daughters as may die unmarried, or, being married, shall die childless, must revert to my surviving sons and daughters; but, in case any of my married daughters leave a child or children in minority, a reasonable part of her annuity is to be applied for education, the remainder to accumulate, and with the stock, only in the event of no child of my deceased daughters reaching twenty-one years, is to be divided among my children." There is then a provision for the rights of the testator himself, should he survive any of his married sons or daughters. This codicil, I think, quite clear in point of meaning. He declares in it that, with one exception, he wishes the shares of his children to be equal, and as regards daughters £500 is to be payable to each on marriage and £500 more to each to bequeath, and the remainder, or what he calls "the entire residue," had been settled in the original deed in this way, "laid out in heritable security, and so remain until her marriage, when the same shall be secured in the same way for her proper liferent use, and afterwards to her children in fee." That is not revoked by this codicil, but then he adds, if any die unmarried, or if married childless, their portion shall revert to his surviving children. That is a provision of survivorship in case of any daughter dying unmarried or childless, and that is not dying before the testator, as that too is provided for. This is a clear provision in favour of brothers and sisters. This then appears clearly to show that no right of fee was meant to be given which could defeat that survivorship. Therefore, taking the original deed and these two codicils together, I have no difficulty in coming to the conclusion that nothing was meant to be given to daughters but a liferent. That leads me to the conclusion that, as they have only a bare liferent, there was no power given to Mrs Morice to divide or apportion these funds among her children, who already have the fee in them.

Lord Ardmillan—Mrs Morice executed a deed of apportionment by which she directed her marriage-contract trustees to divide the capital of her fortune among her children. The power of doing so was reserved by her in her marriage-contract, but the effect of this reservation must depend upon whether she had a liferent or a fee under her father Mr Anderson's settlement. It does not occur to me that there can be any serious question whether, if there is only a liferent given to the parent, and the fee is actually conveyed to the children, that parent, being a liferenter, can disturb this settlement of the fee, and regulate the share of the fee which each child is to take. But this is a question which we are not now called upon to decide. The true question is, Was the right given to Mrs Morice by her father a right of liferent, or a right to the fee? Now, where there is no trust, the law sustains the limitation of the parent's right to a liferent only when the word allenarly is used. Thus a direct disposition to a parent in liferent and to the children *nascituri* in fee, is held to carry the fee to the parent. This result is prevented by the use of the word allenarly—a disposition to a parent in liferent for his liferent use allenarly carries nothing more to the parent than the liferent. Where there is a trust of an executorial character, merely for the purpose of payment, that trust does not take the case out of the general rules, but where there is a trust for holding and for continuing administration of the estate, it is settled that the same strictness of construction is not to be applied, but that the intention and meaning of the testator, as expressed in the deed, is to be especially attended to. So we must consider the clause in Mr Anderson's settlement, in which he deals with his daughter's portion. In the first place, he gives her £500 to be at her absolute disposal, and then he directs that the rest shall be laid out on heritable security, and so remain until her marriage, when the same shall be secured in the same way "for her proper liferent use, and afterwards to her children in fee." Now the distinction which is here drawn between the power of absolute disposal given as to the £500, and proper liferent use given as to residue, is very obvious. The word proper is not a usual word in reference to a liferent, and it is important to inquire into its meaning. The word has two grammatical meanings. In the first place, it may mean "own," for example, as in Shakspeare, "our proper son," meaning "our own son;" or, as in Dryden, "at your proper cost," meaning at your own cost. It is obvious that this cannot be the meaning here. It cannot mean her own liferent as distinguished from the liferent of another. But, in the second place, the word proper may mean appropriate or peculiar, as for example in Milton, "by our proper motion we ascend," meaning by our appropriate motion. I think that this is the sense in which the word is here used, and that "for her proper liferent use," means for her use in proper liferent, or appropriately in liferent. Thus, I think, there can be no doubt but that Mrs Morice took only a liferent under her father's settlement. I agree with your Lordship that the codicils make this still more clear, but, for the reasons I have stated, I think the point sufficiently established by the deed itself. Having only a liferent she could not alter or disturb the destination of the fee, at least in so far as regards the original share. In regard to the accruing share, a different question may arise. But that is not at present before us. I am therefore of opinion that the answer to the question presented to us should be, that Mrs Morice had no power of apportionment of the original share.

The other Judges concurred.

The Court accordingly held that Mrs Morice had no power to apportion among her children the capital of the original share provided to her and her children under her father's testamentary deeds.

Counsel for the First and Third Parties—Watson and Pearson. Agents—Henry & Shiress, S.S.C.

Counsel for the Second Party—Keir. Agent—D. Scott Moncrieff, W.S.

Counsel for the Fourth and Fifth Parties—Dean of Faculty (Gordon) and Gloag. Agents—Goldie & Dove, W.S.

Friday, December 13.

FIRST DIVISION.

SPECIAL CASE—ROBERT MACKAY AND OTHERS AND LORD GLASGOW'S TRUSTEES.

Marriage-Contract—Jus crediti—*Trust—Approbate and Reprobate—Negative Prescription—Right of Election.*

In a case where a marriage contract had

created a *jus crediti* in favour of the heir of the marriage, the father executed a trust-deed which was *in fraudem* of his heir's right, and some years later another trust-deed, which two deeds formed at his death a complete testamentary disposal of his whole estate, heritable and moveable. The heir made up a title under the antenuptial contract to the lands contained in the first trust-deed, and took benefit under the second deed, discharging the trustees, in ignorance of the existence of the said first deed, or of his right to challenge it; *Held* that the right of his trustees and executors to challenge is not cut off by the negative prescription, but that they have a right of election either to abide by his approbation of his father's testamentary settlement, or to challenge the first deed on renouncing the benefit received under the second.

This was a Special Case presented for the opinion of the Court by Mr Robert Mackay, W.S., trustee appointed by the Court to carry out the unfulfilled purposes of a trust-disposition, executed in 1825 by the late George Earl of Glasgow, of the first part; by the present Earl of Glasgow of the second part; and by General Peel and Lord Mure, trustees and executors of the late James Earl of Glasgow, of the third part.

The questions submitted are as follows:—

"I. Whether the residue of the trust-estate created by the said trust-disposition of 2d December 1825 falls to be settled upon the said George Frederick Rosse Earl of Glasgow, as heir of entail in possession of the said lands and estate of Hawkhead at the period when the purposes of the said trust-disposition were fulfilled, and upon the heirs of entail entitled to succeed to the said lands and estate, under all the conditions, restrictions, and declarations of the existing entail of Hawkhead?

"II. Whether the said George Frederick Rosse Earl of Glasgow has, as heir-at-law of the deceased George Earl of Glasgow, his father, absolute right to the said residue, or to any part thereof?

"III. Whether the said Jonathan Peel and Honourable David Mure, as trustees and executors and residuary legatees of the said deceased James Earl of Glasgow, have a preferable right to the said residue, or to any part thereof?

"IV. Whether, in the event of the said residue falling to be settled, as aforesaid, upon the said George Frederick Rosse Earl of Glasgow, and the heirs of entail entitled to succeed to the said lands and estate of Hawkhead, the first party is bound to settle the same upon the said George Frederick Rosse Earl of Glasgow and the said heirs of entail, subject to all the fetters of a strict entail, and to procure the deed of entail to be executed by him for that purpose duly recorded in the Register of Tailzies, and also feudalised?

"V. Whether the said trustees and executors of the said James Earl of Glasgow are entitled to receive out of the said residue payment of the foresaid debts, amounting to £16,000, paid by the trustees and executors of the said George Earl of Glasgow out of his executry estate at Martinmas 1843, or any part thereof?

"VI. Whether the said George Earl of Glasgow, as heir of entail in possession of the entailed estate of Kelburne, and of the entailed estates of Kilbirnie, and of Crawfurd-Lindsay, and Glengarnock, is entitled, out of the residue of the said trust-estate, to have the said entailed estates disburdened of any and what part of the foresaid sums of £8000 and £12,000, contained in the said bonds and dispositions in security granted by the said James Earl of Glasgow on 18th July 1850?"

At advising—

LORD PRESIDENT—This is a somewhat complicated case, and though the questions are framed so as to dispose of the matter, some of them require attention.

The main point under question I. is, whether the deed of 1825 is effectual, but that again raises the question whether the maker had power to grant it, or, secondly, whether, even if he had not such power, it is not effectual. I shall try to dispose of the various arguments on the point.

The power of Earl George to make the deed depends on his marriage contract of 1788. The entailed estate of Hawkhead, which belonged to Earl George's mother, was made the subject of the contract, and a right was reserved to him to make an effectual entail, and so, though the estate was settled under the provisions of an existing entail which was defective, he had the right to make a new and valid one. The contract also settled a number of other lands held by Earl George in fee simple.

He, in contemplation of his intended marriage, provides—"and in further contemplation of the said marriage, the said George Earl of Glasgow hereby dispones and conveys to and in favours of himself and the heirs whatsomever to be procreated of his body, and his or their assignees, whom failing to the foresaid Lady Elizabeth Boyle," and it is a question whether, under this clause, the heir of the marriage had any right which Earl George was entitled to defeat. The peculiarity of the clause is in the words "his or their assignees," which mean that the conveyance is first in favour of Earl George and his assignees. It is simply a conveyance to him in fee-simple. That would be a very strange provision, and unless one is driven to it by the plain meaning of the words themselves, it is the last interpretation one would put upon them. But looking at the clauses of the deed, and considering also the meaning of the words themselves, it cannot be read as a mere conveyance to himself. In short, I think the words "his or their assignees" must be held to mean only that if there was no heir of the marriage Earl George's assignees would be preferable, for I do not find that there is any *jus crediti* to anybody else, but that there is a preferable right to the heirs of the marriage with Lady Augusta Hay, whereby Earl George was restrained from gratuitously alienating the lands in question.

The next point is, whether the trust-disposition granted by him in 1825 is a gratuitous alienation of these lands. At first sight it looks like a deed for the benefit of the granter's eldest son James Lord Kelburne, for its sole object is to provide for payment of his debts. It sets out as its consideration—"I, the Right Honourable George Earl of Glasgow, considering that I stand bound in sundry obligations for money borrowed for the use of my eldest son James Lord Viscount Kelburne, which are as follow, viz., the sum of £18,000 sterling to the assignees of the executors of the late Earl of Stair, secured over the estate of Etal," and it goes on to give a list of sums due to various persons.

Now, it is to be observed that the narrative shows that the granter was himself bound for pay-

ment of these sums, and does not show that Earl James was bound. In short, the nature of the proceeding was that Earl George borrowed this sum of money on his own security, paid his son's debts, and was then sole debtor. He proceeds further to mention that it is desirable "to provide for the liquidation of the foregoing debts, and of any other after debts and engagements which I may come under on account of my said eldest son at any time hereafter, so as that my personal estate and executry may be effectually relieved thereof, and the lands contained in my new entail as little dilapidated thereby as possible, I have resolved to grant the trust-deed underwritten."—And here observe that, after the marriage-contract, Earl George had made a new entail of Hawkhead in 1819, and that his purpose, as here shown, is to keep the estate as free as possible.

He proceeds to convey a variety of lands to trustees, and first of all Stanlie, part of the old Hawkhead estate, and besides this the lands of Thirdpart, Baidland, and Brodochlie, settled by the contract of 1788. The purposes of the trust generally were to pay these debts, and when that was done they were to denude of any residue in favour of the truster's eldest son; and then he proceeds to recommend the sacrifice of Thirdpart, Baidland, and Brodochlie, so as to save Stanlie, and the remainder of the deed is not very material at present.

Now, if the deed was made for the purpose of paying the granter's debts, by sacrifice of certain lands so as to relieve his own executry, the question is, whether that is not a gratuitous alienation? I think it is. It seems to me to be a deed in prejudice of the heir's right under the marriage-contract. If Earl James had taken benefit directly, he might have been barred from challenge, but he takes none, and the only apparent benefit which he receives is in regard to the £18,000 forming a charge on the estate of Etal. Now, it is said that the £18,000 was originally borrowed for the payment of Earl James' debts, and that the liability of Etal relieved him, but that is not quite sound. Etal did not then belong to him, but was subject to Earl George's debts, and it was in his power to make that sum a permanent burden on it. When James received Etal he received it burdened with £18,000. On the whole matter, it is clear that the deed of 1825 is in effect a gratuitous alienation.

It was maintained that Earl James' right of challenge was cut off by the negative prescription. I do not quite understand this. It is not quite clear, but there is one circumstance which seems to be an effectual bar to such an argument, for in 1843 Earl James made up a title to all the lands contained in the deed of 1825 as heir of provision under the marriage-contract. No doubt it was objected to this, that various conveyances which had been entered into for political purposes had changed the nature of the investiture, but it was not so. When these conveyances had discharged their purpose, everything went back into its old condition. On the whole matter, I think the plea of negative prescription is untenable.

But there is another consideration as to the right of challenge. The deed of 1825 is a conveyance *inter vivos*, but it is also *mortis causa*, and this is made plain by clauses which clearly make it a deed of settlement.

I have already said that I do not think it was in Earl George's power, but if it was a *mortis causa* deed and unrevoked, and Earl James took benefit under it, he may be barred from challenge. There was another deed made by Earl George in 1843, by which he disposed of his executry, and its seems not unlikely that when he made it he had forgotten the existence of the deed of 1825, for though the trustees were infeft under it, they never in fact entered into possession, and never sold any part of the lands, or fulfilled any of the purposes of the trust. At the same time, if the deed stands unrevoked, it must be held to form part of Earl George's testamentary settlement.

Now it was contended that in the deed of 1843 there was a clause of revocation, and it is rather a peculiar one. It begins—"and in order that these presents may receive the more full effect, I hereby direct that the trustees appointed by any separate deeds executed by me shall account for and pay over to my present trustees, for the purposes hereof, any sums which may come into their hands in virtue of such separate deeds, in order that the same may be applied as aforesaid; and, under these explanations, I hereby revoke and recall all other or prior settlements, bonds of provision, or other deeds granted by me in favour of my said younger children of my first and second marriages, or any of them, which may affect my estate, or be contrary hereto, those in favour of my daughter Lady Fitzclarence in regard to the property derived by me from the late Admiral Boyle being always excepted; declaring, however, that the bonds of provision granted by me in favour of my younger children under my powers as heir of entail shall subsist and be effectual until the whole of the provisions hereby granted in their favour shall be paid, when the said bonds shall become null and void, it being my wish and intention they shall hereafter only be valid to the effect of being a security to my said children for payment of their said provisions."

Now the words are—"revoke and recal all other or prior settlements, bonds of provision, or other deeds granted by me in favour of my said younger children of my first and second marriages." I do not think these words apply to the deed of 1825; I think they are a recal of everything in favour of his younger children. I think this deed of 1825 is not revoked by the deed of 1843, but is left as one of Earl George's deeds of settlement.

If Earl James took benefit under the deed of 1843, that may, as I have said, bar him from challenge by the rule of approbate and reprobate, but the question is, Did he take any benefit? He is made a residuary legatee, but the property is burdened with a number of large bequests in favour of the testator's younger children, amounting in all to £46,000. After providing certain annuities, he goes on, under the fourth purpose—"Being desirous to preserve in my family the ancient estate of Hawkhead, I hereby direct and appoint my said trustees to procure the entail thereof which was some years ago executed by me, with consent of my said eldest son, duly recorded in the register of entails, and a proper feudal investiture completed therein: Farther, as the said estate is charged with a considerable amount of debt, contracted by my said eldest son, for which I joined in the securities over the said estate, it is my wish that after fulfilling the other objects before mentioned, the residue of my said personal estate shall be applied in purchasing up the said debts, to the effect the same may be extinguished, and particularly those affecting the old estate of Hawkhead, the interest of these debts being to be kept down by the interest

arising out of any residue of my said funds. And lastly, when these purposes are fulfilled, the sum of £16,000 sterling shall be set apart, and be lent out by my said trustees upon good securities, real or personal, and the interest thereon to be received by my said trustees and added to the said fund, and so continue for the space of five years after my decease, at the end of which period £6000 shall be paid to my said two younger children of my second marriage in equal proportions, and the remainder of said fund, with any additional money that may arise out of my said executry, after fulfilling the objects aforesaid, shall be accounted for and paid over to my said eldest son, whom I wish to be considered as my residuary heir and executor; and he shall then be bound, on the termination of the said trust, to discharge the said trustees, and do every other thing which they may consider to be necessary for carrying out my wishes."

Now we have it before us that the purposes of the deed were to a certain extent accomplished by the trustees. The debt on Hawkhead was paid, and £20,000 was paid to the younger children. The executry could not pay any more, and after having paid off the burdens on Hawkhead and a portion of the younger children's provisions, the balance was very small. The younger children's provisions, therefore, had to be thrown on the entailed estates, so this £20,000 was made a burden on them, and the way this was done was by Earl James applying to the Court for authority to grant bonds and dispositions in security.

All this having been done, the only remaining special purpose of the trust was to set apart £16,000 to be accumulated and then divided, but there was not sufficient money to do this. If there was any balance, Earl James was entitled to it as residuary legatee, and so he got the small balance which there was, and discharged the executors. It is said that he thus took benefit under the deed of 1843. He certainly took very little, for all he got was £1692, 5s., but still the amount is of no consequence; if he only takes benefit to the extent of £1 he cannot reprobate the deed. But, it is said, he created against himself a much greater liability in the shape of these sums of £12,000 and £8000. That is true, and perhaps his payment of interest was much in excess of anything he ever got, but these bonds were available against the estate, or at least its rents; but the way to test whether Earl James took benefit or not is to suppose that the younger children's provisions laid on the estate, and the residue obtained by Earl James, were of the same amount: how would the matter stand then? In place of allowing the executors to pay away the residue, he took it and gave them a security over the entailed estates. Now what took place was in effect the same. The £1692, 5s. ought to have been applied *pro tanto* in satisfaction of the younger children's provisions. I am therefore of opinion that Earl James took benefit under the deed of 1843, and is barred from challenging that of 1825. But the case does not end there, for the circumstances are peculiar, and I think there can be no doubt that he took benefit in ignorance of the deed of 1825, under which, as I have said, the trustees never took any steps. Now, having taken benefit in ignorance, no doubt during his life he would have been entitled to go back on what he had done and repudiate the settlement. But Earl James died without exercising any such right, simply because he did not know that he had it, and so the only question is, whether his trustees and executors, the parties to the third part of this Special Case, are not entitled now to elect to abide by the settlement of 1843, or to renounce the benefit and restore to the executry all he received, and so open the way to their right of challenge.

I think they are so entitled, and therefore question I. must be answered alternatively:—

I would propose to find that in the event of the said parties of the third part electing to abide by the approbation by Earl James, that the residue of the trust-estate falls to be settled in terms of the question, but to find that in the event of their repudiating these, that the residue does not fall to be so settled. Such is my opinion on question I. The other questions are easier.

In regard to question II, I think it must be answered in the negative in any view.

Under question III the executors of Earl James will be entitled to a conveyance of all remaining in the hands of the trustees of 1825, if they elect to repudiate and restore.

In the event of the deed of 1825 receiving effect, I think question IV. must be answered in the affirmative; I think Earl George's intention is very clear.

That brings us to questions V and VI, which may be considered together. Of course both proceed on the assumption that the deed of 1825 is to receive effect. If so, a certain sum of £16,000 was paid under the deed of 1843, which ought to have been paid to the trustees of 1825, and this sum must be paid to them, but it has been paid out of executry, and the executry has a claim to be reimbursed. But the present Earl, as holding the estates on which the provisions of £12,000 and £8000 were charged, claimed to be relieved out of the £16,000, and I consider that he is entitled to relief of his entailed estates to the extent of £14,600, in discharge of that liability for £20,000; the result of the whole being, that the heir of entail is entitled to £14,600, and Earl James' executors to the balance.

The Court pronounced the following interlocutor:—

"In answer to the first question; (*First*) Find that by the antenuptial marriage-contract made between George Earl of Glasgow, and his spouse Lady Augusta Hay, in the year 1788, the lands therein specially described were conveyed by the said Earl, and so settled as to confer on the heir of the marriage a *jus creditii* which the said Earl was not entitled to defeat or prejudice by any gratuitous deed; (*Second*) Find that James Earl of Glasgow was, on the death of the said George Earl of Glasgow, his eldest son, and as such heir of the said marriage; (*Third*) Find that the trust-disposition executed by the said George Earl of Glasgow, in 1825, was a conveyance of portions of the lands settled by the said antenuptial contract as aforesaid, and was a gratuitous deed made *in fraudem* of the said antenuptial contract of marriage, and to the prejudice of the right of the said James Earl of Glasgow as heir of the marriage; (*Fourth*) Find that the said James Earl of Glasgow took no benefit by the said trust-disposition of 1825, and was not personally aware of its existence during his own lifetime, the trust-disponees having been infeft, but not having

taken actual civil possession of any part of the lands conveyed to them; (*Fifth*) Find that the title of the said James Earl of Glasgow during his life, and the title of his trustees and executors, parties of the third part, after his death, to challenge and set aside the said trust-disposition of 1825, as being made *in fraudem* of the said antenuptial contract, and in prejudice of the right of the heir of the marriage, was and is not cut off or lost by the operation of the negative prescription, for this among other reasons, that the said James Earl of Glasgow, in the year 1843, and after the death of his said father, made up a title in his own person, as heir of provision under the said antenuptial contract to the lands contained in the said trust-disposition of 1825, under which he obtained and held possession of the said lands until his death on the 11th March 1869; (*Sixth*) Find that the trust-disposition of 1825, besides being a trust-conveyance *inter vivos* for payment of certain specified debts, was also, as regards its ultimate purposes and the disposal of the residue of the trust-estate, a *mortis causa* deed; (*Seventh*) Find that the said trust-disposition of 1825 was not revoked, either expressly or by implication, by the trust-disposition and settlement executed by the said George Earl of Glasgow on the 24th March 1843; (*Eighth*) Find that the said trust-disposition of 1825 was (subject to a right of challenge by the said heir of the marriage or his representatives) part of the testamentary settlement of the said George Earl of Glasgow, and the said trust-disposition and settlement of 1843, and the said trust-disposition of 1825, were the only unrevoked testamentary deeds left by him, and, taken together, contained a complete disposal of his estate, heritable and moveable; (*Ninth*) Find that the said James Earl of Glasgow was nominated by the said trust-disposition and settlement of 1843 to be the "sole residuary heir and executor" of his father, and in that capacity received from the trustees and executors acting under that deed certain sums of money and moveable estate, amounting in all to the value of £1692, 15s., in consideration of which he discharged the said trustees and executors of their whole intromissions, and bound himself to relieve them of all claims against his said father's estate; (*Tenth*) Find that the said James Earl of Glasgow thus took benefit by the trust-disposition and settlement of 1843, and might have been thereby barred from challenging any part of the testamentary arrangements of his father; and, in particular, from challenging the said trust-deed of 1825; But (*Eleventh*) Find that, having taken benefit under and approbated the testamentary settlements of his said father in ignorance of the existence of the trust-disposition of 1825, and of his right to challenge the same, the said James Earl of Glasgow would have been entitled, if now alive, and his trustees and executors, parties of the third part, are now entitled, to a right of election either to abide by his approbation of the testamentary settlements of the said George Earl of Glasgow, and to allow effect to be given to the provisions of the trust-disposition of 1825, or to repudiate the said settlements and set aside the trust-disposition of 1825 upon condition of renouncing the benefit taken by the said James Earl of Glasgow, and restoring the funds and property received by him as "sole residuary heir and executor" under the trust-disposition and settlement of 1843. Therefore find and declare that in the event of the said parties of the third part electing to abide by the approbation by James Earl of Glasgow of his father's testamentary settlements, the residue of the trust-estate created by the said trust-disposition of 2d December 1825 falls to be settled upon the party of the second part, George Frederick Rosse Earl of Glasgow, as heir of entail in possession of the said lands and estate of Hawkhead, in the case mentioned, at the period when the purposes of the said trust-dispositions were fulfilled, and upon the heirs of entail entitled to succeed to the said lands and estate, under all the conditions, restrictions, and declarations of the existing entail of Hawkhead: But find and declare that in the event of the parties of the third part electing to repudiate the said settlements, and to renounce and restore the benefit taken by James Earl of Glasgow as aforesaid, the residue of the said trust-estate does not fall to be so settled and disposed of. In answer to the second question, Find and declare that the party of the second part, the present Earl of Glasgow, has not in any event, as heir-at-law of his father, the said deceased George Earl of Glasgow, absolute right to the said residue, or any part thereof. In answer to the third question, Find and declare that in the event of the parties of the third part, as trustees and executors of James Earl of Glasgow, electing to repudiate, renounce, and restore as aforesaid, they have a preferable right to the said residue. In answer to the fourth question, Find and declare that in the event of the said residue falling to be settled on the party of the second part, the present Earl of Glasgow, and the heirs of tailzie called to the succession of the estate of Hawkhead, as found alternatively in the answer to the first question, the party of the first part is bound to settle the same upon the said second party and the said heirs of tailzie, subject to all the conditions and fetters of the now existing entail of the estate of Hawkhead, dated 24th November 1819, and recorded in the Register of Tailzies, the 20th July 1843, and to procure the deed of entail to be executed by him, to be duly recorded in the Register of Tailzies, and a proper feudal investiture of the said lands under the conditions and fetters of the said tailzie to be completed in the person of the said party of the second part. In answer to the fifth question, Find and declare that in the event of the said trust-disposition of 1825 receiving effect, the trustees and executors of James Earl of Glasgow, parties of the third part, are entitled to receive out of the said residue payment of the sum of £16,000, being the amount of debts paid out of the executry estate of the deceased George Earl of Glasgow, the payment of which was specially provided for out of estates conveyed by the trust-disposition of 1825. In answer to the sixth question, Find and declare that in the event of the said sum

of £16,000 being paid to the parties of the third part by the party of the first part, the party of the second part is entitled to have the said sum of £16.000 applied to the extent of £14,600, but no further, to disburden *pro tanto* the entailed estates of Kelburne, Kilbirnie, Crawfurd Lindsay, and Glengarnock, of the sums of £8000 and £12,000 charged on the said entailed estates by two bonds and dispositions in security, executed by the said James, Earl of Glasgow on the 18th July 1850; and Decern and Direct the expenses incurred by the parties to the case to be paid by the first party out of the funds in his hands, as the said expenses shall be taxed by the Auditor of Court."

Counsel for Mr Mackay—Watson and Mackintosh. Agent—Party.

Counsel for Earl of Glasgow—Shand. Agents—Hope & Mackay, W.S.

Counsel for Trustees of late Earl of Glasgow—Solicitor-General (Clark) and Marshall. Agents—Tods, Murray, & Jamieson, W.S.

Saturday, December 14.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.

MITCHELL'S TRS. *v.* BANKS OR MITCHELL.

Succession—Construction—"Nearest Heirs."

A destination of moveable and heritable property was made by *mortis causa* deed to "my own nearest heirs and assignees whomsoever, in and through my mother, hereby excluding the relations by my father and all others."

Held—(1) that the destination was not void by reason of uncertainty; (2) that the heirs of the mother were intended to be adopted as the testator's heirs, and that consequently (A), the heritable property, should go to the mother's heir of line, and (B), the moveables, to her next of kin.

This was a reclaiming note against the interlocutor of the Lord Ordinary (MACKENZIE), in a multiplepoinding raised by the trustees of the late Thomas Mitchell. The testator, Mitchell, a tobacconist in Haddington, died August 19, 1870, and was survived by his widow. His estate consisted both of heritable and moveable property, and he left a disposition and settlement, with a codicil annexed, dated respectively December 22, 1857 and June 22, 1859. The codicil, under which the questions in the action arose, contained a partial revocation of the previous settlement, and constituted a trust, in favour of certain persons named, of all his estate, moveable and heritable, and then continued—"And I nominate and appoint my trustees to be my sole executors; but declaring always that these presents are granted by me in trust only, for the ends, uses, and purposes after mentioned, viz.; *First*, that my trustees shall pay all my just and lawful debts, funeral expenses, and the expense of executing this trust. *Second*, that they shall, from the first and readiest of my moveable means and estate, make payment of the principal sum contained in the bond and disposition in security narrated in the preceding settlement, and any interest due thereon, so as to obtain a full and valid discharge thereof from Miss Wilkie, the holder, or her heirs and assignees. *Third*, my trustees shall pay, as I hereby direct them to pay, an annuity, at the rate of seven shillings per week, commencing in advance, as at my decease, to Margaret Waddell, my aunt . . . *Fourth*, my trustees shall hold the trust-estate and effects generally and particularly before mentioned, aye and until Thomas Mitchell, my son, and presently in my service, is twenty-one years of age, and they shall pay and apply the rents, interests, and profits thereof in manner following; that is to say, they shall give and apply the free rents (after paying repairs, insurance, and whole expenses of management) of the subjects in Crossgate or High Street of Haddington, and of the subjects at Gilmerton, before disponed, and the household furniture, plenishing, and effects in my dwelling-house, presently occupied personally by myself, to the said Wilhelmina Banks or Mitchell, my spouse, so long as she continues my widow; declaring that she shall *ipso facto* forfeit these provisions if she again marry, and that without any process of law to that effect; and they shall pay and apply the free rents of the subjects in Tolbooth Street or Market Street, after answering the burdens and payments leviable therefrom and herein also contained, to aliment, board, and clothe properly the said Thomas Mitchell, so long as he requires the same, and till he is twenty-one years of age; And with respect to my moveable means and estate, after answering the purposes foresaid, I direct and appoint my trustees to pay one-half of the free interest or annual proceeds thereof to my said spouse, and to retain in trust, for behoof of the said Thomas Mitchell exclusively, the remainder thereof, aye and till he is twenty-one years of age, when the same will fall to be applied and divided as after mentioned."

The 5th purpose of the trust had reference to the majority of the testator's son, and the apportionment of the estate to be made in that event; and then followed the important clause—"*Sixth*, in case the said Thomas Mitchell should predecease me without leaving lawful issue, my trustees shall pay and apply the estate and effects, before directed to be conveyed to the said Thomas Mitchell, to David Mitchell my father, and in case of his being then dead, to my own nearest heirs and assignees whomsoever in and through the late Helen Waddle, my mother, hereby excluding the relations by my father and all others, except through my said mother, in the same way as if the said Thomas Mitchell had been alive: Declaring and hereby providing that the provisions herein contained in favour of my said spouse are in full to her of all terce, *jus relictæ*, or otherwise, which she could claim in any manner of way; and I recommend to my trustees to dispose of and terminate the trades or businesses carried on by me at my decease, if any, unless the said Thomas Mitchell is nearly major, and in their opinion enabled to carry one or either of them on. And I authorise my trustees to appoint any person to uplift and discharge the funds of the trust, and to invest, alter, and change them at pleasure, as also to sell any part of my estate by public roup or private sale, except the heritable subjects specially disponed; and I confer on them full powers of compromise and submission, and in general, I