from, would be a ground, or at least a sufficient ground, for an award such as this. Thus, if a passenger had been quite unhurt, and merely was affected by what he saw around him, the question before us would have been in a different position. That this was not so here the medical evidence has amply demonstrated. The sum, in my opinion, is rather a large one, but this is certainly not a case of "excessive" preposterous damages.

Lord Benholme—I concur, and only add that I cannot, in respect of the amount awarded, throw out that award.

The Court pronounced the following interlocutor:—

"Apply the verdict, and decern against the defenders for payment to the pursuer of £2000: Find the pursuer entitled to expenses, and remit to the Auditor to tax and report."

Counsel for Pursuer—Solicitor-General (Clark), Q.C., and Balfour. Agents—J. W. & J. Mackenzie, W.S.

Counsel for Defenders—Lord Advocate and R. Johnstone. Agents—Hope, Mackay, & Mann, W.S.

S. Clerk.

HOUSE OF LORDS.

Tuesday June 17.

FORBES *v.* TREFUSIS.

(*Ante* vol. v. p. 593; vol. ix. p. 593.)

Appeal—Competency—6 *Geo. IV.*, 120, § 25.

The appellant having sued by a mandatory, as being absent from the United Kingdom; *Held* that the fact of his mandatory's presence and action for him did not exclude his right to appeal any time within 5 years under § 25 of the statute.

Entail—Destination.

A deed of strict entail contained a destination to A, and the heirs-male of the marriage between A and the entailer's daughter, and the heirs-male of their bodies respectively; whom failing, to the heirs-female of the marriage, &c. *Held* (sustaining judgment of the First Division of Court of Session) that on the succession opening by the death of the eldest son of the marriage without male issue, his only daughter, as heir whatsoever of his body, was entitled to take in preference to the next heir-male of the marriage.

Sir John Stuart of Fettercairn executed in 1811 a procuratory of resignation and deed of entail, whereby he bound and obliged himself, his heirs and successors whatsoever, to make due and lawful resignation of the lands and barony of Fettercairn, and others therein specified, "in favour of, and for new heritable infeftment of the same to be given and granted to myself, and failing me, to the heirs-male of my body; whom failing, to Sir William Forbes, Baronet, of Pitsligo, and the heirs-male procreated of the marriage between him and the deceased Dame Williamina Stuart or Forbes, my daughter, his spouse, and the heirs-male of their bodies respectively; whom failing, to the heirs whatsoever of the bodies of such heirs-male respectively; whom failing, to the heirs-female procreated of the said marriage, and the heirs whatsoever of their bodies respectively; whom failing, to John Hepburn Belsches, Esq. of Invermay, and the heirs-male of his body; whom failing, to the heirs-male of the body of the said Sir William Forbes, Bart., in any subsequent marriage; whom failing, to Sir George Abercromby, Bart., of Birkenbog, and the heirs-male of his body; whom failing, to the heirs whatsoever of the body of the said John Hepburn Belsches; whom all failing, to my own nearest heirs or assignees whatsoever, the eldest heir-female and the descendants of her body, always excluding heirs-portioners, and succeeding without division throughout the whole course of succession foresaid, as often as the same shall descend to females, and the daughter of the heir who shall happen to be last in possession of the lands and heritages before mentioned (whether such heir was served heir of tailzie or not) succeeding always preferably to the daughter of any former heir, so often as the succession through the whole course thereof shall devolve upon daughters, and which I hereby declare to be my true meaning, notwithstanding of the aforesaid general destination of heirs whatsoever."

The deed contained the usual prohibitory, irritant, and resolutive clauses of a strict entail.

Sir John Stuart died in 1821 without male issue. He was survived by his son-in-law, Sir William Forbes, who died in 1828 without having completed a title to the entailed estate, and who left three sons born of the marriage between him and the entailer's daughter—viz. (1) Sir John Hepburn Stuart Forbes; (2) Charles Hay Forbes; (3) James David Forbes.

On the death of Sir William, his son, Sir John H. Stuart Forbes, in accordance with the destination in his grandfather's deed of 1811, succeeded to the entailed estates, and completed a title thereto.

Sir John died in 1866, leaving an only child. Lady Clinton, who, as heir of tailzie and provision to her father, completed a title to the estate, which was now challenged in an action of reduction and declarator at the instance of her cousin, the eldest son of Charles Hay Forbes, who was next brother to Lady Clinton's father.

The pursuer pleaded—"(1) The pursuer being one of the heirs-substitute under the deed of entail of 11th October 1811, has a good and undoubted title to insist for reduction of the writs called for, which were granted to his hurt and prejudice. (2.) The writs called for are null and void, and liable to be reduced and set aside, in respect of vitiations, informalities, and defects in the execution or registration thereof, or otherwise. (3.) The deed of entail executed by Sir John Stuart Forbes (afterwards Sir John Hepburn Stuart Forbes) on 30th September 1829, and the deeds following thereon, and Crown charter of 1829-30, and infeftment following thereon, are invalid and reducible at the instance of the pursuer as an heir-substitute under the deed of 1811, in respect the deed of 1811 contained an effectual prohibition against altering the order of succession, while Sir John Hepburn Stuart Forbes did, by the deed of 1829, gratuitously alter the order of succession in violation of the said prohibition, as regards one portion of his estate, and by obtaining a destination in the Crown charter of 1829-30 as regards the other portion, *disconform* to and not warranted by the entail of 1811, on which it professes to proceed. (4.) By the entail

of 1811 heirs-male of the bodies of heirs-male of the marriage of Sir William and Dame Williamina Forbes are entitled to succeed to the lands and estate thereby conveyed, in preference to heirs-female or heirs whatsoever, either of the said Sir William Forbes or of any subsequent heir of entail. (5.) Sir John Hepburn Stuart Forbes was bound to have made up his title to the estate of Fettercairn under the entail of 1811, and with the destination therein prescribed, which contained an effectual and valid condition to that effect; and not having done so, the titles made up by him are reducible and ought to be set aside at the instance of the pursuer. (6.) The defenders are bound to flit and remove from the said lands, estate, and others, and yield possession thereof to the pursuer, seeing that they have no right or title thereto; and they are further bound to account to the pursuer for all the rents, profits, and produce of the same, as and from the death of the said Sir John Hepburn Stuart Forbes. (7.) In the circumstances above set forth, the pursuer is entitled to decree of reduction and declarator as concluded for."

The defenders pleaded—"(1.) The pursuer has no title to sue. (2.) The pursuer has no right or title to sue the present action; and, *separatim*, the defenders are entitled to absolvitor—1, Because, according to the sound construction of the deed of entail of 1811, the pursuer is not heir of taillie and provision to the said deceased Sir John Hepburn Stuart Forbes. 2, Because, according to the sound construction of the said deed of entail, the succession thereby appointed opened, on the death of Sir John Hepburn Stuart Forbes without male issue, to the heirs whatsoever of his body; and the defender being heir whatsoever of his body, is now entitled to succeed to him as heir of provision under the said entail. 3, Because the titles sought to be reduced have been made up in conformity with the destination contained in the said deed of entail and the succession thereby appointed. 4, Because the writs and titles expede in 1829, and especially those in reference to the lands of Bogmill and others, referred to in the third article of the condescendence, were expede *in optima fide* for the purpose of bringing the whole lands effectually under the entail of 1811, and of carrying out the intentions of the entailer, and have effected no change either upon the order of succession or upon the conditions appointed by the entailer. (3.) In no view has the pursuer a title to challenge or to call for the production of the writs called for in the summons, excepting in so far only as they are alleged to import an alteration of the order of succession to the lands contained in the taillie of 1811. (4.) The allegations of the pursuer being irrelevant and insufficient in law to support the conclusions of the action, the defenders are entitled to absolvitor. (5.) The pursuer's allegations being unfounded in fact, the defenders are entitled to absolvitor. (6.) In respect that the deeds of 1829 did not alter the order of succession contained in the procuratory of resignation and deed of taillie of 1811, and that the defender Lady Clinton and Saye has right to the estate in question as heir of taillie and provision to her deceased father under the said entail, the defenders are entitled to absolvitor from the whole conclusions of the summons, with expenses. (7.) In any view, the petitory conclusions of the action are untenable, and the defenders ought to be assoilzied therefrom, in respect that the pursuer is not entitled to call for an accounting of the defenders' intromissions with the rents of the estate unless and until it shall be found that Lady Clinton and Saye has no right to the estate, and her titles shall be reduced; and in no event is the pursuer entitled to call for an accounting from the date of Sir John Hepburn Stuart Forbes' death."

On considering the record, LORD JERVISWOODE the Lord Ordinary, pronounced the following interlocutor —

"*Edinburgh, 4th June* 1867.—The Lord Ordinary having heard counsel, and made avizandum, and considered the record, productions, and whole process, Sustains the first, third, fourth, fifth, and seventh pleas in law for the pursuer, and repels the first, second, fourth and sixth pleas in law for the defenders: Reduces, decerns, and declares in terms of the reductive and declaratory conclusions of the summons; and, before answer on the remaining conclusion for count and reckoning, appoints the cause to be enrolled, that parties may be heard thereon; reserving meanwhile the question of expenses.

"*Note.*— . . . . The leading contention between them has had reference, properly and necessarily, to the meaning and effect of the direction contained in the deed of entail of 1811, executed by the deceased Sir John Stuart, Bart. of Fettercairn, as partly set forth in the first and second articles of the condescendence; and, as defining the question of law which formed the more direct and special subject of debate, it may, in the Lord Ordinary's apprehension, be fairly represented to be that which arises under the fourth plea in law for the pursuer, on the one hand, and under the first and second branches of the second plea for the defenders, on the other.

"These pleas bring the parties to discuss, and have brought the Lord Ordinary to deal with, the question, Whether, under and in relation to the terms of the destination in the deed of 1811, the heirs-*male* of the bodies of the heirs-male of the marriage referred to are, or are not, called in priority and in preference to the heirs *whatsoever* of the bodies of such heirs-male.

"In the course of the argument in relation to this matter, reference has been made, and with much propriety, to various judgments of this Court and of the House of Lords, and, in particular, on the part of the pursuer, to the case of *Grahame* v. *Grahame*, June 20, 1816, F. C., and in the House of Lords, June 14, 1825, 1 W. and S., p. 353; the defenders, on the other hand, referring, for illustration of their argument, mainly to the *Roxburghe* cause, as reported in Paton's Appeals, vol. v., p. 320, and to the elaborate opinions, as delivered in this Court and in the House of Lords.

"But, while such references have been thus made, it has been conceded on both sides of the bar, if the Lord Ordinary be not mistaken, that in none of the reported cases is the phraseology of the destination identical with that here employed, and on the interpretation of which the merits of the present action must depend. Hence the difficulty which the Lord Ordinary has felt.

"The opinion at which he has finally arrived is, that, according to the true intent of the entailer as expressed, the 'heirs whatsoever of the bodies of such heirs-male respectively' are not called under the clause of destination until the failure of *all* the said heirs-male of the bodies of Sir William Forbes and Williamina Stuart or Forbes, the daughter of

the entailer. Much depends, in the Lord Ordinary's estimation, in so determining this question of construction, on the meaning attached by the entailer to the word 'respectively,' which has obviously been used as applying to separate classes of heirs, more than once in the course of the clause of destination, with discriminating intent. As the Lord Ordinary reads the clause, the entailer thereby intended to call the *respective* or several *heirs-male* of the bodies of Sir William Stuart Forbes and his daughter in priority, and preferably to the 'heirs whatsoever of the bodies of such heirs-male;' and if this be so, the defender Lady Clinton, who founds her right and title to the character of heir of entail, now entitled to take the estate under the destination to the heirs *whatsoever* of the bodies of such heirs-male, must of necessity fail in the defence which has been here maintained on her behalf.

"In dealing with this question, the Lord Ordinary has been struck by the peculiarity, as it has appeared to him to be, that, while the defender Lady Clinton seeks to be preferred to the pursuer, claiming through the destination to heirs-male of the body, by asserting her own title as 'heir whatsoever' of the body, the deed contains a further and express destination to the 'heirs-*female* procreated of the said marriage, and the heirs whatsoever of their bodies respectively,' under which latter class of heirs the defender unquestionably falls. But were it the case that the entailer had contemplated and has directed that the '*heirs whatsoever*' of the successive heirs-male called under the first branch of the destination should or shall take the succession in preference to the other *heirs*-male of the marriage, this ultimate destination to the 'heirs-female' of the marriage and 'the heirs whatsoever of their bodies' would, in the apprehension of the Lord Ordinary, have been, in the most favourable aspect for the defender, mere surplusage, and altogether unnecessary as carrying out the intent of the entailer.

"In short, the view of the Lord Ordinary is, as he has stated, that, under the destination as framed, 'the heirs-male of their bodies respectively' must each take the estate before any 'heir whatsoever' or 'heir-female' can assert a right to the same, under the terms of the deed of 1811.

"As respects the conclusions of the summons which seek reduction of the deed of tailzie executed by the deceased Sir John Forbes in 1829, and relative writs, the Lord Ordinary has here assumed that, if the construction which he has applied to the entail of 1811 be sound in law, these conclusions must, as matter of course, take effect."

The defender reclaimed, and, after discussion, the case was appointed to be reheard by the First Division with three Judges of the Second Division.

Argued for the defender (reclaimer)—According to the pursuer's construction, the destination is simply to the heirs-male of the marriage, whom failing, to the heirs-female of the marriage. So simple a destination would hardly have been expressed in the very special terms which the deed contains. By the first branch of the clause, closing with that part of it which destines the estates to Mr Belsches of Invermay, the entailer contemplated a succession to and from sons and their families, intending that each son should succeed *seriatim*, and then his heirs-male, and thereafter his heirs-female, before any other son should take. There was nothing unusual in such a destination, each son of the marriage being the head of a new *stirps*, in which the male are preferred to the female descendants, and these last to the male descendants of another *stirps*. The words "whom failing" were introduced simply to let the heirs-male of the body of each heir-male succeed in preference to his heirs-female. The defender was called to the succession as "heir whatsoever of the body" of her father, and was thus entitled to succeed at a time when she could not take under the clause calling the heirs-female of the marriage, who were unquestionably postponed to all heirs-male. By adopting this construction, effect would be given to every member of the destination, which would not be the case if, as the pursuer contended, the words "heirs whatsoever of the bodies of such heirs-male" indicated the same class of persons to whom the estates were afterwards destined as heirs-female.

Argued for the pursuer—The terms of the deed indicate a predilection for heirs-male. The destination is to heirs-male however far distant, and until they are exhausted there is no room for an heir whatsoever, or an heir-female. The words "whom failing" have a settled technical meaning and effect, and there is no instance where these words were held not to operate as a disjunction of what precedes them from what follows. In the *Largie* case it was just because the words "whom failing" were not used that the heirs whatsoever of each heir-male were allowed to take. It is impossible to proceed to the destination to "heirs whatsoever" without first exhausting the persons previously called, viz., all the immediate sons of the marriage, and the heirs-male of their bodies "respectively," *i.e.* successively. The pursuer was therefore entitled to succeed in preference to Lady Clinton.

At advising—on 6th June 1868—their Lordships delivered their opinions as follows:—

"Lord Curriehill—Sir John Hepburn Stuart Forbes, who was infeft as heir of entail in the estate of Fettercairn, having died in the year 1866, the right to that estate then became *in hæreditate jacente* of him; and the question is, Who then became entitled to succeed to him as the next heir of entail in that estate? The answer to this question must be found in the destination in the deed of entail. That entail had been made in 1811 by his maternal grandfather, Sir John Stuart. His intention as to the order of the succession of the series of the heirs thereby appointed will be more easily understood by keeping in view what was then the state of his family. He had no son. He had daughters, the eldest of whom, Williamina, had been married to Sir William Forbes, but she was then dead. There then survived three sons of that marriage, John, Charles, and James Forbes. There were also daughters of that marriage. The destination in the entail, so far as it regulated the order of succession among the entailer's descendants, was—(1) to the heirs-male of his body; (2) to his son-in-law Sir William Forbes; (3) to 'the heirs-male procreated of the marriage between him and the deceased Williamina Stuart or Forbes, my daughter, his spouse, and the heirs-male of their bodies respectively, whom failing, to the heirs whatsoever of the bodies of such *heirs-male* respectively; (4) whom failing, to the heirs-female procreated of the said marriage, and the heirs whatsoever of their bodies respectively.' On the

death of the entailer without male issue, Sir William Forbes succeeded to the estate as the first heir of entail, and he possessed it until 1828, when he died, and was succeeded by his eldest son John, as the heir-male of the marriage between him and Lady Forbes. John, again (who was called Sir John Hepburn Stuart Forbes), survived until 1866, when he died; and the question, as already stated, is, Who was then the party to whom the succession opened upon his death? In order to find the answer to this question in the destination of the entail, it is necessary to see what the position was which Sir John himself had held under that destination. It was that of the eldest heir-male of the marriage between his parents, Sir William and Lady Forbes. Hence, on his death in 1866, the heir to him, under the third branch of the destination, would have been the heir-male of his own body, if any had existed. But he had no son, and so there was an entire failure of heirs-male of his body; and, consequently, the next heir to him, in terms of the sequel of that branch of the destination, was the heir whatsoever of his body. And as he left a daughter, Lady Clinton (who is the defender in the present action), she was the party who was in that position, and to whom, therefore, as I think, the succession then opened. Her Ladyship accordingly, in the year 1866, expede a title to the entailed estate, as being then the nearest heir of entail to her father; and she has since possessed the estate in virtue of that title.

"The pursuer of the present action is a nephew of Sir John, being the son of his immediate younger brother, Charles, who had predeceased Sir John. He had then become the heir-male of the marriage of Sir William and Lady Forbes; and the question now is, Whether, in that character, he, in 1866, also became the heir of entail of his uncle Sir John?

"The pursuer would have been in that position if the third branch of the destination had been an unqualified one to the heirs-male of the marriage of Sir William and Lady Forbes. But that branch of the destination was not made in these unqualified terms; and the fallacy in the pursuer's argument consists, as I think, in his ignoring the effect of the qualification which it embodies. That qualification consists in this branch of the destination providing the succession not simply to the heirs-male of the marriage, but to them 'and the heirs-male of their bodies respectively, whom failing, to the heirs whatsoever of the bodies of such heirs-male respectively.' And as Sir John's position, while he was heir of entail in possession, had been that of the heir-male of the marriage of his parents, the next heir who was appointed to succeed to him on his death in 1866 (without heirs-male of his body) was the heir whatsoever of his body, who was his own daughter, Lady Clinton. The first objection, therefore, to the pursuer's claim—and it is itself a conclusive one—is, that it could not receive effect without denying all effect to the clause by which the entailer thus called to the succession the heir whatsoever of the heir-male of the marriage, in the event, which actually happened, of the failure not only of the heirs-male of the marriage, but also of heirs-male of his body.

"A second objection to the pursuer's contention is, that it is inconsistent with the established technical meaning of this branch of the destination. In order to see clearly what is the established meaning of such a destination, two of the technical rules of tailzied destination must be kept in view. One of them is, that a general destination to heirs-male of a *stirps* who leaves more sons than one does not call to the succession all of them simultaneously as joint heirs, but calls each of them separately and *seriatim* in the order of birth. And, accordingly, it is not disputed that, in conformity with this rule, the right to the whole of the entailed estate descended, on the death of Sir William Forbes, to his eldest son, John, alone. That rule not only is established in practice, but is also founded on principle; because, although all the sons be male descendants of a *stirps*, yet on his death the eldest one alone is his male heir. This principle was strikingly illustrated by the *Roxburghe* case, in which there was a destination to the eldest daughter of Harry Lord Ker, and their heirs-male; and it having been held, from the whole scope of the deed of entail, that by the expression 'the eldest daughter' was meant all the daughters of Lord Harry, it was nevertheless found that by that expression only the daughter who was eldest by birth, and her heirs-male, succeeded in the first instance, to the exclusion of the younger daughters and their descendants. And in the case of *Largie* (Bell's App. i. 215), Lord Cottenham explained the meaning of such a general destination thus:—'When any description of heirs are called, the term, though used in the plural, is construed to mean individuals, who from time to time, and in succession, may answer the description.'

"Another of the technical rules to which I have alluded is, that when such a general destination to heirs-male of a *stirps* is qualified with a subordinate destination to the heirs of any description of such heirs-male, then all those who are called to the succession by such subordinate destination succeed to each of such heirs-male separately and in succession in the order of their births. For example, if the destination be not only to the heirs-male of a *stirps*, and to the heirs whatsoever of the body of such heirs-male, the effect is, that all the heirs of his body, whether they be male or female, succeed in their order to the eldest heir-male of the *stirps*; and unless all of them shall be exhausted, and so entirely fail, the succession does not open to the second heir-male of the body of the original *stirps*, or the heirs whatsoever of his body. Such was the destination in the *Largie* case, and such was found to be its legal meaning and effect. Lord Cottenham in that case follows up the remark I have already quoted, as to the meaning and effect of a destination to heirs-male generally, by stating, as to the meaning and effect of such a qualification of a destination to such heirs-male, that 'if the gift to heirs may be so divided as to give the estate to every individual heir in succession, why may not the next gift to heirs whatsoever of the body be also construed distributively, so as to apply to heirs general of the body of each successive heir-male who might be added to the succession?' And that was the principle of construction upon which the *Largie* case was decided, both in this Court and in the House of Lords.

"The practical effect of so qualifying a destination generally to heirs-male of the body of a *stirps*, with such subordinate destination, is to constitute each of such immediate heirs-male of that *stirps*, in his order, a subordinate *stirps* in reference to the succession of his own descendants.

This, also, was thus expounded in the case of *Largie* by Lord Mackenzie. He stated that 'the heirs-male are called as *stirps* since their heirs whatsoever of their bodies are expressly called as descendants, although each of these *stirps* had herself been called to the succession as the substitute of a primary *stirps*.' His Lordship also refers to Dallas' Collection of Styles for the model form of such qualified destinations. This is indeed the most explicit manner of calling to the succession the descendants of any substitute heir of entail, where the intention is to call in a certain order all the descendants of any substitute (whether those descendants be males or females) before the collateral heir of such substitute. This being the case, each of the heirs-male of the marriage of Sir William and Lady Forbes was constituted a subordinate *stirps* in reference to his own descendants; there being thus substituted to him, first, the heirs-male of his own body, and failing them, the heirs whatsoever of his own body, before the succession should pass to any of his younger brothers or their descendants, as the heirs-male of the marriage of their parents. Hence, on the death in 1866, of Sir John, the eldest heir-female of the marriage—the party to whom the succession opened in virtue of the subordinate destination created by this qualification—was his daughter, the heir whatsoever of his body. The condition upon which the succession then opened to her was the failure, not of all the heirs-male of the marriage of her grandparents, but only the failure of heirs-male of the body of her own father, as the eldest of the heirs-male of that marriage. The contention of the pursuer is thus not only at variance with the words of the deed, but is also inconsistent with the established rules of tailzied succession in Scottish conveyancing.

"Thirdly, in this case the entailer has himself explained that his meaning was in conformity with these rules. He did so by directing that the heirs-male of the marriage should respectively be succeeded by their own descendants, whether males or females, in a certain order. No meaning can fairly be attached to that expletive 'respectively,' as so used, except that the descendants of each of these heirs-male of the marriage, in his order of birth, should be succeeded by the heirs-male of his own body, whom failing, by the heirs whatsoever of his own body, before the succession should pass to the next younger heir-male of the marriage and his descendants.

"Fourthly, that such is the true construction of the destination is corroborated by the fact that it gives a meaning to every one of the clauses in the destination, whereas the construction contended for by the pursuer would leave some branches of the destination altogether meaningless. In particular, it would deprive of any rational meaning the clause by which the destination to the heirs-male of the marriage of Sir William and Lady Forbes is qualified, as I have pointed out.

"And finally, the meaning which it gives to all the branches of the destination is, that it interrupts the legal rules of succession less than that contended for by the pursuer. The intention which is indicated in the branches of the destination applicable to the entailer's descendants appears to be, that in every case when the right to the estate is provided to any party as a *stirps*, it is to go to the descendants of that *stirps*, in a certain order, so long as any of them shall exist; and that it shall never go out of his family until all his own descendants shall fail. This would not be the case according to the construction contended for by the pursuer. It is a principle which is of great importance in the construction of tailzied destinations, that the legal rules of succession are not to be deviated from beyond what is directed by the entailer. In the case of *Largie*, Lord Jeffrey concludes his comments on the prior cases thus:—'In all these cases, then, it was held clear that the rule is to interpret and read the destination as if it had made express reference to the legal order of succession, and that this is never to be excluded unless where the words do not at all admit of its adoption.' In the present case the entailer's directions, according to my reading of them, proceed upon this footing in so far as these relate to his descendants, and such will be their effect. And this is brought out prominently by a special provision which he made as to the only contingency, in which the case might eventually have been different had the words of the destination itself been left unqualified. I allude to the clause in which it is 'provided that the daughter of the heir who shall happen to be last in possession of the lands and heritages before mentioned (whether such heir was served heir of tailzie or not) succeeding always preferably to the daughters of any former heir, so often as the succession, through the whole course thereof, shall devolve upon daughters, and which I hereby declare to be my true meaning, notwithstanding of the aforesaid general destination of heirs whatsoever.'

"That clause shows clearly the granter's intention that the succession should never, according to the legal rule, be taken away from the descendants of any person who might actually have possession of the estate as its owner, except in those cases in which the ownership was expressly directed to pass to a different family; and so this clause secures that the legal rules of succession should not be deviated from in even such exceptional cases, unless some of the express provisions should direct such a deviation to take place.

"The result is, that in my opinion the title of Lady Clinton is not challengeable on the ground set forth in this action, and that she should be assoilzied from its conclusions."

"LORD BENHOLME—In the year 1811 Sir John Stuart settled his estate of Fettercairn in strict entail.

"At this period the entailer was childless, his only child, a daughter, having died, leaving several sons and two daughters of her marriage with Sir William Forbes of Pitsligo.

"By this entail the estate of Fettercairn was destined, failing the entailer and the heirs-male of his body, 'to Sir William Forbes, Baronet, of Pitsligo, and the heirs-male procreated of the marriage between him and the deceased Dame Williamina Stuart or Forbes, my daughter, his spouse, who was formerly designed Williamina Belsches Wisheart, and the heirs-male of their bodies respectively, whom failing, to the heirs whatsoever of the bodies of such heirs-male respectively, whom failing, to the heirs-female procreated of the said marriage, and the heirs whatsoever of their bodies respectively, whom failing,' to other substitutes.

"The entailer died in 1821. Sir William Forbes, the next substitute, survived till October

1828, when he died without making up any title. Sir William left three sons, John, Charles Hay, and James David, and two daughters, of his marriage with the entailer's daughter.

"The eldest son, Sir John, made up titles to the estate, of which it is only necessary to say, that in the pursuer's view of the entail of 1811 they constituted a violation of that entail, whilst in the defender's view they carried out correctly, although in a somewhat expanded form, the destination of that entail.

"Sir John possessed the estate upon these titles for a long period of years, till his death in 1866. On his death, his only child, the defender Lady Clinton, made up her titles as heiress of entail to her father.

"The pursuer, who is the son of Charles Hay Forbes (now dead), and who is now the heir-male of the marriage of his grandfather and grandmother, Sir William and Lady Forbes, has brought a reduction of the defender's titles, upon the footing that he, and not the defender, is the nearest heir of entail to Sir John Forbes under the entail of 1811.

"The present case, therefore, involves a pure question of construction, to be solved mainly by an examination of the clauses of destination set forth above, although considerations of some importance may be derived from a subsequent clause of the entail, relative to the succession, and the preferences of heirs whatsoever *inter se*, to be hereafter particularly adverted to.

"The destination of this entail, so far as it relates to the Forbes family, is by no means one of a simple kind, but is broken down into parts, and distinguished by expressions of reference from the latter to the former parts. in the repeated use of the word 'respectively.' The exact purpose of the entailer cannot be ascertained without a detailed examination of the articulation by which the members of entail are, in the first place, distinguished, as well as of the references by which a peculiar connection is ultimately established between them.

"In the first place, it is evident that the entailer has distinguished the immediate offspring of his daughter's marriage with Sir William Forbes from all their descendants. The sons he has distinguished as the heirs-male precreated of the marriage, the daughters as the heirs-female procreated of the marriage. The sons are distinguished from the heirs-male of their bodies, the daughters from the heirs whatsoever of their bodies.

"Secondly, it is equally clear that in the words 'whom failing, to heirs whatsoever of the bodies of such heirs-male,'—the expression 'such heirs-male,'—a reference is made to the heirs-male procreated of the marriage, *i.e.*, to the sons; for if the words 'such heirs-male' be referred to the second generation of heirs-male,—that is, if the heirs-female of their bodies alone are called,—there would be an exclusion from this clause of all the granddaughters of Sir William Forbes by his sons. Nay, there would be an exclusion of such granddaughter from the whole destination: for the subsequent clause calls only the heirs whatsoever of the daughters of the marriage.

"Thus, for example, Lady Clinton could never, upon that supposition, succeed under the entail. She is neither an heir of the body of any male member of entail, except of her own father, a son of the marriage; nor is she an heir of the body of any daughter of the marriage. And the same observation applies to all the granddaughters by sons of the marriage.

"A still more absurd consequence of this interpretation of the words in question would occur if it be supposed that there had been many sons of the marriage, who all died leaving daughters, but no sons. These daughters might leave multitudes of descendants, none of whom could take under this entail if this construction of these words were adopted.

"It is absolutely necessary, then, to include under these words 'the heirs whatsoever of the body of such heirs-male,' the descendants of the sons of the marriage.

"The whole clause of destination may therefore be thus paraphrased:—'To Sir William Forbes and the sons of his marriage with the entailer's daughter, and the heirs-male of the bodies of the said sons' bodies respectively, whom failing, to the heirs whatsoever of the bodies of the said sons respectively, whom failing, to the daughters of the said marriage, and the heirs whatsoever of their bodies respectively.

"The peculiar force of the word 'respectively,' three times repeated, seems now to come out very distinctly. The entailer had distinguished the sons and daughters of the marriage from their respective descendants. He afterwards conjoins these descendants, male and female, in a certain order and rank, with their respective progenitors.

"The question is, Did he not intend all the descendants of each *stirps* to share the precedence arising from seniority attached to their respective progenitors? The defender maintains that the repetition of the word 'respectively', as applied to descendants of both sexes (although these descendants, *inter se*, are called in a certain order by the words 'whom failing' interposed between the male heirs and the heirs whatsoever), decides this question in the affirmative. She maintains that the effect of this word 'respectively' is precisely the same in every instance where it is used. It first ascertains the preference of the eldest son's male descendants to those of his younger brothers. It next extends that preference of their respective progenitors to the heirs-female of the body of the sons, in case the heirs-male of that progenitor should fail. And in the last clause where it occurs it appropriates to the descendants of each daughter of the marriage that preference over the younger daughters and their descendants which, by a subsequent clause excluding heirs-portioners, was attached to the eldest daughter.

"This case bears a strong resemblance to the *Largie* case, which was so much commented on at the bar. It differs from it in this, that in the present case the heirs-female of the body are introduced by 'whom failing' instead of the conjunctive 'and.'

"But when it is considered that the word 'respectively' is applied both to the heirs-male who are supposed to fail, and to heirs-female who are called immediately to succeed them, and that reference is thus plainly made to the *stirps* to which both classes of heirs respectively belong, the effect of the conjunctive 'and' is precisely attained by the qualified 'whom failing' that occurs in the present case.

"What, then, is the contention of the pursuer in reference to this somewhat complex and articulately detailed destination? It amounts to this: that the entailer intended merely to call the heirs-male

of the marriage, whom failing, the heirs-female. Surely that interpretation of this destination is to be rejected which supposes the entailer to have employed so much unnecessary circumlocution to have introduced so many distinctions that were useless, and made so many references that were unmeaning.

"But this is not all, for the pursuer's interpretation involves serious contradictions or inconsistencies.

"To estimate these it is necessary to advert to a subsequent clause of the entail, which, after various classes of substitutes out of other families have been called to the succession, provides as follows:—'The eldest heir-female and the descendants of her body always excluding heirs-portioners, and succeeding without division throughout the whole course of succession aforesaid, as often as the same shall descend to females, and the daughter of the heir who shall happen to be last in possession of the lands and heritages before mentioned (whether such heir was served heir of tailzie or not) succeeding always preferably to the daughters of any former heir, so often as the succession through the whole course of it shall devolve upon daughters, and which I hereby declare to be my true meaning, notwithstanding of the aforesaid general destination of heirs whatsoever.

"There is here laid down an imperative rule to determine the first heir whatsoever who is to take upon the failure of heirs-male. The entailer evidently anticipated that this rule might frequently come into operation. And it is no light objection to the pursuer's interpretation of the destination that under it the rule could be brought to bear only once by possibility in the Forbes family, since it is only on the failure of all the heirs-male of Sir William's marriage that heirs whatsoever could, once for all, come to succeed; whereas, according to the defender's view, the rule might become operative in each successive branch of the destination flowing from each of the sons as a *stirps*.

"What then was that rule? According to what criterion was the preference of heirs whatsoever to be determined? Was the heir whatsoever to be preferred whose progenitor was elder in the family than that of her competitor? Quite the reverse. The rule gives the preference to the heir whatsoever of the heir-male who had last possessed the estate, and that heir-male (where more than one branch of the family had taken the estate) must necessarily belong to the youngest branch.

"Now, let the rule be applied in the only case in which, under the pursuer's interpretation, it could come into operation in the Forbes family. Let it be supposed that all the heirs-male of the marriage have failed, after heirs-male of the body of several of the sons have successively taken the estate. Let it be supposed that the succession opens to heirs whatsoever when there are female descendants or heirs whatsoever of all or of several of the sons in existence. It is plain that the rule in question will call first to the succession the descendant of the youngest son whose heirs-male have taken the estate, because they must be the last takers. This being clearly ascertained, let attention be directed to the pursuer's interpretation of the word 'respectively,' attached to the clause introducing the succession of heirs whatsoever,—'whom failing, to the heirs whatsoever of the bodies of such heirs-male respectively.'

"The pursuer's counsel being asked what meaning he attached to the word 'respectively' in this clause, suggested that it might mean successively. And, indeed, if any meaning is to be given to it at all, it must be that which is here suggested. For, upon the hypothesis of the pursuer's interpretation, all the heirs-male of the marriage have failed; and therefore this word cannot be employed (as it is under the defender's interpretation) in deciding the competition between heirs whatsoever of the body of an elder son and the heirs-male of a younger son. It must therefore have to do with a competition between heirs whatsoever *inter se*, or else it must be altogether disregarded. Now, if this be its object, it does not seem possible to understand it in its own proper sense, or in any other sense than as synonymous with successively.

"Then, if the heirs whatsoever are to succeed successively, or with reference to their respective progenitors, the heir whatsoever must be preferred who is descended from the eldest son—an arrangement the very reverse of that which is provided by the anxious and imperative clause above quoted, subjoined to the substitutions.

"I conclude that the pursuer's interpretation, which gives to this word 'respectively' its only use as a rule for deciding competitions between heirs whatsoever *inter se*, must be erroneous, since such rule must be in necessary conflict with the explicit declaration of the entailer in the subsequent clause of the entail.

"The pursuer is thus reduced to the necessity of giving no meaning, or at least no available meaning, to this important word.

"Before concluding, I wish to advert to what I consider to have been certain misapprehensions of the Lord Ordinary, by which it is evident that his opinion was much influenced. His Lordship is of opinion that under the ultimate destination to the heirs-female procreated of the marriage, and the heirs whatsoever of their bodies respectively, the defender unquestionably falls, although she claims under a former clause of the destination. Now, if the observations I have ventured to make are at all correct, his Lordship is mistaken in this position. If heirs-female procreated of the marriage mean daughters, it is plain that Lady Clinton could never succeed under this clause, as she cannot be designed as the heir of the body of the daughter of the marriage. Another mistake into which the Lord Ordinary has fallen has arisen from his inadvertently reading 'heirs whatsoever of the body of the heirs-male' as if the words were 'heirs whatsoever of the heirs-male.' The clause as it stands in the entail excludes collateral heirs of the sons of the marriage, and embraces only descendants of these sons. It is from this mistake that the Lord Ordinary has arrived at the erroneous conclusion that, under the defender's interpretation of the destination, the last clause relative to the heirs-female procreated of the marriage is mere surplusage. Had it not been for that clause, the daughters of Sir William Forbes (who are not descendants of the heirs-male) would have no place in the destination.

"Upon the whole, I am of opinion that the Lord Ordinary's interlocutor ought to be altered, and the defender assoilzied from this action of reduction."

"LORD DEAS—The result at which I have arrived is the same with that which has been expressed by your Lordships who have already spoken;

and the grounds upon which I arrive at that result are so very much the same as those that have been stated, that if I were to attempt to state them in detail, I think I should rather run the risk of confusing the matter than of making it clearer than it is. The destination is not to the heirs-male of that marriage, whom failing, to the heirs-female of that marriage, but it is to the heirs-male of that marriage and the heirs-male of their bodies—&c., making the heir-male of the body of the heir-male of the marriage the *stirps*. Now, coupling that with the use which is made of the word 'respectively,' both in connection with the heir-male of the body of the heir-male of the marriage, and in connection with the heirs whatsoever of the bodies of such heirs-male, I think the meaning pretty plainly is that which has been put upon it in the opinions which have just been delivered. Mr Fraser took pains to show us that the style given by Dallas and by the other authoritative formalists who have followed him—almost identical, with this important exception, that the word 'respectively' is in this entail, and is not in any of those. I think that just goes to indicate that the word 'respectively' must have been introduced here for some special purpose—introduced advisedly, according to that view of it—into the other form or style which the maker of the entail was taking as his general model. I do not see any room to doubt that the word 'respectively,' where it occurs in one line immediately after another, has the same separative meaning and effect in each. The estate goes to the heir-male of the body of the heir-male of the marriage; and then, if there are no heirs-male in that descent, it goes to the heir whatsoever of the body of the heir-male who has thus succeeded. The only other observation I wish to make is, that I think the construction which your Lordships have put upon the clause is very much confirmed—and I have thought all along that it was very much confirmed—by the clause at the middle of page 6, where it is said—'and the daughter of the heir who shall happen to be last in possession of the lands and heritages before mentioned (whether such heir was served heir of taillie or not) succeeding always preferably to the daughters of any former heir, so often as the succession, through the whole course thereof, shall devolve upon daughters, and which I hereby declare to be my true meaning, notwithstanding of the aforesaid general destination to heirs whatsoever.' I think that clause indicates this—that the entailer took for granted that if an heir—obviously meaning an heir-male of the body of the heir-male of the marriage—had succeeded to the estate and made up a title to the estate, the estate would continue in his family; and that on this assumption he provided that although that heir-male who had been in possession of the estate had not made up a title to the estate, the same thing should occur—the estate should continue in that family. I think that clause goes to show, along with the other grounds which have been stated, that what the entailer contemplated was a *stirps* which was to be exhausted before the estate went to any other *stirps*. With these observations in supplement of what has been stated, I entirely concur in the opinions which have been delivered."

The LORD PRESIDENT, LORDS COWAN, NEAVES, and ARDMILLAN, concurred in the unanimous judgment of the Court.

The Court pronounced the following interlocutor:—"Recall the interlocutor complained of; repel the reasons of reduction; sustain the defences; assoilzie the defenders from the whole conclusions of the libel, and decern; find the pursuer liable in expenses," &c.

This decision was appealed to the House of Lords.

An objection was taken to the competency of the appeal under 6 Geo. IV. 120, § 25, which provides that "the decrees or orders of the Court of Session shall be final, and not subject to be complained of by appeal to the House of Lords, unless the petition of appeal shall be lodged with the Clerk of Parliament or the Clerk-Assistant within two years from the day of signing the last interlocutor appealed from, or before the end of fourteen days, to be accounted from and after the first day of the session or meeting of Parliament for the despatch of public business next ensuing the said two years: Provided always, that when the person or persons entitled to appeal shall be out of the kingdom of Great Britain and Ireland, it shall be competent for him or them to enter an appeal at any time within five years from the date of the last interlocutor, if he or they shall remain abroad so long, or within two years from the time of coming into Great Britain or Ireland, the time allowed to such person or persons for lodging his or their appeal in no case on account of mere absence exceeding the foresaid space of five years, together with the space that may elapse before the end of the fourteenth day from and after the session and meeting of Parliament next after the expiration of the said five years." The petition of appeal was presented on 25th March 1872, and on 23d April the respondents petitioned that it should not be received. This last petition was referred to the Appeal Committee, which met on the 24th day of April 1872, when the appellant verified the fact of his absence in New Zealand by the affidavits of Mrs Stuart Forbes, his mother, and Mrs Traill, his sister. The fact of the appellant's absence was not disputed by the respondents before the Appeal Committee, but they contended that his mandatory, being sisted as a party, became his representative, and that the case was thus brought within the first paragraph of the 25th section of the Act relative to parties in the kingdom, and the other provision relative to appeals by parties abroad was displaced. The Appeal Committee reported that the petition of appeal ought to be received, but that the respondents should have liberty to raise this question of competency at the hearing. The appeal was accordingly received, and the usual order made on the respondents to answer.

The appellant's case, *inter alia*, stated—

(1) As to the competency of the appeal—A mandatory is appointed merely to secure the opposite party's costs.

Authorities quoted—*Gordon* v. *Gordon*, 2 S. & D. 572; Darling's Practice, vol. i., p. 101; Shand's Practice, vol. i., p. 154–162; *Buik* v. *Patullo and Ramsay*, 17 D. 568; *Smith* v. *Norval*, 6 S. & D. 852; *Sandilands* v. *Sandilands*, 10 D. 1091; *Caledonian Ry. Co.* v. *Turner*, 12 D. 406; *Cairns* v. *Anstruther*, 2 Robinson, 29.

(2) As to the merits of the appeal—The clear meaning of the destination is to call next after Sir W.

Forbes, the heirs-male of his body by his marriage with the entailer's daughter; and on their entire failure, but only in that event, the heirs-female or heirs whatsoever of the bodies of these heirs-male. It may be convenient here to place in contrast to the above-mentioned limitations, taken from the destination in the entail of October 1811, the corresponding branch of the destination in the entail of 1829. It is as follows,—"to myself (Sir John Hepburn Stuart Forbes), and failing me, to the heirs-male of my body, whom failing, to the heirs whatsoever of my body, whom failing, to the other heirs-male procreated of the marriage between the said deceased Sir William Forbes of Pitsligo, Baronet, my father, and the also deceased Dame Williamina Stuart or Forbes, his spouse, my mother, lawful daughter of the said deceased Baron Sir John Stuart, who was formerly designed Williamina Belsches Wisheart, and the heirs-male of their bodies respectively, whom failing, to the heirs whatsoever of the bodies of such heirs-male respectively, whom failing, to the heirs-female procreated of the said marriage, and the heirs whatsoever of their bodies respectively, whom failing," over. The appellant apprehends that this sentence is clearly antagonistic to the destination in the entail of October 1811. In the entail of 1829 the heirs whatsoever of Sir John Hepburn Stuart Forbes, who was an heir-male of the body, have improperly conceded to them precedence over heirs-male of the marriage of his father and mother; while in the entail of 1811 these heirs whatsoever are called only on the failure of the heirs-male of the marriage. The appellant is the next heir-male of the marriage, without any doubt or dispute. The respondent is only an heir whatsoever or heir-female of the marriage. The entail of 1829 in this respect just reversed the order of succession laid down in the substitutions of the entail of 1811. The great fallacy which led to this deviation from the entail of 1811 is to assume that the entailer intended that each of the sons of Sir W. Forbes should be instituted as the root of an independent *stirps*, and that the limitation should have the same effect as if each son had been called by his name, with limitation to the heirs-male and female of his body. Had this been intended, apt and familiar words might easily, and would undoubtedly, have been used to express it. But, for the sake of argument, let it be assumed that the effect of the clause was as the Court have found. Be it that the introductory limitation was equivalent to a limitation to "the first and other sons," how do their Lordships get rid of the words of inheritance which follow, viz., "the heirs-male of their bodies respectively"? The Court altogether ignore the word "male." They read the substitution as if it were "the first and other sons of the marriage, and the heirs-general of their bodies;" because a limitation to heirs-male and female of the body is precisely the same as a limitation to heirs of the body, or heirs whatsoever of the body. If the first son died, whether in his father's lifetime or not, leaving a daughter, and survived by the other sons, the daughter would, on the reasoning of the Court below, take, to the exclusion of the sons; and so would the heirs, whether male or female, of her body; in other words, instead of the descent to heirs-male of the marriage, so stringently provided for in the entail of 1811, the primary descent on the death of an eldest son leaving only a daughter would be to heirs-female of the body, because there can be no heirs-male if one female intervenes. Is not this plainly repugnant to the destination in the entail of 1811, by which the "heirs-male of the marriage" are called as a class, and "the heirs whatsoever" are likewise called as a *class*, on the failure or extinction of heirs-male? Much reliance was placed by the respondents on the particle "respectively" with which the limitation ends—"to the heirs-male of their bodies *respectively*." This particle however expressed nothing more than the sentence would without it. It expressed the manner in which the succession is regulated in all cases of class succession. Had the word been absent, the class of heirs-male of the body would not have succeeded jointly, but in the legal order of primogeniture and descent. Had it been the intention of the entailer to institute the sons *seriatim* as the root of a *stirps*, embracing heirs-female as well as heirs-male of their bodies, in their order, he would have adopted a well-known form or style familiar to conveyancers,—a style which has frequently been used to carry such intention as this into effect. That style or form will be found in many entail cases.

Authorities quoted—*Anstruther* v. *Anstruther*, 2 Bell's App. Cases, 242; *Howden* v. *Rocheid*, 1 L. R. (Sc. App.) 550; *Lockhart* v. *Macdonald*, 1 Bell's App. 202, 2 D. 384; Sir G. Mackenzie, vol. 2, p. 484; Dallas, p. 623; *Carleton Entail*, Register of Tailzies, vol 31, p. 116; *Gordon* v. *Gordon*, Mor. 15,386; *Creditors of Carleton* v. *Gordon*, 5 Brown's Sup. 252; *Lockhart* v. *Gilmour*, M. 15,404; *Farquhar* v. *Farquhar*, 1 D. 121; *E. of Kintore* v. *L. Inverury*, 4 Macq. 520; *Edward* v. *Shiell*, 10 D. 685.

The reasons of the appellants in asking for reversal of the judgment of the Court of Session were as follows:—"(1) Because, according to the sound construction of the entail of 1811, heirs-male of the marriage of Sir William Forbes and the entailer's daughter are entitled to succeed to the entailed estates in preference to heirs-female or heirs whatsoever, either of Sir William Forbes or of any subsequent heir of entail. (2) Because the appellant is the nearest heir-male of the said marriage. (3) Because the substitution to the heirs whatsoever of the bodies of the heirs-male of the marriage, only arises on the failure of the previous substitution to heirs-male of the said marriage, and that event has not happened. (4) Because the entail of 1829 was a violation of the prohibition against altering the order of succession in the entail of 1811, and was reducible at the instance of the appellant."

The respondents stated in their case—(1) That the appeal was incompetent under the statute. The mandatory was never furth of Scotland, was even present at the judgment in the lower Court. Then the appellant Sir William Forbes, by the law of Scotland, not being within the kingdom, was not entitled to sue without a mandatory.

Authorities — *Railton* v. *Matthews*, 6 D. 1350; *Overbury* v. *Peek*, 1 Macph. 1058.

The mandatory is a party, and a necessary party to the suit, and also to this appeal. The parties who answer to the description of the "person or persons entitled to appeal" are Sir William Forbes *and his mandatory*; and to bring them within the proviso applicable to persons out of the kingdom, they must both have been in that situation. Sir William Forbes and his mandatory, although two persons, form but one party to the suit, and represent but one interest. That interest is not only one

but indivisible; and was fully represented in this country by the mandatory. And as he who represented that interest before the Court has been present throughout, it seems impossible to hold in this case that the "persons entitled to appeal" can claim the privilege of absence from the kingdom.

Further, even assuming that Sir William Forbes had a separate right of appeal, it seems fatal to his claim for an extended period that, while personally absent, he was constructively present. To entitle a party to the privileges of absence, he must have been, not merely personally, but as a party to the cause, "out of the kingdom." This cannot be said of Sir William Forbes. If he founds on his bodily absence, then he is not by himself a person entitled to appeal. He cannot take a step in Court without his mandatory. If, on the other hand, he refers to the spirit and meaning of the Act, and pleads his right as the party substantially interested in the suit, it is fair to inquire whether, in his character of pursuer of the action, he has been absent from the kingdom. So far as the spirit and meaning of the statute are the test, he seems to have been throughout present by his mandatory. To allow this would practically enable any party to obtain latitude of five years for appeal to the House of Lords, simply by going out of the country and suing by a mandatory.

(2) On the merits: — In effect the difference between these two views is this. Let it be supposed that the three sons of the marriage had issue, the eldest a daughter only, the second a son only, and the third a son and a daughter. According to the appellant's view, the eldest son's daughter could not succeed until both the second son and the third son, and their male issue, had been exhausted; because it is contended that the heirs whatsoever of the body of the eldest son are only called failing all heirs-male of the body or any of the heirs-male procreated of the marriage. Nor does the effect of the appellant's view end here. For the deed contains a declaration that the daughter of the heir who shall happen to be last in possession is to succeed always "preferably to the daughter of any former heir, so often as the succession, through the whole course thereof, shall devolve upon daughters." Thus, the daughter of the eldest son would be postponed, not only to the other sons and their male issue, but also to the daughter of the youngest son, if he should succeed to and possess the estate. On the other view, the three sons are dealt with as separate *stirpes*, under the designation "heirs-male procreated of the marriage," and the whole descendants of each are called 'respectively' before the next son and his descendants; the male descendants being called first, and the issue-female afterwards. This is the effect of the words, "and the heirs-male of their bodies respectively, whom failing, to the heirs whatsoever of the bodies of such heirs-male respectively." The words "whom failing" are here read with the word "respectively," and as referring to the heirs-male of that particular *stirps*. Thus —(1) The daughters of the eldest "heir-male procreated of the marriage" would not take until the whole heirs-male of that *stirps* had been exhausted, but would take before the second "heir-male procreated of the marriage," or any of his descendants; (2) The daughter of the third son would not take until all the descendants of the two elder sons, and all the heirs-male of the third son, had been exhausted; nor (under the declaration above mentioned) would she take until the daughters of the heir last in possession, if any, and their descendants, had been exhausted. And this preference of the daughter of the heir last in possession would take place in each *stirps*, when the heirs-male of that *stirps* became exhausted; (3) Finally, the daughters of the marriage (described as "heirs-female procreated of the said marriage,") who are called with the "heirs whatsoever of their bodies respectively," would not take the succession until the whole heirs-male procreated of the marriage, and all their descendants, both male and female, had been exhausted.

A startling result of the appellants' view, and one which affords a strong presumption against its accuracy, is, that it resolves into a simple destination to the heirs-male of the marriage of Sir William and Lady Forbes, whom failing, the heirs-female of the said marriage. It deprives of all meaning and effect the careful and elaborate distribution of that family into (1) the heirs-male procreated of the marriage, and the heirs-male of their bodies respectively, whom failing, the heirs whatsoever of their bodies respectively; and (2) the heirs-female procreated of the marriage, and the heirs whatsoever of their bodies respectively. That any conveyancer should so express a destination to the heirs-male of a marriage, whom failing to the heirs-female, is difficult to believe. On the other hand, if the respondents be correct, the destination could scarcely have been otherwise expressed without mentioning separately each son of the marriage, and the heirs-male of his body; whom failing, the heirs whatsoever of his body, and so on with the daughters of the marriage, and their heirs. The fallacy of the appellant's view consists in missing the meaning of the distribution which is so obviously aimed at in the destination. If it be carefully examined, the destination will be found to be marked by very distinct and significant features. In the first place, keeping in view the state of the family, it will be observed that the issue of the marriage are not divided simply into heirs-male and heirs-female. They are first divided into "heirs-male procreated of the marriage," and "heirs-female procreated of the marriage." Then the "heirs-male procreated of the marriage" are distinguished from the heirs of their bodies, so as clearly to indicate that, by the term "heirs-male procreated of the marriage" is meant sons of the marriage. Then the heirs of their bodies are divided into (1) the heirs-male of their bodies; and (2) the heirs whatsoever of their bodies; and each of these sets of heirs are attached to them "respectively." In the second place, it will be observed that, "the heirs-female procreated of the said marriage," *i.e.*, the daughters of the marriage, and their descendants, are postponed in the order of succession until all the heirs-male procreated of the marriage (*i.e.*, sons of the marriage), and all the descendants of such heirs-male, whether heirs-male of their bodies or heirs whatsoever of their bodies, have failed. In the third place, as to the order in which the daughters of an "heir-male procreated of the marriage" are to take, this at least is plain, that they are to succeed "respectively, *i.e.*, in the order in which their parents would have taken, and before any daughter of the marriage, or any descendant of such daughter. This leaves the only question to be decided whether Lady Clinton, as daughter of the eldest son of the marriage, is connected with her father as a

branch with its root, and was intended to take immediately on the failure of heirs-male of the body of her father, or whether she is appointed to succeed only on the failure of all the sons of the marriage and the heirs-male of their bodies? To postpone her succession farther seems utterly inconsistent with any construction of the destination. The object of the declaration is very plain. The entailer was making a destination in favour of, primarily, three grandsons and the heirs-male of their bodies respectively, whom failing, the heirs whatsoever of their bodies respectively; and, secondarily, to two grand-daughters, and the heirs whatsoever of their bodies respectively. Here was a case in which three different times, among the descendants of his grandsons, there was to be, in some order or other, a change of the succession from heirs-male to heirs whatsoever of their bodies; and he must have foreseen that which might, and in all human probability would, happen. The estate, after being held by heirs-male of the body of the eldest grandson, would fall to his heirs whatsoever. The daughter of the heir last in possession might not be the heir whatsoever of the eldest grandson, or of any of the grandsons. The heir whatsoever might be the female descendant of an elder brother of her father, the heir last in possession. And accordingly, but for such a declaration, the daughter of the heir last in possession would have to cede possession to the heir whatsoever of the body, perhaps, of her great-great-grandfather. To prevent such a change of possession as that,—a change not necessary to the observance of the appointed order of succession,—on the occasion of the succession devolving upon daughters, was the professed object of the clause. This was a most reasonable and natural object; and if it was contemplated that there should be such a devolution in the family of each of his sons successively, the reasonableness and propriety of providing for the event would be very obvious. But it is difficult to believe that the declaration was intended to conflict with and defeat the order of succession so far as to postpone the family of the eldest son of the marriage to a daughter or granddaughter of the youngest. Much more reasonable is it to suppose that it was meant to prevent the estate being carried away from the family of the heir in possession to some remote descendant of the same *stirps*, from whose family the estate had already passed, and to whom it would return before passing from that *stirps* altogether, than to put a construction upon the whole clause which would give the declaration in favour of the daughter of the last heir the effect of defeating the express destination in favour of the heirs whatsoever of the heirs-male procreated of the marriage respectively.

The respondents asked the dismissal of the appeal with costs, and the affirmation of the judgment of the Court of Session, for these reasons—"(1) Because the appeal is incompetent. (2) Because the claim of the appellants is not supported by the deed of entail on which they found. (3) Because, according to the sound construction of the entail, the succession opened to Lady Clinton as heir whatsoever of the body of her father, the eldest heir-male procreated of the marriage of Sir William and Lady Forbes, upon her father's death, and on the failure of heirs-male of his body. (4) Because the conclusions of the summons are ill-founded, both in fact and in law."

At advising—

LORD CHANCELLOR—My Lords, in this case your Lordships have the benefit of a very careful and well considered judgment, not only of the Judges of the First Division, but also of the consulted Judges who were called in to assist them, and the result of whose united deliberations was to produce unanimity, the Judges of the First Division having been originally divided in their opinions. I need not say, my Lords, that it would be only on very clear and strong grounds that your Lordships would be disposed to decide against that weight of authority, and against so well-considered a judgment of the Court below. Further, I may observe that the learned Lord Ordinary, who came to a different conclusion, founded it, not wholly, but certainly in a considerable degree, on a view of the construction of a part of this deed which is no longer insisted upon at the bar, and therefore it may be doubted whether, if the Lord Ordinary had had the same benefit of further consideration which the Judges of the First Division had, his Lordship might not have concurred in their opinion.

When we come to examine the deed, the first thing which I think is clear—in fact it was hardly resisted by the Dean of Faculty in his reply—is this, that although "the heirs-male procreated of the marriage," and in a latter place, "the heirs-female procreated of the marriage," between Sir William Forbes Baronet, and Dame Williamina Stuart, the settler's daughter, are words which might have extended to all the male line descending from that marriage, and all the female line also descending from that marriage, yet it appears from the context of this particular deed that that is not truly their meaning, because having spoken of "the heirs-male procreated of the marriage" between Sir William Forbes and the settler's daughter, the deed goes on with the words "and the heirs-male of their bodies respectively,"—plainly therefore, speaking of the first heirs-male procreated as the authors of a *stirps* or line from whom other heirs-male were to descend and to take by inheritance. That by itself, I think, unless there were other difficulties in the context which do not occur here. would be a sufficient reason for taking "heirs-male" to signify sons, and to be a word descriptive of the persons who are to be the heads of several *stirpes*, and the heirs-female in like manner to be daughters. And I would observe, my Lords, that although the words "procreated of the marriage" between two persons named, are words that would not necessarily exclude the ulterior descent of a remoter issue from them, yet in their strict and accurate signification they are certainly more appropriate to issue of the first generation than to any afterwards who are truly and literally procreated of other persons, though their immediate parents may be traced back to the persons named.

Having arrived at that construction of those words, one material step has been made towards the rest of the construction, because we have thereby ascertained that this testator intended several of the *stirpes* to take one after another in the order of primogeniture, and not a single *stirps* to take according to the ordinary rules of simple descent.

My Lords, I cannot help observing that that construction is further illustrated by a comparison of this portion of the deed with those parts which follow it, because when the testator intended a simple destination to the heirs-male of the body of a particular person, he knew how to express it, for he goes on to say, "whom failing to John Hep-

burn Belsches Esquire of Invermay, and the heirs-male of his body, whom failing, to the heirs-male of the body of the said Sir William Forbes, Baronet, in any subsequent marriage, whom failing, to Sir George Abercromby" "and the heirs-male of his body, whom failing to the heirs whatsoever of the body of the said John Hepburn Belsches,"—in every case expressing himself in the manner in which, if the argument for the appellants were sonnd, he might have been expected to express himself in this first part of the deed. For in truth the argument of the appellants is that all this amounts in the result to neither more nor less than what would have been the effect of the deed if the testator had simply said, "failing the heirs-male of his own body, to Sir William Forbes, Baronet, of Pitsligo, and the heirs-male of his body by his marriage with my daughter, whom failing to the heirs-female of the said Sir William Forbes by the same marriage." For that, of course, it would have been quite unnecessary to have used the very special language which this testator has used, dividing the *stirpes* instead of uniting them in one, using the word "respectively" and contrasting the language of this part of the deed in the manner in which he has contrasted it with the parts which follow.

Now, it is certainly a sound principle that when you find words used you should suppose them to be used for a purpose rather than without a purpose, and I think, therefore, that if we can place a reasonable construction upon the words which occur here, and which are rendered superfluous by the appellant's argument, we ought to do so. The appellant's argument turned very much upon what was said to be the proper or technical force of the words "whom failing," which, it was said, were words intended after the exhaustion of one limitation or a series of limitations to introduce another. To that proposition I see no reason whatever for taking the slightest exception, but it is in truth a mistake to suppose that it is a proposition in any way inconsistent with the judgment of the Court below. The same effect, neither more nor less, is given by the argument on both sides to these words "whom failing." Both agree that on the failure of the one line they are meant to be introductory of another. The question is not as to the effect of the word "failing," but as to the effect of the word "whom." What is the antecedent to which the word "whom" is relative? The *Largie* case has no tendency whatever to throw the least light upon that which is the only question in this case, because it is admitted by the respondents in this case that the destination "to the heirs whatsoever of the bodies of such heirs-male respectively" is not to take effect until the failure of the heirs-male of the bodies previously mentioned. The question is, what is the true antecedent of the relative word "whom." Now, I cannot help thinking, my Lords, that the Court below had sound reason for answering that question as they have answered it, in this way, that the "heirs-male of their bodies respectively" is the antecedent, not "the heirs-male procreated of the marriage between" the settler's daughter and Sir William Forbes and their descendants, but those persons "respectively."

Having arrived at that, I cannot but think that the effect of the word "respectively," introducing the gift over, which commences with the words "whom failing," and recurring at the end of that gift over to the "heirs whatsoever of the bodies of such heirs-male respectively"—such heirs-male being there clearly such sons—is to import the force of that word "respectively" into the entire sentence, and that it is not really distinguishable in sense from what it would have been if, as it was put to the counsel in the course of the argument, it had been "whom respectively failing" or "whom failing respectively," the effect of it being that the heirs of the bodies of each *stirps* are to succeed in this manner—the heirs-male of that *stirps* first, the heirs-female of that *stirps* afterwards, but both the heirs-male and the heirs-female of that *stirps* succeeding next, respectively, to the parent towards whom they stand in the relation of heir, and are meant to stand in the relation of successor. My Lords, that word "respectively" is, in its natural and proper sense, and with the force which it constantly has in these legal instruments, a word at once of distribution and connection. It distributes when a series of persons are intended to take, or to take in a certain order or manner. And it is a word of connection because it brings together by reference the heir to the ancestor, the issue or the child to the parent. So understood here, it seems to be only a short term for expressing a series of limitations, in each of which, as I understand it, and as the Court below has understood it, the whole issue of each *stirps* is to be exhausted before you go into the subsequent limitations in this deed, the male issue, however, being always preferred to the female.

Now, I do not know that we really need more to support this construction than the reasons which I have offered to your Lordships, and which in truth are more fully and more ably expressed in the judgments in the Court below, particularly the judgments of Lord Curriehill and Lord Benholme. But I cannot help saying that although I think it was quite right of the learned counsel for the respondents not to lay their main stress upon subordinate clauses in the deed, which after all assist rather by way of illustration than by direct construction, yet I cannot but think myself that the subsequent clause, as to the rule which is to apply upon the succession of daughters, is very much more consistent with the construction placed upon this instrument by the Court below than with that contended for by the appellants. Your Lordships will observe that the effect of the appellants' construction is to reduce this to the simple elements which I mentioned at the outset, the single *stirps* of Sir William Forbes, or rather the testator's daughter as the wife of Sir William Forbes, there being a preference of the male issue descending from that *stirps* over the female; but, subject to that preference, a simple gift first to the male issue of that *stirps* and then to the female. On the other hand, the construction which the Court below has adopted and which I think is hardly now contested as far as the division of the *stirps* is concerned (I mean as far as the construction of the words "heirs-male procreated" and "heirs-female procreated" are concerned) make several *stirpes* each to take successively, the one after the other.

Now, with which of these two schemes of the will is this declaratory clause more consistent? Your Lordships will see that the declaratory clause contemplates the rule to be followed for female succession, the succession of daughters always, "so often as the succession through the whole course thereof shall devolve upon daughters"--that rule being that the daughters shall take with reference to the latest taker, I mean with reference to the

last state of possession by the heir from whom that daughter takes—that, for instance, if there should be a daughter of the last taker in male line, that daughter should succeed before the daughter of any former taker in the male line. I think that that rule, fairly understood, will also give a clue to the mode of succession if that daughter's line were exhausted ; or if the last taker in the male line died without any issue at all, then you are still to look to the last previous possessor, and the female taker is to take in order of possession reversed—that is that the heir representative of the family in the preferred male line transmits to his own daughter as his successor, and if that line fails you then go back to the next preceding male heir in the preferred male line, and his daughter will take in preference to any former ones. That is a mode of succession at least more consistent with the division of the whole into *stirpes* and the succession of the females of each *stirps* after the failure of the males of that *stirps*, than the notion that all the males of a single *stirps* are to be completely exhausted and then all the females are to come in.

However, my Lords, I agree entirely with what was said, that after all from these subsidiary clauses illustration rather than proof is to be derived. All that I venture to say is, that taken in the manner in which they have been taken by the Court below, the result is something consistent with the ordinary scheme of a family settlement in strict entail, where you have a division like this into a certain number of *stirpes*, and being so, I think that the opposite view is very much less consistent with the ordinary scheme of will. Therefore I think the antecedent probability concurs with the conclusion at which I arrived from the words themselves, and particularly from the governing word "respectively" as found in the earlier part of the instrument. On the whole, I advise and move your Lordships to affirm these interlocutors, and to dismiss this appeal with costs.

LORD CHELMSFORD—My Lords, I must confess that I have felt considerable doubt in the course of the argument as to the proper construction of this deed of entail of 1811, nor can I say that that doubt has been entirely removed; but considering that we have here the unanimous judgment of seven learned Judges in the Court of Session, which judgment is concurred in by the opinion of my two noble and learned friends, I feel that my doubt is unfounded, or at all events that it ought to yield to such high authority. I therefore agree that these interlocutors should be affirmed.

LORD COLONSAY—My Lords, I concur entirely in the opinion which has been expressed by my noble and learned friend on the woolsack. The case is a very simple one, and cannot be illustrated by more statement than has been given by him, and by two at least of the learned Judges in the Court below. It appears to me that the clause of the deed of entail makes each of the sons of the marriage a *stirps*, and that it says, with regard to those sons respectively—that is as to each *stirps*—that the descent shall be to the heir-male of his body, whom failing, to the heirs whatsoever of the body of such sons. That seems to me to decide the whole case. I think that is the natural reading of the words. I think it is consistent with the ordinary course of descent in such cases, and, on the whole, reconciles the subsequent clause better than if we took the opposite construction. I have nothing more to add.

The DEAN OF FACULTY—My Lords, perhaps you will allow me to make an observation with reference to the costs. I shall not say anything of course as to the costs of the principal appeal, but there was an objection taken to the competency of the petition of appeal presented by my clients, on the ground that their application was too late. The same proceeding took place in this House in the case of *Kerr* v. *Keith*, on the 10th of June 1842, and there the same adjournment of the objection from the Appeal Committee to the House took place as in this case—the point was argued on either side, and the result was, that while the judgment was affirmed with costs, your Lordships' House made the following order with regard to the objection to the competency of the appeal, and the costs of it—"And it is also further ordered that the said petition to dismiss the original appeal as incompetent be, and is hereby, refused." That I presume, unless your Lordships hold that the objection was withdrawn at the bar in this case, would require to be repeated here, "and that the said respondent, William Keith" (that was the party who took the objection to the competency of the appeal), "do pay or cause to be paid to the said appellant in the said original appeal the costs incurred in respect of the case and proceedings in this House arising out of the said petition, the amount thereof to be certified by the clerk-assistant." Now, the only difference between that case and the present is this—that in that case the validity of the objection was argued at the bar of the House, whereas in the present case it was not argued. I do not know that that makes much difference.

LORD CHELMSFORD—It rather makes it stronger in your favour.

DEAN OF FACULTY—Yes, I think so, because it implies that it was scarcely an arguable point. We have been put to some expense in consequence of this objection being taken, and the precedent in the case of *Kerr* v. *Keith* shows the way in which your Lordships' House has disposed of a similar objection before.

LORD CHELMSFORD—I think, my Lords, that the appellants ought to have the costs of the opposition to their appeal on the point of competency. Your Lordships may recollect that the Lord Advocate, being pressed by my noble and learned friend on the woolsack, said that he did not mean to insist upon the objection. This is a stronger case, as it appears to me, than that cited by the Dean of Faculty.

LORD ADVOCATE—Perhaps I may be permitted to say, as we are the respondents upon this application, that I should not, after the motion which has just been made, or the opinion which has just been expressed by the noble and learned Lord, say a word upon the substance of the question of our being subjected to these costs, but I presume the costs will only be the costs of the answer to the petition.

LORD CHELMSFORD—Your objection before the Appeal Committee was that the appeal was not in time.

LORD ADVOCATE—Yes, the appeal was not in time.

LORD CHELMSFORD—I think the appellant ought to have all the costs occasioned by your opposition on that point.

LORD ADVOCATE—That would be merely the attendance of the agent. The appeal was presented after a lapse of close upon five years, and it was presented by a party who is in precisely the same position now as he was throughout in the Court of Session. A petition against the competency of the appeal was presented, and an agent appeared before the Appeal Committee, to whom it was remitted, and the Appeal Committee reserved the question for the consideration of this House.

LORD CHANCELLOR—I think, my Lords, it would be much better to use words which do not anticipate the function of the taxation of costs, but which express the principle upon which the House proceeds; and, with that view, I propose to your Lordships these words—"the costs occasioned by the presentation of a petition against the competency of the appeal."

Counsel for Appellant—Dean of Faculty (Gordon) Q.C., and J Anderson, Q.C. Agents—Adam & Sang, W.S., and W. Robertson, Westminster.

Counsel for Respondent — Lord Advocate (Young), Q.C., Solicitor-General (Jessel), and Lee. Agents—Mackenzie & Kermack, W.S., and Loch & Maclaurin, Westminster.

COURT OF SESSION.

Tuesdays, June 3 and 10.

SECOND DIVISION.

DUKE OF BUCCLEUCH AND OTHERS *v.* COWAN AND OTHERS.

(*Ante*, vol. ii. 253; vol. iii. 61 and 138; vol. iv. 190; 2 Macph. 653; 4 Macph. 475; 5 Macph. 214 and 1054.)

River—Pollution—Nuisance—Motion for Decree—Declaratory Conclusions—Interdict.

The pursuers, proprietors of lands on the banks of a private stream, holding the verdict of a jury in their favour, moved for decree in terms of the conclusions of the summons of declarator against the defenders, paper manufacturers on the banks of the stream, to have the water transmitted to them in a state fit for primary purposes; and also for interdict. — *Held* (1) that they were entitled to the declarator; and (2) that interdict must also be granted—the defenders having stated (after a short delay for consideration) that they had no proposal to make by which the nuisance complained of might be abated.

This case has been in various forms before the Court of Session since 1841. The pursuers are the Duke of Buccleuch, Lord Melville, and Sir W. Drummond, riparian proprietors on the North Esk, and the defenders are proprietors of mills on the banks of that stream. A jury trial of eleven days' duration commenced on July 30, 1866, and the issues sent to the special jury then empannelled were as follows:—

"1. Whether, between 1st January 1835 and 1st October 1853, the defenders, the first-mentioned firm of Alexander Cowan & Sons, did, by discharging refuse or impure matter at or near their mills of Bank Mill, Valleyfield Mill, and Low Mill, or any of them, pollute the water of the stream or river called the North Esk, to the nuisance of the pursuers or their authors, as proprietors of their respective lands aforesaid, or of one or more of them?

"2. Whether, between 1st October 1853 and 20th May 1864, the defenders Alexander Cowan & Sons, the present occupants of said mills, did, by discharging refuse or impure matter at or near their said mills, or any of them, pollute the water of the said stream or river, to the nuisance of the pursuers or their authors, as proprietors of their respective lands aforesaid, or of one or more of them?

"3. Whether, between 1st January 1835 and 15th May 1856, the defenders, the first-mentioned firm of William Somerville & Son, did, by discharging refuse or impure matter at or near their mill called Dalmore Mill, pollute the water of the said stream or river, to the nuisance of the pursuers or their authors, as proprietors of their respective lands aforesaid, or of one or more of them?

"4. Whether, between 15th May 1856 and 20th May 1864, the defenders William Somerville & Son, the present occupants of said Dalmore Mill, did, by discharging refuse or impure matter at or near their said mill, pollute the water of the said stream or river, to the nuisance of the pursuers or their authors, as proprietors of their respective lands aforesaid, or of one or more of them?

"5. Whether, between 1st January 1835 and 1st July 1856, the defenders, the first-mentioned firm of Alexander Annandale & Son, did, by discharging refuse or impure matter at or near their mills called Polton Papermills, pollute the water of the said stream or river, to the nuisance of the pursuers the Duke of Buccleuch and Lord Melville, or their authors, as proprietors of their respective lands aforesaid, or of either of them?

"6. Whether, between 1st July 1856 and 20th May 1864, the defenders Alexander Annandale & Son, the present occupants of said Polton Papermills, did, by discharging refuse or impure matter at or near their said mills, pollute the water of the said stream or river, to the nuisance of the pursuers the Duke of Buccleuch and Lord Melville, or their authors, as proprietors of their respective lands aforesaid, or of either of them?

"7. Whether, between 15th May 1856 and 20th May 1864, the defenders James Brown & Company did, by discharging refuse or impure matter at or near their mill called Esk Mill, pollute the water of the said stream or river, to the nuisance of the pursuers or their authors, as proprietors of their respective lands aforesaid, or of one or more of them?

"8. Whether, between 1st May 1848 and 20th May 1864, the defender Archibald Fullerton Somerville did, by discharging refuse or impure matter at or near his mill called Kevock Mill, pollute the water of the said stream or river, to the nuisance of the pursuers the Duke of Buccleuch and Lord Melville, or their authors, as proprietors of their respective lands aforesaid, or of either of them?

"9. Whether, between 1st January 1843 and 20th May 1864, the defenders William Tod & Son