No. 14. THOMAS EARL OF STRATHMORE, Appellant.—*Attorney-General —Robertson.*

JOHN EARL OF STRATHMORE'S TRUSTEES, Respondents.— *Lushington—Rutherfurd.*

Tailzie—Trust—Title to pursue—Statute—Death-bed.—The House of Lords affirmed (ordering costs to be paid out of the trust estate) a judgment of the Court of Session, adhering to an interlocutor of the Lord Ordinary, finding that an heir excluded by a deed of entail and deed of nomination of heirs, executed according to the lawful powers of the granter, from an heritable succession in Scotland, had no legal title or interest to challenge a trust-deed as disposing of that succession in an irrational or otherwise illegal manner; the connexion between the trust and the other deeds not being such as to infer, that if the trust-deed were liable to relevant objections from the nature of its provisions, the entail and nomination must thereby be rendered invalid; that the objects and purposes of the trust-deed were clearly and intelligibly expressed; and there is no rule or principle established in the law of Scotland which renders it unlawful for a man, who is *rei suæ arbiter*, to appropriate the rents and profits of his estate under a trust in the manner provided by the trust-deed under reduction; that the case of the rents of heritable estates in Scotland being expressly excepted from the provisions of the Act 39th and 40th Geo. III. c. 98, while they are clearly extended to personal funds in Scotland, any implication involved in that exception is against the supposition of any nullity being understood to be established by the common law of Scotland, in such a trust, for the accumulation of rents or other funds for a limited term; that the heir has no title or interest, under the Act of 39th and 40th Geo. III., to challenge the settlement of personal estate; that he cannot insist in the reduction of the last deed, on the head of death-bed, in respect that his title and interest are excluded by the previous deeds; and the last deed does not revoke, but substantially confirms all the prior deeds.

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1st DIVISION. Lord Moncrieff.

JOHN, tenth Earl of Strathmore, the representative of a noble family, and to whom extensive possessions and honours had descended through a long line of ancestry, held his titles to his landed estates in fee simple. On the 15th December 1815 he executed a strict entail of the Barony of Glammis and his other Scotch estates in favor of himself and his issue, in a certain order, "whom failing, to any person or persons to be "named by him in any nomination or other writing to be ex- "ecuted by him at any time of his life;" whom failing, to the party in right for the time to the earldom of Strathmore. This deed, proceeded on the narrative that it was for the better preservation of his estates, family, and name, and reserved full power and liberty to himself, at any time of his life, to revoke or alter in whole or in part, and to burden and affect with debt the lands

and other heritages (therein) before disponed, and generally to manage and dispose of the same in every respect as if he were absolute fiar thereof, and had not granted the said deed. On the same day he made a deed of nomination, which, after narrating the execution of the entail, and that he was "resolved "to exclude the Hon. Thomas Bowes, my only surviving "brother-german, and John Lyon of Hetton House in the county "palatine of Durham, and Charles Lyon his brother, from ever "succeeding to my said estates," he appointed that "in case of "the failure of heirs whatsoever of my body, and the heirs of "their bodies, my said lands and estate shall devolve and belong "to the heirs male of the body of the said Thomas Bowes "successively in their order, &c.; whom failing, to the persons "having right for the time to the titles, &c. of Earl of Strath-"more and Kinghorn, &c., other than and except the said "Thomas Bowes, John Lyon, and Charles Lyon, all and each "of whom are hereby specially excluded and debarred from "ever succeeding to or enjoying my said lands and estate;" but always with and under the provisions, restrictions, &c., clauses irritant and resolutive, &c., contained in the foresaid disposition and entail; and declaring that the said disposition and entail was granted and should be accepted by the heirs of entail, &c. with and under the burden of a trust-disposition granted by him of the same date (of which below); it was also declared that this deed of nomination should be held and received as a part of the said disposition and entail, and power to alter and revoke was reserved. On the same day, and with reference to the entail and deed of nomination, he executed a disposition in favour of trustees, which proceeded on the narrative that he was "resolved "that my lands and estates in Scotland now belonging to me, "together with such other lands and estates there as shall be "acquired by me or my trustees after named in manner after "specified, shall, in terms of the entail and deed of nomination "and appointment before narrated, failing heirs of my own body, "devolve upon the heirs male of the body of the said Thomas "Bowes and the other heirs of tailzie therein mentioned, and "that for the periods after specified; and while any debts "affecting my Scotch estates remain unpaid the same shall be "possessed by my trustees after named; and that the rents, "profits, and emoluments thereof, and prices of woods allowed "to be cut and sold by my said trustees as after mentioned,

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March 23, 1831. " together with the produce of my personal estate, and debts " due to me in Scotland, shall be applied by them to the pur- " poses after specified." He therefore disponed to the trustees, and to such other person or persons as should be named by him by any writing under his hand, or assumed after his death by the trustees, a majority for the time being a quorum, the earldom, &c. and his whole heritage within Scotland belonging or which might happen to belong to him at his death, with all debts, sums of money, heritable or moveable, &c., due to or belonging to him in Scotland; " but in trust to and for the " uses, ends, and purposes after specified; viz. that my said " trustees or trustee may, immediately after my death, establish, " in their or his person or persons, a valid feudal title to such " lands and other heritages as may belong to me at my death, " but which are not specially described in the entail executed by " me as aforesaid, and shall then convey and make over the " same to my said heir of entail and the other heirs of tailzie " thereby appointed to succeed to him or her; but always with " and under the provisions, restrictions, &c. contained therein, and " in the said deed of nomination and appointment, and also under " the burden of this trust-disposition; and shall cause record " such entail to be executed by them in the Register of Tailzies, " and also in the books of Council and Session; and that the " debts, sums of money, arrears of rent, sums due upon bonds, " heritable or moveable, bills, contracts, &c. herein-before dis- " poned, and the prices of woods allowed to be sold as after " mentioned, may be uplifted; and also that my moveable estate " and effects in Scotland before conveyed, (with the exception " of the furniture and other effects in Glammis castle,) which " shall belong to me at my death, may be sold, and that the " price and produce thereof may be applied to the purposes after " mentioned; viz. payment of debts, of the expense of the trust, " &c. maintaining in repair the castle of Glammis, &c. payment " of legacies, &c.; and, lastly, my said trustees shall apply, lay " out, and invest the rents and produce of my said estates, and " debts and other effects hereby conveyed to them, and prices " of wood allowed to be cut as after mentioned, either in the " purchase of government securities or on heritable securities " in Scotland, as they shall think most advisable, until an " opportunity offers of applying the same to the purchase of " lands in Scotland, situated as contiguous and convenient as

" may be to my said tailzied estate; and when such opportunity March 23, 1831.
" shall offer the said trustees or trustee acting for the time shall,
" at their discretion, apply the said rents and debts, and the
" produce of the said effects, with the growing interest thereof,
" from time to time, on such purchases; and after establishing
" a proper feudal title to the lands and others so to be purchased
" in their own persons as trustees foresaid they shall execute
" an entail or entails thereof in favour of the person who, by
" the foresaid entail and nomination executed by me, shall
" have right for the time to my said tailzied estate under
" the burden of this trust, and of the other heirs of tailzie
" thereby appointed to succeed to him; but always with and
" under similar provisions, restrictions, &c. contained in my
" said entail, and also under the burden of this trust, which
" shall extend to the lands so to be acquired and entailed by my
" said trustees as well as to the lands which shall belong to me
" at my death, and which are hereby conveyed to them; and
" which entail or entails my said trustees shall immediately
" record in the Register of Tailzies, and also in the books of
" Council and Session; and further, I hereby declare that this
" trust shall subsist till all the debts, legacies, donations and
" others payable out of my Scotch estate as aforesaid shall be
" paid and extinguished, and for the space of thirty years from
" the day of my death, and until the death of the longest liver
" or survivor of the said Thomas Bowes my brother, and of
" John Lyon of Hetton House in the county palatine of Durham,
" and Charles Lyon, brother of the said John Lyon; and im-
" mediately after the expiry of thirty years from the day of my
" death, and after the death of the longest liver or survivor of the
" said Thomas Bowes, John Lyon, and Charles Lyon, and when-
" ever the debts, legacies, donations, and others shall have been
" paid as aforesaid, this present trust shall fall and become ex-
" tinct; but declaring always, that in case the said Thomas Bowes
" should die, leaving a child or children succeeding to the title
" and dignity of the Earl of Strathmore and Kinghorn, and
" having right to succeed to the said estates as heir of entail
" therein, his said trustees might, after the expiry of thirty years
" from the day of his the said earl's death, and in case the other
" purposes of the said trust are then completed, convey and
" make over or cede and give up possession of the said estates,
" together with the furniture and other effects in his said man-

March 23, 1831. " sion-house of Glammis Castle, to such child or children, and " that although the said John and Charles Lyon, or either of " them, might be then living; and in like manner, in case the " said John Lyon shall die leaving a child or children succeeding " to the said title and digniy, and having right to succeed to the " said estates as heir of entail therein, the said trustees may, " after the expiry of thirty years from the day of his death, and " in case the other purposes of the said trust are then completed, " convey and make over or cede and give up possession of the " said estates, together with the furniture and other effects in the " said mansion-house of Glammis Castle, to such child or chil- " dren, and that although the said Charles Lyon may be then " living; but with this special condition and provision always, " that in case the said John Lyon or Charles Lyon shall at any " time thereafter succeed to the said title and dignity by the " death of the child or children of the said Thomas Bowes, or " of the said John Lyon, who shall have had right to succeed to " the said estates as heirs of entail therein, and have been put " in possession thereof as aforesaid, then this present trust shall " revive, and the said trustees shall be entitled to resume pos- " session of the said estates, and the said John Lyon and Charles " Lyon shall be excluded from the said estates, and from the " rents and profits thereof, during their respective lives; but " declaring, that in case the said title and dignity of Earl of " Strathmore and Kinghorn shall descend to the said John Lyon, " he shall be entitled from the said trustees to the sum of £2,000 " sterling yearly, from the time of his succession to the said title " and dignity, during his life, and no more; and in case the said " title and dignity shall descend to the said Charles Lyon, he " shall likewise be entitled to receive from the said trustees the " like sum of £2,000 sterling yearly, from the time of his suc- " cession, during his life, and no more; and after the said debts, " legacies, donations, and others payable out of his the said " Earl's Scotch estates shall be paid and extinguished as afore- " said, and after the space of thirty years from the day of his " death, and after the death of the longest liver or survivor of " the said Thomas Bowes, John Lyon, and Charles Lyon, his " the said earl's heirs of entail for the time shall be immediately " entitled to enter to the possession, not only of his said entailed " estate, in terms of the foresaid entail and deed of nomi- " nation executed by him as aforesaid, but also of any other

" estates in Scotland which might thereafter be acquired by him March 23, 1831.
" or by his said trustees, and which should be entailed by him
" or by them in terms of the said trust-disposition, and the said
" trustees or trustee acting for the time shall then be bound to
" cede the possession of the said estates to the said heir of taillie,
" together with the furniture and other effects in the said man-
" sion-house of Glammis Castle; and in case the sum in the
" hands of his said trustees, together with what they shall have
" received and invested, or placed out at interest as aforesaid,
" shall not exceed the sum of £4,000 sterling, they are thereby
" empowered and directed to pay and make over the same, with
" all the securities they may hold therefor, to his said heir of
" taillie, who will then be entitled to the possession of the said
" taillied estate, upon his granting a receipt therefor, and a dis-
" charge and ratification of all the transactions and management
" under the said trust, and also ratification of the whole settle-
" ments executed by him the said earl, as well with regard to
" his English as his Scotch estates; but if the sum in the hands
" of his said trustees, and what has been received and invested,
" or placed out at interest as aforesaid, shall exceed the sum of
" £4,000 sterling, they shall be bound to retain the same, not-
" withstanding they shall have then ceded the possession of the
" said taillied estate to the heir of entail entitled thereto, and
" shall employ it, together with the growing interest and pro-
" duce thereof, when an opportunity offers, in the purchase of
" other lands to be entailed by them as aforesaid:" " With and
" under all which conditions and provisions" the said trust-deed is declared " to be granted, and no otherwise." The deed concludes with the usual clause, reserving power to recal, or alter, sell, or gratuitously dispone, and generally to do any thing concerning the same, &c.; with dispensation from delivery in common form.

The usual powers were given to the trustees, and they were named sole executors and intromitters with the moveable estate in Scotland; all which powers were stated to be conferred, to the end that the trustees might more effectually execute the purposes of the trust.

On the 1st of July 1820 the Earl executed another deed, which, after referring to those above narrated, and stating the previous appointment of trustees, and the conveyance in their favour, proceeded thus:—" Having full trust and confidence

March 23, 1831. "in John Dean Paul of the Strand, Esq. (now Sir John), "I do hereby nominate and appoint the said John Dean Paul "to be one of my trustees and executors under my said trust-"disposition, along with the trustees and executors therein "named; and I give, grant, and dispone to him, along with "the trustees named in the said trust-disposition, all and sundry "the earldom, lordships, &c. and other heritages therein speci-"fied, upon the same trusts and for the same uses, &c. in the "said trust-disposition contained, &c.; and I direct these pre-"sents to be held and taken as a part of my said trust-disposi-"tion, and in all other respects I confirm the same; and I "consent to the registration hereof in the books of Council and "Session in Scotland," &c. The Earl died on the 3d of the same month without lawful issue.* By this event his brother Thomas became Earl of Strathmore, whose eldest son became Lord Glammis.

The trustees made up titles and took infeftment under the disposition, and Lord Glammis was thereafter served heir of tailzie under the deed of entail, and infeft in virtue of a charter of resignation. The estates yielded upwards of £12,000 per annum, and it was alleged that the accumulation at the end of the thirty years would amount to several millions. After being unsuccessful in an action of aliment against the trustees†, the Earl raised a summons of reduction, declarator, and adjudication against the trustees and Lord Glammis, the object of which was to set aside the trust disposition, entail, and deed of nomination executed on the 15th of December 1815, also the deed of the 1st of July 1820, and the service and titles in favour of Lord Glammis, and to have it declared that, as heir male or of line to his brother the late Earl, or to his father the preceding Earl, he had right to the estates, and, as next of kin to his brother, he had right to the moveables.

The pleas in law relied on by the pursuer in support of his action, and by the trustees in defence, were substantially the

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* In 1811 the Earl had a natural son by Mary Milner, an English woman. The parties were domiciled in England, and the child born in England. A few hours before his death he married the mother in England; but a Committee of Privileges of the House of Lords decided that this marriage did not legitimate the son. See Appendix to 4 Wilson and Shaw.

† See 2 Shaw and Dunlop, No. 80, and 1 Wilson and Shaw, No. 41.

same with those afterwards urged at the bar of the House of Lords. March 23, 1831.

The Lord Ordinary found, "That the late Earl of Strathmore "held the estates mentioned in the summons in absolute fee "simple, and had full power to dispose of them in any man- "ner not prohibited by law: Finds, that by deed of entail, of "date 15th December 1815, the said Earl did, in due and law- "ful form, dispone the said estates to himself and the heirs male "of his body; whom failing, to the heirs whatsoever of his body; "whom failing, to any heirs to be named by him by any deed "of nomination or other writing: Finds, that by deed of nomi- "nation of date the said 15th December 1815, executed in due "and lawful form, the said Earl declared his will and intention "to exclude entirely from the succession to his said estates the "pursuer, then the Honourable Thomas Bowes, who was the "heir presumptive by the standing investitures, and also John "Lyon and Charles Lyon, esquires, and did by the said deed "nominate and appoint the heir male of the body of the said "Honourable Thomas Bowes, and a series of other heirs therein "mentioned, to be the heirs of tailzie entitled to succeed to the "said estates, failing the heirs male and female of the said Earl's "body, as provided in the said deed of entail: Finds, that by "certain clauses in the said deeds of entail and nomination, the "conveyance, and all the rights thereby created, are declared to "be subject to the burden of a trust-deed executed of the same "date, of 15th December 1815, and the whole conditions and "provisions therein expressed, but that in other respects the said "deeds of entail and nomination constitute a complete settle- "ment by entail in favour of the heirs thereby appointed, to the "entire exclusion of the said pursuer: Finds, that by trust- "deed, bearing date the said 15th December 1815, executed in "due and lawful form, the said Earl conveyed the whole of the "said estates, and also his whole moveable funds and effects, in "the event of his own death, to the defender James Dundas "Esquire, and certain other persons, as trustees, for certain ends "and purposes therein specified, and that the objects of this "trust appear to be clear and distinct; viz. on the one hand to "accumulate the rents of the existing estate and any residue of "the personal funds, after paying the testator's debts and certain "legacies provided during thirty years, to be employed in the "purchase of lands to be added to the entailed estates, and, on

March 23, 1831. " the other, to continue the trust and the employment of the " rents during the lives of the said Honourable Thomas Bowes, " and of John Lyon and Charles Lyon, except in the special " case of a son of the said Hon. Thomas Bowes, or of the said " John Lyon, having right by their deaths respectively to " the honours and dignities of the family, in which event the " trustees are directed to convey the estates to such son, to whom " they are destined by the deed of entail: Finds, that by deed " bearing date the 1st day of July 1820, the testator, on the " narrative of the previous entail and trust-deed, nominated and " appointed the defender, Sir John Dean Paul, to be trustee " along with the persons appointed by the previous trust-deed, " and of new disponed the whole estates and funds to him and " the other trustees, under all the clauses and conditions of the " said former deed: Finds, that the said Earl of Strathmore died " on the 3d day of July 1820; and that it is averred by the pursuer, " and though not admitted is not denied by the defenders, that " he was ill of the disease of which he died at the date of the said " last-mentioned deed, on the 1st day of July 1820. In this " state of the case, Finds, 1mo, That the grounds of reduction " insisted in have no application to the deed of entail or the deed " of nomination, except in so far as these deeds are connected " with the trust-deed, as being qualified and burdened with the " title and provisions thereof; and finds that that connexion is " not such as to infer that, if the trust-deed were liable to rele- " vant objections from the nature of its provisions, the entail " and nomination must thereby be rendered invalid; therefore " finds, 2do, That the pursuer has no legal title or interest to " insist in his grounds of reduction of the trust-deed, being va- " lidly excluded from the succession by the deeds of entail and " nomination executed according to the lawful powers of the " granter: Finds, 3tio, That the objects and purposes of the " trust-deed are clearly and intelligibly expressed; and finds that " there is no rule or principle yet established in the law of Scot- " land which renders it unlawful for a man, who is rei suæ ar- " biter, to appropriate the rents and profits of his estate, under a " trust, in the manner provided by the trust-deed under reduc- " tion: Finds, 4to, that the case of the rents of heritable estates " in Scotland being expressly excepted from the provisions of the " Act 39th and 40th Geo. III. c. 98, while they are clearly " extended to personal funds in Scotland, any implication in-

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"volved in that exception is against the supposition of any "nullity being understood to be established, by the common law "of Scotland, iu such a trust for the accumulation of rents or "other funds for a limited term: Finds, 5to, that it is averred "that there is a considerable sum of the personal estate of the "late Earl still in the hands of the trustees, but that this averment "is denied by the defenders; but finds it unnecessary to direct "any inquiry into this matter, in respect that the pursuer has no "title or interest under the Act of 39 and 40 Geo. III. to "challenge the settlement thereof, it being provided by the said "act that all the money accumulated contrary to its enactment "should belong to the party who would have right thereto if no "such accumulation were directed: Finds, 6to, That the pursuer "cannot insist in the reduction of the last deed on the head of "death-bed, in respect that his title and interest are excluded by "the previous deeds, and the last deed does not revoke, but sub-"stantially confirms, all the prior deeds; therefore sustains the "defences, and assoilzies the defenders from the whole conclu-"sions of the libel, and decerns; but finds no expenses due." *

On the case being brought before the First Division, their Lordships [16th Feb. 1830], without requiring cases, and after hearing merely counsel for the pursuer, adhered.†

The pursuer appealed.

Appellant—(As to title).—There is no sound objection to the appellant's title to sue. In the situation in which the entail stands, the appellant's being excluded by that entail from the succession is of no consequence; for the entail, the nomination of heirs, and the trust-deed must be considered in law as one

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* His Lordship added, in a Note:—"The pursuer rests his case mainly on the "case of M'Culloch of Barholm, Nov. 28, 1752, shortly reported by Lord Elchies. "The Lord Ordinary has carefully considered that case in the papers, both those "shown to him preserved with the reports of Lord Elchies and those in the collec-"tion of Lord Drummore, who was Ordinary in the cause, and he is completely "satisfied that the decision pronounced can only be supported as a judgment on a "very special case, on the ground alluded to in a short note of Lord Drummore, "when the hearing was ordered, that the settlement could not be sustained as being "unintelligible, inexplicable, et contra bonos mores. At all events he sees no ground "for holding that that decision did or could establish any general principle in the law "of Scotland, to prevent a proprietor in fee simple from vesting his estate in trust for "accumulation during a limited course of years; and the Lord Ordinary is not "aware of any legal ground on which this can be maintained."

† 8 Shaw and Dunlop, No. 248.

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act and deed, and as component parts of the same settlement. They must stand or fall together, and no one of them without the other can be supported as embodying or expressing the last will of the deceased. (On merits.) The settlement of Lord Strathmore, having for its chief object the prevention of enjoyment, and the locking up of the subjects for the sole purpose of accumulating their produce, without any onerous or reasonable cause, for a long period of time after the death of the granter, and containing besides many other irrational and inconsistent and contradictory provisions, is liable to reduction as adverse to the principles of the common law of Scotland, and contrary to reason, natural justice, and public policy. This proposition is fully warranted by the case of M'Culloch *v.* M'Culloch, Nov. 28, 1752 *;

Nov. 28, 1752.

* JOHN M'CULLOCH of BARHOLM against JOHN, WILLIAM, HENRY, JEAN, and MARY M'CULLOCHS.

Tailzie— Trust.—Settlements containing irrational and ridiculous provisions, and locking up or limiting the enjoyment of the rents and produce of the estates, real and personal, conveyed for many or what might prove many years, reduced at the instance of the heir.

John M'Culloch, besides property which he acquired himself, inherited from his ancestors the lands of Barholm, producing about five hundred merks of yearly rent. He married Jean Gordon, who succeeded to the lands of Culvennan. They had one child, who married David M'Culloch, and had John, and Elizabeth. Barholm and his lady settled in strict entail, except a small portion lying contiguous to Barholm's own property, the estate of Culvennan, upon the daughter (married to William Gordon), and the heirs of her body, with a substitution in favour of her brother and the heirs of his body. The brother John, by consent of his father, had already been married to Elizabeth Cutlar, daughter of Cutlar of Argreennan, in whose marriage articles it is said to have been stipulated that the grandson was to be put in immediate possession of the lands of Barholm. Of this marriage there were born John, and two other sons and two daughters. In the year 1742 Barholm executed a deed of tailzie, comprising his own paternal patrimony and part of his wife's lands, about the annual value of £50 per annum, for new infeftment to himself and Jean Gordon his spouse, and longest liver of them two in liferent, and to John M'Culloch his grandson and the heirs male of his body in fee, with a long series of substitutions, under strict prohibitive, irritant, and resolutive clauses. This tailzie refers to a separate deed, executed by Barholm, with consent of his grandson, of the same date, relative to the personal estates in favours of certain trustees, containing also an assignment of the rents of the tailzied estate for the space of sixty years after the death of the longest liver of Barholm and his wife, for certain uses and purposes therein specified, which trust-right and assignment of the rents the heirs of entail are taken bound to ratify under an irritancy. By this tailzie liberty is granted to the several heirs of entail, male or female, to provide their respective spouses to a fifth part of the free rent of the whole estate, by way of locality, in

ciple, alike applicable to every country, we may look to the analogy afforded by the law of England, where this view is

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lieu of terce and courtesy; but it is nevertheless provided, that such life-rent localities should not impugn or weaken the assignment of the whole rents by the trust-deed, and that the same should only take effect after the years of which the rents were assigned, that is, at the end of sixty years after the death of the longest liver of Barholm and his wife; and, in the last place, it reserves a faculty and power to Barholm to revoke, rescind, or alter the same, in whole or in part, by any writing to be signed by him at any time in his life, etiam in articulo mortis, excepting the lands of Peble, which Barholm thereby renounces all power or faculty to burden, affect, or alter the destination of; and provides, that these lands of Peble shall fall and belong to the said John M'Culloch and his heirs, under the conditions, limitations, and irritancies above expressed, free and clear of any power in him to alter the same, and of any life-rent competent to him, or to Jean Gordon his spouse, of and concerning the same.

By the separate deed of trust (and which referred to the above-recited disposition of tailzie) Barholm assigned and made over to the trustees therein named all debts and sums of money, heritable and moveable, then resting or that should be resting to him at his death, all rents and arrears of rents, goods, gear, &c. (in all about £6,000), and more particularly the rents of his whole estate for the space of sixty years from the first term preceding the death of the longest liver of him and his wife, and hail growing wood upon said estate during the aforesaid space, in trust, First, for payment of his whole debts, and funeral expenses of the longest liver of him and his wife: Secondly, for purchasing in certain parishes any lands lying near the lands already belonging to him that might be offered to sale, as an addition to the tailzied estate, under the like provisions, limitations, conditions, irritancies, &c.; in default of these being purchaseable the trustees were bound to apply the trust subject for the other uses and purposes in the deed specified: Thirdly, for purchasing other lands, not below 1,500 merks and not exceeding 1,800 merks of yearly rent, in favours of the second son to be procreated of the body of John M'Culloch, his grandson, and the heirs whatsomever of the body of the said second son, with certain remainders over; and failing these, to return to his heirs of tailzie: Fourthly, for purchasing other lands of the like value and extent in favours of the third son to be procreated of the body of the said John M'Culloch, his grandson, with certain remainders over, and with the like return to the family: Fifthly, for making the like purchases of other lands, to the like extent, for behoof of each of the other younger children to be procreate of the body of the said John M'Culloch, his grandson, and the heirs of their respective bodies, with certain remainders over, and under the like clauses of return: Sixthly, he appoints the several lands thus to be purchased for behoof of his younger great grandchildren to be settled upon them severally by his trustees in the form of as many strict entails, with and under the same provisions, limitations, conditions, declarations, clauses irritant and resolutive, as are contained in his tailzie of the lands of Barholm, excepting only the obligation thereby put upon the heirs of entail to use the designation of Barholm; providing nevertheless, that the trustees should not denude of these purchases so to be made until such time as the younger great grandchildren severally should be married, and in the meantime that the rents of the lands so purchased should be added to the funds for making other purchases: Seventhly, if any funds remained after all these purchases, he directs the like purchases to be made for the behoof of his great great grandchildren, and these also to be settled in the form of as many strict entails. In 1746 Barholm and his spouse executed another trust-disposition, whereby, inter alia, they assigned and made over to the trustees therein named, for the uses and purposes therein-after expressed, the hail rents of his estate, comprehending the rents of Barholm and Peble, together with other subjects

March 23, 1831. supported to the fullest extent, and the point now brought by statute to a precise and definite limit. No doubt the statute

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specified in this second trust-right, without any limited endurance in point of time, but for such a number of years, next and immediately after the death of the longest liver of him and his wife, as should be sufficient for answering the ends and purposes in the said deed expressed; the particulars of which are:—

In the first place, he thereby confirms to John M'Culloch his grandson the rents of the lands of Barholm, but under this limitation, that he should have no right or interest in the growing woods; and he thereby further allows to his said grandson the rents of Bardristram and two parts of Clachrig and Camrid, in all about 300 merks more; and he declares that the rents of Bardristram, Clachrig, and Camrid shall not be arrestable or affectable by his creditors, but should continue under the management of the trustees, and that these trustees should apply the rents for purchasing victual and other necessaries for his grandson's family. Secondly, he appoints the rents of his whole other lands to be applied for portioning the other children of his grandson John M'Culloch, in such manner that each of these younger children, not exceeding the number five, should have five full years' rent of his estate, (deducting the life-rent provision made to the grandson, an annuity of 300 merks payable to David M'Culloch, and a provision made to Elizabeth Cutlar, in case it fell due,) and if six or more, that they should severally be entitled to four years' rent; that these rents should be applied in purchasing lands for behoof of these children respectively, to be settled upon them in the form of as many strict entails, under the same limitations, restrictions, and irritancies as in the bond of tailzie of the estate of Barholm, &c., but so as that these children should not be entitled to the benefit of these provisions, or of the lands purchased for them severally, till they should attain to the years of majority or marriage; and in the meantime, until these children should be married or attain the years of majority, and after majority if the children did not then claim their portions, that the annual rent, or the money, or the rents of the lands so to be purchased, should go in with the other subjects to increase their portions. Thirdly, it is provided that "if any of the said children die without succession of their own bodies, then the second male child next in age shall succeed; or, failing of males, the second female shall succeed. If Jean M'Culloch shall die without children, then Mary's second son or daughter shall succeed; and if Mary M'Culloch shall die without children, then William's second son or daughter shall succeed; and if William M'Culloch shall decease without succession of his own body, then his brother Henry, his second son or daughter, shall succeed. The succession shall go on in like manner to all their brethren and sisters that may be born; and if all of them shall die without issue of their own bodies, then John's second son (who is our heir), and the other brothers and sisters that second shall have, shall succeed every one of them to have a share as it is proportioned." Fourthly, it is appointed, and the trustees are empowered "to settle the five children of the said John M'Culloch, our grandson, in that part of Balhassie we now possess, and in the house we dwell in, and office houses about it; and we hereby assign them our cattle of all kinds, and also our crop, with all our household plenishing; only our heir is to have right to what silver plate there is, and the two best horses, and two mounted beds, when the children are disposed of. The children now existing are, namely, Jean, Mary, William, and Henry M'Cullochs. We allow them, besides the profits that may arise out of our present possession of Balhassie that we now occupy, the 400 merks payable to us out of the other parts of Balhassie, as they will need to be expended upon them; and they are to have all the presents and services belonging to us, excepting the flying presents and services on the south side of Mony-pool-burn, which are given to their father; and the said trustees are to provide a virtuous modest woman

contains the exception, that " nothing in this act contained shall " extend to any disposition respecting heritable property within

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to take care of the children and their family, and they are also to provide a plain sober man to educate and teach the children. There is none to be entertained with them in their family, friend or other, but necessary servants; and if any shall remove the children, then the profits of present possession, with what else is allowed for their maintenance, shall be withdrawn, and applied as our rents are to be; only the trustees are not to set the piece of ground we now possess, but to keep it open for the children to return when they please. This settlement for their maintenance is not to take effect till after the death of the longest liver of us two. Any other children the said John M'Culloch may have in this present or any subsequent marriage are to be brought here at four years of age, and maintained and educate with the other children; and if any of the children shall be taken away, or all of them shall go away, then every thing that is allowed for their support shall be withholden from them, and applied as our other rents are appointed by us to be. When the girls come to be ten to eleven years of age there is a discreet prudent woman to be brought to the house, and kept half a year or a year with them, to teach them to make and dress their own clothes; and the boys are to be taught their Latin and Greek, writing and arithmetic, at home, and all of them to wear cloth made in the country."

In the same year Barholm and his spouse executed a second disposition or deed of tailzie, containing procuratory of resignation for new infeftment to be granted to himself and spouse, and longest liver of them two, in life-rent, and to John M'Culloch the defender, their eldest great grandson, and the heirs male of his body, in fee, with a long series of substitutions, and under the like provisions, conditions, &c. as in the tailzie 1742; and more particularly providing, that it should not be leisome to any of the heirs of tailzie to quarrel or impugn the assignation of the rents and duties of said lands and estate made by him to certain trustees, for the uses and purposes therein specified. Power to innovate or change the same, in whole or in part, by a writing under his hand, at any time in his life, etiam in articulo mortis, was reserved by Barholm. Thereafter Barholm, with consent of his spouse, and, as alleged, when upon death-bed, executed a third tailzie, in substance the same with the two former, John M'Culloch, the great grandson, being preferred to his father; and certain lands lately acquired were made part of this settlement; and of which it is an express condition, that the heirs of tailzie should not quarrel or impugn the trust assignation to the rents of these lands for the uses and purposes to which they were destined, the contravention of which, as of all the other conditions and limitations, is made an express irritancy of the right. By this tailzie also it is provided, that the haill heirs of tailzie above mentioned shall enjoy, bruik, and possess the said lands and estate, and every part and portion thereof, by virtue of this present tailzie, and infeftments, rights, and conveyances to follow hereupon, and by no other right or title whatsomever.

After Barholm's death, John the grandson having come to the resolution of quarrelling Barholm's settlements, granted a trust-bond to David Maxwell, in order to lead an adjudication upon a special charge, to be the title of challenge. In the reduction which followed, John's children, and the other substitutes in the entail, were made parties defendants. The pursuer maintained, inter alia, (various points having been raised, and among others the objection that the last deed had been executed on death-bed,) that Barholm had, by his settlements, not only tied up the property of the estate by a strict entail in terms of the statute 1685, but had also sunk the rents of his estate for a great while after his death, and had locked them up, in order to raise irrational provisions for his younger great grandchildren, while in the meantime the heir of tailzie was left to

March 23, 1831. "that part of Great Britain called Scotland;" but this exception was introduced because it was unnecessary to extend the protection of the statute to Scotland, seeing that the common law of that country was in itself sufficient to prevent undue accumulation. Surely the exception could not have been made

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starve, and without the possibility of obtaining a proper education, while the destination to and obligations incumbent on the younger children are preposterous, perplexed, and inextricable. Barholm's settlements are so constructed that they must stand or fall together; the good cannot be separated from the bad. If any be such as law and good conscience must condemn, the deeds must be reduced in toto; they receive no support from the law of entail. It was, before the statute 1685, justly doubted whether clauses de non alienando et contrahendo were consistent with the nature of property or the general principles of law; but in every view the power given by the statute will not authorize a testator to indulge in whimsical conceits, or injure his family by irrational, extravagant, and preposterous provisions, locking up estates for ages, securing from them the least possible advantage to his family, and leaving his immediate descendants in poverty or ignorance. Now it is impossible to deny, regarding the deeds separately or collectively, that this is not their character. Looking to the number of younger children born, and the possibility of others being born, and the time that must have elapsed before their provisions could have been made up, they might be fifty years of age before they could enjoy these provisions; in any way, not less than twenty-five years would have been requisite to raise provisions to five younger children. If a settlement, having such an object, be sustained, there is no point where you can stop. Ingenious conveyancers will speedily devise clauses whereby not merely property, but the first fruits of that property, may be locked up for generations. But besides these settlements being irrational, extravagant, illegal, and contra bones mores, they are in many particulars utterly inexplicable.

In defence it was stated:—Barholm held without limitation the estates which had descended to him; he was equally in uncontrolled dominion of the estates he had bought; and it is an incident of property that the owner shall have full power of directing its descent after his death. This should be treated as a mere question of power. He could have given his whole estates to a charity; much more can he cut and carve out what interest he intends shall devolve upon his own family. There was nothing to prevent Barholm to settle the fee on one person, and yet for any number of years settle the rents on others, excluding for the time the fiar. Aware of this, the pursuer exaggerates the features of the settlements, challenges and attempts to represent them as preposterous and irrational. But that proceeds on palpable misrepresentation of the provisions and the facts under which they may be applicable. In the true view of the subject, the testator did not dispose of more than ten years' rents of his property; but taking it at twenty-five, surely that was legally within his power. Could he not, by means of a conveyance to trustees, have tied up the rents for twice the time; and where is the difference in principle? In point of fact, the children being very young, the ends of the trust behoved, morally speaking, to be accomplished long before the heir was of age. Barholm therefore had the power—he has not exceeded in point of time—and there is nothing in the conception of the provisions that should subject them to the heavy penalty of being utterly reduced.

Upon the report of Lord Drummore, the Lords, before answer as to the reasons of reduction ex capite lecti, remit to the Lord Ordinary to admit the same to the pursuer's

for the purpose of insuring, in Scotland, in a worse shape, the existence of the evil thus corrected in England. Could the law of Scotland on this point have been regarded in any other light, the statute would have been exposed to have been utterly evaded by English parties making their accumulations Scotch; but at least it cannot be maintained that all accumulations, however excessive, can be supported; and if the question be one dependent on the discretion of the Court, the deeds in question cannot stand. They could not, if the accumulation had been "as long as the grass groweth up, and the water "runneth down," neither can they—looking to all the principles of analogous cases—in the instance now under discussion. 2. The settlements under challenge are not supported by the provisions of the Scotch statute 1685, c. 22., authorizing entails. The purpose of these settlements is totally different from what is declared in that statute to be the only legal object of tailzies. Here the Earl had in view, not the prevention of the alienation or dilapidation of the ipsum corpus of the estates, but the exclusion from enjoyment of the growing fruits of these lands for an indefinite period of time beyond thirty years certain after the granter's decease. 3. As far as moveable funds are to be accumulated the act of 39 and 40 Geo. III. c. 98. applies; for the exception there relates to Scotch heritage only. 4. The deed of 1820 had the effect of superseding the first trust-deed, and constituted a new trust-disposition of the lands, and, having been executed on death-bed, is reducible ex capite lecti. (As to costs.) The interlocutors appealed from find no expenses due to either party; but in questions like the present, whether the appellant be successful or not, it is the practice to order costs to be paid out of the trust-fund. March 23, 1831.

Respondents. — (As to title.) The appellant has no legal title or interest to insist in reduction of the trust-deed, seeing that the late Lord Strathmore was proprietor in fee simple of his estates, and by the deed of entail and relative deed of nomination absolutely excluded the appellant from any share in the succession. These deeds are not affected by the objections pleaded against

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probation; and, having considered the other reasons of reduction, find the same relevant and proven, and therefore reduce the haill deeds in question, and decern and declare accordingly.

Counsel for pursuers, Alexander Lockhart—for defenders, Robert Craigie.

March 23, 1831.

the deed of trust. The appellant cannot show that the trust-deed is so inseparably blended with the deed of entail that they could not subsist independently of each other; and so far as the present action concludes for reduction of the deed of assumption and nomination of the 1st of July 1820, he is barred by the previous conveyance in trust, and by the deed of entail, which were not revoked by the deed of the 1st of July 1820; farther, as that deed is an insulated deed, having no object or purpose but to name an additional trustee, it cannot affect the validity of the prior deeds, which are altogether separate and distinct, and must subsist and receive effect independently of it. (On merits.)—In the Court below the appellant strongly urged the illaudable and even mischievous object of the trust-deed, and the reprehensible motives which actuated the late Earl. There is no ground whatever for such charges; but clearly such inquiries are not hujus loci, for the present is merely a question of power; but the Earl being unfettered proprietor, holding in fee simple, had unchallengeable power to convey and destine his property in the way most agreeable to himself. There is nothing contra bonos mores in the settlements; they are expressed clearly and intelligibly, and do not counteract any known rule of Scotch law. The exertion of this power was also consistent with justice and prudence, having relation to the interest, honour, and domains of the ancient family which the Earl represented. There are some restrictions known in law, but the party who found on these restrictions must show that they are applicable; in this, however, the appellant has utterly failed, and until he can do otherwise it is in vain to rest on general maxims. It may be true that interest reipublicæ nequis re sua male utatur, but has he shown the male utatur? Except the case of M'Culloch—a case which has almost slept in the records, and which undeniably proceeded on specialties — he neither can refer to statute or common law in support of his position. The difficulty which occurred in Thelluson's case was created by a peculiarity in the law of England; and, after all, the law as it now stands was introduced by statute, and in which Scotch heritage is expressly excluded. The argument raised on this point by the appellant is quite illusory. At common law there is no absolute prohibition to an accumulating trust; in introducing this exception, therefore, the legislature was not influenced by any supposition that the common law sufficiently

dealt with the subject. Besides it must be admitted that the statute applies to personal estate in Scotland. Now, as it cannot be pretended that, as regards accumulation, our common law knew any difference between heritage and moveables, it is plain that the legislature, had it been actuated by the view imputed to it, would have extended the exception to moveables as well as heritage; and not having done so destroys the whole of the appellant's argument. The Scotch heritage, being excepted, therefore remains subject to the Scotch law; and there is no authority for showing that an accumulating trust, such as the present, is exposed to any objection of illegality, inexpediency, irrationality, excessiveness, or unfairness. The deed of 1820 is not liable to reduction on the head of death-bed, as the previous deeds exclude the title and interest of the appellant, and, instead of revoking, the last deed confirms all the prior deeds; but in point of fact the Earl, when he executed that deed, was not ill of the disease of which he died. * March 23, 1831.

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* The decision, M'Nair *v.* M'Nair, Bell's Reports, 546, was also relied on by the respondents. The following are the notes of the opinions of the Judges given on the two occasions when that case was advised. They are taken from the manuscript observations made by Lord President Campbell on his copy of the printed papers.

FIRST ADVISING.

Lord President.—In one particular the deed appears to be inconsistent; for by a clause in the principal deed certain sums are ordered to be paid to the male and female descendants at their age of twenty-five, besides other sums to indigent children, without being limited to the yearly produce of the estate, and therefore affecting the stock itself; and by the codicil there is to be a division of the free residue of the produce at the end of every seven years, yet it is evidently taken for granted in this codicil that the stock is to remain entire; consequently there may be no fund out of which the £50 and £25, &c. can be payable.

The whole is a very whimsical if not inextricable arrangement, and resembles very much the case of Lady Dick's settlement, which was intended in like manner as a perpetual mortification, or, as she called it, "a cautore" for her distressed children and grandchildren, under the conduct of her son Sir John Cuningham and her daughter Lady Dalrymple, with power to them to name succeeding trustees, her jewels being deposited in a strong box for the use and ornament of her posterity to the tenth generation, and then to her nearest in kin. Her effects in general were also limited in the same manner to remain in trust for her posterity to the tenth generation for their maintenance and education, &c. The grounds of challenge were, 1. That the trustees had repudiated it; 2. That the destination was so irrational and whimsical as to be ultra vires of any proprietor; 3. That it is vacated ex presumpta voluntate defuncti from the eviction of a considerable part of the estate, the remainder not being sufficient to answer the purposes intended. Upon the second head the case of Barholm was quoted, and upon the third that of Sir James Rochead's settlements, where a large sum of money having been destined for

March 23, 1831. **LORD CHANCELLOR.— My Lords, this is a case of considerable interest, and of the greatest possible importance to the parties. It arises upon an appeal relative to three deeds respecting the same**

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purchasing lands to be added to the entailed estate, and the heirs of line having prevailed in a reduction of the tailzie of the estate, the destination of the money was found not to subsist, the settlement having failed in its principal object. The first objection received an answer from decisions finding that a settlement might subsist though the trust fell; and it is probable that, in setting aside Lady Cuningham's settlement, the Court went upon the other two grounds.

A settlement in the form of a perpetual trust upon the heirs themselves is a novelty in the law of Scotland, neither agreeable to any principle of common law, nor deriving any support from the act 1685. The Court went far enough in the case of Lord Hyndford, where a temporary trust for special purposes was supported; and in that case the trust was not vested in the heir himself, but in third parties.

Suppose the pursuer were to make up complete titles as heir at law, and to sell the subjects, a purchaser would be safe upon the faith of the record, and those concerned in the succession would only have an action of damages against him; and suppose all those at present in existence were to agree to the measure, and to waive such action, the remedy at a distance of time to persons yet unborn might be very ineffectual.

But taking the case even as it stands at present, the reasons of challenge appear to be very strong, though the fact is not yet sufficiently cleared up as to the second ground, viz. the alleged insufficiency of the funds.

Monboddo.—Deed legal, and ought to be sustained.

Swinton.—For setting it aside. Testamenti factio est juris civilis, when a man ceases to live, cannot hold his property. It is the civil law, not the law of nature, that allows testamenti factio and substitution; but still the heir, when he succeeds, may do as he pleases. This case not a tailzie within the act of Parliament.

Justice Clerk.—To overturn wills of defuncts upon ideas of rationality is very delicate. If it be unlawful it ought to be set aside, but not otherwise, if it be at all extricable. It has lasted already twelve years, and may continue till it becomes inextricable. Entails introduced long before act of Parliament.

President.—For setting aside the deed.

Eskgrove.—Had an inclination to set it aside, but hesitate at present, at the instance of the heir, who represents the granter.

Dunsinnan and *Henderland.*—Same.

Alva.—For setting it aside.

SECOND ADVISING.

Lord President.—The deed in question may be considered as meant for two purposes. 1. To settle the succession upon the eldest son, with the burden of provisions to the younger children and widow. 2. To create a perpetual trust in the heirs called to the succession, for behoof, not only of themselves, but of all the descendants of the granter to the end of time, so long as any should exist.

The first purpose was rational and legal, and the deed ought so far to have effect if it be possible to sustain it in part, and set it aside quoad ultra. The mode of provision is indeed somewhat unusual, by paying so much per day, or so much a year, to each child during life; but it is easily enough extricable in that shape; and the provisions to the widow are likewise reasonable, as well as the allowance to a particular servant and his wife so long as they continue performing the service required.

property. By a very ill-conditioned course of conduct — I can call it nothing else — arising from a dislike towards a brother, which nothing could justify a person feeling on his death-bed, — the Earl

March 23, 1831.

Neither is there much to be said against the provisions upon the widows of the sons, or even against the clause by which certain sums are given to each of the grandchildren by his six children when they attain to the age of twenty-five.

The result of these different clauses put together, so far as regards the younger children and grandchildren, is, that certain annuities are given to the children themselves, and the fee of certain sums to the grandchildren by these children.

Had the deed stopt there, Robert the eldest son would just have taken the succession with the burden of making the payments thus ordered to his mother and brothers and sisters, and their children attaining to a certain age; and there would have been nothing in this case to distinguish it materially from any other settlement in favour of an eldest son, with the burden of provisions to the rest of the family.

But the deed goes much farther by creating or attempting to create a sort of tailzie, under the name of a trust of a very anomalous kind, to have endurance, if not for perpetuity, at least so long as any descendants of the six children of the granter shall exist, which may be for many generations, and perhaps for ever, and including an infinite number of persons.

It is this object of the deed, and all the clauses relative thereto, that are not only whimsical, irrational, and singular in their nature, but in a great degree absurd, inconsistent, and inextricable. In the very outsetting it is said that the granter means to preserve and secure his estate for the support and subsistence of his descendants in all time coming, and it is plain that he meant to settle the succession upon his descendants, whether of the male or female line; but inadvertently he disinherits his daughters, and calls in, failing the heirs male of his son's body, his own collateral heirs male, in prejudice of his whole female descendants, even the daughters of his son and their issue; and their collateral heirs male, upon succeeding, will be entitled to the provision made for them. It may be true that he meant by the words "my own heir male" to call only the heirs male of his body; but this limitation cannot be supplied, as the Court found in the late case of Miss Hay *v.* Hay of Drumelzier, concerning the estate of Linplum.

The appointing each succeeding heir to be a trustee, and to be liable in a certain distribution among the descendants progressively at their age of twenty-five in all time coming, with certain weekly allowances and apprentice fees in different events, the heir himself being factor, with an allowance for factor fee, to keep books, hold quarterly meetings, render accounts, and to submit questions and disputes to certain official arbiters, would, if sanctioned by a judgment of this Court, lay the foundation of a new species of entail not hitherto recognised in the law of Scotland, and therefore of dangerous example, besides being wild and extravagant in its nature.

The principles which regulate tailzied fees in Scotland are well known, and are fully discussed in the case of Cassillis. They are different from those of an English entail; for with us the whole fee is in each succeeding heir, but subject to restraints and limitations arising from the clauses prohibitory, irritant, and resolutive, which give a jus crediti to the subsequent heirs, entitling them to challenge deeds of contravention, and which, by the act 1685, are effectual against third parties when duly registered in a certain form.

Trust settlements are likewise usual with us, and admit of being easily extricated when granted for certain reasonable and temporary purposes, such as payments of debts, and securing provisions to wives and children. In the late case of Lord Hyndford's settlements the Court went as far as possible to sustain a trust-deed where the purposes went

March 23, 1831. of Strathmore chose to execute a deed, the object of which was to defeat all succession in the person of his nearest legitimate relation, and to whom his titles must descend. The Earl, with the prospect

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a little beyond what has usually been thought reasonable and consistent with the powers of a proprietor with regard to the disposal of his estate after his death; but lawyers differed with regard to the validity of that deed, though temporary in its nature, and calculated for purposes which, in the case of a noble family, were not thought inexpedient or unwise.

Even in that case, however, third parties were named as trustees, and the non-acceptance of these trustees was not thought a sufficient reason for defeating the deed, because this Court might have appointed other trustees to follow out the lawful purposes of such a trust.

Where an estate is given to a corporation, or to an hospital or charity, the management can only be in trustees or administrators; but in such a case the property or substantial right is in the corporation or community to which it belongs, and the case would be just the same if the estate were purchased, the corporation being a *person* in the eye of law which can hold property, but the management necessarily conferred upon trustees or factors acting for the real owner.

The case of a perpetual trust in the individual owner of an estate, himself and his heirs for ever succeeding to that estate, declaring the right to be vested in them indefeasibly for certain ends and purposes, is a novelty both in law and practice. The mere name of a trust cannot tie up their hands, for if they succeed to the fee of the estate they must have the power of disposal, unless in so far as they are limited by clauses prohibitory, irritant, and resolutive, in the usual form, and having the usual effect of an entail by the law of Scotland, or come under an obligation that it is actionable. Thus, if I should settle my estate upon my eldest son and the heirs of his body, whom failing, my second son and the heirs of his body, &c., declaring the same to be a trust in my said eldest son and the heirs of his body, and each of the succeeding heirs for themselves and the heirs called after them, without tying them up by clauses prohibitory, irritant, and resolutive, it is thought that this would be neither more nor less than a simple destination.

In the answers it is said, the object of this deed was to secure the capital of the granter's fortune to his children and their descendants, and that this trust should be perpetual. What is this but an entail in a new form, viz. that of a trust vested in the heirs themselves for behoof of themselves and those interested in the succession, *i. e.* among whom the rents or produce are to be divided in all time coming, not for the preservation of the family by having one representative succeeding another in a certain order, and enjoying successively the whole benefit of the estate, but by a partition of the rents among all the members of the family, and still carrying on the succession to the remotest generation, whereby perhaps in time they would not have a shilling or a penny each person.

But, further, when the deed and codicil are attended to, this very object, which is held out as the sole purpose of the deed, seems to be entirely frustrated by the clause in the printed codicil, compared with the deed.

Perhaps the granter meant that the yearly produce only should be lent out as directed; yet the stock mentioned, and which, failing descendants, was to go to the hospital, seems to be the whole residue, whether consisting of capital or interest.

Perhaps, too, the dividends were only meant to reach the yearly produce and interest after satisfying other purposes; yet, when explained by the words which go before and those which follow after, it seems difficult to give it this limited construction; so that at the end of every seven years all the subjects on hand, after satisfying the

before his eyes of speedily going to his great account, appears to have had two objects in view; one to spite his brother, and the other to evade the laws of his country. Your Lordships have been called on more than once to consider the means by which he endeavoured to give legitimacy to his natural son through a marriage solemnized for the purpose of bringing the principle of the Scotch law — the Roman law of legitimation — to bear upon the status of an aforeborn child. That attempt of the Earl your Lordships frustrated; but this attempt of the Earl, I am afraid, must be supported. I cannot but grieve to say it, and I would that it could be defeated. I would that the law of Scotland had been made the same as the law of this country, and that a positive and distinct legal enactment had specifically laid down within what period accumulations should go on, which take land out of the proper enjoyment, and which take personal property out of trade; but I am compelled to admit that the legislature has not thought fit to make any provision to limit that power in Scotland, but rather, as I think I shall shew your Lordships, has assumed that the restraint does not exist. March 23, 1831.

In humbly giving the advice I am about to offer your Lordships to confirm this decree, after what I have said, I shall not be

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annuities and other provisions then actually paid or payable to persons existing, are made the subject of immediate distribution; and if in a year or two thereafter so many more claimants should exist, there would be no fund for them till some of the preceding annuitants should die out, or a proportional defalcation would take place; or even if we should suppose that these septennial dividends were to be confined to the interest, leaving the capital entire, still each payment of £50 would encroach upon the capital if there was no sufficient fund on hand arising out of the interest; and in this way the intended perpetuity would be frustrated, and the deed rendered inconsistent with itself. If this settlement can be supported upon any ground, it must be upon the footing of the heir having come under an obligation by acceptance of the deed, and possessing under it, to pay these eventual provisions; at same time this will not tie up his hands from selling, &c.; neither can he be obliged to find caution to make them effectual.

Hailes.—Interlocutor goes too far in supporting this deed in whole—deed cannot subsist for ever—intended for a perpetuity, in same way as entail, but an entail comes to an end—would be for finding that the payments must be made *without defalcation*.

Swinton.—Not an entail, and no instance of such a settlement being sustained. Suppose an estate ordered to be divided into square yards.

Eskgrove.—No ground for setting it aside. If he may choose stranger heirs, why not his heirs? besides, this pursuer bound.

Justice Clerk.—Great rule is, that the will of the defunct must have effect. If it becomes inextricable it will reduce itself. We cannot divide the deed. Cannot the absurd clauses be set aside, *e. g.* suppose they were immoral, impossible, &c.?

Henderland.—Testam. factio juris gentium here not inextricable, at present may be supported hoc statu.

March 23, 1831. suspected by your Lordships of harbouring any great wish to see the late Earl's purpose carried into effect; but the law is such, and we cannot help it — we must decide according to the law, and not according to our own inclinations. Now the facts of this case are clear; there is an accumulation for thirty years from the day of his death, and after the death of the longest liver of the two Lyons, who were then from fifteen to eighteen or twenty; so that it could not be an accumulation of less than thirty years; and the question is simply, Whether, by the law of Scotland, when no statutory provision has been made (except what I shall by and by mention), this is a valid disposition of the property? By the will of Mr. Thelluson, he had intended, from motives of family pride, to accumulate property to an immense amount. It was calculated that the fund might probably reach 100 millions before it could be enjoyed; and it was said that in thirty years, which was the lowest period you could then look forward to, it would amount to eighteen or nineteen millions. Alas! the calculations of those who thus commented on that will were as vain as the wishes of the testator himself; for it is a fact worth mentioning, to show the value of such perspective views of accumulation, that the Court of Chancery having got possession of the property, this great accumulation, instead of nineteen millions, now is under 500,000*l.*! It is thirty-three years since; and what was an estate of near 20,000*l.* a year at the death of Mr. Thelluson is, I believe, little more than 22,000*l.* at the present time; so well have they provided in Chancery for the prevention of an accumulation, which was matter of alarm at the time, as threatening to overset the constitution. Effectual means have, it should seem, been found to moderate the rate of accumulation, so as to make it harmless enough to the state. That case was decided in favour of the will, after much learned argument by most able judges — Lord Loughborough, assisted by the Master of the Rolls, Lord Alvanley, and by Mr. Justice Buller, and Mr. Justice Lawrence. My Lord Loughborough thereupon brought in the act by which the power of accumulation in England is restrained to the death of the testator, and twenty-one years after, upon the principle on which our law of real property, as to perpetuity, proceeds; and then there follows this clause with respect to Scotland: — 'Provided also, that nothing in this act contained shall extend to any disposition respecting heritable property within that part of Great Britain called Scotland.' Now, it is contended on the one side that this assumes that there was in Scotland, without the act, a sufficient limitation of perpetuities and accumulation; and that the act as to heritable property was not extended to Scotland, because it was not wanted in Scotland. On the other side (and it appears to me, if it

went no further, that this is the better argument of the two,) it may be said that the act expressly excludes Scotland, because it proceeded on a principle known to the law of England; namely, the recognition of the period of twenty-one years, and a little more, after lives in being, beyond which restraint of property is not allowed, for fear of creating perpetuities. But in Scotland the law, instead of discouraging perpetuities, gives them all manner of encouragement, and instead of confining the time to the lives in being, and twenty-one years, with the time of gestation beyond, permits you in every case to tie up property for ever and ever, as may happen in one case in England, that of the reversion being in the Crown, and in that case only. The adaptation of the limitation was therefore intelligible and rational in England, but would have been inconsistent with the principle of the Scotch law, and therefore it was not extended to Scotland. There is another observation which appears to be decisive. Real and personal property stand precisely on the same footing in Scotland. If the law restrains perpetuities in Scotland as to real property, it restrains perpetuities in Scotland as to the accumulation of personal; that cannot be denied. Now, this act leaves heritable property as it stood by the common law, but extends to Scotland quoad personality accumulation. If so, does it not follow that this act assumes that there is no restraint in Scotland? because if there was at common law a restraint as to heritable property, it is contrary to any thing that has been argued on either side of the bar that personal property would not also be restrained; and, consequently, this act would not have been wanting to extend to personal property in Scotland. Yet it does extend to personal property there, and is expressly precluded from extending to heritable property. It is not, however, perhaps quite correct to draw inferences of this sort from an act of parliament, when you consider that the legislature is always to have the same fairness and candour dealt out to it that a court of justice has in giving an obiter opinion in deciding on a particular point of a case. When the lawgiver lays down a particular rule upon the subject which he is dealing with — upon the principal point in the act, if I may so speak, by analogy to judicial decisions, there is no doubt of the intention, and he must be obeyed; so if he declares the law, reciting, whereas the law in such a case is doubtful, I declare that it is so and so; — that makes the law. But your Lordships are aware, that although the preamble to an act of parliament expressly affixed a certain construction to another act of parliament, the Courts have passed by that referring preamble altogether, although they were much pressed by the argument which, at first sight, appears a rational one — who so good a judge of what he means in

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the former act as the lawgiver who is passing a new one? Although the lawgiver expressly said, I formerly passed an act, and meant so and so by it; yet that was rejected in the Courts of Westminster Hall, by a decision which has ever since been held to be the rule in such cases. They considered that the construction of one act is not to be taken from an assumption in the preamble of another made upon a different matter, and not expressly declaring by enactment; and I should say, that the same principle applies, in a certain degree, to such doctrines as have been broached here. You ought not, when the legislature does not lay down a distinct rule, by enactment or declaratory clause, rashly to imply, from what it has not said, any meaning as to what is or what is not the law in other respects.

Now then we come to the grounds on which it is argued that the Scotch law is against the validity of these deeds. I think it clear, in the first place, that the pursuer had a title to pursue; that indeed has scarcely been disputed at the bar here. I take it to be clear, in the next place, that you must construe these different deeds together, and as parts of one conveyance. It will be less necessary to dwell much upon this second point; because I am of opinion the Court below have come to the right judgment in saying this is not, by the law of Scotland, such a perpetuity as a man may not create with regard to real property of which he is the unlimited fiar. Now there is no dictum of any text-writer on either side. There is also no decision on all-fours with the present case; those decisions on which the appellants rely appear to me not applicable to this question. Much doubt is raised on the Barholm case. I do not deny that it was well decided, and that there have been subsequent decisions in which it has been so far referred to that we cannot regard it as a case which has slept in the books, or been repudiated as against principle, or fallen into a kind of nullity from not having received the sanction of the profession, like Fitzroy *v.* Gwillim, and one or two other cases admitted not to be law in Westminster Hall, though never directly over-ruled. But the question is,—does the Barholm case apply to this? And when I look to the decision there, I find the report of it by Lord Elchies as follows: "This was a question of reducing two most ridiculous entails and trust-rights, whereby, excepting small aliments to the heir, the rents were to be applied for many years in purchasing other estates, and entailing them in the same manner. We all agreed to reduce the whole deeds, remitting to the Ordinary to allow the pursuer to prove the reason of death-bed against the last deed. I inclined to give that proof first, though I agreed in opinion as to the other reasons; but the Court did as above." But on looking into the papers, there appears clearly to

have been something in the nature of a perpetuity,—it was not twenty-one years,—it might be sixty years; and accordingly, in one part of the argument, they contended that it must be sixty years. I do not go along with the argument to that extent, because I think it might have been less. But there are provisions again and again for unborn children; and to show it does not merely deal with persons in existence, and to give them a vested interest in possession of the accumulated fund at some period of a life in being, it says, if only five children should come into existence, or shall be in existence, then five years' rent shall be taken; but if more than five, then four shall be taken; and, accordingly, the calculation is made on twelve, which would be forty-eight; and then that would be a fund to accumulate, and to accumulate in order to be dealt with after those children came into existence; and when they shall attain the age of majority, that is, twenty-one years after the last of the twelve children; and the accumulation does not cease until after the birth of the last of the twelve children; but the last of the twelve children might be born twenty-one years (they were all grand-children of this person) after the death of the person; there is forty-two years at once; it might have been forty years after the last, or thirty years after the last, and there would have been fifty-one; and therefore it is in vain to talk of this being twenty-five years. As I read the deed, there is an accumulating fund for twenty-five years, not to come into possession at the end of that time, but it might be many years afterwards. But, my Lords, I ought to state, that in reading this deed, I feel the greatest doubt, from its being an absurd, and, as the Court called it, a contradictory and unintelligible disposition of property, whether I have come to the right construction of it; for instance, the testator says the second son shall succeed, or, failing of a second son, the second daughter, as if the eldest daughter and the eldest son were out of the field; and yet you plainly see, from the other parts of the deed, he does not mean that, but something different; it is indeed not easy to see what he precisely means. This is a case where Courts of law are called on to put a construction upon a will, and endeavour to find out a meaning for a man who had no distinct or intelligible meaning himself; so that the Court may be said rather to make a will than to construe one; and this tends to bring some obloquy on the law. Thus the decision in the Barholm case very possibly might have been different, if the Court had seen a plain, consistent, and distinct intention on the part of the maker of those deeds, such as they plainly, clearly, and consistently perceive to have existed in the mind of the maker of Lord Strathmore's deeds; and if I were satisfied it was only an accumulation for twenty-five years in the Barholm case, which I am not at all satisfied

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of, but the contrary, or if I were satisfied what was the meaning of the party, (which I cannot be with any certainty,) the case might be of some weight as an authority; but when I find the settlement there mixed up with such a mass of clauses impossible to be construed, that very nonsense of itself constitutes a material specialty, and prevents the case from applying as an authority to another case, where no such speciality exists, but where a clear, consistent, and intelligible sense is seen operating from the beginning to the end of a very short and simple conveyance. Whatever bad qualities may be found in Lord Strathmore's disposition, no man can accuse it of being either unintelligible, inconsistent, or confused.

There are other cases which your Lordships have been referred to, and among these that of Hyndford; but M'Nair *v.* M'Nair, and the authority of Sir Ilay Campbell, have been much pressed on the attention of the House. Here is Sir Ilay's argument in that case: "A settlement, in the form of a perpetual trust, upon the "heirs themselves, is a novelty in the law of Scotland, neither "agreeable to any principle of common law, nor deriving any sup- "port from the act of 1685. The Court went far enough in the "case of Lord Hyndford, where a temporary trust for special pur- "poses was supported; and in that case the trust was not vested in "the heir himself, but in third parties." In this case of M'Nair, it is quite clear they speak of a perpetuity in terms, yet it is evidently taken for granted in this codicil that the stock is to remain. Certain sums are ordered to be paid to the male and female descendants at the age of twenty-five; and now they say, that this is so irrational and whimsical as to be ultra vires of any proprietor, because the fund might not vest in any proprietor until the expiration of so many years as would come within the description of a perpetuity. It is either a perpetuity—in which case the decision does not apply at all—or it is not a perpetuity. Now, let us look at the decisions:—First, the Hyndford case is distinctly stated by Lord President Campbell to be for a limited number of years, and to have been sustained. What do they say in this case of M'Nair and M'Nair? Lord Monboddo, a great authority, says, "The deed is legal, and "ought to be sustained." Lord Swinton is for setting it aside, on the ground, that "when a man ceases to live he cannot hold his "property." Now, really, my Lords, if a learned Judge is represented as stating such a reason as this, which is contrary to all law, that a man is to have no power of disposing of his property, real or personal, after his decease, what possible conclusion can we come to, except either that the learned Judge never said so, and that therefore we have no right to know he was for setting the deed aside, or, that the learned Judge, on this occasion, did not exercise

his usual acuteness and discrimination. True, a man cannot hold it, but he may deal with it. His Lordship continues: "It is civil law, "and not the law of nature, that allows testamenti factio and substi- "tution; but still the heir, when he succeeds, may do as he pleases." To be sure; but the question is, When is he to succeed; and to what period is the succession to be postponed? "This case is not a "tailzie within the act of parliament." That is, "You are trying "to do per indirectum what the law will not allow (and there every "one must go along with his Lordship); you must not get rid of the "act by a sidewind; you must either make it an entail or not. If "it is not an entail, it has no protection; if it is a tailzie, it must "have the fencing clause and registration." Then observes the Justice Clerk, (one of the greatest lawyers that ever sat on the Bench in Scotland, and one of the clearest-headed men, and of the most masculine understanding, I had ever the good fortune to hear argue,) "To overturn wills of defuncts upon ideas of rationality is "very delicate. If it be unlawful, it ought to be set aside, but "not otherwise, if it be at all extricable. If it is unintelligible "and confused, then it is set aside, not as a perpetuity, but be- "cause you cannot make sense of it; so was the case of Barholm, "perhaps to a certain degree. It has lasted already twelve years, "and may continue until it becomes inextricable. Entails were in- "troduced long before the act of parliament." I say that the result of this is, that the Lord Justice Clerk was against setting aside the deed. It is not very distinctly given. The President was for setting aside the deed, but he considered it a perpetuity. Lord Eskgrove had an inclination to set it aside, but he hesitated at present, the suit being at the instance of the heir who represented the granter; Lord Dunsinane and Lord Henderland the same—so they did not give a decision on the subject; and Lord Alva, a judge of little authority, was for setting the deed aside. Then comes the Lord President Campbell's second argument. He goes over the ground, that it went to create a perpetual trust in the heirs called to the suc- cession, for behoof, not only of themselves, but of the descendants of the granter, to the end of time, so long as any should exist; and yet, notwithstanding this, you see three judges—among them one of great learning—are of opinion that the deed should stand, and three do not decide the reverse; yet this is a perpetuity, and how then can we say the law of Scotland abhors perpetuities? "The "deed," says his Lordship, "goes much farther, by creating, or at- "tempting to create, a sort of tailzie, under the name of a trust of a "very anomalous kind, to have endurance, if not for perpetuity, at "least so long as any descendants of the six children of the granter "shall exist, which may be for many generations, and perhaps for

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" ever; and including an infinite number of persons." That is Lord President Campbell's statement of this case, which goes to a perpetuity. Lord Hailes—" The interlocutor goes too far in supporting " this deed in whole: it cannot subsist for ever." Lord Swinton —" It is not an entail, and no instance of such a settlement being " sustained,—suppose an estate ordered to be divided into square " yards." Lord Eskgrove, an eminent lawyer—a man of most luminous understanding upon all legal points—says, " No ground " for setting it aside; if he may choose stranger heirs, why not his " heirs? besides, this pursuer is bound." Justice Clerk—" The " great rule is, that the will of the defunct must have effect; if it " becomes inextricable it will reduce itself. We cannot divide the " deed. Cannot the absurd clauses be set aside; for example, sup- " pose they were immoral or impossible?" He does not say they were. Lord Henderland—" Testamenti factio est juris gentium; " here it is not inextricable at present, and may be supported hoc " statu." As far as this goes, it is in favour of the deed. " In the " late case of Lord Hyndford's settlement, the Court went as far as " possible to sustain a trust-deed, where the purposes went a little " beyond what has usually been thought reasonable and consistent " with the powers of a proprietor, with regard to the disposal of his " estate after his death; but lawyers differed with regard to the " validity of that deed, though temporary in its nature, and calcu- " lated for purposes which, in the case of a noble family, were not " thought inexpedient or unwise." That is all for supporting the deed. " The case of a perpetual trust," says Lord President Campbell, " in the individual owner of an estate, himself and his heirs for " ever succeeding to that estate, declaring the right to be vested in " them indefeasably for certain ends and purposes, is a novelty both " in law and practice. The mere name of a trust cannot tie up their " hands; for if they succeed to the fee of the estate, they must have " the power of disposal, unless in so far as they are limited by " clauses prohibitory, irritant, and resolutive, in the usual form, and " having the usual effect of an entail by the law of Scotland, or " come under an obligation that is actionable." Now, my Lords, I ask whether any one can doubt that Lord President Campbell's opinion only goes against a perpetuity being created? and in that opinion he is not supported by his brethren; but he also says: " I " am not against this because it is an entail—it is either an entail " or nothing—if it is not an entail it is unknown in law—a novelty " —an anomaly in the law; and if it is an entail, where are the " fencing clauses, and where is the registration?" Then, on that ground simply he puts it.

I have looked into the papers in the Hyndford case, and they raise

the impression that the trust was to endure for a longer period of time than by possibility this could. That was not a deed for twenty-five years, except in one event—in the event of one of two alternatives happening; but nevertheless that deed was supported, if I am to take the statement of Lord President Campbell. He says it may be supported, so far as it was temporary, for special purposes; and what possibly may reconcile the books on the subject is, that it was supported as far as regards the temporary part, and set aside only as regards the perpetuity. Here it is not contended that the perpetuity should be supported, nor is that contention necessary to support the judgment of the Court below. I do not mean to say that there may not be an extremely good ground for setting aside an accumulation which is to go on for ever, and I do not consider that we are bound to say how long or how short a period money or land may accumulate in Scotland. We are not called on to decide that at the present time, or to draw a line, the want of which, as to leasing, was so much felt in the cases from Turner and Turner down to the Roxburgh case, which finally fixed the period on somewhat of an arbitrary ground, not perhaps well adapted to the Scotch law, yet now acceded to by the Scotch lawyers, who at first thought it was an importation of English law into the Scotch law of tailzies. I must say, — adverting to the difficulty felt in these cases, and to the others connected with the present question, that it would be very desirable to have the rule fixed by positive statute in Scotland, as Lord Loughborough's act did in England. With this observation I shall conclude what I have to offer on this case. I have entered into it at greater length than I should otherwise have done, rather on account of the importance of the question to the parties than of any doubt upon the decision fit to be given upon it. I was prepared to give the same opinion to your Lordships after hearing the appellant's counsel; but as they complained that they had been dismissed rather hastily in the Court below, it seemed better that the argument should be gone through, and that the appellant (whose case is a very hard one) should have the opportunity of replying, new lights being sometimes struck out in a reply. But from the first I entertained no doubt at all that the principle of the decision come to in the Court below was right. March 23, 1831.

Mr. *Attorney-General.* — I apprehend this is a case in which your Lordships will think the trust-property should bear the costs.

Lord Chancellor. — I shall propose that reasonable and ordinary costs on both sides should be paid out of the estate. I never saw a clearer case for so doing. This appellant was entitled to have this question thoroughly discussed, and to that extent there is no reason whatever to spare the estate; but if I find the expense

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The House of Lords found, That the appellant had a title to pursue this action; and with this finding it is ordered and adjudged, That the interlocutor complained of be affirmed; and it is further ordered and adjudged, That the cause be remitted back to the Court of Session, with instructions to that Court to direct the reasonable costs incurred by both parties relative to this cause to be paid out of the trust-estate; and to do further in the said cause as to the Court shall seem fit, and as shall be consistent with this judgment.

Appellant's Authorities.—1685, c. 22; 39 & 40 Geo. III. c. 98; Randall on Trusts, pp. 46 and 88; M'Neill, January 27, 1826 (4 Shaw and Dun. No. 266); Ker, January 23, 1747 (12,987); Earl of Wemyss, November 17, 1815 (F.C.); Mordaunt, March 9, 1819 (F.C.); M'Culloch, November 28, 1752 (ante) and Elchies voce Tailzie, No. 48; Thelluson's Case, and authorities quoted, 4 Vesey, 227; affirmed, 11 Vesey, 112; 2 Blackstone, c. 1, p. 10; 2 Hen. Antiq. tit. x.; Kames, His. Tr. p. 134; 1 Bell's Com. 38; Elchies, voce Tail. No. 48; Crawfurd, Nov. 17, 1795 (14,958), and H. of L., March 14, 1806; Hill, April 14, 1826, (2 Wilson and Shaw, No. 11); Crichton, May 12, 1826 (3 Wilson and Shaw, No. 17).

Respondents' Authorities.— 3 Ersk. 8, 98; Rowan, Nov. 22, 1775 (11,371); 2 Bligh, p. 619, 655; Moir, March 2, 1820 (F.C.); Batley, Feb. 2, 1815 (F. C.); Thelluson's case, 4 Vesey, 227; affirmed, 11 Vesey, 112; 3 Hargrave, Juris. Exer. p. 138; M'Nair (Bell's Cases, 546).

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