see nothing in the interlocutor which ought to lead to the inference that it was intended to include anything more than what is necessary for the convenient use of the railway as a railway. The word "station" is a perfectly well understood term, and any definition would be open to the observation that it was *clarum obscura involvens*. Everybody knows what the word "station" means—that it is a place to which every person using the railway may come on foot or in carriages, and bring their luggage, and it probably has connected with it a room where persons may wait, if it is a railway for taking various descriptions of passengers—first, second, and third class passengers—and all that description of accommodation, without which a railway cannot be conveniently used. It certainly will not include a hotel and other matters not necessary for the occupation and convenient use of the railway. I think it may properly include a directors' room. It is exceedingly important, that there should be at a station a directors' room, to which persons having complaints to make may resort for that purpose. I do not think there can be any practical difficulty upon the subject. I think that that which Mr. Rolt invited your Lordships to do, namely, to insert some definition, would be infinitely more likely to give rise to litigation than to lead to any good result.

With respect to the cases that were relied upon, they were English cases, and have no application to this case, because what the respondent rests upon is the construction of this Scotch Poor Law Act. But there was no such act in England; and the assessment having been made upon the land which was occupied by the railway in the particular parishes upon the best principle that the parties could arrive at, and they having done it very elaborately, and perhaps very reasonably, (if you please, more reasonably under the Scotch Poor Law Act,) the Court of Queen's Bench thought it a very reasonable mode, and refused to interfere with the rate. That is wholly inapplicable to this case, which rests, not upon any abstract discussion as to what would be the more expedient or the more just or reasonable way of assessing a portion of a railway which passes through a particular parish, but upon the construction of this special act of parliament. I therefore move that this interlocutor be affirmed, with costs.

LORD BROUGHAM.—My Lords, I take entirely the same view of this case, both as to the result and as to the argument of my noble and learned friend. I have taken most anxious care, from the beginning of this case, that every part of the argument urged in the Court below and at your Lordships' bar should receive, as far as I was able to give it, my fullest attention, and most deliberate consideration; and if I do not repeat any of the arguments, it is because I feel it to be superfluous to go over the same ground again, which has been so ably and distinctly gone over already.

I have at different times had doubts whether or not we ought to attempt to lay down some definition of the word "station," so as to preclude the necessity of further litigation, ending, in all probability, in a further appeal to your Lordships' House; but, on further consideration, I think that it would be not only difficult for us to make any satisfactory definition, but impossible, for I can hardly imagine our making any definition which would not be sure to lead to other questions, not now raised by the law, as it stands at present. Some reference has been made to the 37th and 42d sections of the Poor Law Act, and to the Railways Clauses Act, all of which provisions call to my mind very many cases before Courts of Justice, illustrating the faulty manner in which acts of parliament are drawn, and I heartily wish I could see a better system laid down and pursued for more accurately framing them.

Interlocutors affirmed, with costs.

Appellants' Agent, James Burness, S.S.C.—*Respondents' Agents*, Smith and Kinnear, W.S.

JUNE 14, 1855.

ROBERT GRAHAM, *Appellant*, *v.* ROBERT STEWART and PATRICK MURRAY THREIPLAND (Lord Lynedoch's Trustees), *Respondents*.

Trust Deed—Direction to make a Valid Entail—Extrinsic Evidence—Powers and Duties of Trustees—*In terms of the trust settlement of a proprietor of an estate held under an entail, dated in* 1726, *his trustees were directed to invest the residue of his means in the purchase of land, and to convey it to the same series of heirs, and under all the conditions and clauses contained in the entail of* 1726, *in "so far as the same may be applicable, and so as to form a valid and effectual entail, according to the law of Scotland." After the death of the truster, it was judicially decided, that the fetters of the entail of* 1726 *were ineffectual to prevent sales, and so fell under the operation of the Entail Amendment Act of* 1848; *and the estate was thereafter sold.*

HELD (affirming judgment), *That the trustees were not entitled to entail the lands purchased by them according to the terms of the defective entail, in which way the entail would be nugatory, but were bound to do so in such a way as to form a valid and effectual entail, according to the law of Scotland. The reason is, that extrinsic evidence as to the testator's intention is not admissible to explain the clear language of the will.*

(*Per* LORD ST. LEONARDS dissenting), *On the face of the settlement, the words being ambiguous, extrinsic evidence was admissible to explain their meaning; and the main object of the testator was, that all the lands should go together in the same line.*[1]

This was an action to have it found and declared that certain lands conveyed to the defenders by the trust deed and settlement of the late Thomas Lord Lynedoch, ought to be disponed to the pursuer (the appellant) in fee simple. The pursuer Mr. Graham is the heir of entail succeeding to the truster in the estates of Balgowan and Lynedoch. Shortly after the death of the truster, the pursuer brought an action to have it declared that the entails of these estates, executed in 1726 by Thomas Graham and John Graham of Balgowan, were ineffectual to prevent selling, and that sales which had been previously made by him, were legal and valid. The Court decided in his favour on 20th January 1848—(20 Sc. Jur. 622); and the judgment was affirmed in the House of Lords, 6 Bell's App. 441.

By the settlement before referred to, which also conveyed in trust to the defenders Lord Lynedoch's whole moveable and unentailed heritable property, the defenders were directed, after payment of funeral expenses, expenses of management, debts and legacies, to execute an entail of the residue in favour of the same parties who were the heirs of entail under the destination in the entails of Balgowan and Lynedoch. This direction, which constituted the fourth purpose of the trust, was in the following terms:—"*Fourthly*, That after fully accomplishing the purposes aforesaid, if any of my lands and heritages before disponed shall remain unsold, my said trustees shall in due form of law dispone and convey the same to the heirs of entail called after me in and by a certain deed of entail executed by Thomas Græme sometime of Balgowan, and John Græme his son, dated on or about the 7th day of February and 9th day of June in the year 1726, and recorded in the register of entails on or about the 30th day of December in the same year, under all the conditions, provisions, and clauses prohibitory, irritant and resolutive, in the said deed of entail contained, so far as the same may be applicable, and so as to form a valid and effectual entail according to the law of Scotland; and shall also lay out the remainder of my personal estate and effects, if any be, as soon as convenient purchases of land in the county of Perth shall offer, in purchasing lands as aforesaid; and when the lands are so purchased, to dispone the same, or take the dispositions and conveyances thereof to and in favour of the heirs of entail called after me, in and by the aforesaid deed of entail executed by the said Thomas Græme, and John Græme his son, dated and recorded as aforesaid, under all the conditions, provisions, and clauses prohibitory, irritant and resolutive, in the said deed of entail contained, so far as the same may be applicable, and so as to form a valid and effectual entail according to the law of Scotland; and upon such deed or deeds of entail being executed, as well in regard to the lands and heritages remaining unsold, as to the lands and heritages to be purchased, to cause the same to be recorded in the register of entails, and the authority of the Court of Session to be interponed thereto."

The following codicil, executed by the truster in 1838, is given in farther illustration of his views as to the lands to be disposed of by his trustees:—"And whereas, by my said trust disposition and settlement, I directed the debts and sums of money due to me at my death might be uplifted, and that my moveable estate, and lands and heritages thereby conveyed, might be sold, in whole or in part, at the discretion of my said trustees, and that after payment of my deathbed and funeral expenses, expenses of executing the said trust, my just and lawful debts, and any legacies, donations and sums of money ordered by me to be paid as aforesaid, if any part of my said lands and heritages should remain unsold, my said trustees should convey and dispone the same to my heirs of entail called after me by the deed of entail of Balgowan, and should also lay out the remainder of my personal estate and effects, if any should be, in the purchase of lands, and settle the same on my said heirs of entail in manner more fully set forth and expressed in my said trust disposition and settlement, I hereby declare that my said trustees shall nowise be bound to sell my said lands and heritages, or any part thereof, for payment of my debts, legacies and donations, but may, if they see fit, dispone and convey the said lands and heritages, or such part thereof as they shall not have sold, to my said heirs of entail, under the real burden of said debts, legacies and donations, or such part thereof as may be unpaid at the time, in the terms directed in my said trust disposition and settlement in reference to the lands and heritages which might remain unsold after payment of my deathbed and funeral expenses, expenses of management, and my debts and legacies; and I recommend to my said trustees, in case they shall consider the sale of my said lands and heritages, or any part thereof,

[1] See previous report 15 D. 558; 25 Sc. Jur. 340. S. C. 2 Macq. Ap. 295: 27 Sc. Jur. 473.

expedient, to sell, first, those parts thereof least adjacent to the place and grounds of Lynedoch, and thereby, or by excambion with my heirs of entail or otherwise, to carry into effect my wish to preserve to my heirs of entail those parts of my said lands and heritages contiguous to Lynedoch, and most essential to its amenity: And further, I declare and appoint that the rents and profits of my said unentailed lands and heritages, and of any lands to be purchased by my said trustees while vested in their persons, as well as the annual interest and produce of any monies that may be in their hands arising from the sale of any part of my estate, heritable or moveable, whether under the said trust disposition, or any will executed or to be executed by me relative to my real estate in England, or from any claims that I may have at my death against the heirs of entail succeeding to me in my entailed estates, and generally the annual profits and produce of any funds and estate falling under the said trust, shall be paid and accounted for by them to the heir of entail in possession of the said entailed estate of Balgowan for the time."

During the truster's possession, certain deeds of entail of lands other than Balgowan and Lynedoch were executed by him, and by trustees appointed by a private statute for selling parts of the original entailed estates, and purchasing other lands, and entailing them in lieu thereof. These entails were in the precise terms of the Balgowan and Lynedoch entail of 1726; and the pursuer completed his title under them.

It is material to keep in view the following dates:—The trust settlement was made in 1821, and the codicil in 1838. The truster died in 1843. As already said, the decision finding that the Balgowan entail was ineffectual to prevent alienations, was pronounced in January 1848, and affirmed on 3d May 1849.

The trustees in their defences contended, that they were bound in executing the entail directed by the truster to make it a valid entail according to the law of Scotland.

The Court of Session held that the trustees were so bound, and were not entitled to convey the lands in fee simple, or to execute a deed in terms of the ineffectual entail of 1726.

The *pursuer*, in his *case*, argued for a reversal, that, 1. According to a sound construction of Lord Lynedoch's trust deed and codicils, he must be held to have instructed his trustees, in entailing lands purchased, to follow the Balgowan entail as a model, and to insert in the entail to be executed by them the same conditions, provisions, and clauses prohibitory, irritant, and resolutive, *mutatis mutandis*, as those which were contained in the Balgowan entail. 2. The trustees, in any entail to be executed by them, were bound to follow these instructions, and had no discretion conferred upon them to insert conditions, provisions, or clauses irritant and resolutive, different from or additional to those contained in the Balgowan entail. 3. The Balgowan entail having been found defective and insufficient in the irritant clause against disponing or alienating the lands, the only entail which Lord Lynedoch's trustees could competently execute would not be effectual as a strict entail, and the appellant was therefore entitled to obtain a conveyance to the lands or residuary estate in dispute in fee simple. *Brown* (*Murray M'Gregor's trustee*) v. *The Bank of Scotland*, 1 D. 251.

The respondents answered, that, According to the sound construction of the directions given by Lord Lynedoch to his trustees, they were bound to execute a valid and strict entail, according to the law of Scotland, of the lands and others conveyed to them in trust, and were not empowered or bound to make them over to the appellant in fee simple.

Solicitor-General (Bethell), and *Rolt* Q.C., for appellant.—This is not the case of an executory trust, where you must mould, as it were, the intention of the testator, but it is the case of an executed trust, where he has himself defined exactly the nature of the thing to be done. What he directs the trustees to do is not to frame an original deed, but to follow merely the details of the Balgowan entail. The object of the testator was to make both estates go together to the same line of heirs, and this could be accomplished only by executing an entail the same in its provisions as the Balgowan entail. The clause, "so as to form a valid entail," was merely explanatory of what the testator thought he had already done; it was surplusage, or, at most, an accessory clause, which must follow the principal clause which preceded it. It was a mere expression of the supposed legal effect of a deed following the Balgowan entail, but the substance of the direction was, that the trustees must follow that entail as their model. The proper mode of testing the true meaning of the trust deed, is to consider what the testator would have done if he had proceeded himself to carry out the direction the day after the deed was executed, or if the trustees had proceeded to do so immediately after his death. They would certainly have followed to the letter the Balgowan deed. He himself followed it during his life in settling the excambed lands; and the Judges to whom parliament referred the matter, previous to the acts being passed authorizing the excambion, gave the same advice that the Balgowan deed must be followed. Such being, then, the intention of the testator, and the effect of the trust deed, how can the mere fact of something happening *ex post facto*, viz., the discovery of a flaw in the Balgowan entail, alter or vary the meaning of the trust deed? Besides, the trustees, in following the Balgowan entail, would still satisfy the words "so as to form a valid entail."

[LORD BROUGHAM.—Then you read the words "so as" as if they were "thereby"?]

[LORD CHANCELLOR.—You say in effect, that though the entail thus executed by the trustees

might be defective in some one point, still it would be effectual in many other respects, and would be a valid entail for many purposes?]

Yes; it is a mistake to say that an entail is not valid, because it omits some one irritant and resolutive clause.

[LORD CHANCELLOR.—I am disposed to think so too, for if I leave an estate to "A and the heirs of his body," it is a valid entail until A bar it, or do something to defeat it.]

[LORD BROUGHAM.—I rather think a Scotch lawyer, if asked what a valid entail was, would not reply—it is one which omits to fence the prohibition against selling.]

The question is not what a lawyer would understand by the phrase "a valid and effectual entail," but what the testator understood by it, who was to some extent his own conveyancer. The cases relied on by the other side are cases where the truster gave a clear direction that the settlement was to be a strict settlement in every sense of the word, as in *Stirling* v. *Stirling's Trustees*, 1 D. 130. The cases as to executory trusts have gone too far in England in moulding the testator's intention, but a check was given to this tendency by the late case of *Egerton* v. *Brownlow*, 4 H. L. Cas. 1.

Lord Advocate (Moncreiff), *R. Palmer* Q.C., and *Anderson* Q.C., for the respondents.—It is the law both of England and Scotland, that, if a testator direct a particular object to be attained, such as the executing of an entail, the Court will see that that object is attained in the best and most effectual manner. Here the primary object of the testator was the making of a valid and effectual entail. To that general object all that he directed to be done was subordinate. He indicated the Balgowan entail as a good model to be followed, so far as it fulfilled the general intention.

[LORD BROUGHAM.—If the testator had himself proceeded to execute an entail, instead of leaving it to his trustees to do so, would he not have copied the Balgowan entail?]

It does not at all follow that he would.

[LORD ST. LEONARDS.—The very narrative of the trust deed shews, that he considered the Balgowan entail valid, and he himself followed it in settling the exchanged lands authorized by the acts of parliament.]

The contract of excambion can throw no light on the intention, as shewn, in the trust deed, for the testator was necessarily bound to settle the lands which he had acquired in exchange in the very same terms as those under which he formerly held the entail. It is well settled that you cannot go into extrinsic evidence to explain words that are not ambiguous.—Wigram, on Discovery. We contend there is no mode of reading the trust deed except as directing, that the trustees were to execute a valid and effectual entail. There was nothing to bind the trustees down to follow the letter of the Balgowan entail. The testator merely threw out a suggestion that that was a good model, but the trustees might have used their discretion in following it or not. A liberal construction must always be given to instructions of this kind addressed to trustees.—*Campbell's Trustees* v. *Campbell*, 14 S. 770; *Stirling* v. *Stirling's Trustees*, 1 D. 130; *Sprott's Trustees* v. *Sprott*, 6 S. 833; *Forrest's Trustees* v. *Martine*, 8 D. 305; *Cuming*, 10 S. 804; *Duthie*, 3 D. 616; *Stair* v. *Stair's Trustees*, 2 S. 205. The argument of the other side would strike out the words, "and so as to form a valid entail," as of no meaning, whereas we hold them to be the keystone of the whole deed.

Sir R. Bethell replied.—The other side beg the question when they assume this is an executory trust. It is well known, when there are general words followed by special directions in a will, the latter must be taken to be the exponent and measure of the general intention. The particular directions are substantive and independent, and are not to be sacrificed to general language.

Cur. adv. vult.

LORD CHANCELLOR CRANWORTH.—My Lords, this is an appeal against an interlocutor of the Lords of Session, in an action raised by Robert Graham of Redgorton, against Robert Stewart and Sir P. M. Threipland, who are trustees of the late Lord Lynedoch. The object of the action was to obtain a declarator establishing the fact, that the pursuer Mr. Graham is absolute owner in fee simple of certain lands, as to which the defenders contend that he is only tenant in tail.

The question arises upon the construction which is to be put upon the trust deed of Lord Lynedoch, which is in the nature of an entail executed by him, directing the disposition of his lands after his death. It is a trust disposition and settlement made by Lord Lynedoch, dated 20th June 1821, and codicils, dated 7th March and 4th May 1838, all registered in the Books of Council and Session on the 30th December 1843.

The facts of the case are shortly these:—In 1726 the then Mr. Græme was in possession of the property and estates of Balgowan, and executed certain deeds whereby he entailed those estates, as he supposed, with all necessary fetters, in strict settlement. Under that settlement, after different heirs, whom it is not necessary to enumerate, the late Lord Lynedoch became entitled, as heir of entail, a good many years ago, somewhere towards the latter part of the last century, in 1770, or thereabouts. He was, I think, the grandson of the person who first created

the entail. At different times certain of the lands that were settled were sold, and others substituted in their place. That was done by virtue of three several acts of parliament, passed in 1787, 1805, and 1811.

After Lord Lynedoch's death the question was raised as to the validity of the settlement, and, not to trouble your Lordships with recapitulating the proceedings which took place, with which your Lordships are very familiar, eventually it was established, that there was no fetter in the settlement which restrained alienation, and that, consequently, in truth, the entail was invalid. —*Murray* v. *Graham*, 6 Bell Ap. 441. Subsequently to that there has been an act of parliament passed very recently, enacting, that where one fetter fails, the whole entail shall fail, because, in truth, if you want to get rid of the entail, you have only just to go through a form, and you get rid of the effect of the other fetters. You might charge the estate with debts to an unlimited amount, and, in fact, that was the design with which the act of parliament was passed, which makes one fetter being broken vitiate the entail altogether. That has not much bearing upon the present case. It was established, finally, that under that deed of entail of 1726, Lord Lynedoch, as heir of entail, was in truth absolute owner.

Lord Lynedoch, by his trust deed, to which I have adverted, made in 1821, settled his estates, and directed them to be disposed of in a variety of ways, both the personal and the real estates, in the *first* place, for the payment of his deathbed and funeral expenses; *secondly*, for the payment of his just debts; *thirdly*, to pay legacies; and, *fourthly*, (and this gave rise to the present question,) "that after fully accomplishing the purposes aforesaid, if any of my lands and heritages before disponed shall remain unsold, my trustees shall, in due form of law, dispone and convey the same to the heirs of entail called after me, in and by a certain deed of entail executed by Thomas Græme, sometime of Balgowan, and John Græme, his son, dated on or about the 7th February and 9th June 1726, and recorded in the Register of Tailzies on or about the 30th December in the same year, under all the conditions, provisions, and clauses prohibitory, irritant, and resolutive, in the said deed of entail contained, so far as the same may be applicable, and so as to form a valid and effectual entail, according to the law of Scotland."

Now, Lord Lynedoch having died seised of a considerable amount of real estate, and of personal estate which became vested in the same person, the question arises—whether the person who has taken as heir of entail is to take an absolute fee simple; or whether it is to be taken under the fetters of a strict entail. The present pursuer contends, that, it having been decided that the deed of 1726 did not create an effectual entail, this direction was substantially a direction to settle the lands of which he was seised in fee simple, or which might be purchased with the residuary personal estate, in the same way as the deed of 1726 had settled the estates; and inasmuch as that settlement gave to him now an absolute estate in fee simple, he is entitled to a fee simple in the lands of which Lord Lynedoch was seised in fee simple, or which were purchased by the residuary personal estate, and with that view he instituted the present action. The Court of Session held that that was not the true construction to be put upon the language of this trust deed of 1821, for that, although it is true that the direction was, that the lands of which he was seised in fee simple were to go to the heir of entail "under all the conditions, provisions, and clauses," and so on, contained in the former deed, yet there were superadded the words — "And so as to form a valid and effectual entail, according to the law of Scotland;" and if, therefore, looking only to the conditions, provisions, and clauses contained in the deed of 1726, there is any defect (as undoubtedly there is) that will make that deed not a valid and effectual entail, according to the law of Scotland. The learned Judges were of opinion that that direction would include, that those restrictions must be added which are necessary to form a valid and effectual entail. That was the opinion of the majority of the Judges of the Court of Session. They determined that, according to the true construction of the deed of 1821, the settlement was to be made so as to create a valid and effectual entail according to the law of Scotland. The question now comes to be decided by your Lordships. Now, I must own, that, in my opinion, the conclusion at which the Court of Session arrived was a perfectly correct one. And I have formed that opinion upon grounds extremely simple, and which may be very shortly stated. I take it to be a canon of construction, that you are, in the first place, in construing an instrument, to strike out no words that are sensible, and that you cannot see have been introduced by accident or inadvertence; and that you are to give to all words their natural meaning, unless there is something in the context, or, in certain cases, in external circumstances, to shew that they are not so to be understood. Now, all that is here directed is, that these fee simple lands are to be settled under the conditions, provisions, and clauses prohibitory, irritant, and resolutive, in the former deed of entail. If that had been all, no doubt, inasmuch as that former deed of entail had the omission of an irritant clause, whereas it was necessary that there should be an irritant clause in order to make the entail valid, the contention of the pursuer would have been right, and he would have been entitled to the fee simple. But the testator, having directed that the deed was to be framed with all the conditions, provisions, and clauses in the former deed, goes on :—"And so as to form a valid and effectual entail, according to the law of Scotland." The Court of Session held, that you have no more right to strike out those words than to strike out the former words; that the

two are perfectly consistent; that you may make the settlement subject to all the conditions, provisions, and clauses prohibitory, irritant, and resolutive, contained in the deed of entail of 1726, and you may do that, so as to make a valid and effectual entail, according to the law of Scotland. What difficulty is there in that? Here are two directions given, the first is, that all the clauses in the former deed shall be inserted; and the other is, that the settlement shall be made "a valid and effectual entail, according to the law of Scotland." You do that by taking all the clauses and conditions of the former deed, some of which may not be necessary for a valid entail, as, for example, taking the name and arms. That was not necessary for a valid and effectual entail; and again, in the case of a female succeeding taking the name of the family, that was not necessary for a valid entail; and all that was to be inserted in this deed, and they are to do this so as to form a valid entail. Now it appears to me, upon that very short ground—that the words are to have their natural meaning, and that you are to strike out none, if it be possible to give effect to all—the Court of Session have arrived at a perfectly correct conclusion.

My Lords, in the course of the argument it was strongly pressed that this could not have been the meaning of Lord Lynedoch, because he certainly supposed that the deed of 1726 created a valid entail, and that therefore he, supposing that that was a valid entail, must be taken to have understood, when he directed these lands to be settled according to that deed, "and so as to form a valid and effectual entail," that he was only adding words that were superfluous, and that no real meaning was to be attributed to them, but that they were entirely tautologous. And to shew that that was his idea, we were referred to certain matters which had taken place in Lord Lynedoch's lifetime, which I will shortly advert to, but with the observation, that I reserve my opinion as to how far they can have any legitimate bearing upon the question before your Lordships.

It appears that in 1787, Lord Lynedoch being then heir of entail in possession, and having other fee simple lands of his own, obtained an act of parliament enabling him to evacuate the entail as to certain portions of the lands that had been included in the settlement of 1726, and to substitute for them some of the lands of which he was seized in fee simple, upon the ground that the lands which were to be evacuated were less conveniently situated for the bulk of the property than those which he proposed to substitute for them. For that purpose he obtained an act of parliament, which proceeded in this way: It recited the original entail, and then "that the following lands, lying within the county of Perth, contiguous to the principal part of the entailed estate, have been from time to time purchased by Thomas Graham and his ancestors, and now belong to him in fee simple, which are altogether of the yearly value of £1242 sterling, and that the following lands comprised in the deed of entail lie discontiguous, and are of less value." The value is given, and then it says—"that Thomas Graham had proposed, and all the other heirs of entail were willing and desirous that in lieu and place of the discontiguous lands the others should be substituted." Then power is given to him to proceed under the act of parliament, "and apply summarily by petition to the Court of Session, and, with their direction, to execute a deed of settlement of those lands, to go in the same way, and under all the conditions, provisions, declarations," and so on, "contained in the old deed." Now it is said that that shews that he understood this deed to create a valid entail. If this were a matter before a jury, and I were to decide it, I should say that great weight is to be attributed to this fact. I should say, very likely he did so understand it. But my doubt is, whether it has any bearing upon the question. No doubt, whether he did or did not believe so, the fact is, that when the thing was to be done, all he did was to substitute certain fee simple lands for certain entailed lands, whether effectually entailed or not.

Precisely the same proceeding took place in 1805, and again in 1811. It was pointed out that the language in the act of 1811 was somewhat stronger than that of the other acts, inasmuch as the lands which were directed to be substituted were to be "in the form of a strict entail, and under all the conditions, provisions, declarations, limitations, and irritancies, limited, and so on, by the aforesaid deeds of entail, in so far as the same are now subsisting, or capable of taking effect, which settlement and entail shall be so framed as to bind the said Thomas Graham or other person executing the same, as well as the succeeding heirs of entail." When in conformity with that the deed was made, merely following the deed of 1726, that was relied upon as shewing that these parties must have understood that that deed created an effectual entail, and the more so, as when that deed was made in pursuance of that direction in the act of parliament, it was made a few days before the trust deed, the construction of which is now before your Lordships. It began in this way—"Considering that Thomas Græme, sometime of Balgowan, now deceased, did, in and by a certain deed of entail executed by him and John Græme, his son, which is dated the 7th February and 9th June 1726, and duly recorded in the Register of Entails kept at Edinburgh upon the 30th December in the same year, settle and secure, by way of strict entail, his lands and barony of Balgowan and others, in the county of Perth." Then Lord Lynedoch goes on and settles these substituted lands. That was only a few days before this trust deed was made. That, it is contended, is conclusive evidence to shew that he supposed that the deed

of 1726 was a valid deed of entail, and, consequently, that all he was called upon to do was to make a deed in conformity with it.

Now, my Lords, supposing that, as a conclusion of fact, that is a conclusion to which it would be reasonable to arrive, what I venture respectfully to suggest to your Lordships is, that that is not a matter which you can take into consideration at all. Where the settler, the testator, or the maker of the deed, has used words that, in themselves, are perfectly clear and unambiguous, you have no right to go into extrinsic evidence to shew how he understood these words. That doctrine has been so very often considered of late years, that it would be, I think, mere pedantry to go through the cases on the subject. I merely allude to one which concluded the question in your Lordships' House. It was a case of the very strongest description. I allude to the case of *Mr. Oxenden*, (*Doe d. Oxenden* v. *Chichester*, 4 Dow, 65,) in which, having an estate, the largest portion of which was situate at a certain place called Ashton, but other estates situate in adjoining parishes, he was in the habit of always speaking of his estate as "my Ashton estate." He kept his books in that way, and his stewards kept them in that way, and whether an estate was in the parish of Ashton or not, (it did not appear to him the least material,) he called it his Ashton estate, and in his will he said, "I give all my lands in Ashton." In the *first* place, it was held that that meant "all my lands at Ashton;" but after the case had gone through all the Courts, and eventually had been brought here, Lord Eldon, in concurrence with all the Judges, Gibbs, C.J., expressing the opinion of the Judges, came to the clear conclusion, that it was an expression which admitted of no doubt whatever upon the face of it, and that you could not admit extrinsic evidence to shew that the person using words which have a plain meaning, was in the habit of using them in a different sense from that which was their ordinary meaning; that the expression itself was simply to be looked to, and, consequently, nothing passed by the devise except so much of the lands as were situate in Ashton. That was carrying the case to the greatest possible extent, and, as it seems to me, must govern the present case. The appellant contends, that Lord Lynedoch must have understood that these words which were added were unnecessary, and that, if they had been omitted, the object would have been effected without them, but he has fortunately, for that which was his object, introduced these words; and, I think, without infringing upon the rules that govern the doctrine as to the admission of evidence to explain words, your Lordships are not at liberty to look to extrinsic evidence in order to see what he meant, in direct violation of the precise terms he has used.

These are the short grounds upon which it appears to me that the Court below have come to a correct conclusion. The grounds upon which they proceeded were, that there is nothing inconsistent in the two directions; that it was quite right to direct that the deed should contain all the provisions of the former deed; and that it was consistent with that to say that it should be done, so as to form a valid and effectual entail, according to the law of Scotland; that that is a direction which may be easily and effectually executed; and that even if you imagine that Lord Lynedoch had a different intention, you cannot collect that intention—you are not at liberty to look to external circumstances; but you must be guided, not by what you suppose from external circumstances was his intention, where you can ascertain what is the intention, that the plain language which he has used clearly expresses. Upon these grounds I move your Lordships to affirm the interlocutor of the Court below.

LORD BROUGHAM.—My Lords, after some hesitation during the argument, I have come to be of the same opinion as my noble and learned friend. It is in vain to speculate upon what Lord Lynedoch himself would have done, had he been the party to frame the instrument himself, and to make the entail, instead of only giving instructions to his trustees to make that entail. We cannot speculate upon that. Probably, and, I may say, very likely had he done so himself, he would have taken the course which, it is said, would have been sufficient, according to his understanding of the law, as it then was before the decision of your Lordships' House, finding the fencing clauses of the old entail of 1726 insufficient—it is very likely that he himself, considering those clauses to be sufficient, might have made the entail with those clauses, and possibly with no alteration in them, and possibly with no addition to them. I cannot speculate upon that, any more than I can speculate upon what he probably would have done—nay, I would say, upon what it is quite certain that he would have done, if not only he had been the party to make the entail himself, instead of only directing it to be made, but if he had made it with the knowledge of what subsequently passed, namely, that that entail was invalid. I have no doubt whatever, that if such had been his knowledge, if he had been aware that that old deed of entail of 1726 was invalid, he would not have adopted those clauses, but would have drawn the deed so as to constitute a valid and effectual entail. But I can speculate neither upon the one nor the other of those suppositions. I must look, and, in my opinion, I am bound only to look at what he really did.

Now I cannot get over the argument, which appears to have had weight with the majority of the learned Judges in the Court below, as it has with my noble and learned friend, that in order to reverse this judgment, and agree with the minority of those learned Judges, you must really strike out that very essential part of the fourth proviso, beginning with the word "and"—"and

so as to form a valid and effectual entail, according to the law of Scotland." We cannot do that. We have no right to strike out these words, for he qualifies it or he extends it (I care not which) by adding those words. He says you are to make the entail under all the conditions, provisions, and clauses in the said deed of entail contained; and not only does he say so without adding "and none other," or without adding "allenarly," or any other words that would restrict the trustees to those very clauses, and prevent them from adding to or altering those clauses, but he adds, "and so as to form a valid and effectual entail." It is not "so as to form a valid and effectual entail," for then the argument might arise, which I see appears to have had great weight with that very learned Judge, Lord Cunninghame—a most excellent lawyer, no doubt, and great conveyancer—but this is really not a question of the Scotch law of entail, or Scotch conveyancing. It is a question upon the construction of this instrument in the words in which it is now before us. His Lordship appears to have thought, that if the word "and" had not been there, but only "so as to form a valid entail," &c., those latter words would have been what he and the other Judges, in the course of the argument, have termed merely exegetical or explanatory, and would have served to indicate that that was Lord Lynedoch's own opinion or his own impression as to what would be the effect of making an entail with those clauses. My Lords, I have great doubts whether I could say so, even if the material word "and" had not been inserted, but with that word "and" I really can entertain no reasonable doubt whatever, that we are bound to take them, not merely as indicating what Lord Lynedoch's opinion was of the effect that would be given to those clauses in law, if those clauses were put in the deed without any alteration, and without any addition, but that we are to go a step further, and to hold, as the Court below have held, that he gives a direction (whether under the influence of a legal error or not I will not inquire) to insert all those clauses, and to form—he does not say "to form thereby"—but "to form a valid and effectual entail." I agree therefore with the Court below, that this clause cannot be rejected, occurring, as it does, not only in the first part, but repeated again in a subsequent part of the deed; but that the words, taken literally, and taken in the sense which only can be given to them, in my opinion compel the trustees to make a valid and effectual entail, according to the law of Scotland.

LORD ST. LEONARDS.—My Lords, this case was decided in the Court below by three Judges against two. I am of opinion with the minority, and think that the decision of the Court ought to be reversed. The facts previously to the settlement executed by Lord Lynedoch are simply these—that the estate was settled according to the law of Scotland in 1726, by a deed intended to be, no doubt, a strict entail, and which was a strict entail, according to the forms of the law of Scotland at that time, except, as it ultimately appeared, that there was one of the fetters not sufficiently fenced, namely, that against selling, which would therefore enable the heir of entail, by going through a form, to avoid the settlement in question.

Now, at the time the settlement was made, of course it was considered a perfect settlement, and for a very long period after that time, for upwards of a century, it was deemed a very good settlement. It never occurred to the mind of any man that there was a defect in the settlement.

Lord Lynedoch himself had obtained, from time to time, portions of the fee simple property which were contiguous to the principal estates, and which he thought of great importance to be attached to them for the purpose of joint holding. He accordingly obtained three several acts of parliament for the purpose of enabling him to take in exchange outlying parts of the settled estates, in return for particular portions of land which he himself possessed, and which were contiguous to and desirable to be held with the settled estates. Now if anybody had imagined at that time that there was a defect in the fetters of the entail, of course the expense of those acts of parliament would have been saved, and Lord Lynedoch himself would in another way have effected those several alterations by annexing the three different estates at the three different periods when the acts of parliament were passed, so as to save the whole expense and machinery of those acts.

Now the acts of parliament themselves were very strongly framed. The first was in these words:—"Lord Lynedoch was authorized to apply by petition to the Court of Session in Scotland, with their direction and approbation, to grant and execute a disposition of the fee simple lands in such form and manner as shall appear to the Judges of the Court proper for effectually settling and securing the said lands and estates, free of all debts and incumbrances, upon the said Thomas Græme, and the other persons and the heirs of entail called by the aforesaid deed of entail, in the same form of a strict entail." The Judges at that time were of opinion that the proper mode of effecting the settlement of these estates was to settle them exactly in the very words of the settlement of 1726.

In the later act of parliament of 1811, the direction was still more singular. It was "to grant and execute a disposition of the aforesaid lands, in such form and manner as shall appear to the Judges of the Court, in either division thereof, proper for effectually settling and securing the said lands and estates, free of all debts and incumbrances, upon the said Thomas Græme, and the other persons and heirs of entail;" then came these words—"called to the succession in the said herein before in part recited deeds of entail, executed by the said Thomas Græme

and John Græme, his son, and by the said Thomas Græme, now of Balgowan, respectively, in the form of a strict entail, and under all the conditions, provisions, declarations, limitations, and irritancies, limited, provided, mentioned, expressed, and declared by the aforesaid deeds of entail, in so far as the same are now subsisting or capable of taking effect, which settlement and entail shall be so framed as to bind the said Thomas Græme or other person executing the same, as well as the succeeding heirs of entail." If anything, therefore, in words, could have directed the making an effectual entail, it would have been the words which I have just read.

But there was also a clear intention expressed, which was to convey these estates to the uses of the deed of 1726. These deeds are all recited in the trust settlement of Lord Lynedoch, upon which the House now has to decide; and, therefore, this is not a question as to how far you may go into extrinsic circumstances by collateral evidence, in order to place yourselves in the situation in which the testator or granter stood at the time that he directed the settlement to be made; because upon the very face of the settlement those different dispositions and instruments are stated, and consequently you are entitled to look at them, not for the purpose of striking out these words—I disclaim any such intention—nor for the purpose of giving to them a meaning which they will not admit of; but for the purpose of enabling you to ascertain the sense in which ambiguous words were used by the testator in the clause in question.

Now, so far it is perfectly clear, that it was the great object of Lord Lynedoch's life to annex to the family estate all the portions of the estate which he acquired, and which were desirable to be held with the family estate; and ignorant as he was that there was any defect in the settlement of 1726, he took that deed, as a matter of course, as his guide. That was his model; that was the thing to which he referred, and he meant the estates to go with the principal estate. The principal estates were not, as he considered, within his power, but they were strictly settled by the deed of 1726. He could therefore have but one intention, and that was, that as those estates were to go with the principal estates, they should go according to the settlement of the principal estates; and there was no other way in which they could go with the principal estates, except by being annexed to those estates according to and under that settlement.

Let us suppose this case, that immediately after Lord Lynedoch's death there had been a settlement executed—that the Judges had to settle the estates, how would they have settled them? They would clearly have settled them according to the settlement of 1726. No one doubts that. According to the extent of the knowledge of the law possessed by every professional man in Scotland, from the highest to the lowest—every agent, every advocate, every Judge—all the parties concurred in the construction of the settlement of 1726, that it was a binding and legal settlement according to the law of Scotland, with sufficient irritant and resolutive clauses to carry the estate, so far as the act of 1685 would allow any estate to be carried. Then the whole difficulty has arisen, not upon what those words would authorize you to do, because when you are talking of striking out the words, as I have said already, I utterly disclaim any such intention. I disclaim the intention not merely of striking out the words, but of putting a forced and unnatural construction upon them. If the words do not bend to what was clearly the intention of the testator, of which I have no doubt, then let no effect be given to them. But the words cannot be so exceedingly difficult to manage, if, as in the case I am now putting, supposing that the Judges of Scotland—the whole weight of knowledge of Scotland, in point of law—had been brought to bear upon this settlement immediately after the death of Lord Lynedoch, they would have agreed that the words would have authorized a settlement to the very uses of the settlement of 1726. The words cannot be of a nature that will not admit of that construction, if that is the construction which all Scotland—the Judges, and the bar—would have agreed in.

Then some person discovers that there was a defect in this settlement; but what was that defect? It was not a defect arising out of the natural construction or the proper construction of this settlement of 1726; by no means. But the Courts of Law in Scotland, aided by this House, have taken the same view of the Statute of 1685 which our Courts of Law here took of the Statute *de donis*, that is, setting their minds against the strictness of entail, which was allowed by the Statutes, and being desirous of throwing lands into the general commerce of the country, made a forced, unnatural, and, I may say, without offence, an improper construction of these instruments, in order to avoid the instruments and to defeat the fetters, and to throw the property for general purposes into circulation. But that was not their natural construction; and when the point was raised with regard to this deed, the Lord Ordinary was of opinion that the fetters were good. When it went to the First Division they called in all the Judges of Scotland, and they were consulted upon it, and there was a majority of opinion that the fetters were not good. Then it went to the Second Division, and what became of it then? The Judges were equally divided. There never was a point, therefore, open to more doubt. The construction put upon the settlement of 1726 turned upon a mere quibble, a mere playing with words. It was not carrying the intention into effect, but defeating the intention. That was the great object of the course of decision, but it is a course of decision adopted in no other case. And what does it prove? It proves that the Courts of Scotland, supported by this House, as a

judicial tribunal, will not go out of their way to encourage fetters, but, on the contrary, that they will go out of their way in order to put a forced construction upon an instrument, with a view to fetters being defeated.

How has that been followed up by the legislature itself? Why, by the act of parliament, which says, that if there is one fetter in an entail not sufficiently fenced, the whole entail shall be void. That is strong legislation; but it is a strong approbation of the course which had been taken by the legal tribunals. Their object has been that which has been ultimately accomplished by the legislature to avoid fetters of every possible construction, not to look at the intention, but to look and see whether it is possible, upon a mere construction of words, to get rid of the fetters, and so to enable the parties to defeat the entail.

Now it was stated by my noble and learned friend on the woolsack—and it does sound somewhat odd, that you are now asked to convey this estate to this gentleman in fee simple, when a strict entail was intended—that it does not depend upon the settlement, but upon the act of parliament, that the intention is not an element to be looked to in this case. You are not at liberty, in construing this settlement, to look at the act of parliament at all. The act of parliament acts upon this settlement as it does upon all other settlements. This settlement, therefore, let it be made in whatever form it may, must submit in all things, just like other settlements, to the act of parliament, but not to a greater extent. It is an element, but not an element in the discussion of this case. The settlement is the subject of the act of parliament, and the act of parliament will act upon it just as upon any other settlement, but not in a higher degree or in a different manner.

Now if we were to look at this case as it stood, irrespective of the discovery of this blot, I take it to be perfectly clear, that we should have directed the settlement to be made according to the settlement of 1726; and I take it to be clear, that if the settlement had been so made, no subsequent discovery of the blot in the settlement of 1726 could ever have enabled any Court of Justice or this House to have reformed that settlement, but the subsequent settlement, like the original settlement, must have stood precisely as it was formed. Now the real difficulty here, as it appears to me, arises from this, that two things are confounded. In point of fact, the thing which is the wrong to be complained of, as it turns out, and which the testator Lord Lynedoch would have liked to have had corrected, if he had known of it, was not the settlement which, in my view, his own deed authorized, but the settlement of 1726. There is the *corpus delicti;* there is the mischief. It is not in the direction to make a settlement in conformity with the original settlement, but it is in the original settlement itself. Nobody knew of that blot; and that Lord Lynedoch, by the words which I will presently refer to, meant to correct that or to vary it in any manner, I cannot satisfy myself. My Lords, most unwilling as I am to differ from my noble and learned friend on the woolsack, I have not come to this conclusion without the deepest consideration, and repeatedly turning the case over in my mind. I am, however, perfectly satisfied that it is not possible to come to any other conclusion, looking to what the intention was. The fault is in the original settlement, of which nobody complains.

Now it is a very strong circumstance, and I am entitled to look at these circumstances. We are bound to look at the circumstances of the original settlement, because here it is no question as to extrinsic evidence; these settlements are recited and made evidence upon the face of the instrument itself. Eight days before this trust settlement, Lord Lynedoch conveyed over this estate to the uses of the settlement of 1726. Now, if Lord Lynedoch had himself included the estates now in question in that settlement, or if he himself had executed a separate settlement of that, or of any other part of his property—if, instead of the testamentary disposition of 1821, he himself had executed his own purpose—if he had not left it to the trustees to make the settlement, but had himself made the very settlement which he directed the trustees to make,—I ask, can any one doubt what would have been the settlement that Lord Lynedoch would have made of those estates? The answer is clear, that from all that appears, with all the knowledge he had, we are entitled to say that in this case he would have followed the settlement of 1726, upon the belief, which everybody entertained, that that was a perfect settlement. Clearly he would have acted upon that, as he did on all the other settlements. It would not have altered his intention, nor could it have altered the settlement which was made by him. So far, I think, we are all agreed. Then comes the settlement eight days later, and that settlement directed that the remaining estates should be in conformity with the uses of the deed of 1726. He was not sure that there would be any estates remaining, but he directs that those estates, if any, which shall remain undisposed of after paying debts, and so on, shall be settled in this manner; so that that was rather an insignificant part of the property. He had settled all the main points of the property that he meant to settle, and in an irrevocable manner, to the uses of the settlement of 1726, and he treated these as being a very small portion of his property, but he directed them to be settled in the way I shall presently mention, (which has been already mentioned,) and in doing so he uses these words which are found at the conclusion of the sentence. Now, supposing that the estates were not all settled, he actually authorizes them to be exchanged for settled estates. Look again at that, and see what he had recently himself done in exchanging this property for

other settled estates ; it is perfectly clear that he meant the land taken in exchange to be settled exactly according to the uses of the settlement of 1726—of that there can be no doubt. And then there is this circumstance, which has not been referred to by either of my noble and learned friends who preceded me, and which has had great influence upon my mind in coming to a conclusion upon this case, and that is this :—That throughout the settlement of 1821 Lord Lynedoch has shewn, over and over again, an intention to unite the two estates, so that whatever he then had to settle should go along with the principal estates. Now there is no way in which that which was his primary intention can be effected except by settling the remnants of these estates exactly as he has settled the other estates as he acquired them, viz., to the uses of the settlement of 1726. Let it be recollected, that there can be no greater misapprehension than to imagine that the construction which I have put upon this instrument does not make a strict and effectual entail of the property to a great extent, and to such an extent as might satisfy the parties. It is not because the subsequent act of parliament has enabled you to acquire the fee, that therefore you are to consider that it amounted to a declaration that the man is entitled to a fee under the settlement. He is entitled to no such thing under the settlement. Under Lord Lynedoch's trust deed there was not a strict settlement. As far as his will is concerned, my opinion, of course, coincides with the opinion of everybody else, that the estates were to be settled to the uses of the settlement of 1726, with all the fetters and limitations contained in that settlement. If I go further, and obey the act of parliament, it is not construction, it is obedience to the act of the legislature. It is not because I am of opinion that he is entitled to the estates in fee that the settlement is inoperative, but it is because I am of opinion that the settlement is binding and operative, and creates a strict entail, beyond all possibility of doubt, if there is every fetter, and there is every fetter, except that with respect to selling, properly fenced. I therefore look at it as a direction to make that settlement an effectual settlement, according to the uses of the settlement of 1726, as the Judges themselves considered three times over when they settled the property to those very uses. They had been directed to entail them in an effectual form of settlement, according to the act of 1811. I consider that this would be a perfect settlement, except upon that fetter not properly fenced, and that was a defect which went over the whole estate. Now if I shew to your Lordships, as I have satisfied myself, that these estates were all meant to go together, and that if you adopt the construction which has already been put by my noble and learned friends upon this instrument, you must sever the estates, you cannot then execute, as I have shewn, the directions of that testamentary instrument, and you cannot accomplish the intentions of the testator.

Then I have to ask this question :—If Lord Lynedoch had been aware that the settlement of 1726 was defective in one of the fetters, and at the moment that he made his will in 1821 it was quite out of his power to supply that defect, how would he have settled the property, that is, the collateral property which he had acquired, and which was about to be settled by the deed of 1821? It is my firm impression that he would have settled that according to the deed of 1726. With the infirmity upon the face of that deed, what else could he do? He meant his heir of entail to take the property. This was a mere excrescence. It was adjoining land which he thought it convenient to hold with the principal estate. He did not intend to form a new strict settlement of that bit of property. He did not intend that the property, which he had left to the last, should form a new entail, and go to a new heir under the Statute of 1685, and be for ever entailed. He meant no such thing. But he meant the whole estate to be bound by the entail, if that could be accomplished. If the accomplishment of that was not within his power, then, what did he intend? He intended it to be subject to the settlement of 1726. The estate had been upwards of a century in the family. He himself had enjoyed it as heir, and every heir of entail in succession would enjoy it. Under the settlement of 1726, no doubt, there was a power to sell, but there was no other defect. The settlement of entail was perfectly good. The entail would have carried it to every person who was designated in the order of succession : but, no doubt, it was open to be defeated by that defect. But I cannot persuade myself, that if Lord Lynedoch had had himself to decide this question—if he had asked himself the question—In what way shall my remaining property be settled?—he would have said—Certainly as to the principal estates there has been a defect in the settlement, but I cannot correct the settlement of 1726, and I must therefore settle this remaining property to the same uses.

Now, in my apprehension, it is impossible to read the deed of 1821 without being thoroughly satisfied, as a lawyer, that the great object that Lord Lynedoch had was to annex this small additional property to the other property. But now, having cleared the way by these observations, I will ask your Lordships' attention once more to the actual trust deed. It is in these words—(reads fourth clause.) Now let us see what the meaning of that is. In the *first* place, what is the primary intention? It is clear, as he has told you, referring to the former deed of entail of 1726, and to all the conditions, provisions, and clauses prohibitory, irritant, and resolutive, contained in that deed, that his original primary intention was to settle these properties to the uses of the deed of 1726. Some of those conditions were no longer applicable. He therefore introduces those words, "so far as the same may be applicable ;" and, in my opinion, the

words that follow are referable to that particular clause of the sentence, and also referable to this, that the settlement which is to be made shall be in itself made so as to form a valid and effectual entail, according to the law of Scotland. He settles it to the very uses of the settlement of 1726, and under all those limitations, "so far as the same are now applicable, and so as to form a valid and effectual entail." It is as if he had said—"Take care that, in leaving out things which are no longer applicable, you do not defeat my intention, and leave it an ineffectual entail; and take care that in making the deed itself, you make it an effectual entail." But an effectual entail for what? For the uses of the deed of 1726. Can anything be more direct? Can anything be more conclusive? He directs his trustees, in the most solemn manner, to convey the property according to the deed so registered, and under the limitations and restrictions of the irritant, prohibitory, and resolutive clauses. He says you are to do that, and to make it an effectual entail. According to the law at that time it was an effectual deed of entail, being under those limitations. Undoubtedly since it has been discovered that there is a defect; but, in my opinion, those words admit of an easy and natural construction, according to the whole frame of the sentence. He is to be understood as directing the trustees to make an effectual settlement in point of form—that is to say, the deeds must be properly registered. For example, they must contain the proper clauses; they must repeat the clauses according to the law of Scotland. All that was intended by him. It is as though he had said—You are to take care and make the deed effectual; you are to strike out that which is unnecessary, but in striking that out you are to take care not to damage the effectual entail. But what is to be made effectual, according to the law of Scotland, is the settlement of this property in the manner in which the principal estates were settled, viz., to the uses of the settlement of 1726. I know, as far as it is possible for one man to know what was within the knowledge of another, that he had no knowledge, he could have none, of the defect in the settlement of 1726. And I myself, I must say, am clearly of opinion, that those words do not admit of any construction like this, that he intended to correct the error, if there was one, in the settlement of 1726, for which it could never have entered into his mind that there was the slightest foundation.

If it had stood upon that alone, I should have put that construction which was conformable to the whole tenor of the circumstances, and then all that would happen would be this, that this remnant of the property would have gone along with all the rest of the property, and be subject to just the same line of succession—no higher or lower—no greater, no less, than these estates themselves. But when I come to look at the dispositions of Lord Lynedoch, I see that throughout he intended those estates to go with the other estates. But if they go as the act of parliament now orders them to go, one estate will go to one party, and another estate will go to another party. Therefore I know I have defeated his intention. I am making a new separate entail now of that which it never entered into his mind should be so entailed. He thought the whole of the estates would go together, and I believe, as I have said before, that the very last thing he desired is, that which your Lordships are now called upon to do, viz., to cut off those estates, and leave those remnants of estates separate from the others. Those were estates, I should suppose, of very small value, but under this decision they are to be a separate inheritance with new fences, contrary to his intention.

Nobody admits more than I do that we are to construe this instrument of Lord Lynedoch's according to its plain import, and give effect to it; and if I had the power I would give effect to his intention, and to the words which express it in the most literal way in which it is possible to do it. But I think I am doing so in the view I submit to your Lordships. Now he recites what he has done on the face of his own disposition of 1821. He recites that he has settled these lands, and he has no notion, of course, that he has not settled them properly. This is a matter which admits of no doubt. By a codicil, executed in 1838, he particularly recites the settlements which he has made; and he states, that after the payment of his deathbed and funeral expenses, he directed the estates to be conveyed as follows. He here recites what the settlement of 1821 was, and I beg your Lordships' attention to this. This is a codicil executed by him in 1838, in which he states, what he considered he had done in 1821—"and whereas, by my said trust disposition and settlement, I directed the debts and sums of money due to me at my death might be uplifted, and that my moveable estate and lands and heritages thereby conveyed might be sold, in whole or in part, at the discretion of my said trustees, and that after payment of my deathbed and funeral expenses, expenses of executing the said trust, my just and lawful debts, and my legacies, donations, and sums of money ordered by me to be paid as aforesaid, if any part of my said lands and heritages should remain unsold, my said trustees should convey and dispone the same to my heirs of entail called after me by the deed of entail of Balgowan, and should also lay out the remainder of my personal estate and effects, if any should be, in the purchase of lands, and settle the same on my said heirs of entail in manner more fully set forth and expressed in my said trust disposition and settlement." Does he look at all to anything beyond the mere entail of 1726? Can anything be more express than this which he does in 1838, giving his own construction of his own disposition.

Then he states in the disposition of 1821, that he has in one part of his disposition directed,

that if the trustees whom he has appointed shall fail, then certain things shall take place. "And failing all my trustees named, or to be named or assumed, by non-acceptance, death, or otherwise, then to the person or persons who shall succeed to me as heir or heirs, male and female, of the Balgowan estate for the time," and so on. Now, I ask, was it likely that, unless he intended his estates to go strictly together, he ever could have ordered that the heirs of entail of the Balgowan estate, under the settlement of 1726, should be the trustees of this new settlement? Can anything be more inconsistent than to say that his intention was, that his estates should be severed, and yet that the heirs of entail of the Balgowan estate should become the trustees of this separate portion of land? It is quite clear that he intended no such thing, but that he expected the estates to go together.

But how are we to get over this clause? This was a point very much relied upon at the bar. It is as follows:—"I declare and appoint that the rents and profits of my said unentailed lands and heritages, and of any land to be purchased by my said trustees, while vested in their persons, as well as the annual interest and produce of any monies that may be in their hands, arising from the sale of any part of my estate; heritable or moveable, whether under the said trust disposition, or any will executed or to be executed by me, relative to my real estate in England, or from any claims that I may have at my death against the heirs of entail succeeding to me in my entailed estates, and generally the annual profits and produce of any funds and estate falling under the said trust, shall be paid and accounted for by them to the heir of entail in possession of the said entailed estate of Balgowan for the time." How is that to be executed, if the entail of Balgowan is not to be the measure of the settlement of this property? The heir of Balgowan might become entitled to the estate in fee simple whenever he pleased, and then he would have no relation at all to this property, which must continue, according to your Lordships' probable or necessary decision, separate, and must go in a different manner.

And then to whom are the several debts to be paid? Are they to be paid to the persons who really will have them, or are they to be paid to the heirs of the Balgowan estate? Is the heir of the Balgowan estate to have them? or is the person who is no longer heir of the Balgowan estate, who may have sold or lost the Balgowan estate entirely, to have them? or is the person to have them under this new settlement? These are difficulties which it appears to me impossible to get over; but all the difficulties are avoided by giving what I consider an easy and natural construction to the words upon which the difficulty has arisen, and thus making these estates go with the rest of the property.

Now I must say a word upon the question of constructive trusts. It is a matter so well settled now, that it is mere pedantry to go through the authorities. Every trust, where an act is to be done, or a common conveyance to be executed, is an executory trust, no doubt, in a sense; but not in the sense in which lawyers speak of it. That is a trust executed; but a trust executory means not simply a trust under which an act is to be done, which applies to every case, but one in which there is something to be performed, which is not defined by the original settler, where he has expressed an intention in general words, which is to be carried out in a complete and legal form by the persons who are entrusted with the estate. Now the question constantly arises, to what extent the trustees may go in forming a settlement under an executory trust.

There is a case upon this subject, which was very much considered, before Sir W. Grant, viz., *Stanley* v. *Stanley*, 16 Ves. 491. It is a case of this nature:—The testator directed his estate to go to the second son of one of his nephews for life, and then to trustees, to preserve contingent remainders, and then to the first and other sons of that second son, and if that second son died without issue male, or did not attain 21, then it was to go to the third son in like manner; on his death without issue male, it was to go to the fourth son. Then he declared that there was another estate in the family called Puddington, which he wished not to be united with his estates, and he made a provision of this nature, that in case any of those persons to whom he had thus given this property should become possessed of the estate of Puddington, then "the estate devised to such of them so becoming possessed as aforesaid, shall thereupon cease and become void, or not take effect, or be made, (that is, under the settlement that was directed to be made,) as the case may be, and the persons next in remainder under the said limitations or directions shall thereupon become entitled to the estates." Then came this important clause—"And I do further direct and authorize my trustees, in making the settlement herein before directed, to correct any defect in legal or technical, or other incorrect, expression, in this my will, and to form such settlement from what appears to them to be my real meaning, with all and every the powers herein before inserted, and the further powers of exchanging any of the lands herein before devised in the usual way, and such other like powers as may appear to the trustees, or the survivor of them, or his executors, administrators, and assigns, convenient and proper." That is a very large direction, going infinitely beyond, as it appears to me, these ambiguous words, which are found in this sentence. They were to execute his intention according as they could collect it, and "to correct any defect of legal and technical words." The second son became possessed of the Puddington estates, and thereupon, of course, his life estate ceased; indeed, it ceased before he became possessed of it, because he was under age when he became entitled to

the Puddington estate. He had afterwards a son; that son claimed the estate directed to be settled. In answer to which it was said—no; the intention of the testator was to keep these two estates distinct, as far as might be; the trustees are authorized to carry his intention into effect, according to what they collect it to be; and it is clear that he intended the estates to go over to the persons in remainder, and he meant them to take, and not the tenant for life, who was living at the time the estate fell in. Sir W. Grant held that, the direction in the first proviso being that the estates should cease and be void, he could give no further effect to the direction than the words actually expressed, and that, consequently, the trustees to preserve contingent remainders must take the estate, they being the persons next in remainder to take. And the result, therefore, of that was, that the second son of the tenant in tail took the estates devised by the will, although his father had the Puddington estate. And then when Sir W. Grant was asked to give effect to this clause authorizing the trustees to execute the settlement according to the testator's intention, he made this observation (p. 511):—"It was said, lastly, that, being an executory trust, it is to be executed by directing the consequence, so as best to answer the apparent intention, viz., to prevent the union of the two estates in the same person, and to keep them asunder as long as can be by law. The testator has not said that was his intention. It is only inferred from the provision, for the purpose of preventing the union of the estates in certain persons specified. What ground is there for extending to other persons the incapacity of holding both estates? He has not said that a son of Thomas shall lose the devised estate by becoming possessed of the Puddington estate. Is the Court to say that, not because he has, but because he may possibly become entitled to that estate? The testator has not completed his purpose by this proviso. He authorizes the trustees to correct any defect or incorrect expression, and to form the settlement according to his real meaning, not to change the limitations. A direction to them to follow his true meaning, rather than the literal construction of his will, is very different from an authority to new mould the limitations, if they suppose those which he has directed will not have the effect he intended. There is no reason to suppose he intended either the trustees or this Court to have such a power."

That appears to me to be a much stronger decision than I should wish to give here. I think it, and have always thought it, a perfectly right decision. It is one of those cases which I have, I may say, a thousand times over been under the necessity of considering the effect of in the the course of my own professional life, and I think it has been properly decided, and I think it goes much further than I should call upon your Lordships to go in this particular case.

There is a case which will exemplify the danger of separating properties in this way. It was before the same Judge—the case of *Brounker* v. *Bagot*, 1 Meriv. 271. That was a case of this nature. It was not a case of an executory trust; but the testator devised his real estate to one for life; remainder to trustees to preserve contingent remainders; remainder to the heirs of his body, so as to give them an estate tail with remainder over; and in every case a remainder to trustees to preserve contingent remainders. And he then gave his leasehold estates to trustees, upon the same trusts, with the same limitations as he had given his real estate upon; and having been counsel in the case, from the notes I have I see that the words giving the leasehold estates are much larger in the will than they are stated in the report. There were more ample words shewing the intention that these leasehold estates should go along with the real estates to those different uses. Now, the question was—in what way those leasehold estates were to devolve? If they were to be taken by the analogies of the common rule, that an estate tail in real property gives an absolute interest in a leasehold estate, then, of course, you are to strike out the trusts, and to substitute in effect a simple gift of the leasehold estates to the first man, and his executors, administrators, and assigns. It was argued by counsel against the leasehold vesting in the first taker, that the analogy was not complete; that it was a long time before the Courts could hold that estates for life, with remainder to heirs male, did give an estate in tail male to the tenant for life. It was a long while before they came to that construction, but that has become a construction which is no longer to be denied, and therefore the heir male was to take the real estates; but when the testator devised the leasehold estates, and directed the trust to be with limitations, and so on, in all those well known words, he intended the estates to be given in the way in which he thought he had settled the real estates. And though the rule of law was to settle according to the intention as regards the real estates—and there was a general rule upon that, viz., that all the heirs in tail male would take, if permitted to take, under his disposition—yet that, as regards the leasehold estates, the first taker would at once, without any act of his own, take the whole property. Sir W. Grant decided that the leasehold estates must follow the principal estates; and he made this observation, which bears, in my humble apprehension, upon the case now before your Lordships. He said in the conclusion of his judgment (p. 282)—"If there is any disappointment of the testator's intention in the case, it is rather in making his devise operate so as to give an estate tail in the real, than in giving the like interest in the personal, estate." That is just as here. If Lord Lynedoch's intention is defeated, it is, in point of fact, by the way in which the instrument of 1726 was prepared, and not by the effect that I ask your Lordships now to give to the instrument of 1821; and therefore, as you cannot correct the

original instrument, you may do that which he intended — let these estates go with the others.

My Lords, I have a strong impression upon this case. I regret to be compelled to differ from my noble and learned friends. The decision is given in a way in which, in my opinion, it ought not to be. I suppose they have come to a right conclusion; but after all the attention I have given to the case, I have arrived at a different conclusion, and I am not able to agree with them.

Interlocutors affirmed.

Dundas and Wilson, C.S., *Appellant's Agents.*—T. G. Murray, W.S. *Respondents' Agent.*

JUNE 19, 1855.

DAVID MANSON, *Appellant*, *v.* SIR WILLIAM BAILLIE and his *Curator Bonis*, and Others, *Respondents.*

Trust—Liability of Co-Trustees—Factor—Law Agent—Agent and Principal—*A law agent, who was a trustee and beneficiary under a trust settlement, was appointed "commissioner, factor, cashier, and attorney," in the affairs of the trust, by his co-trustees, one of whom, who was also a beneficiary, was his client, while the others were gratuitous trustees. The whole trust funds having been thereafter exhausted in litigation, a large balance due on the accounts of that trustee, as factor and law agent to the trust, was claimed by him from his his co-trustees.*

Held (affirming judgment), *That his co-trustees had not incurred any personal responsibility to him, and were not liable in payment of the balance of his accounts, for it must be presumed that he was acting throughout for his own interest and at his own risk.*[1]

The late David Clyne, S.S.C., died on 1st November 1833, leaving a trust disposition and settlement, executed by him on that day, whereby he conveyed his whole means and estate, heritable and moveable, to the defenders, "Sir William Baillie, James Farquhar Gordon, W.S., John Meiklejohn, W.S., John Logan, W.S., Robert Lockhart, S.S.C., and to David Manson, writer, Edinburgh, and to the survivors or survivor of them," the majority being a quorum. The purposes of the trust were declared to be—*1st*, That "out of my said means and effects my said trustees shall pay the expenses of conducting the present trust." *2nd*, To purchase and present a gold watch of the value of 50 guineas to Mr. George Millar, in London. *3rd*, To make payment out of the first and readiest of the subjects to Sir William Baillie of £3000 sterling; to Miss Isabella Baillie, his sister, £1000; and to Mr. David Manson, £3000. *4th*, To pay a sum of £20 sterling annually to the trustees of the congregational chapel, Thurso, and to divide the sum of £270 among five charitable bodies, in the proportions specified by him. *5th*, To pay certain legacies and annuities to about 35 different individuals of the name of Clyne or Manson, 10 of whom were to receive annuities of the amount of £10 each, and the other 25 were left legacies, amounting in whole to about £420. *6th*, "To each of my said trustees and executors I leave the sum of £10 sterling each, for the trouble they will have in superintending the affairs of the said trust."—(These legacies of £10 were never claimed by, or tendered to, the trustees.) *Lastly*, Mr. Clyne directed the residue of his means and estate to be divided equally among Sir William Baillie, Miss Baillie, and Mr. Manson.

No power was given to the trustees, by this deed, to assume new trustees, or appoint a factor, or to submit or compound doubtful questions connected with the trust; and the truster gave no power to any of the trustees named to resign, renounce, or denude, or to receive any resignations or renunciations, after acceptance of the trust.

Mr. Clyne's funeral took place on 8th November 1833; and a meeting was held the same day —which was attended by all the trustees except Mr. Meiklejohn—for the purpose of opening the repositories of the deceased. The trust disposition and settlement having been read over, the trustees who were present intimated their acceptance; and, on the 13th of the same month, Mr. Meiklejohn also accepted the trust, and signed the minutes of the meeting above mentioned, which had previously been subscribed by the other trustees.

The truster had been a party in about 30 pending litigations, and the trustees according to the truster's directions prosecuted these suits. The trustees being however unable to attend personally to the details, appointed Mr. Manson "their commissioner, factor, cashier, and attorney" to execute the trust, and he carried on the litigations without consulting them.

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[1] See previous reports 12 D. 775; 18 Sc. Jur. 231; 22 Sc. Jur. 331. S. C. 2 Macq. Ap. 80: 27 Sc. Jur. 526.