferent only is conclusive, and excludes the rule on which the Lord Ordinary has here acted.

The Lord Ordinary observes "that an entail of lands in Scotland cannot be constituted according to the law of this country except in strict compliance with the statutory rules which regulate entails." But a liferent and fee, with a destination to heirs-male of the fiar's body, and as long a destination beyond as you please to think of, although it is indeed an entail, is not a statutory entail, or anything but a simple destination standing on the common law. It is not suggested that this will is a statutory entail of the Scotch lands, or that the testator has expressed any desire that such an entail should be made, although if he had I really see no reason why his will should not have effect, the statutory rules of course being complied with in the conveyances made in pursuance of it. But that is not the question. The question is, whether a testament which distinctly expresses the testator's will and desire that his Scotch lands shall go to his eldest son in liferent, and to the heirs-male of his body in fee, is to have effect or not? and the Scotch Entail Acts have, as I think, no bearing on this question. "Tail-male" is not the language of Scotch conveyancing, but, as interpreted to us by agreement, it is precisely, or almost precisely, equivalent to what we call a fee, with a simple destination to heirs-male of the fiar's body. A tail-male in immediate succession to an estate for life vests in possession, we are told, on the termination of the life estate, when the fiar taking, if of lawful age, or as soon as he attains it, may dispose of the estate as he pleases. The only peculiarity, as distinguished from our law in the corresponding case, seems to be that the fiar cannot alienate or burden during the continuance of the life estate. Whether in giving effect to the will the fiar ought to be disabled from affecting the estate during the subsistence of the liferent by postponing till that time the vesting of the fee in the fiar, and leaving it to stand in the liferenter as a fiduciary or otherwise, we are not called on to decide. It may be that the testament will be sufficiently and satisfactorily fulfilled by constituting the estates of liferent and fee as therein desired—leaving the law of Scotland to determine the quality and incidents of these estates respectively in Scotch land without reference to the rules of the law of England applicable to similar estates in English land. On this question, which may never arise, I give no opinion now.

In this action we can only give or refuse, in whole or in part, one or other of three declarators alternatively concluded for, and are not required to settle, and I should think cannot competently settle, the terms of the conveyances by which the testament is to be carried into execution with respect to the Scotch estate. The proper judgment, in my opinion, is to repel the pursuer's pleas, sustain the second and third pleas for the defenders, and assoilzie them from the action.

In my opinion, the fundamental error in the Lord Ordinary's judgment consists in this—that he has regarded the instrument in question, not as an English will, which it is, but as a Scotch conveyance, which it is not. The notion seems to have been that the Act of 1868 substituted "dispone" for "devise," and with that change left the instrument to be construed and stand or fall as a deed of conveyance of Scotch heritage. In that view, which I have already said I think is erroneous, I must own that I do not see how the instrument could stand at all. It would certainly be a unique title in the register of sasines. Taken as an English will, we have only to find the meaning of it in the usual and familiar way, and give it effect accordingly with respect to both real and personal estate within our jurisdiction, requiring, as the Act of 1868 enjoins, that in so doing with respect to land our conveyancing forms shall be observed and a registrable title made. Another error, which I have, I think, sufficiently pointed out, consists in the idea that there is here any question about a strict entail—*i.e.*, an entail with fetters. It is generally known, even in Scotland, that an English estate "tail" is just a fee with a simple destination to heirs of the body, and that an estate in "tail-male" is just a fee with a simple destination to heirs-male of the body, although if there had been any question about it we should, according to our practice, have required it to be cleared by a reference to English lawyers. Such an estate in "tail" or "tail-male," to take effect on the termination of a life estate created by the same instrument, is the familiar strict settlement of English conveyancing. The destination may be made as extensive as the settler pleases, but however extensive, it is simple destination in the sense familiar to us, viz., that any fiar taking may alter or terminate the destination and deal with the property at his pleasure. I cannot accept the suggestion that we have no sufficiently exact equivalent in Scotland to enable us to give effect to an English will using the English terms when these are interpreted to us—for a liferent and fee with a simple destination to heirs-male of the body is exactly equivalent except in the single particular I have already mentioned, viz., that with us a fiar may dispose of his fee while the liferent subsists, which it appears is not the case in an English settlement. I see no difficulty in making the assimilation altogether exact if necessary by postponing the vesting of the beneficial fee till the termination of the liferent, and meanwhile giving a fiduciary fee to the liferenter. But no question about this arises now, or may ever arise, and meanwhile the property is quite safe, inasmuch as the pursuer having by our judgment a liferent

only cannot affect the fee or prejudice the party who may eventually be entitled to it.

Lord Justice-Clerk—I regret that I am unable to concur in the judgment proposed; and the questions raised are so important to the law that I shall shortly express the grounds of my dissent.

The instrument the effect of which we are to determine in this case professes to devise or convey certain real estates in Inverness-shire to persons therein designed, to be held under the restrictions and qualifications expressed in the settlement. We are told that this devise and the conditions annexed to it constitute a settlement in tail-male according to the law of England, and that if it had related to real estate in that country the rights thereby acquired would have been those described in a statement on which the parties have agreed. The question raised in this case is, whether the law of Scotland will recognise and give effect to a conveyance of land estate in Scotland to which these conditions are attached?

I need not stop to establish—for the proposition is too elementary to be disputed—that this is a question which can only be determined by the law of Scotland. The domicile of the granter of the conveyance is in this question of no moment. The conveyance, wherever executed, and whatever the domicile of the granter, must be effectual according to our own law, or it is not effectual at all. If the granter had been domiciled in Scotland the question would have been precisely the same.

Before the Statute of 1868 the conveyance would have been wholly ineffectual for want of sufficient words of disposition, but no question of that kind is involved in the present case. If the substance of the right conveyed be according to our own law, the words used in the settlement are by that law quite sufficient to operate a valid conveyance. "Devise," as a term applicable to personal estate, is, under the 20th section of the Act of 1868, an effectual term of disposition in a testamentary settlement. But the provisions of the statutes, as I shall show immediately, reach no further, and cannot possibly authorise land in Scotland to be held under a tenure which the law of Scotland does not recognise.

It has been said that we are bound to discover the intention of the granter, and having done so to give effect to it, whether that can or cannot be done by the actual devise. It is of more importance to ascertain what the granter has done. There is no doubt about his intention. He meant his lands in Inverness-shire to be held under an English settlement in tail-male, and had no other intention, and that which he intended he has embodied, not in informal instructions, but in a formal instrument. The question is, whether this deed can receive effect? There is no other question.

The following are the provisions of this instrument:—"I devise all such and such parts of my manors, messuages, lands, and hereditaments, situate in the counties of Devon, of Inverness in Scotland, of Stafford, and of Warwick, and of my estates called The Four Dwellings, The Quinton, and The Farm at 'Bell End,' whether in Worcestershire or Staffordshire or elsewhere, as consist of freehold of inheritance (which several hereditaments are hereinafter called 'Edward's Freehold Estate'), to the use of my elder son Edward Fairfax Studd and his assigns, for his life, without impeachment of waste; and after the death of the said Edward Fairfax Studd, to the use of the first and every other son of the said Edward Fairfax Studd successively according to their respective seniorities in tail-male, with remainder to the use of my trustees during the life of my younger son Alnod Ernest Studd, upon the same trusts as hereinafter declared concerning the real estate next hereinafter devised to my trustees, and called 'Alnod's Freehold Estate;' and after the death of the said Alnod Ernest Studd, to the use of the first and every other son of the said Alnod Ernest Studd successively according to their respective seniorities in tail male, with remainder to the use of the first and every other son of the said Edward Fairfax Studd successively according to their respective seniorities in tail, with remainder to the use of the first and every other daughter of the said Edward Fairfax Studd successively according to their respective seniorities in tail, with remainder to the first and every other son of the said Alnod Ernest Studd successively according to their respective seniorities in tail, with remainder to the first and every other daughter of the said Alnod Ernest Studd successively according to their respective seniorities in tail, with remainder," &c.

The parties to this action have agreed on a glossary or interpretation of these terms, the material clauses of which are the following:—"(2) That as such tenant for life the pursuer is entitled to possession, both natural and civil; and by virtue of the Settled Estates Act 1877, section 46 (re-enacting the provisions of an earlier Act), he can of his own authority let leases for agriculture or occupation (subject to conditions imposed by the Act) for a period not exceeding twenty-one years; (3) That in virtue of the clause 'without impeachment of waste,' he may cut timber in a husbandmanlike manner for his own benefit, and open mines, quarries, and the like, as well as work existing ones, and permit buildings, fences, and the like to dilapidate with impunity, but may not wantonly pull down houses or fell ornamental timber, or commit other injury of a like nature; and (4) That he is entitled to convey away or assign absolutely his life estate, and that it can be attached by his creditors, and on bankruptcy or liquidation by arrangement his life estate passes to his trustee in bankruptcy or liquidation. *Third*, The devise contained in the same clause, 'After the death of the said Edward Fairfax Studd, to the use of the first and every other son of the said Edward Fairfax Studd successively according to their respective seniorities in tail male, with remainder to the use of my trustees during the life of my younger son Alnod Ernest Studd,' &c., (1) Confers upon the eldest or only son of the pursuer, on the birth of such son, a vested estate or interest, as tenant in tail male, which will take effect in possession on the death of Edward Fairfax Studd, unless such estate in tail-male has previously come to an end by the death of the son without leaving issue male. This estate cannot be disappointed by the act of the pursuer or by his creditors. The second and every subsequent son of Edward Fairfax Studd takes a like estate, but always in remainder expectant on the

death and failure of issue male of the elder son or sons; and on failure of all sons and their issue male the trustees of General Studd take an interest for the life of Alnod Ernest Studd. (2) On any son of the pursuer attaining the age of twenty-one years he will be in a position (subject and without prejudice to the estates and interests prior to his own) to bar the entail, *i.e.*, to disentail by the execution of a deed (which must be enrolled in Chancery). Such deed will be effectual not only against his own issue, but also against the remainder men or substitutes, if the deed be executed after the death of the pursuer, or if the pursuer be a consenting party thereto. But if executed in the lifetime of the pursuer without his consent, it will only be effectual to bar the issue of the party executing it. (3) On the pursuer's death the first tenant in tail male, whoever he may then be, will be entitled to possession, and at or after twenty-one years of age will be in a position by his own deed alone to bar the entail to all effects, so far as he may not previously have done so."

It will, however, be kept in mind that the results of the legal relations thus constituted which are here enumerated are but a fraction of the numberless legal incidents which flow from the rights of tenant in tail and remainder man by the law of England. If I mistake not, this is one of the most technical chapters in the English law of real property. In the course of succession contemplated under this will, are the rights of the tenant for life and the remainder man to continue to be regulated by the law of England, or are the persons called intended to be Scottish proprietors holding their estate under the law of Scotland? Is the entail—if entail it is to be considered—to be terminated according to English rules, or according to ours? Are questions regarding the right to cut timber or impeachment of waste to be settled by our law or that of England? I only point out these things which lie on the surface to show on how wide a sea of difficulties it is proposed to embark. To my mind it is entirely impossible to carry out the only intention which the testator has expressed. Excepting in their relation to general jurisprudence, we know nothing of the rules of the law of England beyond what the parties have agreed to tell us. But we see enough from the statement of parties to make it certain that a devise to a tenant for life, with remainder to another, is not equivalent to, but is entirely discrepant from, a Scotch disposition to A in liferent and to B in fee. The difference is vital. A disposition to A in liferent and B in fee makes B the immediate proprietor under burden of the liferent, and unless he is limited by the fetters of a strict entail he may sell or charge the lands as he will, or his creditors may attach it for his debts, although only under burden of the liferent. The law will recognise no restrictions which are not in conformity with the Entail Statute of 1685, and the right of fee cannot be held in abeyance. But a devise of real estate in England in tail male to A for his life, with remainder to B, is, as we know, one estate, in which the remainder commences when the life terminates, and in which the validity of the grant for life is essential to support the grant in remainder. There is no fee in existence other than the right for life, in the sense in which we use that term, while the tenant for life lives, although the interest in expectancy vests, and must vest, from the date of the grant. These distinctions affect the whole nature of the gift, its immediate enjoyment, and its ultimate effect. In my opinion, it is hopeless and idle to attempt to weld into one two incompatible and inconsistent rights.

I conclude, therefore, that as under this settlement no present right of fee is vested in anyone during the life of the tenant for life, the right of fee remains undisposed of by the law of Scotland, and the heir-at-law may complete a title to it. I come to the same result as regards the life interest. As the right conferred is not a burden on a present fee, as every liferent is by the law of Scotland, but a right on which the remainder depends—a doctrine unknown to the law of Scotland—I think the whole settlement must fail, and the pursuer as heir-at-law must prevail.

There is no injustice in this result. Scotch conveyancers are as accessible as English conveyancers, and we are not to make a crude and unscientific jumble of our land rights because people will not take the trouble to use reasonable precautions. The case is precisely analogous to one which the Courts in England would have to decide if it were attempted to entail an English real estate in the terms of the Statute 1685, either by conveyance *de præsenti* or by *mortis causa* settlement. I cannot believe they would listen for a moment to such an attempt, for the English law of real estate will not permit a series of limited fees, and the Courts are not likely to alter their settled law because of a similar blunder by a Scotch conveyancer.

It seems to be thought that the 20th section of the Act of 1868 enables an English testator to attach to a bequest of real estate in Scotland conditions which are ineffectual by the law of Scotland, and that it abrogates the *lex rei sitæ* in such a case. Whether this view extends to a Scotch testament I have been unable to gather from your Lordships' opinions. But I apprehend that the clause in question not only gives no sanction to this result, but is wholly inconsistent with it. The clause in question deals exclusively with the solemnities or formalities requisite in conveyances of land, and with the mode of completing a feudal title under them.

Clause 19 of this statute provides a short method of making up a title under a general disposition of real estate. It provides that this may be done by recording a notarial instrument in the form of Schedule L of the Act, and that schedule must contain any conditions or qualifications attached to the right by the general disposition. Clause 20 then provides that it shall be competent to any owner of lands to settle the succession to the same in the event of his death, not only by conveyances *de præsenti* according to the existing law and practice, but likewise by testamentary or *mortis causa* deeds or writings. It then provides that it shall not be necessary to use the technical word "dispone," but that it shall be sufficient to use any words which if used in a will or testament would entitle the granter to claim moveables; and that if such deeds are executed according to the law of Scotland regulating testaments, they shall be equivalent to a general disposition of the lands within the meaning of the 19th section thereof. It then provides that the title may be made up either by a

conveyance from the heir-at-law or by a notarial instrument, as provided in section 19.

It is thus manifest that the title so made up must contain the conditions and qualifications contained in the general disposition, and no other. As to the effect to be given to these conditions and qualifications the statute of course is wholly silent. It dealt with no such matter. But it shows that the conditions and qualifications must enter the title precisely as they are contained in the general disposition; and if these are such as the law of Scotland will not recognise, there is not a word in this clause which can give them validity.

It is said that this 20th section places bequests of land on the same footing with bequests of moveables, and on this assumption the opposite argument is wholly built. But this is not what the clause does. It puts bequests of land, in testaments which contain words which would be sufficient to convey moveables, on the same footing with a general disposition of land *inter vivos;* and if this were a general disposition of land *inter vivos*, it seems to be conceded that it could not be supported. If so, the foundation of the hypothesis is destroyed, because by the very words of the section this settlement is equivalent to a general disposition of land *inter vivos.*

I am therefore of opinion that there is here no valid disposition of this estate, because it is qualified by conditions repugnant to the law, and that the pursuer as heir-at-law is entitled to the property in fee-simple.

The Court recalled the Lord Ordinary's interlocutor, repelled the pleas-in-law for pursuer, and sustained the second and third pleas for the defenders Edward Arthur Studd and Gladys Studd, and assoilzied them from the conclusions of the libel.

Counsel for Pursuer — Asher — H. Johnston. Agents—Mackenzie & Kermack, W.S.

Counsel for Curator *ad litem* — Kinnear—Maconochie. Agent—Charles Cook, W.S.

Saturday, December 11.

FIRST DIVISION.

PETITION—HARRISON.

Process — Bankruptcy — Bankruptcy (Scotland) Act 1856, *sec.* 48—*Warrant to Record Abbreviate in Sequestration.*

The petitioner was the creditor of a bankrupt estate, on whose petition the first deliverance in the sequestration was obtained before the Sheriff of Orkney, &c. The bankrupt had since died, and as his successors were pupils and no tutor *ad litem* had been appointed, the warrant granting the sequestration of the estate had not been pronounced.

By section 48 of the Bankruptcy (Scotland) Act 1856 it is declared that the party applying for sequestration shall present, before the expiration of the second lawful day after the first deliverance if given by the Lord Ordinary, or present or transmit by post before the expiration of the second lawful day after the said deliverance if given by the Sheriff, an abbreviate of the petition and deliverance to the Keeper of the Register of Inhibitions at Edinburgh.

The petitioner stated that through an oversight he had not complied with the above provision of the statute, and he therefore craved the Court to grant warrant for the recording of the abbreviate, which he produced with the petition.

The Court pronounced the following interlocutor—"Grant warrant and authority to the Keeper of the General Register of Inhibitions at Edinburgh, within the period of fourteen days from this date, to receive the abbreviate of the petition and deliverance in the sequestration mentioned in the petition, and to record the same in the said register, and to write and subscribe a certificate on the said abbreviate, in the form specified in the statute, as prayed for, and decern: Reserving all objections to any party having interest against the validity of the proceedings, with all answers thereto as accords: And declaring that the expenses of this application and procedure connected therewith are not to be allowed against the estate."

Counsel for Petitioner—Galloway. Agent—Thomas Carmichael, S.S.C.

Tuesday, December 14.

SECOND DIVISION.

[Lord Curriehill, Ordinary.

(Before Seven Judges.)

STRAITON ESTATE COMPANY (LIMITED) *v.* STEPHENS.

(*Ante*, June 12, 1878, vol. xv., p. 622, and 5 R. 922; July 8, 1879, vol. xvi., p. 718, and 6 R. 1208.)

Superior and Vassal—Composition for Entry—Implied Entry—Conveyancing Act 1874, *sec.* 4—*Obligation of Relief—Titles to Lands Consolidation (Scotland) Act* 1868, *sec.* 8.

Composition for an entry being due and payable at the death of the last entered vassal, if the person who was proprietor of the lands at the death of the last entered vassal subsequently sells them without having paid the composition, by disposition containing the statutory clause of relief of all casualties, feu-duties, and public burdens, he is liable, notwithstanding the implied entry introduced by the Conveyancing Act of 1874, to relieve the disponee of the composition when demanded by the superior.

Opinion (per Lords Shand and Young) that he would be so liable without the express obligation of relief.

Where the disponee had, after notice to the disponer, contested the claim of the superior to a composition for entry, on the