entitled to do, producing only in support thereof the unchallenged investiture of 1783, but none of the subsequent titles.

"So standing the case, the Lord Ordinary thinks that the only point which he can decide is the pursuer's title to sue. Prescription, relevancy, and even title to exclude, cannot be adjudicated on, the first two being on the merits, and the title to exclude not being supported by production of writs.

"The Lord Ordinary thinks, however, that the pursuer, as the case stands, has not instructed a sufficient title to sue, and on this ground only he has dismissed the action.

"The only title to sue which the pursuer has produced is a general service to the late Thomas Ogilvy of Baldovie, M.D., who died, unmarried, 10th March 1767. The service bears that the pursuer is great-grandson of the deceased James Ogilvy, who was cousin of the said deceased Dr Ogilvy.

The defender has produced Dr Ogilvy's deed of settlement (1762), alteration thereon (1766), and instrument of sasine following on these deeds in favour of Elizabeth Ramsay (1783). The Lord Ordinary thinks that these deeds completely divested Dr Ogilvy of the whole lands, without any right of reversion or return to him, and that no general service to Dr Ogilvy can give the pursuer right to reduce Elizabeth Ramsay's conveyances, or what followed thereon.

"Dr Ogilvy was in 1762 unlimited fiar of the lands. In that year, by *mortis causa* deed, he conveyed them to 'Elizabeth Ramsay, my niece, and to the heirs lawfully procreate of her body; whom failing to the said Margaret Ramsay, my niece, and to the heirs lawfully procreate of her body, heritably and irredeemably, without any manner of reversion, redemption, or regress.' By other clauses in the deed he gave power to his nieces to dispose of the lands, and by his deed of alteration of 1766 he empowered his niece, Elizabeth Ramsay, 'In case she shall have no children of her own body,' to sell and dispone the lands without the consent of her sister Margaret. On these deeds Elizabeth Ramsay was infeft after Dr Ogilvy's death, and thus became vested with the fee of the lands, subject to the destination in the deeds.

"Elizabeth Ramsay, the fiar, had issue of her body, her eldest son being Thomas Farquharson, who died 21st November 1860. If Elizabeth Ramsay had died without executing any deed, Thomas Farquharson would have taken the subjects as her son and heir of provision. But in 1799 Elizabeth Ramsay or Farquharson disponed the subjects to her son Thomas Farquharson, and in virtue of this disposition and sasine thereon (1799) Thomas Farquharson, as is set forth by the pursuer himself, possessed till his death in 1860, being upwards of sixty years. This disposition in favour of Thomas Farquharson, and sasine thereon, are the first deeds that the pursuer now seeks to reduce.

"Now, the Lord Ordinary is of opinion that, supposing these deeds challengeable, and the plea of prescription to be got over, the only person who could challenge them would be the heir of Elizabeth Ramsay—her heir of provision, if there be one, if not, her heir-at-law. But her heirs of provision have all failed. She has now no heirs of her body, and her sister Margaret died without issue, so that, if the lands were still in her *hereditas jacens*, they would be taken up by her heir-at-law. But the pursuer has produced no service to Elizabeth Ramsay either in special or in general. All he has produced is a general service to Dr Ogilvy. But Dr Ogilvy conveyed the lands and divested himself, 'without any manner of reversion, redemption, or regress,' so that it is not to his heirs-at-law, but to his niece's heirs-at-law that the lands will ultimately go by succession. Dr Ogilvy's heir has no title whatever.

"The only remaining difficulty is that the pursuer avers that he is heir of Elizabeth Ramsay. He has produced no evidence of this, and a mere assertion is not a title. If he had really meant, however, that he was heir in blood to Elizabeth Ramsay (of course through her father, for she left no descendants), the Lord Ordinary might have been disposed to have sisted process to give the pursuer an opportunity of expeding service. But it is plain this is not what the pursuer means. He did not pretend at the bar to state his relationship to the Ramsays; his contention being that he was only heir to Elizabeth Ramsay of provision, by being heir to Dr Ogilvy, to whom there was an implied clause of return. This the Lord Ordinary thinks is untenable.

"The Lord Ordinary might go one step further. He thinks, on the pursuer's own statement, that Elizabeth Ramsay had full power to convey the lands to her son Thomas Farquharson. Even if it had been a strict entail, it was simply propelling the succession to the next heir in the destination. *A fortiori*, in a simple destination such a deed is valid. Dr Ogilvy's settlement is not a destination with prohibitions, for the prohibition can only be implied from a power given; but even if there had been a prohibition against altering the order of succession, such prohibition would only have been for the benefit of the substitutes, who in this case received the conveyance. It could not be pleaded upon by the pursuer, who is not a substitute favoured by the deed.

"On the whole, and although it would have been more satisfactory to have had the whole deeds produced, and to have given judgment on the merits, the Lord Ordinary thinks the defenders are entitled to have the action as it stands dismissed."

The pursuer reclaimed.

The Court adhered.

Counsel for Pursuer (Reclaimer)—Watson and Smith. Agent—T. Spalding, W.S.

Counsel for Defenders—Solicitor-General (Clark), Q.C. and Marshall. Agents—Tods, Murray, & Jamieson, W.S.

Friday, July 4.

FIRST DIVISION.

[Lord Shand, Ordinary

EARL OF MAR *v.* EARL OF KELLIE.

Entail—Succession—Destination.

By deed of entail certain lands were destined to "A and the heirs-male to be procreated of her body, whom failing, to the heirs whatsoever descending from her body."

Held that the expression "heirs-male" must be construed to imply that the whole class of "heirs-male" should be exhausted before the class "heirs whatsoever" could claim under the destination.

Observed, that in the Largie and Fetter-

cairn cases the destination was worded in a manner materially differing from that in the present case.

The pursuer brought this action to have his right to the Mar estates declared preferable to that of the defender.

The whole circumstances involved in the case are fully narrated in the Note to the Lord Ordinary's interlocutor, and in the opinions of the Judges on advising the case.

On 28th January 1873 the Lord Ordinary (SHAND) pronounced the following interlocutor:—"The Lord Ordinary having considered the cause, finds that the defender, as the nearest heir-male of the body of Lady Frances Erskine, has right to the estates in question by virtue of the destination contained in the deed of entail libelled: Finds that the pursuer, as an heir-female or heir whomsoever of the body of the said Lady Frances Erskine under the said entail, has no right or title in a question with the defender to the said estates: Sustains the defender's second, third, and fourth pleas in law: Finds that the pursuer has no right or title to insist in the conclusions of the present action, and accordingly dismisses the same, and decerns: Finds the pursuer liable in expenses, allows an account thereof to be given in, and remits the same when lodged to the Auditor to tax and to report.

"*Note.*—In the year 1866, on the death of John Francis Miller Earl of Mar and Kellie, without issue, the defender's father, Walter Coningsby Erskine Earl of Kellie, was served nearest and lawful heir-male of taillie and provision in general to him to the Earldom or estates, which form the subject of the present action.

"This service was expede under and by virtue of the disposition and deed of entail dated 6th January 1739, and registered in the register of tailzies 10th December 1741 (on the construction of which the questions raised by the present action depend), executed by James Erskine of Grange, Esq., and Mr David Erskine of Dun, one of the Senators of the College of Justice.

"The present action has been raised by John Francis Erskine Goodeve Erskine, claiming to be Earl of Mar, for the purpose of vindicating his alleged right to the Mar estates. The declaratory conclusion of the action is to the effect that on the death of the said John Francis Miller Erskine Earl of Mar, his uncle, the pursuer had and still has the sole and exclusive right to the Mar estates, as heir of tailzie and provision to him under the deed of entail above mentioned; and that he had then, and still has, the right to make up all proper titles to these lands as such heir of tailzie and provision, and to enter upon and possess the estates as proprietor thereof. By the reductive conclusions of the action, the pursuer seeks to reduce—(1) The various services and other writs by which the late Walter Coningsby Erskine Earl of Kellie, the defender's father, completed his title to the estates in 1866; and (2) The decree of general service, dated 9th, and recorded in Chancery 20th May 1872, pronounced by the Sheriff of Chancery in favour of the defender, Walter Henry Erskine Earl of Kellie, as nearest and lawful heir of tailzie and provision of his father, the said Walter Coningsby Earl of Kellie, under the deed of entail above-mentioned.

"The action is maintained on the footing and averment that the pursuer, as heir of line, succeeded to the title and dignity of Earl of Mar upon the death of the late John Francis Miller Erskine, above-mentioned, his uncle; and the pursuer founds on a decree of general service in his favour dated 14th February, and recorded in Chancery 4th March 1867, granted by the Sheriff of Chancery in his favour, by which he was served as one and the elder of the two nearest heirs-portioners of his uncle, the late John Francis Miller Erskine Earl of Mar, above-named.

"The defender, the Earl of Kellie, maintains that he is Earl of Mar, and that the claim of the pursuer to that title and dignity is unfounded. The pursuer's claim to the title is based on the allegation that the peerage descends to heirs-general, while the defender maintains his right to the peerage as the nearest heir-male of the last Earl; and the question whether the pursuer has right to the title in preference to the defender is at present *sub judice* of the House of Lords, and it is said may be decided in the course of the present year.

"As the pursuer's claim to the estate in question is rested entirely on the ground of his being the person having right to the title and dignity of Earl of Mar, and as the question whether he has such right cannot be determined by this Court, and may be decided by the House of Peers within a short time hence, the Lord Ordinary was at first disposed to sist the present action until that question should be decided, for if it should be decided against the pursuer, the ground of his claim under the present action would be swept away. The defender, however, objected to this course, and pressed the Lord Ordinary to take up and dispose of his 2d, 3d, and 4th pleas in law. Under these pleas it is maintained that, even on the assumption that the pursuer has right to the title and dignity of Earl of Mar, and that this should be declared by the House of Peers, he has nevertheless no right to the estates in question, inasmuch as the defender is the heir having right to the estates under the destination contained in the deed of entail by which the succession is regulated.

"The defender's contention under these pleas is, that assuming the pursuer to be Earl of Mar, he is not the heir called by the destination to the succession of the estates, and that the case stated by him founded upon his being the nearest heir whatsoever of the late John Francis Miller Erskine, or at least the eldest heir-portioner of such nearest heirs whatsoever, is not relevant or sufficient in law to support any of the conclusions of the action. The Lord Ordinary feels that the defender is entitled, as he desires it, to have a judgment on these pleas, as he has a legitimate interest to require that the action shall be now disposed of in place of being sisted, if there are grounds which enable the Court to do so.

"In this view the question now for determination is, Whether, assuming the pursuer to be Earl of Mar, as he alleges, he has right to the estates in question under the entail; and the Lord Ordinary is of the opinion, to which he has given effect in the preceding interlocutor, that the pursuer has not such right, but that the defender is lawfully in possession of the estates, as heir of entail under the subsisting destination.

"The question thus raised is one entirely as to the meaning and effect of the destination contained in the entail. The pursuer maintains that the destination must be read as carrying the

estates always to the person who holds the title and dignity of Earl of Mar, while the defender maintains that this is not its true meaning, and that although it may be inferred from one clause in the entail that the granters of the deed had contemplated that the title and dignity of Earl of Mar should accompany the estates, this has not been provided by the destination, which gives him right to the estates independently altogether of whether he has or has not right to the title and dignity.

"The entail, which, as already stated, was executed in 1739, was made by James Erskine of Grange and Mr David Erskine, one of the Senators of the College of Justice, after they had purchased the estates from the Commissioners and Trustees for the sale of Forfeited Estates in Scotland. And the destination in the entail was, in the first place, in favour of Thomas Lord Erskine, only lawful son of John, then late Earl of Mar, and eleventh Lord Erskine (who was attainted in 1715, and whose estates had been in consequence forfeited), and the heirs-male lawfully to be procreate of his body, whom failing, to the heirs whatsomever descending of the said Thomas Erskine his body. Thomas Lord Erskine died without issue in 1766, and the branch of the destination which then took effect, and is now subsisting, is in the following terms:—'Whom failing, to Lady Frances Erskine, his sister, and the heirs-male to be procreate of her body, whom failing, to the heirs whatsomever of her body.'

"The defender is the nearest heir-male of the body of Lady Frances Erskine. This is instructed by the services produced, and the relationship on which these services proceed is not disputed by the pursuer, nor is it disputed that the defender is the nearest heir-male of Lady Frances Erskine and of the late John Francis Miller Earl of Mar, whose right to possession of the estates during his life is admitted by both parties. The pursuer, on the other hand, is somewhat nearer in degree of relationship to John Francis Miller Earl of Mar, but he is an heir-female, and not an heir-male of the body of Lady Frances Erskine, nor an heir-male of the late John Francis Miller Earl of Mar. As in the case of the defender so in that of the pursuer, his alleged relationship or propinquity is not disputed.

"Further, if the destination were alone to be looked at, it seems to be quite clear that the pursuer has no right or title to the estates in a question with the defender. The destination itself is expressed in clear, distinct, and ordinary language, and carries the estates, in the first place to the heirs-male of the body of Lady Frances Erskine, in preference to the heirs-female or heirs whatsoever of her body. The defender is called to the succession as an heir-male under this destination, and until such heirs-male are exhausted, the pursuer, as an heir-female, has no place in the destination. The two branches of the destination are separated by the ordinary term 'whom failing,' denoting that the heirs-male, of whom the defender is one, must be exhausted before an heir-female can claim right to the estates.

"Accordingly, it was pleaded for the pursuer that the destination is controlled by other clauses in the entail, and that in respect of these clauses its language ought to receive a different meaning from that ordinarily given to it in similar deeds; and that the effect of these other clauses is to call under the destination an heir-female of the body of Lady Frances Erskine possessing the title and dignity of Earl of Mar, to the exclusion of an heir-male who is not in possession of that title and dignity. It was not disputed by the counsel for the defender that it is possible from other clauses in the deed to ascertain that the terms used in the destination are to be taken in a different signification from that which ordinarily attaches to them; but it was disputed that there are any clauses having such an effect in the present deed.

"The clauses founded on by the pursuer as having the effect of thus interpreting or controlling the ordinary meaning of the words of the destination, were, in the first place, the narrative of the deed quoted in article 14 of the condescendence; and, in the next, the provisions narrated in condescendence, articles 16 and 18, to the effect that the heirs of tailzie who should happen to succeed to the estates by virtue of the above destination should be obliged in all time after their succession to assume and constantly use and bear the surname of Erskine, and in case the attainder of the said John, late Earl of Mar, should be reversed, the title, dignity, and honours of the family of Erskine of Mar, and the arms thereof, as their own proper surname and arms in all time thereafter; and the relative provision, that if the heirs of entail succeeding to the estates 'shall fail to assume, use, and bear in all time thereafter the surname and arms above written' (here follow a reference to the contraventions of the general prohibitions in the entail, and a relative clause of irritancy), 'but also each person or persons so contravening or failing to fulfil the above written conditions and provisions, or any of them, shall, for themselves only, *ipso facto* annul, loose, and forfeit their right and interest in the said lands and estate, and the samen shall become void and extinct, and it shall be lawful for the next heir of tailzie who would succeed if the contravener were naturally dead, albeit descended of the contravener's own body, to obtain and pursue declarators upon the contravention or failing to fulfil any of the saids provisions or conditions, or obtain adjudications of the foresaids lands and estate, or to obtain themselves served, retoured, entered, infeft, and seased therein as heirs to the person who died last vest and seased in the samen before the contravener had right, in respect that the right of the contravener is hereby declared to become void and extinct, as said is, and the right of succession to the foresaids lands and estate is hereby provided to devolve and pertain to the next heir of tailzie for the time, when the said declarator, adjudication, or service, and retour, or legal mean for establishing the right of the said tailzied lands and estates in their person, shall be used and obtained.'

"The Lord Ordinary is of opinion that these clauses do not affect the destination of the estate, as is maintained by the pursuer, the narrative of the entail having reference to the obligation which the entailers, as purchasers of the estates, had undertaken to entail. The residue which remained after payment of certain debts specifies the destination to be one, 'in favour of Thomas Lord Erskine, and the heirs of his body; whom failing, to any lawful sister of the said Thomas Lord Erskine, and the heirs of her body,' and so on with the different branches of the destination, without indicating that the heirs-male of each *stirps* were to be exhausted before the heirs-female

of that *stirps* should be called to the succession. This, however, is in no respect inconsistent with what was actually done by the destination in the present case, in accordance with the usual practice in entails of large estates. The heirs of the body of each *stirps* are called as the obligation provided, but they are called in a certain order, which is quite consistent with the terms of the obligation. Again, the clause which provides that the heirs of entail shall use the arms of the family of Erskine and Mar, in so far as the same could be legally and warrantably used, and the title, dignity, and honours of the family in case of the reversal of the attainder of John Earl of Mar, is introduced, not as affecting or controlling the clause of destination, or the meaning of the particular terms there used descriptive of different classes of heirs, but for a different purpose, and it cannot, in the opinion of the Lord Ordinary, have that effect. If it had been the purpose of the entailers that the estates should only descend to the person in right of the title in the event of the attainder being reversed, it is only reasonable to believe that this would have been expressly provided by some words or clause directly quallifying the destination itself; and this all the more that the language of the destination, without any such qualification, is perfectly clear in calling the different heirs in a definite order, heirs-male taking before and to the exclusion of heirs-female. The Lord Ordinary is of opinion that the clause in question does not affect the meaning of the destination, or the order of heirs thereby called, and that its true meaning and effect is to impose upon the heirs of entail the obligation of using the arms, and title, dignity and honours of the family of Erskine of Mar in so far as they can lawfully and warrantably do so. The present action is not designed, or, as the Lord Ordinary thinks, suited, to try the question whether an heir in possession, like the defender, under the destination, would contravene the entail and be liable to an action of forfeiture in respect of his failure to use the arms, and title, and dignity of the family of Mar, provided he was not in fact entitled to use these arms, and title, and dignity. That question can only be properly tried in an action of contravention and forfeiture, and the Lord Ordinary will merely observe upon it here, in the first place, that the clause of forfeiture is very limited, and does not in its terms refer to the title and dignity of Earl of Mar at all; and further, that the argument of the pursuer has failed to satisfy him that an heir of entail in possession of the estates could be held to have contravened the entail by failure to use the arms and dignity of the Earl of Mar, if he were in a position to show that he had a lawful excuse for not using these, in respect that he was not entitled to do so, and that the title and dignity belonged to another person. Reference was made for the pursuer to a number of cases, and in particular to the following, viz., *Sutherland*, 1801, Mor., *voce* Tailzie, Appendix No. 8; *Leslie*, 1774, 6 Paton, 792; *Lockhart*, 1842, 1 Bell's Appeals, 202; *Braid* v. *Ralston and Waddell*, 22 D., 433; and *Forbes* v. *Clinton*, 1868, 6 Macph., 900. It appears to the Lord Ordinary, however, that none of these cases affect the decision of the present. In the first of them it is true that the destination in the dispositive clause was interpreted and affected by another clause in the entail, viz., the procuratory of resignation; but the destination itself was there repeated in terms which showed the meaning which the entailer applied to the dispositive clause. In the various other cases referred to the meaning of the terms used in the destination was gathered mainly, if not exclusively, from the terms and structure of the clause of destination itself; and in none of the cases was plain and ordinary language, such as is used in the present entail for the purpose of calling heirs-male in preference to heirs-female, held to be controlled or affected in such a way as to reverse the order in which the heirs are called, which would really be the result of the pursuer's argument.

"On the whole matter, therefore, the Lord Ordinary has come to the conclusion that, whether the pursuer shall succeed in establishing his right to the title and dignity of Earl of Mar or not, he has no title to the estates held under the entail, in a question with the defender, who is an heir called before him under the destination."

The pursuer reclaimed.

At advising—

Lord President—The entail, upon the construction of which the decision of this case depends, was made under somewhat peculiar circumstances. After the forfeiture of John Earl of Mar, in 1715, the estate, or part of it, was sold by the Commissioners, and purchased by his brother James Erskine, at the price of £36,497. It appears, however, that half of that price had been advanced by another branch of the family, David Erskine Dunn, and it further appears that that gentleman had purchased the estate for the purpose of restoring it, and, particularly, with the view of restoring it to his family in such a way that in the event of the attainder being reversed, the title and the estate should go together. The entail was executed in pursuance of that purpose, and it narrates the forfeiture and purchase of the estate, the advancement of money by Mr Erskine, and a back bond containing a declaration of trust, and on on that narrative the entail proceeds. The destination is in these terms "to and in favours of the said Thomas Lord Erskine, and the heirs-male lawfully to be procreat of his body; whom failling, to the heirs whatsomever descending of the said Thomas Lord Erskine, his body; whom failling, to 'Lady Frances Erskine, his sister, and the heirs-male to be procreat of her body; whom failing, to the heirs whatsomever descending of her body;' whom failling, to me the said James Erskine, and the heirs-male lawfully procreat or to be procreat of my body; whom failling, to the heirs whomever descending of the body of me the said James Erskine; whom failling, to the nearest agnate of the said Thomas Lord Erskine, of the sirname of Erskine; whom failling, to the said Thomas Lord Erskine, his heirs and assignees whatsomever.' Now the institute here, Thomas Lord Erskine, died in 1766, without issue, and the estate consequently devolved on his sister, Lady Frances Erskine, whose eldest son succeeded in the year 1776, and died in 1825. In his person the Earldom was restored, the year before his death, and so the title and the estates came together. He left two sons, John Thomas, who succeeded him in the title and estate, and Henry David, who was the grandfather of the defender, the Earl of Kellie. John Thomas, the eldest son, died in 1828, and was succeeded by his son, John Francis Millar, who died in 1866. Thus the succession through the heirs-male of the body of Lady Frances Erskine was uninterrupted from the time

of her death until the death of the last Earl, John Francis Millar. He died without issue. He was survived, however, by a sister, Lady Frances Erskine Goodeve, the mother of the pursuer. It appears that the pursuer is the heir whatsoever of her body, but he is not the heir-male of her body. On the other hand, the second son of the restored Earl, Henry David Erskine, died in 1848, leaving a son, Walter Coningsby, who succeeded to the Earldom of Kellie upon the decease of the last Earl, John Francis, and the defender is his son; so that the defender is the heir-male of the body of Lady Frances Erskine, while, as already stated, the pursuer is the heir whatsoever of her body. If, therefore, the descent is to the heirs whatsoever of the body of Lady Frances Erskine, or to the heirs whatsoever of the heir-male of her body, then the pursuer will be entitled to prevail; but if it is a male descent throughout that is provided in the first instance by the destination, then the defender must prevail. Now, the words there used are—"To Lady Frances Erskine and the heirs-male to be procreated of her body, whom failing, to the heirs whatsoever descending from her body." These are the words to be construed in the first instance. The natural meaning of these words undoubtedly is that the male descendants of Lady Frances Erskine must be exhausted before the succession could open to heirs-female descending from her body, or, as they were called, the heirs whatsoever descending from her body. But it is said that those words, although that is their natural meaning, may be controlled by reference to other parts of the deed; and that is quite a settled rule of construction, provided the words are really susceptible of more meanings than one; but the great difficulty is to find that the words I have just read can bear any meaning but one. Reference is made in the first place to part of the recital of the deed where the makers of the entail state that they executed a back bond, containing a declaration of trust, by which they obliged themselves to denude, and to dispone in favour of "the said Thomas Lord Erskine, and the heirs of his body; whom failing, to any lawful sister of the said Thomas Lord Erskine, and the heirs of her body." It is said that this is quite a different destination from what is contained in the dispositive clause, and that they must be read so as to be consistent with one another, and if the dispositive clause were read in consistence with the terms used in this part of the recital, the effect would be to give the estate to the heirs whatsoever of the body of Lady Frances Erskine. Now, that is rather a rash conclusion. It rather appears to me that the recital of the words of the dispositive clause are quite reconcilable upon a different view. In the recital of the deed it was not necessary to specify very particularly the order in which the descendants of the body of either Lord Erskine or Lady Erskine should take the succession; it was only a general statement that the estate was to be settled upon Thomas Lord Erskine, and his descendants, whom failing, upon Lady Frances Erskine and her descendants. But when this came to be more particularly expressed in the dispositive clause. the descendants of Lord Erskine were called in a particular order; that is to say, the male descendants were called first, and then the female, and in like manner with the descendants of Lady Frances. Then, it is further said that it appears from the other parts of the deed to be the intention of the makers of the deed that the estate and the title should not be separated, that the heirs succeeding to the estate were taken bound to carry and bear certain arms, and also, in case of the attainder of John, late Earl of Mar, being reversed, to bear the title, dignity, and honours of the family of Erskine of Mar, and the arms thereof, as their own proper surname and arms in all time thereafter; and that was fenced with an irritant. It must be observed, with reference to all such observations and provisions about the bearing of arms, that heirs of entail can only be bound by those provisions in so far as they can be lawfully complied with. If the estate come into the possession of a person who is not Earl of Mar, then, of course, he could not comply with the provision, and yet he might be entitled to the estate, unless the entailers had so framed the deed and so altered the succession that it was impossible that the estate and the title could be divorced one from the other. The question thus arises, whether they have so framed the deed? If the pursuer's view of the destination of the peerage be correct, it is very difficult to reconcile that and the destinction in the dispositive clause that has been made. He says he is entitled to the title of the Earl of Mar, and that he is prosecuting his claim to that title in the House of Lords; and if he succeeds in that, it will be because the Earldom descends to the eldest heir whatsoever, in preference to a remoter heir-male. Is it not the case that in this dispositive clause a remoter heir-male of the body of Lady Frances Erskine is preferable to a nearer heir whatsoever, or heir-female? If that be so, then the earldom and the estate are necessarily severed, because the destination in that entail is not the same as the destination of the title of Mar. But it is further contended that we must read the dispositive clause as if it meant that the first heir-male of the body of Lady Frances Erskine should take in the first place; and that her eldest son, having taken, the "heirs whatsomever descending of her body," who were immediately afterwards substituted, must mean, or be construed to mean, the heirs whatsoever of the body of that first heir-male. Reference has been made to two cases in particular as favouring that construction—the case of *Largie*, and the case of *Fettercairn;* but there is a very material distinction between the words of the destination here and the words of either of those cases. Here we have the terms "heirs-male procreated of her body," and "heirs whatsoever," indicating two distinct classes of heirs, separated by the words "whom failing;" and, according to the recognised rules of construction of destinations, the first class of heirs must be exhausted before the second comes in. [Terms of destinations in the *Largie* case and the *Fettercairn* case, respectively, considered.] The short destination in this case, however, is in words of such plain meaning that I can find nothing in the deed, or in the circumstances of the case, to warrant a similar construction. The class of heirs-male being first called, they must be exhausted before the heirs next named come in. Therefore, I am of opinion that the Lord Ordinary's interlocutor ought to be adhered to.

LORD DEAS concurred.

LORD ARDMILLAN—The pursuer of this action is

John Francis Erskine Goodeve Erskine, claiming to be Earl of Mar, and the defender is the Earl of Kellie, son of the late Walter Coningsby Erskine, Earl ofKellie, grandson of Henry David Erskine, and great grandson of John Francis Erskine, who was restored to the Earldom of Mar in 1824.

The object of the action is to obtain decree of declarator of the pursuer's alleged right to the Mar estates. The pursuer also seeks to reduce the services of the late Earl of Kellie, the father of the defender, and the service of the defender himself to his father, as heir of tailzie and provision under a deed of entail, dated 6th January 1739, and recorded 10th December 1741. The important question involved is, however, well raised for decision in the conclusion for declarator.

The entail bears to be granted by James Erskine of Grange, and David Erskine of Dun, one of the Senators of the College of Justice. These gentlemen had purchased the estate, which had been forfeited in 1715, and there is no doubt that they purchased and entailed in order to preserve for the family the estates and the title. The clause of destination is in the following terms—(*reads*) Thomas Lord Erskine died without issue. His only sister, Lady Frances Erskine, succeeded. Her son, John Francis, succeeded to her; and he was in 1824 restored to the Earldom of Mar, which had been forfeited in 1715, in the person of his grandfather, John Earl of Mar. The pursuer of this action is the heir whatsoever of the Lady Frances Erskine. The defender, the Earl of Kellie, is the heir-male of the body of Lady Frances Erskine. The question is—which is entitled to succeed to these estates under the destination which has been read.

The right to the Peerage of Mar—a title of great antiquity—is not directly or immediately involved in this case. Nor has this Court the power of disposing of that question of peerage succession. It must be decided by the House of Peers. We have only to deal with the pursuer's claim to the estates. At the same time, it is not to be overlooked that, on the supposition that the pursuer succeeds, as we must assume that possibly he may, to the title, the effect of a judgment against him in this action would be to separate the estates from the title. It is naturally and forcibly urged that such a separation could not have been intended, and that the deed of entail on which this question turns should be so construed as to prevent that separation, and to maintain the connection between the peerage and the estates. I appreciate the force of this argument. If there were any ambiguity in the words of destination, the argument founded on the presumption against an intention to separate the estates from the title would be appropriate. But if the words are not ambiguous, such a presumption is inappropriate, and must be excluded. Presumed intention can never receive effect when contrary to expressed intention. The entail itself, and especially the clause of destination in the entail, must be read and construed and applied. If there is room for reasonable doubt as to the meaning of the words used, that is, of the intention expressed, then the supposed or conjectured intention to keep the title and estates together may perhaps be founded on in support of that construction of the doubtful expression which seems in accordance with such presumed intention. But if the words are clear and plain, so that no reasonable doubt rests on the expressed destination, then there is no room, and no legitimate place, for conjectural aid to construction. I adopt the words of Lord Fullerton in the *Largie* case (June 24 1840)—"The general rule unquestionably is, that a deed must be construed according to the true force of the expressions employed in it. The meaning of one clause, if ambiguous in itself, may be made out by the context."

Now taking this clause of destination, and applying my mind to its construction as expressing the will of the entailer in regard to his succession, I really do not see any ambiguity. It would be difficult to express more clearly the meaning of the entailer. He disposes his estate 1st to Thomas Lord Erskine and the heirs-male procreate of his body, whom failing, to the heirs whatsomever of his body. I pause for a moment here to explain, that I do not consider the variation of expression between "procreate of his body" and "descending of his body" to be of any importance. I think that the words "heir-male procreate of the body" comprehend a son, a grandson, being the child of a son, or a great-grandson, being the grandchild of a son, and in short is not limited to the first heirs-male of the body, viz., the sons. There are many instances in which the words have been so construed. But the expression never can comprehend either an heir female of the body, or a male descending from or through an heir-female. On the other hand, the words "heirs whatsomever descending of the body" must mean in this destination all heirs soever descending of the body, except the heirs-male of the body who are previously called. The clause then proceeds "whom failing" (as Thomas Lord Erskine and his heirs did fail) then to Lady Frances Erskine and the heirs-male to be procreate of her body." The defender is undoubtedly heir-male of the body of this Lady Frances Erskine, he being the great-grandson, through males only, of John Francis Erskine the restored Earl, who was the only son of that Lady Frances Erskine. The destination proceeds "whom failing,"—that is, failing Lady Frances, and the heirs male of her body—then to the heirs whatsomever descending of her body—that is, to heirs-female descending of the body of Lady Frances Erskine. Now the pursuer is the heir whatsoever—the heir-female—descending of the body of the same Lady Frances Erskine, being the son of a younger Lady Frances Erskine, who was grand-daughter of the restored Earl; and the defender is the heir-male of the body of Lady Frances Erskine. To me it appears very clear that until the heirs-male of the body of Lady Frances Erskine have failed, the heir-female of the body of Lady Frances Erskine cannot succeed under this destination.

After the exposition already given by your Lordship it is unnecessary for me to explain the grounds on which I arrive at this conclusion. Unless a doubt can be set up founded on the two decisions which have been urged on us by the counsel for the pursuer, viz. the case of *Lockhart* v. *M'Donald*, and the case of *Forbes* v. *Baroness Clinton*, both of which were decided in the House of Lords, there is in my opinion no authority opposed to the contention of the defender, that as heirs-male of the body of Lady Frances Erskine he is entitled to succeed under this destination.

These two decisions are, however, of very high authority, and we must be careful in dealing with this case so to read the destination is to give effect

the principles of construction laid down by the House of Lords, affirming in both cases the decisions of our own Court.

I am, however, of opinion that in construing as we now do the words of this destination we do not run counter to the decision either of the *Largie* case, or of the case of *Lady Clinton*.

In the *Largie* case the destination was to "the heirs-male of the body of Elizabeth M'Donald and the heirs whatsoever of the bodies of the said heirs-male." The word "and," instead of "whom failing," is a peculiarity in the clause in the *Largie* case which does not occur here, and which some of the Judges thought important, but still more important are the words "heirs whatsoever of the bodies of the said heirs-male,"—not heirs whatsoever of the body of Elizabeth M'Donald. It was held, as I think, that the words "the said heirs-male" could not be construed collectively as denoting a class, but must be construed distributively, as denoting each individual in succession holding the character of heir-male. This appears to have been considered by Lord Mackenzie and Lord Fullerton as an important peculiarity of the clause, and if I do not misapprehend the remarks of Lord Cottenham he is of the same opinion. Not only did Lord Cottenham propose the affirmance of the judgment, but I think he expressly agreed with the view taken by Lord Mackenzie and Lord Fullerton.

Each heir-male is called *seriatim*, and each heir-male so called is a *stirps* in the case of *Largie*. He is, as the Solicitor-General well expressed it, a "composite stirps," comprehending the heirs whatsoever of his own body as within the destination, and I think that these heirs did, under the Largie entail, partake of the precedence of the *stirps* as heirs of whom they were called in succession.

In the case of *Lady Clinton*, again, the expression in the clause of destination is, if possible, even more clear. The destination is to the entailer and the heirs-male of his body, whom failing to Sir William Forbes and the heirs-male procreated of his marriage with the entailer's daughter, "whom failing to the heirs whatsoever of the bodies of such heirs-male respectively," whom failing "to the heirs-female of the marriage and the heirs whatsoever of their bodies respectively." In this clause I think the use of the word "respectively" is of special importance, as tending to support the view of Lord Fullerton in the Largie case, and as giving it additional force, so that the words, "such heirs-male respectively," must be construed distributively and not collectively, as denoting not the class, but the individuals who from time to time and in succession may answer the description.

I therefore come to the conclusion that, when these two decisions on the Largie Entail and the Fettercairn Entail are carefully considered, they do not supply any rule of construction contrary to that which the law and practice of Scotland has recognised as applicable to such a clause as this. The difference between the present case and the cases of Largie and Clinton is to my mind manifest. Therefore, I come to the conclusion that the words of destination in the present case are clear, and that we are not entitled to call in the aid of conjectural or presumed intention. The case of the defender rests on the words of destination. Accordingly I agree with your Lordship in the chair, and am for adhering to the Lord Ordinary's interlocutor.

Lord JERVISWOODE concurred.

The Court accordingly affirmed the interlocutor of the Lord Ordinary.

Counsel for the Pursuers—Asher and Adam. Agents—W. & J. Cook, W.S.

Counsel for the Defender—Solicitor-General (Clark) and Balfour. Agents—Gibson-Craig, Dalziel, and Brodies, W.S.

Friday, July 4.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

MORE *v.* MORE AND ARTHUR.

Testamentary Writing—Burden of Proof.

Where a party died leaving apparently no settlement, and his heirs-at-law took up the succession—*held* that the pursuers, who claimed under what purported to be a subsequently discovered holograph testament, were bound to satisfy the Court of its genuineness.

The facts of this case, which turned entirely upon the evidence, will be found in the Lord Ordinary's Note and Lord Ardmillan's opinion.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 6th March* 1873.—The Lord Ordinary having heard counsel, and considered the closed record, proof, and process,—Finds that the settlement or testamentary writing libelled on, dated 13th June 1869, and being No. 24 of process, is the genuine writing of the deceased Alexander More, of Monkrigg; and appoints the cause to be put to the roll, with a view to further procedure.

"*Note.*—The late Alexander More died at Monkrigg on 19th June 1869, after an illness which confined him to bed only four days. He had been suffering from chronic inflammation of the bladder for some time previously, and was regularly visited by his ordinary medical attendant from 3d June until his death. In consequence of his symptoms, Dr Warburton Begbie of Edinburgh was called in as consulting physician, and visited him at Monkrigg on Saturday 12th June. Dr Begbie considered his state to be anxious, and informed him that he was seriously ill. On that day he rose at a later hour than usual, went down stairs to the library where he usually sat, and remained there all day, retiring to rest at an earlier hour than usual. He did the same on Sunday and Monday. He rose, dressed and undressed himself, and walked up and down-stairs without assistance on these three days. On Tuesday he also, without assistance, dressed and undressed himself, and went to a room on the same floor with his bedroom, where he dined. On the evening of that day he became much worse, and went to bed at an early hour. After this he was confined to bed, and gradually got worse, until Saturday, 19th of June, when he died.

"After the funeral, search was made in Mr More's repositories, but no settlement was found. Monkrigg House was occupied for about a week after Mr More's death by his cousin, Miss Aitchison, and thereafter the defender, James More, took possession. The deceased John More, and his mother and sister, the pursuers, also resided for a short time after Mr More's death in Monkrigg House. Soon after Alexander More's death an