and therefore I think we are clearly entitled to give expenses against them. This is just an Exchequer cause, and we, sitting as the Court of Exchequer, are entitled to award expenses to or against the Exchequer in such causes. I think, therefore, that we ought to sustain the respondent's motion for expenses.

LORD GIFFORD—In this case, at the hearing we disposed of the whole merits of the case on the showing of the appellant's counsel, and without calling on the counsel for the respondent, and it was only after this had been done that the question of expenses arose.

But the question of expenses involved a point which the respondent's counsel would have taken earlier if there had been opportunity, namely, that the case itself had been incompetently stated, having been stated not before but after the judgment of the Quarter Sessions had been pronounced, and that therefore it could not be in terms of the statute a case for the direction and guidance of the Quarter Sessions, at least in the particular prosecution now in question.

I am inclined to think this objection well founded. The intention of the statute was to enable the Justices to obtain directions how they were to decide any particular question of law. When the Justices ask such directions they should suspend their decision until the directions are obtained. Here they have not done so. They have decided the case out and out by a judgment which is not subject to any review or appeal, but which is in itself final, and then, on the request of the unsuccessful party who has lost his case, they state this Special Case for the opinion of the Court of Exchequer, not to enable the Justices to decide, but simply asking whether the decision which they have given, and which cannot now be altered, is right or wrong. The accused stands assoilzied by a majority of his judges, and there is no power anywhere to change this acquittal into a decree of condemnation. Now if on the craving of an excise officer an incompetent case is obtained, I think the respondent is entitled to the expense of opposing it, and, on this ground alone, I am for giving expenses against the appellant.

It may be otherwise when a case is honestly stated by the Justices for their own guidance, and where they delay judgment. It may also be otherwise even when judgment is given conditionally and subject to a case stated to Exchequer, and in this view I do not think it is necessary to consider the effect of the decisions in the cases of *White* v. *Simpson* and *The Queen* v. *Beattie*, and other cases referred to at the Bar.

LORD JUSTICE-CLERK—I have come to the same conclusion. In regard to the question, whether Justices have the power to award expenses against the Crown, I should not have thought it right to decide it, after the various expressions of opinion in the cases quoted without consulting their Lordships of the other Division. For myself, I have no doubt that we have power to award expenses, although there are expressions of opinion to the contrary in various cases, such as those of *White* v. *Simpson and R.* v. *Gilroy*.

In the case of *Alison* v. *Watson* the Court had no difficulty in giving expenses to the Crown. In view of these contrary opinions, I am not going to lay down that it is out of our power to give expenses against the Crown. But here we have a case stated which is not in terms of the statute. The case there provided for is one for the guidance of the Quarter Sessions; it may be open to them to decide the case before coming here, but the stated case must bear that the question is still open. This is not the case here, and I agree with your Lordships that we are quite entitled to give the respondent his expenses.

The opinion of the Court was that the appeal from the Petty to the Quarter Sessions was incompetent, and expenses were given against the appellant.

Counsel for Appellant—Solicitor-General (Macdonald)—Rutherfurd. Agent—Solicitor of Inland Revenue.

Counsel for Respondent—Dean of Faculty (Fraser)—Rhind. Agent—W. G. Roy, S.S.C.

Friday, June 7.

FIRST DIVISION.

[Sheriff of Chancery.

NICOLSON (ARBUTHNOTT'S CURATOR BONIS) *v.* ARBUTHNOTT.

Entail—Destination—Construction—"Heirs whomsoever."

An entailer, proprietor of the estates of A and B, executed a deed of entail of B, in which he set out that "for the more effectually preserving" the estate of B "distinct from the lordship and estate of A, as a permanent property to the second son of my only son J, . . . whom failing, by death or otherwise as after mentioned, to his other sons and their heirs-male in their order, subject to the provision after mentioned," he destined the estate of B to the second son of his only son and the heirs-male of his body, whom failing to each of the other younger sons of the family in their order of seniority, calling each by name, and adjecting in the case of each this condition—"who shall not have succeeded or become next in succession to the lordship of A;" whom failing "to the other heirs-male of the body of the said J who shall not have succeeded or become next in succession to the lordship of A," . . . "whom failing to my own nearest heirs-male whomsoever." To this last branch of the destination no condition was specially attached, but there followed the usual clauses with reference to the mode of making up titles, &c., in the event of the prohibitive condition coming into operation, and these clauses were applied to the institute and "the other heirs and substitutes before named and appointed," and in another case to him "or any of the other heirs of tailzie before specified."

There was a further provision, applicable to all the heirs of entail, including "heirs whomsoever," with regard to bonds of provision to wives and children, to the effect that "if the

granter thereof shall succeed to the lordship of A," they should "in that event be absolutely null and void."

In a competition for special service to the estate of B, between a party who claimed as the eldest son of J's eldest son, and who was actually in possession of the lordship of A, and that party's own second son, *held* (1) that both must claim under the last branch of the above destination as "heirs-male whomsoever" of the entailer, the previous branch having reference to J's younger sons exclusively; and (2) that upon a construction of the intention of the testator the prohibitive condition did not apply to the last branch of the destination.

This was a competition for special service to the estate of Halltown or Hatton, the competitors being Viscount Arbuthnott and his second son David Arbuthnott, who was represented by his *curator bonis* Mr Badenach Nicolson. The estate had been entailed by John Sixth Viscount Arbuthnott "for the more effectually preserving the same distinct from my lordship and estate of Arbuthnott as a permanent property to the second son of my only son and future representative John Arbuthnott, whom failing, by death or otherwise as after mentioned, to his other sons and their heirs-male in their order, subject to the provision aftermentioned." It was destined in the entail to John's second son, naming him, and the heirs-male of his body "who shall not have succeeded or become next in succession to the lordship of Arbuthnott." Failing this branch by death or by succeeding or coming next in succession, it was destined to John's third son, naming him, and his heirs-male, and so on to each of John's younger sons then in existence in succession and their heirs-male, naming each of them, and adjecting the same condition of forfeiture. Failing all these by death or by succession as before mentioned, it was destined "to the other heirs-male of the body of the said John Arbuthnott," and to this branch of the destination the same condition was adjected. All the sons called by name and their issue-male having failed by death, there arose in 1869 a competition under this last-quoted branch of the destination between David Arbuthnott, whose interest was in the present case represented by Mr Nicolson, and his uncle General Arbuthnott, a son of John Arbuthnott mentioned in the deed, who had been born subsequently to the date of the deed. The Court determined the competition in favour of the General, holding that "other heirs-male" meant "heirs other than the eldest," so as to give younger sons a preferential if not an exclusive right under this branch of the destination—*Cf. Arbuthnott* v. *Arbuthnott*, January 19, 1869, 6 Scot. Law Rep. 243, 7 Macph. 371.

General Arbuthnott having died, the present competition arose between the Viscount Arbuthnott, eldest son of John's eldest son, and David, Viscount Arbuthnott's second son. They both presented petitions for special service to the Sheriff of Chancery (M'Laren), each claiming under a branch of the destination following that quoted above, viz. "whom failing to my own nearest heirs-male whomsoever."

The question was, Whether the prohibition of holding the estate of Hatton and the lordship of Arbuthnott was applicable to this branch of the destination or not? It was not expressly adjected to this as it had been to all the other branches, but there followed various clauses usual in deeds of entail, as to the method of making up titles, as to the burdening of the lands, and a general declaratory clause of devolution in the case of the heir entitled to take under the deed succeeding to or standing next in order of succession to the lordship of Arbuthnott, in all of which clauses the prohibition was by implication laid on the whole series of heirs. These clauses were—"But with and under this express provision and declaration, as it is hereby expressly provided and declared,—That in case the succession to the lordship of Arbuthnott shall devolve upon the said Hugh Arbuthnott, or in case he, or any of the other heirs and substitutes beforenamed and appointed, shall come to stand next in succession to the said lordship of Arbuthnott, then if either of these events shall happen before the succession to the lands and others after disponed by virtue of these presents shall have opened to him or any of the other heirs of tailzie before specified in their order, the succession shall devolve under these presents upon the next immediate heir in the above order of succession, passing by the person so succeeding or standing next in succession to the lordship of Arbuthnott, and which next immediate heir shall make up titles thereto by service or otherwise to the person last infeft and seised therein, passing by the person so succeeding or becoming next in succession to the lordship of Arbuthnott; and in case either of these events shall happen after the succession to the lands and others after disponed shall have opened to the said Hugh Arbuthnott, or any of the other heirs of tailzie herein-before specified in their order, then the said Hugh Arbuthnott, or such other heir so succeeding or standing next in succession to the lordship of Arbuthnott, shall, throughout the whole course of succession, be bound and obliged to divest himself of and convey the lands and others after disponed to the next immediate heir or substitute who shall not stand next in succession to the lordship of Arbuthnott and the heirs-male of his body, whom failing to the other heirs and substitutes next after him and his said heirs-male in the above order of succession, subject always throughout the whole course of succession to the like obligation upon each of the said heirs and substitutes succeeding to the same in the event of his thereafter succeeding or becoming next in succession to the lordship of Arbuthnott as aforesaid."

There was this further clause as to bonds of provision in favour of wives and children—"But declaring always, as it is hereby expressly provided and declared, that no bond of provision made by the said Hugh Arbuthnott or any of the other heirs of tailzie before mentioned in favour of younger children by virtue of the above powers shall in any way burden or affect the said lands and others before disponed or any part thereof, or the said heirs of tailzie themselves, if the granter thereof shall succeed to the lordship of Arbuthnott, but that the same shall in that event be absolutely null and void whether granted before or after his succession to the said lordship of Arbuthnott."

The Sheriff of Chancery (M'Laren) preferred Viscount Arbuthnott, and served and decerned in

his favour in terms of the prayer of his petition, but under the conditions, provisions, and prohibitory, irritant, and resolutive clauses therein referred to, &c. He added this note to his interlocutor:—

"*Note*—The Sheriff has felt this to be a case of difficulty, but aided by the able arguments of counsel he has formed a clear opinion regarding it. John Sixth Viscount Arbuthnott, for causes which are afterwards referred to, made a grant of his estate of Hatton, in the form of a strict entail, to the second and other younger sons of his only son John Arbuthnott, in their order, and the respective heirs-male of their bodies 'who shall not have succeeded or become next in succession to the lordship of Arbuthnott.' These qualifying words, or others importing the same condition, are introduced into each limitation or branch of the destination in which the succession is derived from the entailer's son John. After these limitations, constituting what may be termed the special destination, there follows the words 'whom failing to my own nearest heir-male whomsoever.'

"This branch of the destination is unqualified, no condition being attached to it, and therefore, but for the declaratory clause, which will be immediately noticed, it is clear that on the opening of the succession to heirs-male whomsoever the estate of Hatton would be united as regards succession with the lordship of Arbuthnott. The younger sons of John Arbuthnott above mentioned and their issue-male have now failed, and the succession has opened to heirs-male general. The estate is claimed by Viscount Arbuthnott, who, although a lineal descendant of the entailer, claims in the character of heir-male general. The competing claim is Viscount Arbuthnott's second son, the Honourable David Arbuthnott, who claims to be the heir-male general who has not succeeded or become next in succession to the lordship of Arbuthnott.

"The claim of David Arbuthnott is founded on a declaratory clause following the destination, and interjected parenthetically between it and the description of the lands, the object of which is —*first*, to exclude the institute of entail, 'or any of the other heirs and substitutes before named and appointed,' who should come to stand next in succession to the family title; *secondly*, to provide for the devolution of the estate in case of any such heir succeeding or standing next in succession to the title after the succession to Hatton opening to him.

"It is under the first part of the declaratory clause that the claim of David Arbuthnott arises, and this is the only part of the clause on which it is necessary to observe.

"Mr Arbuthnott's proposition is that the condition of not having succeeded or being next in succession to the title is applicable to all heirs of tailzie, and is therefore applicable to heirs of tailzie claiming in the character of heir-male general, although in the destination proper that condition is not applied to them.

"The Sheriff is unable to give effect to this argument. He is of opinion that the declaratory clause in question is nothing more than an expansion of the condition which runs through the destination, and he thinks that in sound construction the expanded condition can only be applied to the class or description of heirs to which the simple condition is previously applied. In this view the words 'heirs and substitutes before named and appointed' in the declaratory clause must be held to refer to the special branches of the destination, and not to heirs-male general.

"It would be a strange way of applying the condition to heirs-male general to leave out the limiting words in that branch of the destination which applies specially to them, and then to add a comprehensive clause purporting to apply to all heirs, but really useless for any purpose but that of applying the condition to heirs-male.

"The Sheriff cannot accept such a supposition. He sees evidence in the destination of an intention not to apply the excluding condition to heirs-male general, and he thinks that, if possible, the declaratory clause must be construed in a sense consistent with that intention.

"It may be noticed in confirmation of the opinion given that the cause of granting expressed in the deed is the purpose of preserving Hatton distinct from the lordship of Arbuthnott as a permanent property to the second son of John Arbuthnott, the entailer's son, whom failing 'to his other sons and their heirs-male in their order.'

"There is, therefore, no intention of separating the estates for the benefit of heirs other than those called in the character of descendants of John Arbuthnott. This consideration is very material to the interpretation of a destination which has already been held by the Supreme Court to stand in need of construction, and as to which the narrative has been held to afford evidence of an intention somewhat different from the ordinary and literal meaning of the words of gift."

Mr Nicolson appealed.

The arguments sufficiently appear from the note quoted above and from the judgment of the Lord President.

Authorities quoted—*Arbuthnott* v. *Arbuthnott*, January 19, 1869, 7 Macph. 371; *Borthwick* v. *Glassford*, November 15, 1853, 16 D. 37; *Porterfield* v. *Corbet*, December 1841, 4 D. 234; *Eglinton* v. *Montgomerie*, January 22, 1842, 4 D. 425.

At advising—

Lord President—This is an appeal from a judgment of the Sheriff of Chancery pronounced on two competing petitions for special service to the estate of Hatton. That estate was entailed by the sixth Viscount Arbuthnott, who died in 1791. The first competitor is the present Viscount Arbuthnott, great-grandson of the entailer; the other competitor is the second son of the present Viscount, who, being a lunatic, is represented here by his guardian Mr Nicolson. The question depends entirely on the clause of destination contained in the deed of entail. It is undoubtedly a peculiar clause, and it is not now for the first time under the consideration of the Court, having been the subject of a very well-considered judgment of this Division of the Court in 1869 (*Arbuthnott* v. *Arbuthnott*, 7 Macph. 371). From that judgment we derive considerable light for the consideration of the question that has now arisen.

The great object in making this entail was, as the entailer himself says, to preserve the estate of Hatton "distinct from my lordship and estate of Arbuthnott as a permanent property to

the second son of my only son and future representative John Arbuthnott, whom failing by death or otherwise as after mentioned, to his other sons and their heirs-male in their order, subject to the provision after mentioned." At this time the entailer had only one son in life, John, who subsequently became seventh Viscount Arbuthnott, and of whom he speaks as his only son and representative. John had at that time five sons. The way then in which the entailer proceeds to carry out the object which he has expressed generally in the terms I have quoted is as follows—He calls the younger sons of John *nominatim* in order of seniority, and the heirs-male of their bodies, and he follows up that with this further destination "to the other heirs-male of the body of the said John Arbuthnott." That was the portion of the destination which was under consideration of the Court in the former case, and we held in preferring General Arbuthnott, who was one of the entailer's grandsons, being a younger son of John but born after the date of the entail, that failing the sons called by name and the heirs-male of their bodies he intended by this clause to call any other younger son who might afterwards be born to John Arbuthnott and the heirs-male of his body. In doing so we decided against the claim of David Arbuthnott, one of the claimants in this competition, because he was a son of John's eldest son, and we held that it was younger sons of John and their descendants that were to be preferred, and I think I may say to be exclusively favoured by this clause. It was not necessary that we should decide that it was exclusively in their favour, but we all certainly expressed that opinion, and for myself I see no reason to change that opinion now.

In that way one argument that has been used for David is shut out. He maintained that he and his father were entitled to come in under that branch of the destination, and that that branch of the destination is plainly subject to the condition that if heirs under it took the lordship of Arbuthnott or stood next in order of succession to it they could not take the estate of Hatton; and further, that that being a prior branch of the destination to the branch under which his father claims the estate free from restrictions, he was entitled to be preferred. That I hold to have been settled adversely to his contention by the previous decision of this Court.

But this important and difficult question remains, Whether the terms of that destination under which we must hold that both of these claims are made, viz., "to my own nearest heir-male whomsoever," is subject to the condition that if the heir taking under it shall succeed or become next in succession to the lordship of Arbuthnott he forfeits or cannot succeed to the estate of Hatton? That is a question of some delicacy; but it must be observed at the outset that it is not a question of the construction of fetters, but it is to be solved by special reference to the intention of the maker of the deed, and certainly the leading intention of the maker of the deed is very clearly expressed in the words at the beginning of the deed that I have already quoted. The leading principle is to preserve the estate of Hatton apart from the lordship and estate of Arbuthnott for the benefit of the second son of John Arbuthnott, whom failing his other sons, *i.e.*, his other younger sons and their heirs-male in their order. Now, it would seem to follow that if this purpose is accomplished, and the class for whose benefit this provision is made is exhausted, then the great object of the entailer is accomplished, and a main purpose of the deed is at an end. It is to be observed that in dealing with the younger sons of John Arbuthnott he calls each of them then in existence by name and the heirs-male of their bodies, and calls them in this fashion—"Hugh Arbuthnott, second lawful son of the said John Arbuthnott, now my only lawful son, and the heirs-male of his body who shall not have succeeded or become next in succession to the lordship of Arbuthnott in manner aftermentioned." That is the first branch of the destination to Hugh Arbuthnott and his male descendants, but with this express condition attached, that they "shall not have succeeded or become next in succession to the lordship of Arbuthnott." Then comes the next branch—"whom failing, by death or by succeeding or standing next in succession to the lordship of Arbuthnott, to Robert Arbuthnott, third lawful son of the said John Arbuthnott." Then we have the fourth son called, and the clause regarding him is *in ipsissimis verbis* with the preceding clauses. So too is the clause referring to the fifth son. Then, after the clause that calls the fifth son, there follows the clause calling "the other heirs-male of the body of the said John Arbuthnott," which, as I have said, means other younger sons of John Arbuthnott, and that clause too is accompanied by the same condition as before, that they shall not have succeeded to the lordship of Arbuthnott or come next in succession to it.

Now, stopping here, observe how completely this destination, as it was construed in the previous case, corresponds with the intention expressed by the entailer at the outset of the deed. He has now called every existing younger son of John Arbuthnott, calling each *nominatim*, and he has also superadded a calling of all other younger sons and the heirs-male of their bodies, and to each step in every branch he has expressly applied this condition. The two clauses—the clause of narrative and the clause of destination—precisely correspond with one another.

Then follows this clause—"Whom failing"—and it is important to observe that here there is a marked change; it is not "whom failing by death or by succeeding or standing next in succession to the lordship of Arbuthnott," but simply "whom failing, to my own nearest heirs-male whomsoever," and he has not applied to them the condition "who shall not have succeeded or become next in succession to the lordship of Arbuthnott." Now, that omission is to my mind very important, and it is very marked. If the entailer had intended this condition to apply, would he not have expressed it here also? That consideration, taken with the fact that he has exhausted the object of his deed, becomes of very great weight. Having exhausted all the younger sons of John Arbuthnott for whom he designs to make provision, he calls his own nearest heirs-male whomsoever, and says nothing about their disqualification or forfeiture in the event of their succeeding to the peerage or standing next in succession to it.

Then, however, there comes a clause which is no doubt the strength of the appellant's case. The entailer goes on to express himself thus—"But

with and under this express provision and declaration, as it is hereby expressly provided and declared, that in case the succession to the lordship of Arbuthnott shall devolve upon the said Hugh Arbuthnott, or in case he or any of the other heirs and substitutes beforenamed and appointed shall come to stand next in succession to the said lordship of Arbuthnott, then, if either of these events shall happen before the succession to the lands and others after disponed by virtue of these presents shall have opened to him or any of the other heirs of tailzie before specified in their order, the succession shall devolve," and so forth. Now, one is quite entitled to say that this is one of these conveyancing clauses—whether taken from a style-book or not I do not stop to inquire—which is quite useless for any practical purpose; which has no effect in strengthening any purpose previously expressed. I quite assent to the statement made at the bar, that no such clause has ever been found to be of any practical value. No doubt when the event happens that the person previously entitled to succeed to Hatton forfeits his right to do so he must do what is here specified. But the law will provide that. It needs no such clause as this to direct what course is to be pursued. But the uselessness of this clause tells on both sides. The appellant says—"If it is useless for that purpose, the only object in inserting it must be to include the heirs to whom these restrictions were not previously applied." This is a curious argument. It amounts to this, that this clause, having been found useless in all deeds we have ever seen, is to receive a most important meaning here. The respondent maintains that it is to receive no more meaning than it has hitherto received. These words, it seems to me, are mere words of style, and this is the first time a proposal has been made that they should receive such a meaning as this. There was a much simpler mode of providing that the nearest heirs-male whomsoever should not hold both estates. It could have been done in one-twentieth of the space occupied by this clause, by appending to the branch of the destination containing them a prohibition just as in the previous branches of the destination. To say that this is the object of this last clause is to attribute an irrational purpose to the entailer and to the maker of the deed.

The words used are, it may be observed, rather peculiar; they are, "any of the other heirs and substitutes before named and appointed." That is hardly a phrase applicable to "heirs-male whomsoever." Such persons can hardly be said to be "named and appointed." In the previous instances, where the younger sons are taken in order, the head of the *stirps* is named, and his heirs-male appointed. The phrase is much more appropriate to their case. It is quite true that in other parts of the deed we have the words "heirs specified in their order;" but I think that the true view of these clauses is that they were only intended to apply to the class of heirs regarding whom it has already been provided that they are to forfeit their right to the estate of Hatton if they shall succeed or stand next in succession to the lordship of Arbuthnott.

It is only necessary to observe further the clause as to provisions to wives and children by the heirs of entail. The entailer provides that any provision of the kind made to affect the lands of Hatton shall, "if the granter thereof shall succeed to the lordship of Arbuthnott, in that event be absolutely null and void." And in imposing these conditions he certainly expresses himself in terms sufficient to include all heirs of entail who are called, including the "heirs-male whomsoever" of the entailer. That cannot be disputed, but I think there are two answers to it. First—It is not taking any great liberty with this clause to hold that its words are made as comprehensive as they are by mere oversight. The maker of the deed is no longer dealing with the destination, and accordingly expresses himself with greater looseness. But in the second place, even if he did intend to express himself to the effect that his heirs-male whomsoever succeeding to Arbuthnott should no longer have power to grant provisions of this kind over Hatton, that is a perfectly rational purpose. He may quite well intend that such provisions are to be laid exclusively upon Arbuthnott if anyone should be in the happy position of holding both estates.

On the whole matter, I think that the heirs-male whomsoever of the entailer are not made subject to this condition, and the consequence of that is that Lord Arbuthnott, being the next heir-male of the entailer, is entitled to be preferred to his second son.

LORDS DEAS, MURE, and SHAND concurred.

The Court adhered.

Counsel for Nicolson (Arbuthnott's *curator bonis*) (Appellant)—Asher—Pearson. Agent—John Walker, W.S.

Counsel for Lord Arbuthnott (Respondent)—Dean of Faculty (Fraser)—Paul. Agents—J. J. & A. Forman, W.S.

Friday, June 7.

FIRST DIVISION.

CLARK AND OTHERS (LIQUIDATORS OF WEST CALDER OIL COMPANY) *v.* WILSON AND OTHERS.

Public Company—Statute 25 *and* 26 *Vict. cap.* 89 (*Companies Act* 1862), *secs.* 136, 137, 87, 163, 138—*Powers of the Court to Restrain Diligence in a Voluntary Winding-up.*

A company was being voluntarily wound up when one of their creditors poinded the company's goods for a debt due for expenses in an action of interdict. The liquidators and a majority of three-fourths of the company's creditors then entered into an arrangement under the above-mentioned sections of the statute, with a view to restraining diligence. The third heading of the arrangement was as follows:—"The rights of all parties under the voluntary liquidation shall be settled on the same footing as if there had been a winding-up by or subject to the supervision of the Court under and in terms of the Companies Act 1862."

A petition at the instance of the liquidators, under the 138th section of the Companies Act 1862, praying the Court to restrain the diligence which had been used as above, *refused* on the ground that the heading of the arrange-