exempt from the payment of poor's-rate—an exemption which was fixed by the case of *Cargill*—they continued by implication from the terms of the statute to be still exempt from assessment in respect of their manses and glebes. By the 49th section of the Act it was declared that clergymen should be liable to be assessed for the poor in respect of their stipends, and therefore it was held that the old exemption was intended to stand. The Lord President in *Forbes'* case described the principle on which the exemption rests as inveterate usage. But at the date the Education Act was passed there was no inveterate usage exempting ministers from school-rate, for at that date it fell on a different class — on the valued rent heritors. The education rate imposed by the Act of 1872 is therefore in a different position from the poor's-rate imposed by the Act of 1845, and I think that ministers are not in a different position with regard to it from the other proprietors.

That being so, the question comes to be, whether there is anything in the position of the parochial clergy that will take them out of sec. 44 of the Education Act of 1872, by which the assessment is to be imposed, one-half on owners and one-half on occupiers of all lands and heritages. Those words are broad enough to include the clergy, and unless there is an exemption elsewhere in the Act, express or implied, they will fall under the assessing words. It is admitted that there are no such words in the Act of 1872 as there were in section 49 of the Act of 1845, but I understand that the argument rests on the implication derived from the phraseology of the section. Section 44 appoints the school-rate to be levied and collected along with the assessment for relief of the poor, but that is merely a description of the manner in which the rate is to be levied. It does not affect the character of the parties on whom the assessment is to be imposed.

Then if the position of matters is such that either there is no assessment for the poor in the parish, or that the assessment is not laid half on owners and half on occupiers, then the school board is entitled and bound to assess for and levy the school-rate.

On these grounds I concur with your Lordship.

LORD SHAND concurred.

LORD DEAS was absent.

The Court refused the appeal and affirmed the judgment.

Counsel for Pursuer (Respondent)—Trayner—Lorimer. Agents—Stuart & Stuart, W.S.

Counsel for Defender (Appellant)—Pearson—Dickson. Agent—W. G. L. Winchester, W.S.

Friday, December 12.

FIRST DIVISION.

[Lord Fraser, Ordinary.

LORD ADVOCATE *v.* GRAHAM.

Revenue—Succession—Succession Duty Act 1853 (16 *and* 17 *Vict. cap.* 51), *sec.* 2—*Entail—Predecessor—Disposition—Devolution of Law.*

A truster who died in 1843 directed his trustees to entail certain lands belonging to him upon the series of heirs called after him in a deed of entail of the lands of B. executed by his great-grandfather. By that entail the entailer had destined his lands of B. to his five sons and the heirs-male of their bodies in succession. At the date of the truster's death the heir entitled to succeed under the entail of the lands of B. was a descendant of the entailer's third son, but owing to the dependence of litigations the trustees did not execute the deed of entail until after his death. At the date of the execution of the deed of entail the person entitled to be called as institute was J. M., eldest son of the deceased A. M., a descendant of the fifth son of the entailer of B. The trustees entailed on him as institute, and the heirs-male of his body, whom failing to his immediately younger brother, whom failing to H. S. M., the younger brother's eldest son. On the death of J. M. he was succeeded by his nephew H. S. M. *Held* that since, if the trustees had made the entail according to the directions of the truster, H. S. M. would have taken under a destination to A. M. and the heirs-male of his body, he was not to be prejudiced by the form of the conveyance, and that in the sense of the Succession Duty Act he did not succeed by "disposition" to the truster as his "predecessor," but that his "predecessor" was his uncle J. M., from whom he took by "devolution of law."

Lieutenant-General Thomas Lord Lynedoch died on 18th December 1843, leaving a trust-disposition and settlement dated 20th June 1821, and recorded in the Books of Council and Session 30th December 1843, by which he gave, granted, and disponed to the trustees therein named his whole heritable and moveable estate for the purposes therein mentioned, and *inter alia*, "*Fourthly*, That after fully accomplishing the purposes aforesaid, if any of my lands and heritages before disponed shall remain unsold, my said trustees shall in due form of law dispone and convey the same to the heirs of entail called after me in and by a certain deed of entail executed by Thomas Græme, sometime of Balgowan, and John Græme, his son, dated on or about the 7th day of February and 9th day of June in the year 1726, recorded in the Register of Entails on or about the 30th day of December in the same year, under all the conditions, provisions, and clauses prohibitory, irritant, and resolutive in the said deed of entail contained, so far as the same may be applicable, and so as to form a valid and effectual entail according to the law of Scotland; and shall also lay out the remainder of my personal estate and effects, if any be, as soon as convenient purchases of land in the county of Perth shall offer, in purchasing lands as aforesaid, and

when the lands are so purchased to dispone the same, or take the dispositions and conveyances thereof, to and in favour of the heirs of entail called after me in and by the aforesaid deed of entail executed by the said Thomas Græme and John Græme, his son, dated and recorded as aforesaid, under all the conditions, provisions, and clauses, prohibitory, irritant, and resolutive in the said deed of entail contained, so far as the same may be applicable, and so as to form a valid and effectual entail according to the law of Scotland."

The destination in the Balgowan entail, which was dated in 1726, was to Thomas Græme, the entailer, as institute, and failing him to John Græme, his eldest son, and failing him to Thomas Græme, his eldest son, failing them to the heirs-male of the body of the said Thomas, failing them to the other sons of John Græme in their order and the heirs-male of their bodies, which failzieing to David Græme, his (the entailer's) second son, and the heirs-male of his body, which failzieing to Robert Græme, his third son, and the heirs-male of his body; which failzieing to Thomas Græme, his fourth son, and the heirs-male of his body; "which failzieing, to Patrick Græme, my fifth son, in trust for the use and behoof of the heirs-male of his body, and the other after heirs of entail; and failzieing of him by decease, to the said heirs-male of his body in fee, and the heirs-male of their bodies, for their own proper uses and behoofs."

Lord Lynedoch, the truster, dying without issue, was succeeded in the entailed estate of Balgowan and others by Robert Græme, grandson of Robert, the third son of Thomas Græme, the maker of the Balgowan entail. Robert Græme, the grandson, was likewise the person in whose favour the entail directed by the trust-deed fell to be made. He was advised, however, that the entail of Balgowan was defective in the prohibition against sales, and he therefore sold Balgowan, and brought against the heirs of entail an action of declarator that the entail of Balgowan was defective. The entail was found defective as reported in *Graham* v. *Murray*, 10 D. 380, *affd.* 6 Bell's App. 441. Robert Græme then raised an action against Lord Lynedoch's trustees to have it found and declared that they were bound to hand over the trust-estate to him in fee-simple, upon the ground that the entail they were bound to make was a defective entail. This action was decided in favour of the trustees, as reported in *Graham* v. *Lord Lynedoch's Trustees*, 15 D. 558, *affd.* 2 Macq. 295. In consequence of these and other litigations the trustees did not make the entail which they were required by the settlement to make until the year 1860. On 11th January 1860, Sir Patrick Murray Thriepland of Fingask, Bart., as sole survivor of the accepting and acting trustees, original and assumed, of Lord Lynedoch, executed a disposition and deed of entail, which was recorded in the Register of Entails the 21st day of January 1860, and in the Books of Council and Session the 29th day of February 1860. This disposition and deed of entail narrated the terms and provisions of the said trust-disposition and settlement and codicil, and additional trust-disposition of Lieut.-General Thomas Lord Lynedoch, and set forth that the first, second, and third of the trust purposes of said trust-disposition and settlement and codicil, and additional trust-disposition, "have been implemented, and that after the accomplishment thereof, the lands and others hereinafter disponed which remain unsold form the whole trust-estate falling under the fourth purpose of" the said trust-disposition and settlement, by which purpose the trustees were directed to dispone and convey the same, in due form of law, to the heirs of entail called after Lieut.-General Thomas Lord Lynedoch, in and by the said deed of entail executed by Thomas Græme of Balgowan, and John Græme, his son. Then followed the destination contained in the said deed of entail, after which the disposition and deed of entail stated that owing to the failure of the previous heirs called, "John Murray of Murrayshall, advocate, now John Murray Graham of Murrayshall and Balgowan, is the person entitled to be called as institute of entail and first disponee in the deed of entail to be executed in implement of the said fourth purpose of the trust specified in the said trust-disposition and settlement of the said Thomas Lord Lynedoch, he the said John Murray Graham being eldest son of the now deceased Andrew Murray of Murrayshall, who was eldest son of John Græme, afterwards called John Murray of Murrayshall, who was eldest son of Patrick Græme, who was fifth son of the said Thomas Graham, the tailzier, and being as such the first person called by the destination of said deed of entail of Balgowan to succeed after the said Robert Graham (otherwise Græme), who was entitled to succeed and did succeed immediately after the said Thomas Lord Lynedoch under the same, and that the other heirs and substitutes of taillie called to the succession of the lands and others hereinafter disponed, are the heirs and substitutes of taillie called by the said deed of entail of Balgowan after the said John Murray Graham: Therefore, in implement of the said fourth purpose of the trust, I the said Sir Patrick Murray Thriepland, Baronet, as sole survivor of the trustees, original and assumed, who accepted of and acted in the trust created by the said Thomas Lord Lynedoch, as above narrated, assign, dispone, and convey, with and under the prohibitions, conditions, restrictions, and provisions, and clauses irritant and resolutive aftermentioned, and also with and under the clause or procuratory authorising registration in the Register of Entails hereinafter insert, to and in favour of the said John Murray Graham (formerly called John Murray of Murrayshall), advocate, and the heirs-male of his body in fee, and for their own proper uses and behoofs; which failing to Andrew Murray, second surviving son of the said Andrew Murray of Murrayshall, and superintending engineer of Her Majesty's Dock Yard, Portsmouth, in fee, and for his own proper use and behoof; whom failing to Henry Stewart Murray, eldest son of the said Andrew Murray, and to the heirs-male of his body; whom failing, to any other sons procreated or to be procreated of the body of the said Andrew Murray, successive according to the priority of their birth and order of succession, and to the heirs-male of their bodies respectively, all in fee, and for their own proper uses and behoofs respective;" whom failing, to the other substitutes therein mentioned, All and Whole the lands of Balinbrich and Littlehaugh now called Bertha Park. The other heirs-substitute in the

deed were the whole of the male descendants of the body of Andrew Murray of Murrayshall alive at the time of the execution of the deed, and were called separately and *nominatim*.

John Murray Graham, the institute to the entail, completed a title to the estates, and paid succession-duty at the rate of 6 per cent. He died on 17th January 1881 without leaving male issue, and so the destination to the heirs-male of his body failed. Andrew Murray, the first substitute called in the disposition and deed of entail upon the failure of the destination to John Murray Graham, the institute, and the heirs-male of his body, died on or about 30th October 1872, and so predeceased the said John Murray Graham, the institute, on whose death, therefore, without male issue, the following part of the destination came into operation:—"Whom failing to Henry Stewart Murray, eldest son of the said Andrew Murray, and to the heirs-male of his body."

Henry Stewart Murray (afterwards Graham) completed his title by decree of special service as "nearest and lawful heir of tailzie and provision in special of the said deceased John Murray Graham." It was admitted that he was a "successor" within the meaning of the Succession Duty Act 1853 (16 and 17 Vict. c. 51), the question being whether his "predecessor" in the true sense of that Act was Lord Lynedoch or John Murray Graham. In the former case the succession duty would be, under section 10 of the Act, 6 per cent., in the latter it would be 3 per cent.

This was a Special Case under the Act 19 and 20 Vict. c. 56, at the instance of the Lord Advocate against Henry Stewart Murray Graham, to have this question as to the amount of succession-duty payable by him settled.

The Lord Advocate maintained that the late Lieutenant-General Thomas Lord Lynedoch was the "predecessor," within the meaning of the "Succession-Duty Act 1853," of Henry Stewart Murray Graham, and claimed succession-duty at the rate of 6 per cent. under sec. 10 of the Act, being the rate applicable to the relationship of the successor Henry Stewart Murray Graham to Lord Lynedoch, the said Henry Stewart Murray Graham being a *nominatim* substitute in the entail, and a descendant of a brother of the grandfather of Lord Lynedoch.

The defender maintained that his predecessor was his uncle John Murray Graham, that therefore as he was a descendant of a brother of the "predecessor" the duty should be 3 per cent. He contended "that the trustees were bound to execute the entail as at the date of the death of the truster, and to take the original destination of the Balgowan entail *totidem verbis*. Further, that Andrew Murray of Murrayshall being alive at the date of the death of the truster, and he (the defender) being unborn, he could only have been called along with the late John Murray Graham as an heir-male of the body of Andrew Murray of Murrayshall. The defender also contended that he was *in titulo* to reduce the infeftments of his uncle and himself, and to compel a disposition and deed of entail from the trustees containing a destination in proper form, and this being so, he submitted that he should not be put to the expense of mere conveyancing for the purpose of holding under a destination which would exclude the claim of the Lord Advocate.

The questions of law submitted to the Court were—"(1) Who was the predecessor of the defender within the meaning of the Succession-Duty Act 1853 (16 and 17 Vict. c. 51)? (2) What is the rate of duty to which the succession of the defender is liable."

On 15th July 1884 the Lord Ordinary (FRASER) pronounced this interlocutor:—"The Lord Ordinary having considered the cause, answers to the queries—1st, That the predecessor of the defender, within the meaning of the Succession-Duty Act 1853, was Lord Lynedoch; 2dly, That the rate of duty to which the defender is liable is 6 per cent., and finds him liable in that rate accordingly, and decerns: Finds the Lord Advocate entitled to expenses, &c.

"*Opinion.*—Lord Lynedoch, who died on 18th December 1843, was heir of entail in possession of the estate of Balgowan. He left a trust-disposition and settlement, whereby he directed his trustees, after payment of debts and legacies, to dispone his fee-simple lands, and other lands which his trustees were authorised to purchase, 'to the heirs of entail called after me in and by a certain deed of entail executed by Thomas Graeme,' his great-grandfather. By this entail, dated in 1726, Thomas Graeme destined his lands of Balgowan to his five sons and the heirs of their body in succession. At the death of Lord Lynedoch in 1843 the nearest heir was Robert Graham, the descendant of the third son.

"Robert Graham succeeded to the entailed estate of Balgowan, and instituted an action to have it found and declared that the entail was defective, and that he was entitled to sell the estate. Judgment to that effect was pronounced by the Court of Session, and affirmed by the House of Lords (*Graham* v. *Murray*, 10 D. 380; *Murray* v. *Graham*, 6 Bell's Apps. 441). Robert Graham thereupon instituted another action, to have it found and declared, that as the entail of the fee-simple estates which Lord Lynedoch had directed his trustees to make was to be under all the conditions, provisions, and clauses, prohibitory, irritant, and resolutive, in the deed of entail of 1726, it must therefore be defective; and that therefore he was entitled to have the whole trust-estate conveyed to him in fee-simple. But inasmuch as Lord Lynedoch had directed the entail to be made 'so as to form a valid and effectual entail according to the law of Scotland,' the action proved unsuccessful for the pursuer Robert Graham; and the trustees had therefore to perform the duty of entailing the fee-simple property under a valid entail. The judgment in this action was not pronounced until June 1855 (*Graham* v. *Stewart*, 2 Macq. 295).

"During the pendency of these actions, it was only reasonable that Lord Lynedoch's trustees should not execute the deed of entail which they were directed to make. If Robert Graham's second action had been successful, the expense of executing the deed would have been thrown away; and no one can blame the trustees, therefore, for what they did or delayed to do. But at the same time it was perfectly competent for them to have executed such a deed, and one of the trustees, Andrew Murray of Murrayshall, would have been called as the first substitute. The institute in such an entail would have been Robert Graham, who did not die until 18th March 1859. He left no children, and the next

heir of entail after Robert Graham, as at the date of Lord Lynedoch's death, was Andrew Murray of Murrayshall, who died in 1847, he being the grandson of the fifth son of the entailer. If the course had been adopted of executing the deed of entail immediately after Lord Lynedoch's death, Henry Stewart Murray, the second party to this case (the grandson of Andrew Murray of Murrayshall), would have been called to the succession as an heir-male of the body of the latter.

"But this was not the course that was followed. The deed of entail which was directed to be executed by Lord Lynedoch was not executed until 11th January 1860, when the original trustees were dead. It became the duty then of the sole surviving acting trustee—Sir Patrick Murray Thriepland of Fingask—to carry out the purposes of the trust by executing an entail, giving effect to the following destination in Thomas Græme's deed of entail, 'which failzieing to Patrick Græme, my fifth son, in trust for the use and behoof of the heirs-male of his body, and the other after heirs of entail; and failzieing of him by decease, to the said heirs-male of his body in fee, and the heirs-male of their bodies, for their own proper uses and behoofs." Now, in 1860, the heir-male of the body of Patrick Græme was John Murray of Murrayshall, advocate, the eldest son of Andrew Murray. The lands were disponed to him as institute in the following terms:—'To and in favour of the said John Murray Graham (formerly called John Murray of Murrayshall), advocate, and the heirs-male of his body in fee, and for their own proper uses and behoofs; which failing to Andrew Murray, second surviving son of the said Andrew Murray of Murrayshall, and superintending engineer of Her Majesty's Dockyard, Portsmouth, in fee, and for his own proper use and behoof; whom failing to Henry Stewart Murray, eldest son of the said Andrew Murray, and to the heirs-male of his body; whom failing,' &c. Henry Stewart Murray is the second party to this case.

"Now, if there had been no specialty in the case there could be no difficulty in settling who was the predecessor under the Succession Duty Act, and what was the rate of duty payable. There is to be found in the decisions (all of which are referred to and commented upon in the last of them—*The Lord Advocate* v. *Earl of Zetland*, December 5, 1876, 4 R. 199—*aff.* February 12, 1878, 5 R. 51)—one plain rule of construction, viz., that if the property be destined to a person named and his heirs, each separate person so named takes by disposition from the settler, and his heirs take by devolution of law from him. Therefore when any person takes by disposition the settler or entailer is the predecessor, and when by devolution of law the last possessor is the predecessor.

"John Murray Graham, the institute in the entail, paid succession-duty at the rate of 6 per cent., upon the footing that Lord Lynedoch, the settler, was his predecessor; and according to these decisions, and looking merely at the deed of entail under which the claimant Henry Stewart Murray possesses the estate, Lord Lynedoch must be held to be his predecessor also. He is specially called by name as one of the substitutes of the entail, and is thus the head of a new *stirps*. But it is said that if the trustees had done their duty by immediately upon Lord Lynedoch's death executing the deed of entail in favour of Robert Graham, whom failing Andrew Murray of Murrayshall, and the heirs-male of his body, both the claimant and John Murray would have taken by devolution of law as the heirs of the body of Andrew Murray, and so would have escaped the high duty. It is said the trustees must be held to have done that which they might have done, and that the Court must now deal with the case as if the entail had been executed in 1843, and as if the conveyance made by the trustees in 1860 were reduced and set aside. The trustees undoubtedly might have executed the deed of entail before 1860, but pending the challenge by Robert Graham as to their power to do so, no court of law would have compelled them to do it.

"Now, it is in these circumstances that the Crown find the claimant Henry Stewart Murray in possession of the estate (as set forth in his decree of special service), 'under and by virtue of the foresaid disposition and deed of entail, which is dated and recorded in the register of tailzies as aforesaid' (*i.e.*, in 1860). They are entitled to call upon him to account in the character under which he possesses, and not upon the footing that a different course—which would have involved payment of a lesser duty—could have been adopted. The Court must apply the law to the facts of the case, and the result is to find for the Crown in answer to both the questions put."

The defender reclaimed, and argued—The rule of law with regard to persons called under a deed of entail, to the payment of succession-duty was that each person took by devolution of law who was within the same *stirps* as his predecessor; when a new *stirps* came in, then the person took by disposition from the maker of the entail—*Lord Advocate* v. *Lord Saltoun*, Dec. 16, 1858, 21 D. 124, *aff.* 3 Macq. 659. In this case John Murray of Murrayshall was the predecessor of Henry Stewart Murray Graham, the defender, because according to the intention of the truster they were members of the same *stirps*. Had the trustees carried out the directions of the truster, the destination would have been to Patrick Græme and the heirs-male of his body, or to Andrew Murray of Murrayshall, and the heirs-male of his body. But although the form of the conveyance was against this contention, yet he was entitled to get at the substance of the transaction—*Lord Advocate* v. *Lord Zetland*, Dec. 5, 1876, 4 R. 199, *aff.* 5 R. (H. of L.) 51—*Earl of Breadalbane* v. *Lord Advocate*, June 9, 1870, 8 Macph. 835. He could compel the trustees to execute a new deed—*Ochterlony* v. *Ochterlony*, Feb. 24, 1877, 4 R. 587; but *quod fieri debet infectum valet*. Or he could bring a declaratory adjudication against the heir of the last trustee. The payment by John Murray of 6 per cent., which he was bound in any event to do as first member of a new *stirps*, had enfranchised that *stirps*, and the duty payable by Henry Stewart Murray Graham was therefore only 3 per cent. With reference to the pursuer's argument founded on prescription, it must fail, because in order to get quit of Lord Lynedoch's deed it would be necessary to get rid of the necessary prescription of forty years.

Additional authority—Hanson on Succession-Duty, 248.

Argued for Lord Advocate—There was here a prescriptive title under the Conveyancing (Scotland) Act 1874—See 34 Bell's Prin., sec. 2022; Bell's Illus., ii. 583. Where there were several ways of carrying out a direction, the mode adopted must be held binding, provided it was a habile way—*Lord Advocate* v. *Miller's Trustees*, July 4, 1884, 11 R., Lord Pres., at p. 1057.

At advising—

Lord President—The reclaimer Mr Henry Stewart Murray Graham, upon the decease of his uncle John Murray Graham of Murrayshall on the 17th of January 1881, succeeded as next heir of entail to an estate which does not seem to have any general descriptive name so far as I can find in the papers before us, but which perhaps may be called, in terms of the deed of entail, the lands of Bertha Park for want of a better name. The question comes to be, in what character the reclaimer succeeded to that estate, and who was his predecessor within the meaning of the Succession Duty Act of 1853. The question put to us in the Case is, Who was his predecessor?—but that of course, as in every case of the kind, involves the inquiry, In what character did he succeed, or by what means did he succeed to this estate?—Was it by disposition or was it by devolution? Now, the rules in regard to such questions are very well settled in the leading cases of *Lord Saltoun* and *Lord Zetland* (*supra cit*), and we have only to apply the rules so fixed to the circumstances of the case before us.

I think it may be stated as a proposition admitting of no doubt that the question whether an heir succeeds by disposition or by devolution of law depends upon the terms of the destination in the deed of entail—that is to say, the terms of the destination of the estate as fixed by the entailer,—because in every question regarding the destination of an entailed estate the *regula regulans* is the intention of the entailer. It is a very different rule from that which prevails in construing the fetters of an entail. That depends upon a very strict rule of construction of a totally different kind; but the intention of the settler is the *regula regulans* in every question regarding the construction of the destination in an entail. Now, in the present case, the entailer's intention was expressed in very clear terms in a deed executed by himself—a trust-disposition and settlement. The entailer, Lord Lynedoch, died on the 18th of December 1843, leaving that trust-disposition and settlement behind him. He knew that he was the last heir-male of the body of the eldest son of Thomas Graeme, who made the Balgowan entail, and when he prescribed in his trust-disposition and settlement that his fee-simple lands and other lands which he left money to buy should be settled upon the same series of heirs as the Balgowan estate was settled upon, he of course knew perfectly that his trustees in carrying out that direction must find out in the first place who was the heir next entitled to succeed under the Balgowan entail after the heirs-male of the body of the eldest son of the Balgowan entailer had been exhausted, and that party, when so found, necessarily became, according to his directions, the institute of the new entail. If the trustees had proceeded to carry these directions into effect shortly after the death of Lord Lynedoch, or indeed at any time before March 1859, they would have found that the heir next entitled to succeed in the Balgowan destination was Robert Graham, who did succeed to the Balgowan estate, and broke the entail of that estate and sold it. He would have been the institute of the new entail if they had made that entail while Robert Graham was in life. But he died on 18th March 1859, being the last heir-male of the body of the third son of the Balgowan entailer, the second son having had no descendants at all. The effect of that of course was that the first three branches of the destination of the Balgowan entail had all failed, and the fourth son of the Balgowan entailer had died without male issue, and consequently the only remaining *stirps* in the Balgowan entail unexhausted were the descendants of the fifth son of the entailer Patrick Graham; and that was the state of matters when the trustees under Lord Lynedoch's trust-disposition and settlement proceeded to make the deed of entail. The destination in the Balgowan entail, as I have anticipated in the remarks I have already made, was simply this: The entailer had five sons, and he called these sons and the heirs-male of their bodies in their order—that is to say, he called his eldest son and the heirs-male of his body, failing whom the second and the heirs-male of his body, and so on.

Now, that was the destination which Lord Lynedoch prescribed should be followed in his entail of the lands which he had left and of the lands which were to be bought with the money he had left in trust; and therefore when the trustees proceeded to execute the deed of entail in compliance with Lord Lynedoch's wishes, it appears to me that their duty was a very plain one. The state of the family as regarded the descendants of the Balgowan entailer was this: All his four eldest sons and the male issue of their bodies had failed, and there remained male descendants of the body of the fifth son, Patrick Graham, and these only. Now, the eldest heir-male of the body of Patrick Graham at the time they made that deed of entail was John Murray of Murrayshall, who was the great-grandson of Patrick Graham, the fifth son of the Balgowan entailer; and therefore, in accordance with what I have already shown to be the desire of Lord Lynedoch, they were bound to call John Murray of Murrayshall as the institute in their deed of entail. But what were they bound to do beyond that? Nothing that they could not find in the Balgowan entail, and all that the Balgowan entail enabled them to do beyond that was to add these words—"and to the heirs-male of the body of the said John Murray of Murrayshall, whom failing the other heirs-male of the body of Patrick Graham, the fifth son of the Balgowan entailer,"—and I apprehend they had no right to put another word into their destination beyond that.

Lord Shand—That branch of the destination.

Lord President—There is no more.

Lord Shand—There is another branch of the destination in the deed.

Lord President—Of course, I am not referring to that, but so far as the descendants of Patrick Graham, the fifth son of the Balgowan entailer, are concerned, the trustees were not entitled to insert any words in the destination except those which I have described. What they

did in point of fact was this. They conveyed the estate to and in favour of John Murray of Murrayshall, whom failing to Andrew Murray, second surviving son of Andrew Murray of Murrayshall—that was the younger brother of John Murray of Murrayshall—in fee, and for his own proper use and behoof, whom failing to Henry Stewart Murray, eldest son of the said Andrew Murray, and the heirs-male of his body, whom failing to any other sons procreated or to be procreated of the body of the said Andrew Murray, and then, whom failing to Thomas Graham Murray, Writer to the Signet, third surviving son of the said Andrew Murray of Murrayshall. Now, what right had the trustees to assume that, failing John Murray Graham and his brother Andrew Murray, Henry Stewart Murray was the eldest son of Andrew Murray, and entitled to succeed. They had no right to assume anything of the kind. They may have believed that to be the fact, but in fixing that as a fact, and in fixing that the succession should go to him, they were truly usurping the functions of a court of service, because no one was entitled to succeed under the terms of the Balgowan destination except the person who should be found by a court of service to be the nearest heir-male of the body of the fifth son of the entailer, whoever that might be found to be. And therefore I apprehend that such a destination as this was plainly *ultra vires* of the trustees. They had no right to make such a destination.

Now, that being so, the question comes to be, whether this question is to be decided—the question who is the predecessor of the reclaimer—according to the destination as fixed by the entailer or according to this erroneous piece of conveyancing; and looking to the principle of previous cases, I am very clearly of opinion that we are to decide a question of this kind according to the substance and reality of the case, and not according to a mere form which may be an erroneous form, and which in this case is clearly shown to be erroneous. The will of the entailer is plainly expressed in his trust-deed, and I apprehend it is to his trust-deed that we must go for the purpose of seeing what is the true destination of this estate. Now, if we go to that trust-deed, we find the state of the succession to be this, that John Murray of Murrayshall was the first of the new *stirps*—the *stirps* which began with the fifth son of the Balgowan entailer—and therefore he succeeded, according to the well-established rules, as a disponee, or by disposition—by gift—from the entailer. But everybody after him among the male descendants of the fifth son of the Balgowan entailer necessarily succeeded, according to these rules, by devolution of law; and therefore I come to the conclusion that the true answer to the question here is that the predecessor of the reclaimer is John Murray of Murrayshall, and that Henry Stewart Murray succeeds by devolution of law and not by disposition. I am therefore for answering the first question by finding that the predecessor within the meaning of the Succession Duty Act was John Murray of Murrayshall.

Lord Mure—I am quite of the same opinion, and I have very little to add beyond what your Lordship has so clearly expressed. It appears to me to be quite plain, from the terms of the Lynedoch trust-deed of 1821, quoted in the second article of the Case, that the instruction to the trustees was to convey the estate expressly to the heirs of the entails called after him by the deed of entail of 1726. That is the express direction; so when they came to make the entail at the time that required to be done, after the death of Lord Lynedoch, their duty was to act precisely in terms of the directions there given—calling whoever was the heir of entail at that time under the old deed of 1726, and adding, as your Lordship has explained, the other heirs of entail of the body of Patrick Graham, fifth son of Thomas Graham of Balgowan—that is to say, that John Murray Graham was the first heir under the new *stirps* of the fifth son of Thomas Graham of Balgowan—and therefore after that whoever succeeded to him came in by devolution under that destination. I am therefore of opinion that the question should be answered in the manner your Lordship proposes.

Lord Shand—I am of the same opinion. The direction in the trust-deed of Lord Lynedoch was, that with reference to his fee-simple lands and any lands which were to be purchased by his trustees, his trustees should, after accomplishing the other purposes of the trust, "in due form of law dispone and convey the same to the heirs of entail called after me in and by a certain deed of entail executed by Thomas Græme, sometime of Balgowan, and John Græme, his son, dated on or about the 7th day of February and 9th day of June 1726." When the trustees came to execute the entail of these fee-simple lands and of the lands subsequently acquired, certain branches of that destination had been exhausted, and it was quite right that the trustees should therefore begin with the operative clause or branch of that destination, which was in these terms—"Which failing, to Patrick Græme, my fifth son, in trust for the use and behoof of the heirs-male of his body, and the other after heirs of entail; and failing of him by decease, to the said heirs-male of his body in fee, and the heirs-male of their bodies, for their own proper uses and behoofs;" after which followed a series of other branches of a destination. In executing that deed of entail, what I think the trustees ought to have done was, taking as they did John Murray Graham (formerly called John Murray of Murrayshall), advocate, as the existing nearest heir called under the destination to Patrick Graham and the heirs-male of his body, to make him the institute of this new deed of entail, but having made him an institute in his character expressly as an heir-male of Patrick Graham, the fifth son, the destination should then have proceeded in terms of the clause which I have already read—"whom failing to the other heirs of the body of Patrick Graham, and failing of them by decease, to the heirs-male of their bodies in fee," and so on, taking up the clause as it is there given. If that had been done—if the direction of the truster been carried out—the result would have been that the institute of entail forming the first of the new branch would have taken by deed and not by devolution. He would therefore have had to pay as a successor of the entailer, and not as a successor of his immediate predecessor in the lands of Balgowan. But the result would also have been that every other heir succeeding under

that branch of the destination would have taken as the successor of his immediate predecessor in the lands, with the result that he gets the benefit of the probably close relationship existing between him and his immediate predecessor in the matter of succession-duty with the Crown. In place of inserting the destination as I have said it ought to have been in the deed, the trustees—I have no doubt from proper enough motives—it might be in order to simplify the conveyancing in the subsequent branches of the destination—inserted the names of a number of different persons who, according to their information, were the heirs entitled to succeed under the general destination. I agree with your Lordship in thinking that that is not a practice that ought to be followed, because trustees in such circumstances may make very serious mistakes, and great confusion may result. As your Lordship has put it—I cannot express it more forcibly—it is practically usurping the office of the Sheriff of Chancery in services, who is to settle these matters. But beyond that the Crown have now been enabled to say that as each of these persons was put *nominatim* into the new entail, the result in the question of succession-duty has been this, that whereas succession-duty, if the trustees had obeyed the injunctions of the entailer, would have been only on the footing that each man succeeded to his predecessor, and paid probably upon a degree of relationship somewhat close, the result of the way in which the entail has been formed is this, that each person who succeeds to the estate is held to take directly from the entailer, with reference to whom the relationship in all probability must be extremely remote, and so much larger succession-duty comes to be paid. I do not agree with the Lord Ordinary in the view he has taken, though I think the question is one not free from difficulty, where he says—"It is in these circumstances that the Crown find the claimant Henry Stewart Murray in possession of the estate (as set forth in his decree of special service) 'under and by virtue of the foresaid disposition and deed of entail, which is dated and recorded in the register of tailzies as aforesaid'—*i.e.*, in 1860. They are entitled to call upon him to account in the character under which he possesses, and not upon the footing that a different course—which would have involved payment of a lesser duty—could have been adopted. The Court must apply the law to the facts of the case, and the result is to find for the Crown in answer to both the questions put." I think we are entitled to look to the substance of the relation between the possessor of the estate and the entailer and his predecessors, and not to the mere form; and I find, looking at the substance of it, that this gentleman now in possession of the estate under the directions of the entailer is a successor, not of the entailer, but of his immediate predecessor. Having reference to the numerous authorities upon this branch of the law, I think he takes, not by the deed of the entailer as a *stirps* called under the directions of the entail, but as an heir by devolution in respect of the death of the previous heir. He takes under that general destination to the heirs of Patrick Graham, and not as himself forming a new *stirps* under the entail. On that ground I agree in thinking that we must answer the questions which have been put in this Special Case in the way your Lordship proposes.

The Court pronounced this interlocutor—

"Recal the said interlocutor: Find that the predecessor of the defender, within the meaning of the Succession-Duty Act 1853, was his uncle John Murray Graham of Murrayshall, who died on 17th January 1881; second, that the rate of duty to which the defender is liable is 3 per cent., and find him liable in that rate accordingly, and decern: Find the defender entitled to expenses," &c.

Counsel for Lord Advocate—Trayner—Lorimer. Agent—David Crole, Solicitor of Inland Revenue.

Counsel for Defender—J. P. B. Robertson—Graham Murray. Agent—G. B. Smith, S.S.C.

Friday, December 12.

FIRST DIVISION.

THE STANDARD PROPERTY INVESTMENT COMPANY (LIMITED) *v.* WHITSON (TRUSTEE OF THE DUNBLANE HYDROPATHIC COMPANY (LIMITED).

Public Company—Incompetency of Sequestration of Public Company registered under the Companies Acts—Companies Act 1862 (25 *and* 26 *Vict. cap.* 89)—*Bankruptcy* (*Scotland*) *Act* 1856 (19 *and* 20 *Vict. cap.* 79).

Held that sequestration of a joint-stock company registered under the Companies Acts 1862 and 1867 is *incompetent.*

The Dunblane Hydropathic Company (Limited) was formed and registered as a limited company under the Companies Acts 1862 and 1867. The company was registered on 4th December 1874.

On 29th May 1884 the Standard Property Investment Company (Limited), who were creditors in a bond and disposition in security for £15,000 granted by the Hydropathic Company, dated 15th and recorded 17th May 1877, raised an action of poinding the ground against that company. Decree in the action was obtained on 20th June 1884.

On 3d June 1884 a petition for sequestration of the estates of the Hydropathic Company was presented to the Sheriff of Perthshire at the instance of the Dunblane Gas-Light Company. Answers were lodged for the Standard Property Investment Company, in which it was maintained that the sequestration of a company registered under the Companies Acts was incompetent. The Sheriff overruled the objection, and awarded sequestration on 11th July. On 25th July 1884 Thomas Whitson, chartered accountant, Edinburgh, was elected trustee.

On 19th July 1884 the Standard Property Investment Company presented a petition in the Bill Chamber for recal of the sequestration on the ground of incompetency, to which Thomas Whitson as trustee lodged answers, in which it was stated that the moveables sought to be affected by the petitioner's action of poinding the ground were the furniture and other moveables of the establishment, and worth £2000,