provisions for their widows under the Aberdeen Act, or under the powers given by the entail, which are similar to those of the Aberdeen Act. I am not satisfied with that view. The clause of relief in the entail applies to "all my debts and obligations." I am of opinion, that these annuities constitute a debt in the ordinary sense of the word. They are a debt, in which the widow is the creditor, and the representatives of Mr. Mackintosh are the debtors, and for payment of which the estate of Lamancha may be attached, unless the relief sought be given. But whatever ingenious criticism may be made on the word "debts," it is impossible to escape the generality of the word "obligations." Neither can the obligation be assimilated to a provision under the Aberdeen Act. It does not profess to be anything of the kind. It has none of the requisite conditions or limitations as to the amount or liability or mode of recovery. The only similarity is, that it is a provision for a widow. Nor does the circumstance, that it is an obligation for an annuity, and not for a capital sum, appear to me to raise any practical difficulty. The clause in the marriage contract provides for and sufficiently meets any difficulty of that kind that might have been raised. It reserves the power to relieve the lands, and prescribes the mode. The only question is as to the evidence of the obligation, and I would here again observe, that at the very moment of imposing the burden on Lamancha, Mr. Mackintosh had in contemplation the removal of it by himself or his representatives, and must have intended the relief to come, not out of Lamancha, but out of his own other means, that is to say, out of the general estate. The respondents say, that they cannot purchase an annuity, as no direct power to do so is conferred on them by the trust deed. But if I am right in holding, that the clause of relief in the entail was intended to attach to the general estate, it follows, that the power reserved in the marriage contract may be exercised by the respondents, as the trustees of that estate. They also say, that they have no interest in purchasing an annuity, which would be an expensive proceeding. The same observation would apply to the appellant. But if the obligation to relieve Lamancha has devolved on the general estate, the respondents must give the relief in the mode provided, unless they can find a less expensive and equally effectual mode of doing so.

For these reasons, I am of opinion that the interlocutor of the Court of Session of date 2d March 1870, in so far as appealed from, should be reversed, and that judgment should be pronounced in terms of the third of the alternative forms set forth in the Joint Case, in so far as regards the subject matter of this appeal. If your Lordships concur in the view that I have expressed, it may be a question whether there ought not to be a remit to the Court, because a decernitor may be required, upon which proceedings may be taken. Perhaps the parties will consider that.

LORD CHELMSFORD.—My Lords, I agree in the motion that has been made.

Lord Advocate (for the appellant).—I think it is quite proper that there should be a remit.

LORD COLONSAY.—Then the judgment will be in the terms I have stated. There will be a remit to the Court to do whatever is necessary.

Lord Advocate.—I presume your Lordships have intentionally abstained from saying anything about costs?

LORD COLONSAY.—Yes.

Interlocutor of 2d March 1870, *in so far as appealed from, reversed; and judgment pronounced in terms of the third of the alternative forms set forth in the Joint Cases, in so far as regards the subject matter of the appeal: Cause remitted.*

Appellant's Agents, T. and R. B. Ranken, W.S.; Tatham and Proctor, London; *Respondents' Agents*, Alex. Howe, W.S.; Loch and Maclaurin, Westminster.

MAY 19, 1873.

WILLIAM D. R. SCOTT GLENDONWYN, *Appellant, v.* SIR ROBERT GLENDONWYN GORDON, Bart., *Respondent.*

Entail—Fetters—Institute—General Disposition—Special Destination—Extrinsic evidence to explain Will—*X. was institute under a deed of entail of the lands of C., but the fetters did not bind her. She was also owner in fee of an estate of P. In her general settlement she conveyed all her estate, heritable and moveable, and particularly the estate of P., to G., but nothing specially was mentioned as to the lands of C.*

HELD (affirming judgment), *That it was competent to shew by the actings of X. in reference to the estate of C., that she believed she was prevented from disposing of that estate, or at all*

events did not include that estate in her general settlement, and evidence held sufficient accordingly to shew, that it did not pass by the settlement.[1]

This was an appeal from a decision of the First Division. The action was raised by the appellant to have it declared, that the late Miss Xaveria Glendonwyn held the lands of Cowgarth, etc., in Kirkcudbright and Dumfries in fee simple, and free from the fetters of the entail under which her title to the said lands had been made up; and second, that the said lands were conveyed to the appellant's father by Miss Glendonwyn's general disposition and settlement, and were now vested in the appellant as his father's heir. The late Miss Glendonwyn died seven years before the action was raised, and the respondent had meantime been in possession under the entail. The entail was executed by Miss Glendonwyn's uncle, Mr. Maxwell of Milnehead, in 1821, and she was the institute under the entail. The appellant claimed under her general disposition and settlement, which was in general terms, and the main question was, whether this general disposition evacuated the prior special destination in the deed of entail. The First Division held that it did not.

The following were the appellant's reasons stated in his *printed case* for reversing the judgments :—1. Because the prohibitions and clauses irritant and resolutive in the entail were not directed against Xaveria Glendonwyn, the institute, and she was therefore entitled to dispose of the estate as absolute fiar. 2. Because the clause of general conveyance in Xaveria Glendonwyn's disposition and settlement comprehended in its terms all her property, and no intention to exclude any part of it appearing in that disposition and settlement, the Cowgarth estate was necessarily thereby conveyed to the late Frederick James Scott, the appellant's father. 3. Because, in construing Xaveria Glendonwyn's settlement, it is incompetent and inadmissible to have recourse to extraneous evidence for the purpose of ascertaining the intention of the testatrix. 4. Because the evidence founded on by the Court below, even if admissible, is not sufficient for the purpose for which it was adduced, namely, to defeat the intention of the testatrix, as it is expressed in her settlement.

The respondent stated the following reasons for maintaining the judgment :—1. Because the fetters of the deed of entail applied to Miss Xaveria Glendonwyn equally with the other heirs of entail, and she had therefore no power to convey the estate in question by her general settlement. 2. Because the said Xaveria Glendonwyn had no power to convey the said estate, or to evacuate the destination contained in the said entail, in respect that she had not completed any valid title to the said estate by service. 3. Because, assuming that Miss Xaveria was not subject to the said fetters, the said entail yet constituted a subsisting special destination; and such a destination is not presumed to be evacuated by a general conveyance. 4. Because, in any view, the effect of a general conveyance in evacuating a special destination is a question of intention, and it is proved by competent evidence, that Miss Xaveria Glendonwyn did not intend her general settlement to convey the said entailed estate.

The *Solicitor-General* (Jessel), and *Pearson* Q.C., for the appellant.—The Court below was wrong. Xaveria was the institute under the entail, and the prohibitions against selling did not affect her. She was thus an absolute fiar. That the institute is not bound by the fetters of entail unless expressly named or described is well settled—*Erskines* v. *Hay*, M. 4406; *Edmonstone* v. *Edmonstone*, M. 4409; 15,461; 2 Paton, 255; *Logan* v. *Logan*, M'L. & R. 790; *Thoms* v. *Thoms*, 6 Macph. 704. If Xaveria had power to convey her estate of Cowgarth, then the words of her disposition and settlement were amply sufficient to include it. It is not necessary in a deed which uses general words to specify the particulars of one's property—*Thoms* v. *Thoms*, 6 Macph. 704. Speculations as to whether the testator had or had not in her mind at the time to include a particular estate are irrelevant and inadmissible. The mere fact of a particular estate being held under a special destination is immaterial, for the subsequent general disposition will evacuate it—*Leitch* v. *Leitch*, 3 W. S. 366; *Hyslop* v. *Maxwell*, 12 S. 413; *Thoms* v. *Thoms*, 6 Macph. 705. It is true, that an exception may be established if the testator had already by a prior deed destined a particular estate to other parties, or where the subsequent deed clearly uses the general words in a restricted or limited sense. But there is no foundation for either of those exceptions here; and the cases forming exceptions all turn on special circumstances, as in *Hepburn* v. *Hepburn*, 22 D. 730; *Collow's Trustees* v. *Connel*, 4 Macph, 465. If the general disposition is clear in its language, and there is nothing *ex facie* to cut down the generality of words, then it is incompetent to resort to extrinsic matters in order to restrict it. This would be to destroy, by vague speculations and fancies, the meaning and effect of a will which is presumed to embody all that the testator wishes to say—Wigram on Wills, 6-8. The two cases of *Farquharson* v. *Farquharson*, M. 2260; 6 Paton, 724; and *Campbell* v. *Campbell*, M. 14,855; 1 Paton, 343; relied on for admitting extrinsic evidence, turned on specialties not applicable to this case.

---

[1] See previous report 8 Macph. 1075; 42 Sc. Jur. 630. S. C. L. R. 2 Sc. Ap. 317; 11 Macph. H. L. 33; 45 Sc. Jur. 183.

Lord Advocate and *Asher*, for the respondent.—The fetters of the entail did extend to Xaveria, for she was properly an heir and not an institute or disponee—*Carleton* v. *Gordon*, M. 14,368; *Peacock* v. *Glen*, 4 S. 742. At least she was an heir within the meaning of the deed of entail. But whether or no, she did not by her general settlement convey, or intend to convey, the estate of Cowgarth. The general rule is, that a general conveyance is not presumed to include subjects specially destined, or to evacuate a subsisting special destination—*Traquair* v. *Blushiels*, M. 3591; *Collow's Trustees* v. *Connel*, 4 Macph. 465; *Thoms* v. *Thoms*, 6 Macph. 704. Though in *Thoms* v. *Thoms*, the Judges differed, and it was intended to appeal, the case was compromised, and the point has not been recently before the House. Besides, where the words of a general settlement are general, it is competent by extrinsic evidence to restrict the generality of the words such as by probative deeds, or dealings of the testator with the particular estate—Bell's Pr. § 524; *Logans* v. *Wright*, 5 W. S. 246. It is material, for example, to ascertain whether the testatrix believed she could deal with the particular estate—*Cranston* v. *Brown*, M. 8508; *Cattos* v. *Gordon*, M. 8076. The actings of Xaveria clearly shew, that she believed the estate of Cowgarth had been already beyond her power to dispose of, or at least that she did not intend to disturb the succession as to it.

Cur. adv. vult.

LORD COLONSAY.—My Lords, in the year 1809 William Glendonwyn sold his estate of Parton to William Scott, who was the husband of Mr. Glendonwyn's youngest daughter. The affairs of William Scott having become embarrassed, the estate of Parton was in 1819 judicially exposed to sale in three lots. One of these, called the Cowgarth lot, was purchased by Frederick Maxwell, who was married to a sister of William Glendonwyn; another, called the Parton Place lot, was purchased by Xaveria Glendonwyn, who was the second daughter of William Glendonwyn; she also acquired the third lot, called the Boreland lot. On the 5th March 1821, Frederick Maxwell executed a deed of entail of the Cowgarth lot, and other lands belonging to to him, forming together the Cowgarth estate. By that deed he disponed the estate to his wife in liferent, and after her decease to Xaveria Glendonwyn and the heirs whatsoever of her body; whom failing, to the second son of Sir James Gordon of Letterfourie by his then spouse, who was the elder sister of Xaveria, and the heirs whatsoever of his body; whom failing, to the immediate younger sons of the said Sir James Gordon, by his said spouse, in their order of seniority, and the respective heirs whatsoever of their bodies; whom failing, to the daughters of Sir James and his said spouse, and the heirs whatsoever of their bodies; whom failing, to Ismene Glendonwyn, spouse of William Scott, formerly of Parton, and the heirs whatsoever of her body, whom failing, to certain other substitutes.

In 1823 Frederick Maxwell died, and in February 1824 the entail was recorded in the Register of Tailzies on petition by his widow, the liferentrix, who possessed the estate till 1835 when she died, and Xaveria, the institute, entered into possession, and in March 1842 completed her feudal title by taking infeftment on the deed of entail. She continued to possess the estate on that title until her death in October 1858.

In May 1859 the respondent, who was the fourth son of the foresaid Sir James Gordon, expede a special service as nearest and lawful heir of tailzie and provision in special to the deceased Xaveria in the said estate of Cowgarth. He entered into possession, and he continues to possess that estate as being heir of entail under the deed of 1821.

Xaveria left a disposition and settlement of date 22d February 1834, whereby she disponed to and in favour of her nephew Frederick James Scott, and his heirs and assignees whomsoever, all and sundry lands and heritages, debts, goods, gear, sums of money and effects, and in general her whole means and estate of whatever nature then belonging or which should belong to her at the time of her death, "and particularly, without prejudice to the said generality," "all and whole my estate of Parton described in the title deeds as following," viz.: then follows a description of the Parton Place lot, but no mention is made of the Cowgarth estate. In virtue of that deed Frederick James Scott entered into possession of the lands described in his aunt's settlement, and assumed the name of Glendonwyn. He died in January 1860 intestate, leaving an only child, the appellant, who was then in pupillarity.

In December 1860 the estates of the said Frederick James Scott Glendonwyn were sequestrated, and a trustee was appointed. Funds having been realized sufficient to satisfy the creditors, the sequestrated estates, so far as not realized by the trustee for payment of the debts, were in August 1862 restored to the appellant as heir of his father. It does not appear that in these proceedings any mention was made of the estate of Cowgarth, but there can be no doubt that whatever right the appellant's father had to that estate now belongs to the appellant.

In May 1865 the appellant, with the consent of his curators, raised the present action of declarator and reduction against the respondent and certain other persons, substitutes called to the succession by the entail of 1821. The object of the action is to have it declared, that the fetters of the entail of 1821 did not apply to Xaveria, the institute; that she was therefore unlimited owner, having full power to dispose of the estate of Cowgarth, and that she did dispose

of it effectually by her disposition and settlement in favour of the appellant's father. Reductive conclusions are added for the purpose of setting aside the title made up by the respondent if that be necessary. There are also subsidiary conclusions for accounting and payment.

The grounds of defence maintained against the declaratory conclusions are in substance, 1st, That the fetters of the entail were effectually directed against Xaveria, and prevented her from disponing or conveying the estate; 2d, That the deed of settlement executed by her was not intended to convey, and did not effectually convey, the entailed lands and estate to the disponee therein named.

As regards the first of these grounds of defence, I am of opinion, that it cannot be sustained. Xaveria was the institute or direct disponee as distinguished from the "heirs of entail and substitutes." Ever since the case of *Edmonstone* v. *Edmonstone*, decided in the House of Lords, 15th April 1771, it has been held as settled, that where the fettering clauses in a strict entail are directed against the *heirs of entail* merely, these terms do not include the institute, as he is a disponee, and not an heir of entail, and ought not by implication from other parts of the deed of entail to be construed within the fetters laid only on the heirs of entail. In the present case the fetters, that is to say, the prohibitory, irritant, and resolutive clauses, are in terms laid on the "heirs of entail and substitutes" merely; and consequently the rule established in the case of *Edmonstone* applies.

It is true, that in other parts of the deed, such as the obligation to infeft and the procuratory of resignation and the precept of sasine, we find such expressions as "the said Xaveria Glendonwyn and the *other* heirs of tailzie above named," or "and the *other* heirs and substitutes above mentioned," from which it has been argued, that, according to a sound construction of the deed, Xaveria was to be regarded as one of the heirs of the entail, and consequently not exempt from the fetters which are laid on the whole heirs of entail. But, in the first place, the clauses referred to are not any of the fettering clauses; they are merely part of the machinery provided for enabling any of the parties favoured by the deed to take infeftment, and in the second place, to hold, that such loose expressions could have the effect of converting the institute, who is a direct disponee, into an heir of entail or substitute, or of extending to her by inference the fetters, which, according to the terms of the fettering clauses themselves, apply only to the heirs of entail or substitutes, would be to do violence to the principle of the judgment of the House of Lords in the case of *Edmonstone* and of several cases subsequently decided on the same principle.

The second ground of defence raises a question of a totally different kind, and as to which we have not so much direct guidance from authority. It requires very careful consideration. It assumes, that Xaveria was not under the fetters of the entail, and consequently had full power over the estate of Cowgarth, and could give it to whom she pleased. Did she by the general words in her settlement of 1834 give to Frederick James Scott a right to that estate, to the exclusion of the heir of the existing destination of the deed of entail, by which she as institute got and held the estate? Was that destination thereby evacuated and the estate of Cowgarth put into a different line of descent? That depends on the effect to be given to a clause of general disposition occurring in such a deed of settlement, when brought into competition with an earlier deed containing a special destination of a particular estate, and that again may depend more or less on the circumstances of the case, the rule of the law of Scotland in regard to heritable property being, that a destination once made is not easily presumed to be altered or innovated.

There are two classes of cases in which the question may arise. One class of cases is, where a person having made a deed containing a special destination of a particular estate, or having chosen to take a conveyance of an estate to himself under a special destination, makes a disposition and settlement in general terms of his whole means and estate heritable and moveable, with a different destination, but without expressly revoking or altering the first deed, or making mention of it, or of the estate with which it dealt. Of this class there are several cases reported mostly under the head "Presumption," some of which are referred to in the papers in this case. I think that out of the whole series of cases reported during the last two centuries or more, the following inferences are deducible: 1st, That in determining what effect should be given to the words of general disposition, the question has always been treated as one of presumption or presumed intention. 2d, That a general disposition *mortis causâ* does not derogate from a prior special destination, unless it be made clear that it was intended so to do. 3d, That in dealing with such cases the Court has taken into consideration circumstances calculated to throw light on the intention or purpose of the testator, whether found within the deed or collected from external sources. I may notice that in this class of cases there is this element, that the fact of the prior deed having been found in the repositories of the deceased without having been expressly revoked or altered, may be regarded as favouring a presumption, that, although the general disposition was expressed in terms which, according to their natural and ordinary meaning, would comprehend the particular property which formed the subject of the prior deed, such was not the purpose for which they were used, or the effect the testator intended should be given to them; but, on the contrary, that notwithstanding the unlimited terms of the later general disposition, his intention was, that the prior deed should nevertheless subsist and be taken as part of his

settlement to the effect of regulating the succession to the particular property therein contained. But it does not appear, that the attention of the Court was confined to that view as necessarily conclusive, or that external circumstances were excluded from consideration for the purpose of rebutting or supporting the legal presumption, that the general disposition was not intended to derogate from the prior destination.

Another class of cases is that to which the present may be said to belong, viz. where the person who made the general disposition and settlement was not the maker of the prior deed containing the special destination of the particular estate, but had unlimited power to evacuate the destination and deal with the estate at pleasure. The cases of this class are less numerous than those of the former class, probably because parties intending to evacuate the destination in the deed under which the estate had come to them adopted the more appropriate and unquestionable mode of doing so. But in this class also the cases that have occurred have been treated as questions of presumption or presumed intention. There has indeed of late been difference of opinion as to whether the mere existence of the previous destination unaltered does, without aid from other circumstances, raise in this class of cases a presumption, that the general words were not intended to apply to the particular estate so previously destined. But there does not appear ever to have been any difference of opinion as to the competency of resorting to external circumstances, going to shew, that the general disposition, notwithstanding the comprehensiveness of the language, was not meant or intended to displace the prior special destination.

In the case of *Campbell* v. *Campbell*, decided in the Court of Session in 1740, and in the House of Lords in 1743, (1 Paton, 343,) two questions were raised. Both are reported in the 2d volume of Lord Kames's remarkable decisions but under different heads, one under the head "Substitute and conditional Institute," the other under the head "Presumption." The latter is that which relates to the question raised in the present case, viz. the effect to be given to a general disposition in competition with a special destination by the party from whom the property came to the maker of the general disposition. The Court of Session decided, that the general disposition did not destroy the special destination, and that judgment was affirmed by the House of Lords. One ground appears to have been, that the general disposition was made before the maker of it had right to the estate in question, and that he died before he could have been aware that such right had devolved upon him. It was not however disputed, that the words of the general disposition were sufficient to comprehend the estate, and must have carried it, if there had not been a special destination of it. The estate there in question consisted of moveable property, and it appears to have been suggested about half a century afterwards, that the judgment may have proceeded on the ground, that the right to the moveables had not vested in the maker of the general disposition, as he had not expede confirmation. But with all respect for the quarter from whence that suggestion is said to have come, I cannot accept it as satisfactory. It is not borne out by the report of the case or the printed papers; on the contrary, it appears from these, that the right was assumed to have vested. Nor is that wonderful, seeing that the will which contained the destination was itself a general settlement, and at that time or until 1784, it had not been decided, that a right to moveables under a general disposition required confirmation any more than a special legacy. The second reason in the paper for the respondent in the case of *Campbell* brings out the point that was really in controversy, and was decided against the general disponee in this branch of the case.

The point again came up in the case of *Farquharson*, 6 Paton, 724, and there also the decision was against the party who claimed under the general disposition. The words of the general disposition were, as indeed they always are, sufficiently comprehensive to embrace everything if so intended. But it was maintained, that they were not intended to apply to the particular estates in question, and in support of that contention various pregnant external circumstances, including actings of the party himself with reference to the estates in question, and other estates, were founded on as sufficient to satisfy the Court, that the general words should not be read in the broad sense in which perhaps they might have been read, if there had been no such light to guide the Court.

The point is said to have come up again in the case of *Leitch*, 3 W. S. 366. But that it really did so has been questioned by high authority, and upon grounds that have not been met. The circumstances of the case were somewhat involved, and the main controversy was certainly not upon the point now under consideration, but upon the question whether any right in the fee of the estate of Kilmerdinny vested in Andrew Leitch during the incumbency of a liferentrix whom he had predeceased. The estate was held under a trust deed for behoof of a liferentrix and certain parties successive conditional institutes, in whose favour the trustees were to denude in certain events. The trust deed was so peculiar and so inartistically framed, that one of the Judges declared he had never seen the like of it. On the part of the general disponees of Andrew Leitch it was contended, that Andrew was the institute for whose behoof the trustees held the estate, and in whom the fee had vested, although they could not give him the beneficial enjoyment during the incumbency of the liferentrix. On the other hand, it was keenly contended, that no right had vested in Andrew, and consequently that his general disposition

could not confer any right on his disponees. After much discussion, and much difference of opinion on the Bench, it was decided that a right to the fee had vested in Andrew. That point having been settled, judgment was given in favour of his disponees, and apparently without further contention or observation in the Court below. It does, however, appear that in the House of Lords, besides the main subject of controversy already mentioned, a secondary reason of appeal stated was, that "Andrew's general conveyance, not referring specifically to the lands of Kilmerdinny, cannot exclude the subsequent substitution in John's disposition of that estate." It also appears that the point so stated was not in that case thought to be deserving of much attention.

It has, however, been observed by Judges of high authority, that the circumstances of that case were not such as would have admitted of the application of the principle on which alone such a plea could have been maintained, inasmuch as the import of the direction in the trust deed was to create not an entail or substitution of heirs, but merely a series of conditional institutes; that the fee which was held to have vested in Andrew was an unqualified fee with no substitution in favour of any other person, but only a conditional institution; that the succession having come to him he had a *jus crediti* which he could assign, or which if he had died intestate would have gone to his own heirs at law, and not to any conditional institute under the deed. This may well account for the zeal with which the question of vesting was contested, and the subsequent apparent indifference or disregard with which the second plea was treated, notwithstanding the previous cases in which it had been successively maintained.

In other respects that case differed from the present. In the first place, Andrew Leitch had no feudal investiture in the estate; he had a personal right, a *jus crediti*, entitling him to require the trustees of John to denude in his favour in terms of the trust deed. The appropriate mode of transmitting that species of right was by assignation, or disposition and assignation. He could not have granted warrant for feudal investiture. Secondly, there was no suggestion of any circumstance to indicate, that the words of the general disposition were not intended to be read and applied in their most comprehensive sense.

The recent case of *Thoms* v. *Thoms*, in the Court of Session referred to by the appellant, is the most favourable to his view, and it comes nearest to the present case in this respect, that the maker of the general disposition was the institute in a deed of entail, the fetters of which did not apply to him. That case was fully considered by the whole Court, and the judgment pronounced in accordance with the views of a large majority gave effect to the general disposition. That judgment appears to have proceeded on the ground, that in this class of cases the comprehensive terms of the general disposition were to be held presumably as superseding or displacing the previous destination in the absence of any circumstance leading satisfactorily to the conclusion, that they were not so intended. No such circumstances, either within the general disposition or without it were substantiated in the case of *Thoms*. The substitute heir of entail limited his proof to the deeds themselves and to a letter which he tendered, but which does not appear to have been admitted, or at all conclusive if it had been admissible. But even the Judges composing the majority recognized as a general principle, that each case is circumstantial and "ruled by its own specialties" and one of them illustrated the principle by reference to the case of *Farquharson*, already noticed. That principle was afterwards acted upon in the present case by three of the Judges who composed the majority in the case of *Thoms*.

The case of *Thoms* is, I believe, the first case in which it has been held, that a general disposition was to be presumed to be in derogation of a destination by substitution contained in the deed under which the particular estate had been acquired and possessed, unless the case of *Leitch* was a decision to that effect, which I do not think it was. The judgment in the case of *Thoms* was not appealed, and is not binding on this House, and I may, without disrespect to the learned Judges who composed the majority in that case, be permitted to doubt the soundness of the proposition, that in this class of cases a general disposition is to be held presumably as superseding or displacing the previous destination; without at present discussing that debateable proposition, it not being in my view of this case necessary that I should do so, but guarding against being held as assenting to it, I go on to observe, that the judgment of the majority in the case of *Thoms* was given subject to this necessary qualification, that reference might be made to circumstances outside the deed to rebut the presumption, and that each case is circumstantial, and to be ruled by its own specialties. In the case of *Thoms* there were no circumstances or specialties, and judgment went in favour of the general disponee. The present case is in that respect different; there are circumstances and specialties which have been held sufficient to rebut the supposed presumption, and judgment has gone against the general disponee. In that view the two decisions are reconcilable, but upon a principle which makes it necessary to consider the circumstances to which effect has been given.

In my opinion the circumstances in this case that may be legitimately referred to are quite sufficient to rebut the supposed presumption, and to shew, that the general clause in Xaveria's disposition was not meant to include the estate of Cowgarth, or to disturb the course of succession prescribed by the entail of that estate. I have no doubt, that for this purpose her mode

of dealing with the estate of Cowgarth may be legitimately referred to, and I think that in that alone, apart from everything else, we have enough to shew clearly, that it was not her meaning or intention, that the general clause should apply to that estate. In the first place, she not only did not convey it formally as she did the other two lots, but she did not even mention it by name, in any *mortis causâ* deed, as she might naturally have been expected to do in reference to an estate of so much importance. That is itself significant, but, secondly, after she had made her general settlement, and down to within a comparatively short period of her death, she in various matters of importance in formal deeds dealt with that estate as one which, in her view and according to her own understanding of her settlements, was not to go to her general disponee, but was to continue under the existing destination in the line of descent pointed out by the entail. That I hold to be beyond question, and there is no reason to suppose, or ground for conjecture, that her mind ever underwent any change on that subject. Whether she believed she had no power to take the estate out of the entail, or believed that she had such power, but chose rather that it should remain within the entail, and dealt with it on that footing, is, in my opinion, of little moment, for in either view it is clear to me, that she could not have intended that the general clause of his disposition should apply to it, but must have intended the reverse. Therefore, even if it should be thought that in this class of cases the presumption is in favour of the general disponee, I think that the circumstances referred to are quite sufficient in this particular case to rebut the presumption.

The respondent has referred to various letters pointing in the same direction, written by Xaveria relative to the management of the estate after the date of her general settlement. I am not prepared to say, that in a question of this kind no such letter can be admissible, but I think it unnecessary to go into that matter, or into an examination of the several letters, to see, whether any of them are admissible, as I am of opinion that the case of the respondents is made out irrespective of the letters.

The matter of family relations has also been referred to, but I do not attach much importance to it in this case. Its features are not so distinctively marked as to impress me strongly. All that I think can be said of it is, that it harmonizes with the rest of the case.

I am of opinion that the appeal should be dismissed.

LORD CHANCELLLOR SELBORNE.—My Lords, if the rule as to the construction of testamentary deeds is the same in Scotland as in England, viz. that the intention of the testator is to be collected solely from the words he has used in the instrument itself, extrinsic evidence being inadmissible except for the purpose of ascertaining the subjects of which those words are properly descriptive, or the subjects to which, if the words are ambiguous or inaccurate, they may appear (after proof of the facts shewing their ambiguity) to be most properly applicable, I must confess, that I have very great difficulty in understanding how the operation of general words purporting to pass everything which the settler might be entitled to at the time of his death, can be either enlarged or limited by extrinsic evidence tending merely to shew, that the settler did or did not know or believe that he had a disposing power over some particular property over which he had such power, or (whether knowing or not that he had such power) that he did or did not actually intend to pass that property by those general words.

I am bound, however, to acknowledge that evidence of this kind appears to have been received and to have been more or less relied on by the Court of Session in the two cases which came to the House in Lord Hardwicke's time, *Campbell* v. *Campbell*, and *Farquharson;* and that it was assumed by most (if not all) of the Judges of that Court who lately decided *Thoms' case*, that such evidence was admissible, and might (in a case like the present) be decisive. All the authorities cited in the argument of this case are consistent with each other, if this ground of decision be adopted. But if this be so, the rule of law in Scotland as to the influence of extrinsic evidence upon the construction of written instruments differs from that of the law of England. That is a conclusion which, I confess, for my own part, I should accept with a considerable reluctance, because the rule in this respect of the law of England appears to me to be a consequence flowing also by logical necessity from another rule, common to the laws of both countries, viz. that every testamentary or *mortis causâ* disposition of real estate must be made and authenticated by some instrument in writing, or, in other words, that the intention which is to receive effect must be found expressed in a written instrument. I should have thought it the sounder principle, that, subject to any limitation of their meaning afforded by the context of each particular instrument, or by any rule or presumption of law, general words in a testamentary deed ought to be applied to every subject of which, according to the true meaning of the words themselves, they are properly descriptive.

Holding these views, I should have preferred to rest my concurrence in the judgment proposed to your Lordships upon the doctrine which (if the rules of the law of Scotland for the construction of written instruments are the same as those in England) would in my judgment be properly deducible from the decisions of this House in *Campbell* v. *Campbell* and *Farquharson* v. *Farquharson*, a doctrine which is not (as my noble and learned friend has shewn) really at variance with the later decision of your Lordships' House in *Leitch's case*, and which in *Thoms'*

case, although not reconcilable with the opinion delivered by a large majority of the Judges of the Court of Session, was maintained by a very weighty minority. The doctrine, that mere general words purporting to dispose of a man's whole property in a will or *mortis causâ* deed, shall (unless there be something in the instrument itself to control that presumption) be understood of property, the succession to which, after the death of the testator, is not already regulated by a special destination to a particular class of heirs in a prior instrument, either made by the settler himself or under which he holds, and that the settler is not merely, by the use of such general words, presumed to intend to innovate upon any such special course of succession, seems to be neither unreasonable nor inconvenient.

The word "revocation" or "evacuation" may not be apt to describe the effect produced by an instrument devising lands held under such a title to other persons, because (as was justly said at the bar) such an instrument should operate upon the absolute fee legally in the person executing it, not by altering the special destination, but by withdrawing from it altogether the subject matter of the settlement. If, however, substance rather than technicality is to be regarded, the analogy of revocation properly so called is not without a legitimate bearing on this class of cases. It is admitted that if a special destination were contained in a prior deed (even though not strictly a *mortis causâ* disposition) executed by the settler himself, it would prevail against a subsequent disposition, by general words, of all the settler's property in a testamentary instrument, and it further seems to be the law of Scotland, (on the ground that an intention to innovate on a special course of succession is not readily presumed,) that when a reference to "heirs is found in the dispositive words of an instrument executed by a settler holding a particular estate although without fetters under a prior deed of entail, (whether executed by himself or by any other person,) it must, *primâ facie*, be taken, that the heirs intended by the later instrument are those to whom the estate would go by virtue of the destination in the earlier deed.

The doctrine mentioned by the minority of the Judges in *Thoms' case* seems to me to depend on the same principle, and I find it easier to suppose that this doctrine was the real foundation of the decision of your Lordships' House (under the advice of so great a Judge as Lord Hardwicke) in the two cases of *Campbell* and *Farquharson*, than to refer these decisions entirely to the weight of the extrinsic evidence which was undoubtedly received in them; but whatever may be their true ground I do not think it would be possible to reconcile those decisions of your Lordships' House with a judgment of reversal in the present case; and I concur in the propriety of the motion which has been made to your Lordships by my noble and learned friend.

LORD CHELMSFORD.—My Lords, I am of opinion that these interlocutors ought to be affirmed.

Interlocutors affirmed, and appeal dismissed with costs.

Appellant's Agents, Mackenzie and Kermack, W.S.; Loch and Maclaurin, Westminster.—*Respondent's Agents*, H. & H. Tod, W.S.; Valpy and Chaplin, London.

JUNE 16, 1873.

SIR WILLIAM STUART FORBES, Baronet, *Appellant*, *v.* The Hon. C. J. R. TREFUSIS and Others, *Respondents*.

Succession—Entail—Heirs Male—Heirs whatsoever of the Body—*A destination in an entail was to F. and the heirs male of his marriage with S., 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 of the marriage of F. and S., etc.*

HELD (affirming judgment), *That the only daughter of the eldest heir male of F. was entitled to succeed before the second son and heir male of F.*

Appeal—Limitation of Time—Absence of Appellant abroad—*A pursuer and mandatory having lost their action, a petition of appeal was presented to the House of Lords three years after final judgment, the pursuer having been abroad at the commencement of the action and ever after:*

HELD, *The appeal was in time within the meaning of* 6 *Geo.* IV. *c.* 120, § 25. [1]

---

[1] See previous reports 6 Macph. 900; 40 Sc. Jur. 514. S. C. L. R. 2 Sc. Ap. 328: 11 Macph. H. L. 44; 45 Sc. Jur. 388.