*Tuesday, June 7.*

## SECOND DIVISION.

### SPECIAL CASE—SINCLAIR'S TRUSTEES.

*Agreement—Construction—Succession—Heir or Executor.*

An heir of entail having expended certain sums of money in improvements on his entailed estate of D, entered into a minute of agreement with his son, the heir-apparent, whereby the latter bound himself, and his heirs and successors in the entailed estate of D, to repay the sums so expended. The heir-apparent predeceased his father, and was not represented generally by the heir succeeding to the entailed estate. *Held*, on construction of the special provisions of the deed, that the obligation undertaken by the heir-apparent was conditional on his succession to the entailed estate, and was not effectually imposed either on the heir next succeeding or on his own general representatives.

*Collation—Trust-Deed—Testate Succession.*

An heir of entail, in a trust-settlement dealing wth his moveable estate, directed his trustees to pay one-third of the residue to his son, the next heir of entail, "in consideration of the burden he will be subjected to on his succeeding me in the entailed estate of B., and to his heirs, executors, and successors." This son predeceased his father, leaving three children, the eldest of whom ultimately succeeded to his grandfather as heir of entail of B. *Held* (*diss.* Lord Young) that inasmuch as this was a special legacy taking effect by the express will of the testator, it was not incumbent on the heir of tailzie to collate his life interest in the entailed estate as a condition of participating with his brother and sister in an equal share of the residue.

On 6th March 1851 Sir John Sinclair of Dunbeath, Bart, heir of entail of the lands and estate of Barrock in the county of Caithness, obtained an interlocutor in the Court of Session in a petition presented by him under the Entail Amendment Act (11 and 12 Vict. cap. 36), granting warrant to execute an instrument of disentail, and vesting the said estate in his person in fee-simple. This instrument was duly executed and recorded. He obtained the consents of his three sons—John Sinclair, Alexander Young Sinclair, and George Sinclair—on the express condition and agreement that before re-entailing he should have power to borrow £6000 upon the security of the estate as an equivalent for the amount of a bond of provision then affecting the estate granted by his father in favour of his younger children for the sum of £1500, and for the amount to which he was entitled to burden the estate for improvements thereon, and that he should not only disburden the said estate and heirs of entail of said provisions affecting the same, but that he should renounce all right to affect the estate with any further sums for improvements. Thereafter, having borrowed the sum of £6000 on the security of the said lands and estate, he executed a deed of entail, registered in the Register of Tailzies 18th July 1851, in favour of "myself, whom failing of John Sinclair, lieutenant in the 39th regiment of Madras Native Infantry, my eldest son, and the heirs-male of his body; whom failing to Alexander Young Sinclair, lieutenant and adjutant of the 26th regiment of Bombay Native Infantry, my second son, and the heirs-male of his body; whom failing of George Sinclair, lieutenant in the 63d regiment of Royal Native Infantry, my third son, and the heirs-male of his body; whom failing" as therein mentioned. And he thereby in terms of the agreement he had entered into with his said sons for their consents to the disentail, renounced all right to burden the said lands and estate with any sum or sums of money for improvements, and for such provisions as he had made a right or might of any law or any Act of Parliament be entitled to make, in favour of his widow and younger children. On this deed of entail he was infeft.

On 3d March 1856 a minute of agreement was entered into between him and his eldest son and apparent heir John Sinclair, "whereby, on the narrative that it was advisable to have a corn and meal miln erected at How, on the said estate, the expense of which and its appurtenances, including the mill leads and dams, was estimated to amount to £700; that the parties to the said minute had agreed that the said sum should be borrowed, and the interest thereof during his lifetime paid by the said Sir John Sinclair, the said John Sinclair junior becoming bound to pay the principal sum, with the interest falling due thereon, after Sir John's death; therefore it was thereby agreed—(1) That a sum of £700 should be borrowed for the purpose aforesaid, and that the said John Sinclair junior should grant his promissory-note for that sum to his father; (2) That the interest on the said sum during Sir John Sinclair's lifetime should be paid by him and his executors and successors, without any claim therefor against the said John Sinclair junior, and that the said Sir John Sinclair should also during his lifetime keep the said mill and appurtenances in sufficient repair, and also at his own expense keep the same insured in a respectable office against accidents by fire; and (3) That the said principal sum, with the interest falling due thereon after Sir John's death, should be paid by the said John Sinclair junior on his succeeding to the said estate, without his having any claim therefor against the said Sir John Sinclair or his personal representatives,—as the said minute, providing also for payment of the difference between the said sum of £700 and the real expenditure, and for cancelling the promissory-note to be granted in event of the mill not being erected, in itself bears. Of the date of the minute a promissory-note was granted by the said John Sinclair junior to his father for the said sum of £700, payable three days after date."

On 25th December 1856 he also entered into a minute of agreement with his second son Alexander Young Sinclair in order to provide for the event of the latter's succession to the estate, which was made in terms similar to that made with his eldest son, "and provided that the promissory-note for £700 to be granted by the said Alexander Young Sinclair should not form any claim against him should the said John Sinclair junior make payment of his promissory-note,

'nor unless the said Alexander Young Sinclair succeed to the said estate of Barrock.' A promissory-note, as provided for by the said minute of agreement, was granted by the said Alexander Young Sinclair to his father for the said sum of £700, the same being dated 3d March 1856, and payable three days after date."

The eldest son John Sinclair died without issue on 5th April 1858, in the lifetime of his father. Thereafter on 1st February 1861 "a minute of arrangement and agreement was entered into between Sir John Sinclair and his two surviving sons, the said Alexander Young Sinclair and George Sinclair, whereby, on the narrative of said minute of agreement of 15th November and 25th December 1856, and that the said Sir John Sinclair had 'likewise expended on that part of the said entailed estate lying in the parish of Wick, in the erection of a farm-steading on the farm of Quintfall, sums exceeding £1400;' that he had not taken, and did not intend to take, any steps for burdening the said entailed estate or any part thereof with the said expenditure; and that it was just and reasonable that they, the said Alexander Young Sinclair, as nearest and lawful heir of entail, and the said George Sinclair, as then the first in succession to him in the said entailed estate, should engage and agree as therein set forth: Therefore (1) he, the said Alexander Young Sinclair, the nearest heir in succession to the said entailed estate, and he, the said George Sinclair, as then next in succession to him, by the said minute of arrangement and agreement, corroborated and confirmed the said agreement of 15th November and 25th December 1856, in the whole heads, clauses, and contents thereof; and of new, he, the said Alexander Young Sinclair, in the event of him or the heirs of his body succeeding to the said entailed estate, and he, the said George Sinclair, in the event of him or the heirs of his body succeeding to the said entailed estate, thereby became 'bound to content and pay, as we do hereby in the events foresaid respectively bind and oblige ourselves and our heirs and successors to content and pay, the principal sum of £700 sterling to the executors of our said father, with the interest of the said principal sum from and after his death, aye, and until payment;' and (2) They thereby, in consideration of the said advances by the said Sir John Sinclair upon the improvement of the said estate in the parish of Wick, and in the erection of the steading on the farm of Quintfall, 'respectively as aforesaid become bound, as we do hereby bind and oblige ourselves, and our heirs and successors succeeding to the said entailed estate as aforesaid, to content and pay the further principal sum of £1000 sterling to the executors of our said father, with the interest of the said principal sum from the time of his death, aye, and until payment.' On the other hand, in accordance with the said original agreement, and of the said Sir John Sinclair's desire, he thereby engaged to 'maintain, uphold, and insure the meal mill therein specified in the terms prescribed by that agreement; and likewise to maintain, uphold, and insure the said new steading on the farm of Quintfall, and any other erections he may find it necessary to make for the accommodation of a resident tenant on the said farm;' and lastly, All the said parties thereby bound and obliged themselves, and their respective heirs, executors, and successors, to implement and fulfil the whole conditions of the said recited minute of agreement, and of the said minute of arrangement and agreement as therein specified."

As agreed upon under the first minute, Sir John Sinclair erected a corn and meal mill at How, and regularly kept the same insured against fire to the extent of £1000; he also, in accordance with the second minute, insured the farm and buildings on the farm of Quintfall against fire to the amount of £1600.

On 3d February 1871 Alexander Young Sinclair died leaving three children—John Rose George Sinclair, Margaret Sinclair, and Norman Alexander Sinclair. By his last will and testament he bequeathed his whole property absolutely to his wife Mrs Margaret Crichton Alston or Sinclair, and appointed her his executrix.

On 21st April 1873 Sir John Sinclair died, and was accordingly succeeded in his entailed estate of Barrock by his grandson John Rose George Sinclair, the eldest son of Alexander Young Sinclair, who as heir of entail made up his title to the said estate as heir of tailzie and provision in special to his grandfather. Sir John left a trust-disposition and settlement, dated 22d March 1867, in which he gave, granted, and disponed in favour of James Smith of Olrig and others, his trustees, his whole means and estate then belonging and addebted, or that should belong and be addebted, to him at his decease, including therein all sums due to him under the first minute of agreement with his son Alexander Young Sinclair with reference to the mill of How, or under any other minutes of agreement entered into between him and his sons relative to any additional improvement on the estate of Barrock. The purposes of the trust were, *inter alia*—"In the fourth place, with regard to the residue and remainder of my said estate and effects, heritable and moveable, above conveyed, including therein when free the capital sum or sums lent out or invested to meet the said liferents in favour of the said Dame Margaret Learmonth or Sinclair; and such capital sum or sums which may have been invested to meet the foresaid annuities or any of them, in the event of my trustees considering it expedient to provide for all or any of the said annuities in that way, I direct and appoint my trustees to pay, assign, and dispone one third part thereof to the said Major Alexander Young Sinclair" [afterwards Lieutenant-Colonel Alexander Young Sinclair], "my son, partly in consideration of the burdens he will be subjected to on his succeeding me in the said entailed estates of Barrock, and to his heirs, executors, and successors; and the remaining two third parts thereof to the said Captain George Sinclair, my second son, and his heirs, executors, and successors."

Immediately after his death his trustees called on the widow of Alexander Young Sinclair, as executrix and general disponee of her husband, and the heir of entail Sir John Rose Sinclair, for payment of the said £700 and £1000, but they both declined liability therefor. Thereafter, however, Lady Sinclair, in order to prevent a lawsuit between her late husband's trustees and the widow of her son, paid to them

the sum of £700, and granted an obligation of relief to herself and the other trustees.

On the death of Lady Sinclair upon Nov. 29, 1879, the trustees began to arrange for the division of the trust-funds. As the sum of £1000 was still outstanding, they forwarded to the younger children of the late Alexander Young Sinclair particulars of the claim, and asked for instructions whether the claim was to be insisted in. The whole beneficiaries were then minors, and their guardians declined to give such instructions, in respect that any agreement they might make would not be binding on their wards on majority. It was accordingly agreed to have the legal liabilities of parties settled in this Special Case. The parties respectively were—first, Sir John Sinclair's trustees; second, Mrs Margaret Sinclair, as executrix of her husband Alexander Young Sinclair; third, the present heir of entail, Sir John Rose George Sinclair; and fourth, Miss Margaret Sinclair and Norman Alexander Sinclair, the younger children of the late Alexander Young Sinclair, with their curator *bonis* and factor *loco tutoris*.

The questions proposed to the Court for opinion and judgment were—"(1) Whether the party of the second part, as representing the personal representatives of the said Alexander Young Sinclair, is liable in payment of the said sum of £1000 above mentioned, with the interest thereof from the date of Sir John Sinclair's death? (2) Whether the party of the third part, as heir of the body of the said Alexander Young Sinclair, who has succeeded to the said entailed estate of Barrock, is liable in payment of the said sum of £1000 and interest?"

Another question arose as to the division of the residue of the estate of the late Sir John Sinclair under the fourth purpose of his settlement. The third part or share of the residue bequeathed to the said Alexander Young Sinclair, and to his heirs, executors, and successors, in consequence of his having predeceased the testator, is now payable to his heirs in terms of the settlement, who are the third and fourth parties in the case. The party of the third part maintained that he was entitled to an equal share of the said third part along with his brother and sister. The parties of the fourth part, on the other hand, denied such a right unless on the condition of his collating the value of his life interest in the entailed estate to which he succeeded on the death of his grandfather, the testator.

On this branch of the case, the questions put to the Court were—"(3) Whether the third part or share of the residue of the estate of Sir John Sinclair, payable to the 'heirs, executors, and successors' of Colonel Alexander Young Sinclair, is divisible equally among his children, the parties of the third and fourth parts, without collation by the party of the third part? Or (4) Whether the party of the third part is bound, as a condition of receiving an equal share, to collate the value of his life interest in the entailed estate to which he succeeded on the death of the testator?"

On the first two questions it was argued for the first parties—On a sound construction of the agreement of February 1861, Alexander Young Sinclair bound and obliged himself and his heirs and successors to pay the principal sum of £1000 to the executors of Sir John Sinclair, and that absolutely or otherwise conditionally on the succession of himself or the heirs of his body to the entailed estate of Barrock, and therefore his general representative, his widow, was liable for that sum; in the course of the argument it was conceded that the third party was not liable—*Todd* v. *Moncrieff*, Jan. 24, 1823, 2 D. 113.

The second party denied liability therefor, and argued that the contingency on which Alexander Young Sinclair's obligation depended was his succession to the entailed estate, which event never happened owing to his predeceasing his father.

On the third and fourth questions it was argued for the fourth parties—The heir of entail was only entitled to an equal share of the third part of the residue on his collating the value of his life interest in the entailed estate to which he succeeded on the death of his grandfather, the testator. The doctrine of collation was an equitable one, giving power to the heir who has succeeded to the heritage to share in the *pars legitima* of his father's moveable succession with the next-of-kin on his throwing in the heritage into the common stock—*vide* Ersk. Inst., b. iii., t. 9, s. 3. It was extended by the cases of *Little Gilmour*, Dec. 13, 1809, Fac. Coll. 1 Bell's App. 102; and *Anstruther* v. *Anstruther*, August 16, 1836, 2 S. & M. (H. of L.) 369, and 1 S. & M. 463, to the case of an heir of entail *alioquin successurus*. It received a further extension to the case of testate moveable succession in the case of *Blair* v. *Blair*, Nov. 16, 1849, 12 D. 97, and must apply in this case.

The third party, in reply, argued that this was not a case for the application of the doctrine, inasmuch as this was a special legacy taking effect solely by the expressed will of the testator, and, besides, it was clearly the intention of the testator in his will that the succession of a legatee to the entailed estate should not affect his right to the legacy.

At advising—

Lord Justice-Clerk—In this Special Case there are four parties—first, the trustees of the late Sir John Sinclair of Dunbeath, who was heir of entail in possession of the estate; the second is the widow of Colonel Alexander Young Sinclair, who was the second son—ultimately the eldest son by the death of his brother—of Sir John Sinclair, the heir of entail; the third is the heir at present in possession, Sir John Rose Sinclair, who is the eldest son of Colonel Sinclair; and the fourth are the younger children of Colonel Sinclair for their interest in this matter.

There are substantially two questions that arise, one of them, which I shall afterwards speak to, of considerable interest.

The first two questions relate to a special agreement made between Sir John, the heir in possession of the entailed estate, and his then eldest son, and also his second and third sons, in regard to certain burdens upon the entailed estate. I need not go in detail into the transactions between the father and the sons; but the substance of it is this, that the entailed estate of Dunbeath, under the authority of the Act of Parliament, with the consent of the eldest and the second sons, was burdened with £6000, and Sir John undertook, in the transaction by which the disentail was effected,

to lay no additional burden on the Dunbeath estate for improvements or otherwise; but finding that there were certain matters that were urgently required for the benefit of the estate, he entered into an agreement in the year 1856 with his eldest son in regard to two matters, first, the building of the mill at How, and secondly, the improvement of one of the farm-steadings. The building of the mill was valued at £700, and the improvements on the farm-steading at £1400. The result was that his eldest son, then John Sinclair, undertook, in the event of his succeeding to the estate, to become liable for these two sums. Afterwards the second son undertook a similar obligation conditionally upon his eventually succeeding to the estate. Then after the death of John Sinclair the final agreement was come to in February 1861, which is the subject of the first two questions that arise here.

I must really say that I have endeavoured to arrive at the meaning of that instrument with very little success, and at this moment I am totally unable to say, at least with any amount of confidence, what it was that the conveyancer intended to express by the very enigmatical words which are used in that deed.

However, we must take it as we find it. And this minute of agreement between Sir John Sinclair and his two surviving sons, Alexander and George, after narrating the former agreements, and setting forth that it is reasonable that they, the two sons Alexander and George, should grant these presents, "do hereby corroborate and confirm the said agreement between the said Sir John Sinclair and Alexander Young Sinclair, dated the 15th day of November and 25th day of December 1856, in the whole heads, clauses, and contents thereof; *and of new*, I, the said Alexander Young Sinclair, in the event of me or the heirs of my body succeeding to the said entailed estate, and I, the said George Sinclair, in the event of me or the heirs of my body succeeding to the said entailed estate, do hereby become bound to content and pay, as we do hereby in the events respectively bind and oblige ourselves and our heirs and successors, to content and pay the said principal sum of £700 sterling." To say that that was done of new is an entire blunder, for no such thing had been undertaken by the prior agreements in any sense. The prior agreements were entirely dependent on the heir himself, the party bound, succeeding to the estate, and no such condition or event as the heirs of his body succeeding to the entailed estate was in contemplation at all. That was entirely a new thing. I do not know what meaning is to be attached to "in the event of me or the heirs of my body succeeding." I do not know, I say, what that means, because Alexander Sinclair and George Sinclair might have predeceased the heir in possession by many years, and the idea that the winding-up of their personal succession was to remain over until it was seen whether any of their sons succeeded to the entailed estate, is to my mind a notion that never could have been entertained by a man of business. Therefore I am inclined to read that part of the agreement *pro non scripto*. I do not think it has any meaning, and I do not see how it could by any possibility occur to any practical conveyancer.

The widow paid the £700, and there is no question about it now. But then we come to a question of somewhat more moment. The only importance of the particular clause to which I have adverted is to be found in its bearing upon the next, which was intended, as I think it must have been, to operate precisely the same kind of obligation. It runs thus:—"And in consideration of the said advances made by the said Sir John Sinclair upon the improvement of the said estate in the parish of Wick, and in the erection of the steading on the farm of Quintfall, do hereby respectively as aforesaid become bound, as we do hereby bind and oblige ourselves, and our heirs and successors succeeding to the said entailed estate as aforesaid, to content and pay the further principal sum of £1000 sterling.

It is impossible to exaggerate the want of intelligibility in this clause. It would seem to imply that the heirs and successors had been bound in the prior clause. But there is not a word to bind them in the former clause, and yet here they become bound to bind themselves, their heirs, and successors succeeding to the estate. It is perfectly plain that nothing of that kind could have been intended, because if Alexander Sinclair had the power to bind the heirs of entail, much more had the heir in possession. It must have been perfectly well known that there was no power whatever to do that; and I am quite persuaded that there is nothing here but the most slip-shod and inaccurate language.

The conclusion I come to is, that the only intention of either of these two obligations was to bind the two heirs, the obligants, in the event of their individually succeeding to the entailed estate; and as Colonel Sinclair did not succeed to the entailed estate, I am of opinion his personal representatives were not responsible for either of these obligations.

I am of opinion, therefore, that we must answer the first and second questions to the effect that neither the heir nor the personal representatives of Alexander Young Sinclair are responsible for this sum of £1000.

I have come to that conclusion with some amount of difficulty, because I felt I was dealing with a clause the precise words of which have little meaning. I cannot find the heirs of entail liable when the family are not. Nor do I see how I can say that in the event of one of the heirs of the body succeeding to the entailed estate at an indefinite period that is to be made a condition of the liability.

But then we come to a question of a different kind, and one involving much more important interests so far as the law is concerned, and that is the third question—"Whether the third part or share of the residue of the estate of Sir John Sinclair, payable to the heirs, executors, and successors of Colonel Alexander Young Sinclair, is divisible equally among his children, the parties of the third and fourth parts, without collation by the party of the third part."

It will be observed that the question relates solely to the interests of the younger children of Alexander Sinclair. It arises in reference to the personal succession of the late Sir John Sinclair, but it is not stated or maintained on behalf of the next-of-kin of Sir John; but the younger children of his son Alexander, who have no right in this money but that of legatees, now make this claim against their brother.

The subject-matter of this plea is a legacy left by Sir John Sinclair in a will executed by him in the year 1867, after the date of the agreements we have referred to. He left a trust-deed, the trustees under which are parties here; and after leaving to his wife the liferent of the whole of his property, he proceeds to do this:—"I direct and appoint my trustees to pay, assign, and dispone one-third part thereof to the said Major Alexander Young Sinclair" (afterwards Lieutenant-Colonel Alexander Young Sinclair), "my son, partly in consideration of the burdens he will be subjected to on his succeeding me in the said entailed estates of Barrock, and to his heirs, executors, and successors; and the remaining two-third parts thereof to the said Captain George Sinclair, my second son, and his heirs, executors, and successors."

There is no ambiguity in this bequest. The parties interested in testing its validity were the next-of-kin or the residuary legatees of Sir John Sinclair, but apparently no question has been raised upon that matter. At least the trustees, who are parties in this case, have said nothing about it. The legacy, they therefore seem to think, must be paid according to its terms. Its terms seem to admit of no doubt. Failing Alexander Sinclair, who predeceased his father, his heirs, executors, and successors are conditionally instituted in the right of the legacy; and this leaves the only question to be, who Alexander Sinclair's heirs, executors, and successors are?

Now, as Alexander Young Sinclair left no heritage, his heirs, executors, and successors *in mobilibus* are his children, or next-of-kin, including the eldest son. This is apparently not disputed by the younger children *in terminis*, and, as I think, it seems to conclude the controversy between them.

But it is contended for Alexander Sinclair's younger children that although their father left no heritage, and although they are in no sense the next-of-kin of Sir John Sinclair, whose succession is in question, they are entitled in the division of this legacy, when paid over, to exclude their elder brother, unless he throw in the entailed estate, which he did not derive from their father, and in which they cannot and never could have had the slightest interest.

It is too plain, I think, to require illustration, that if there could be room for this plea of collation as regards this legacy, it is one competent only to the next-of-kin of Sir John Sinclair. Had there been place for the plea at all, they, the next-of-kin of Sir John, might have insisted that the third party here was bound, as a condition of drawing his share of the legacy, to collate with them the value of the life interest in the entailed estate which he took as heir of his grandfather, or as *alioquin successurus* to him; but this plea, if it had been effectual, would not have enlarged the shares of Colonel Sinclair's younger children, but would have increased the residue of Sir John Sinclair's estate.

But even if the demand had been so stated—and it may be that these younger children, as well as the eldest son, may by the failure of the next of Sir John Sinclair's family be in that position—there would have been no ground on which it could have been maintained. It must have failed, first, because the third party here claims nothing as next-of-kin of his grandfather, and it is only to such claims that collation between heir and executor applies; and secondly, because the conditions under which this legacy was left were dependent entirely on the testator's intention, and the settlement indicates no intention on his part so to limit the bequest, but as I think exactly the reverse. As regards the first of these points, it is necessary to recur for a moment to the principle, elementary as it is, on which this rule or law of collation between heir and executor depends. It is a matter entirely peculiar to the technical rules of the Scotch law of real property and personal succession. But its operation and limits have been very clearly fixed by authority. Collation—the right to collate heritage—is the privilege of the heir who has succeeded to the heritable property of a defunct. The right is a limitation of the general rule that the heir is excluded from sharing with the other next-of-kin in the *pars legitima* of a parent's moveable succession. The rules of our common law carry heritable estate to the heir to the exclusion of the other children, and the moveable estate to the other children to the exclusion of the heir. The heir may be, usually is, the eldest son, though he may be the youngest as in conquest; or the character may be borne by an eldest daughter or by a number of daughters as heirs-portioners. But in a question with the other children or next-of-kin, the rule is the same, that the heir in heritage is excluded from sharing in the legitim, and if the dead's part is not tested on, the right of the next-of-kin will exclude the heir there also. But as the heir is in blood one of the next-of-kin, he is allowed the privilege of collating what he takes as heir, and betaking himself to his character of next-of-kin on condition of throwing the heritage or its value into the general succession.

But this right is entirely in the option of the heir, and the next-of-kin cannot compel him to exercise it. One sentence from Lord Stair sufficiently explains the foundation of our law on this subject. He says—"Heirs are excluded from the bairn's part though in the family, because of their provision by the heritage, except in two cases—first, if the heir renounce the heritage in favour of the remanent bairns, for then the heir is not put in a worse position than they, but they come in *pari passu* both in heritable and moveable rights, which is a kind of *collatio bonorum.*" The second case he refers to is when the heir is an only child and combines both characters. Excepting in those two instances the heir is excluded from sharing in the personal estate. The same kind of doctrine is given at greater length by Erskine, b. iii. t. 9, s. 3, and by Bell in his Commentaries, vol. i., 5th ed., p. 101.

But as the heir's privilege to collate is only available or necessary to enable him to assert his right as one of the next-of-kin, it cannot extend to rights from which the next-of-kin are excluded, and therefore cannot possibly have any place in testate succession. The best test of this is to take the case of a legacy left to the heir *nominatim*. The heir is not excluded, and has no privilege to assert and no claim to purchase. The next-of-kin have no claim to it and have consequently no consideration to give. The legacy must be paid *secundum formam doni*, and the intention of the donor or testator is the only note. In the passage I have already referred to,

Mr Bell states this as settled law. He says—"The privilege of collation may be excluded by the will of the deceased where he has the uncontrolled power of disposing of his moveables. Thus, if the will bequeath legacies, and leave the residue to an executor or residuary legatee, or clearly bequeath the succession to the next-of-kin as specifically under the will, the heir will have no right to demand collation." This passage touches the question very closely, for it exhibits so strongly the rule that collation cannot apply in testate succession, that if Sir John Sinclair had left his moveables by will to his next-of-kin as a class, Colonel Sinclair would not have been entitled to any share even by collating his interest in the entailed estate.

But here the case is wholly different. The legatees in this special legacy are not the next-of-kin of the testator, but certain children of another, who are described as the heirs, executors, and successors of their father. This is a mere designation, which, when its meaning is determined, is equivalent to nomination. But its meaning admits of no doubt, because as Colonel Sinclair left no heritable property, his eldest son had from the first all the rights of one of the next-of-kin.

On this first head, therefore, I am of opinion that there is no room for the doctrine of collation here, because this special legacy is testate succession, taking effect solely by the expressed will of the testator.

But secondly, it seems to me very clear that the intention of the testator was that the succession of the legatee of the entailed estate should not affect his right to the legacy. On the contrary, in the case of the institute the will bears that the legacy was given in the prospect of his succession to the entailed estate. I could have understood the younger children maintaining that the words heirs, executors, and successors as they related to moveable succession were primarily to be understood of the younger children and not of the heir—in which case, as the heir was not included in the bequest, he could have no interest in a legacy which was not left to him. But that has not been maintained here, because the intention to the contrary very clearly appears. Here the legacy was expressly given in aid of burdens connected with the title to the land. The conditional institutes were simply to take in all respects as the institute would have taken, and I cannot read into this bequest a condition which seems equally opposed to the legal construction of the instrument and the manifest intention of the author of it. In a word, the fallacy of the argument for the younger children seems to me to consist in confounding two things which are entirely distinct—the designation of the legatees with the rights conferred only by the will. The legatees take no right of inheritance through their nearness of kin to their father; their right of succession comes to them solely by virtue of the bequest. Yet are they quite accurately designed, in the words of the will, the "heirs, executors, and successors" of their father, and would be so however barren the character might be. The identity of the persons favoured being ascertained, their patrimonial interest flows entirely from the intention of the testator.

I must not conclude, however, without saying a word on the case of *Blair*, without which, indeed, the argument for the younger children could scarcely have been plausibly maintained.

The substance of that decision, as far as it relates to the present question, is this—A lady left a mixed succession to the heirs and successors of a relative. The eldest son claimed the whole on the faith of certain informal writings, which was not allowed. He was preferred, however, to a certain leasehold property to which he was entitled under the words of the will. He then proposed to collate this heritage and participate in the general succession. This was allowed, on grounds which I am entirely unable to follow. The decision is most imperfectly reported—Lord Cockburn strongly remonstrating against it; and the grounds stated by the Lord Justice-Clerk Hope are such that I can hardly believe he is accurately reported. He is reported as saying, in direct opposition to the law as laid down by all the institutional writers, and every case, as far as I am aware, decided on the subject, that "collation is not confined to intestate succession, for an heir of entail must collate." I greatly doubt if he so expressed himself; for so far as the remark bears on the case it was inaccurate, and so far as it was accurate it has no application to it. The rule that an heir of entail must collate, coupled with the qualification required to make it accurate, proves, what indeed was not in question, that the heir's obligation to collate is in principle limited to intestate succession, seeing that the liability to collate entailed estate only applies when the heir of entail was *alioquin successurus* to the last heir, and so in a sense taking up his succession. If he is not heir of line or *alioquin successurus*, it has long been settled that he is not bound to collate. But, as I have said, the remark was wholly beside the only question in controversy. The eldest son was not *alioquin successurus* to Miss Blair. The question was, whether by collating heritage acquired by a singular title he could obtain right to a share of a special legacy left to the next-of-kin? On this head the illustration used by the learned Judge has no application whatever, and the result, as I have said, is at variance with the nature of the right and an unbroken current of authority.

The learned Judge is also reported to have said that the eldest son succeeded to the heritage as the heir of his father. But the phrase is quite inaccurate. Strictly he succeeded to nothing as the heir of his father. He succeeded wholly and exclusively as a disponee under Miss Blair's settlement, and he had no other right to the succession. But he was found to be the disponee under Miss Blair's settlement, because he was the person who, if his father left heritage, would have succeeded to him *ab intestato*—a matter entirely turning on the meaning of the words of the settlement.

I do not trust the words of this report, which are evidently abbreviated. The Court, I imagine, must have gone on the footing that they could read in Miss Blair's settlement indications of an intention that if the heritage were renounced, the right of the heir as one of the next-of-kin should take effect. If this were not the ground of it, I can only say I think it an erroneous decision, and am not prepared to follow it, with, I need not say, profound respect for the eminent Judges by whom it was pronounced, and from whom I should greatly hesitate to differ.

Lord Young—On the first question I am of opinion with your Lordship that it must be answered in the negative—the party of the second part is not liable in the payment of this sum of £1000. I am of that opinion because I think it clear that by the agreement relied on the liability is not put upon the second party. The agreement is very inaccurately expressed whatever you take to be the meaning of it. That there is inaccuracy of expression is clear; but construing it with reference to the subject-matter, and with reference to the intention of the parties as I collect it from the instrument itself and other deeds which are narrated there, I think it plain that there was no intention to put the obligation upon the executor of Alexander Young Sinclair, and that the deed does not admit a construction which would put it upon the executor of Alexander Young Sinclair. There is no reason to suggest that; why the party should have thought for one moment of putting the obligation upon the executor of Alexander Young Sinclair, who never succeeded to the estate, I do not know.

With reference to another sum which is not now here in question—the sum of £700—I think it was exactly in the same position as the sum of £1000, with no other difference than that the smaller sum was expended upon the erection of a mill, while the larger sum--slightly larger--was expended upon the construction of a farm-house upon the entailed estate. With respect to the smaller sum, the parties expressed themselves clearly in an antecedent deed that it is the heir succeeding to the estate who is to relieve the grandfather of the immediate expenditure—that is to say, the son, the party to the agreement, is to relieve him if he succeeds, that the immediate proprietor, namely, the father, shall lay out the money and pay interest while he lives, but that on his death his son succeeding him in the entailed estate shall pay off the loan which was incurred for the purpose of making the expenditure. That, I think, was plainly the meaning and intention of the parties, according to the good sense of the thing, with reference to the sum dealt with by the second deed also. From that deed, and from what may be legitimately referred to, I, without any doubt or hesitation in my own mind, think that there was no intention of putting this obligation upon the second party, namely, the executor of Alexander Young Sinclair.

With regard to the heir whose liability is the subject of the second question, the parties were agreed, and as they were agreed, I do not know why the question should have been put. They are not at variance about it at all. They think the heir is not liable.

Upon the third question, Whether the third part or share of the residue of Sir John Sinclair is divisible equally among his children, the parties of the third and fourth parts, without collation with the third party, I have more to say. But before addressing myself more particularly to that question, I should like to point out that the younger children—indeed the whole children—of Alexander Young Sinclair are of the next-of-kin and heirs *in mobilibus* of Sir John. His children all predeceased him, and therefore his next-of-kin were necessarily his grandchildren. A husband, after his own children, can have no nearer of kin than their issue, and they are the only grandchildren of whom we have any account in this case, although George, another deceased child of Sir John, may have left children, and if so, they would be of the next-of-kin of the grandfather also. Now, whatever the importance of it may be, the grandchildren were of the next-of-kin to the grandfather as well as of their father.

One other observation I make upon this head, and it is this—that Sir John Sinclair, the eldest son of Alexander Sinclair, was his father's, and is at this moment his grandfather's, heir of entail or heir of heritage. Of that there is no doubt whatever. He is the eldest son of his deceased eldest son. Therefore he is his heir of heritage, and he has taken the heritage accordingly. And he has taken it none the less that his grandfather Sir John was by reason of the entail powerless to prevent it coming to him—coming to him as the family estate—coming to the family heir; that is undoubtedly the state of the fact. Now, Sir John Sinclair left a will as well as a deed of entail—a will to govern the succession to his personalty, as the deed of entail which he was not free to make or to refuse to make—for I take for granted it was an onerous deed—governed the succession to the only heritage which so far as we know he had. By the entail the heritage descended to his heir-at-law, the heir of the body of his eldest son, who predeceased him, and by the will his personal estate is given—it is only a third part of it with which we have to deal—to the heirs *in mobilibus* of his son, who were also his next-of-kin. Now, that is the whole family succession, heritage and moveables. There is an entail governing the succession to the one but carrying it to the heir in heritage; there is a will governing the succession to the other but carrying it to the heirs *in mobilibus*. The heir of heritage so taking and keeping the family estate seeks at the same time to share the personal estate as one of the heirs *in mobilibus*.

Now, I have considered whether the law compels us to take this view—I confess with some prejudice against it; all the more on account of that prejudice I have considered the law on the subject as I can collect it from the authorities and from the principles which govern the law in the case. I should point out that although in the grandfather's deed the first destination of his personalty—of the one-third in question—is to his son Alexander Young, if he desired to take it, he would, no doubt, have taken it without the least necessity for collating the entailed estate—for it never was doubted, so far as I know, that where a legacy or bequest of residue is given to an heir *nominatim*, he is free to take it along with the entailed estate, or along with an estate however coming to him, *ab intestato* or otherwise. Indeed, any father, or more remote ancestor—it does not signify—may give his worldly goods, if he is free to dispose of them, to his eldest son and cut off the others, except in so far as they are protected by legitim. Legitim preserves a certain amount of their father's estate to them, but any father is nevertheless entitled, if he wills, to give all his worldly goods and gear, heritable and moveable, to his eldest son, or to cut off his eldest son from both the heritage and the moveable estate, except in so far as he would have the legal right of legitim if cut off from the heritage. There is no question about that.

But here, failing Alexander Sinclair—and he

did fail—the construction which the law compels us to put upon the will *quoad ultra* is that it is to Alexander's heirs *in mobilibus* as a class. It is to those, leaving the law to designate them, upon whom the law impresses the character of Alexander's heirs *in mobilibus*. That, I think, is the only way we can read this bequest. It becomes immaterial therefore that by this will the father—I mean Sir John, the grandfather, with reference to the present parties, but the father of Alexander—signified a clear intention to give him one-third of the residue of his personalty in addition to the entailed estate, and that will would have had that effect. He was entitled so to will, and clearly expressing that will it would have received effect. But it is quite immaterial, for Alexander died, and his will, as expressed with reference to the circumstances as applied to those upon whom the law of succession—I mean the general law of succession—impresses the character of Alexander's heirs *in mobilibus*, says that one-third of the residue shall be due. If any effect were to be given, or any importance to be thought to attach, to the circumstance that he meant Alexander if he survived to take it in addition to the entailed estate, it would be that the conditional institution was of Alexander's heir in heritage—the heir of his body taking the entailed estate; and in that view the heir is to take the whole, just as the father would have done if he had lived. But that was not contended, and that circumstance, in my view of the law, is of no materiality at all.

Now, I stated to your Lordships that having a very strong feeling that the policy and equity of the law led to the result that the heir of the family—that is, the eldest son taking the family estate as such—shall be excluded from the class of those upon whom the law impresses the character of heirs *in mobilibus*, unless he chooses to purchase his admission into that class by collating what he has taken as heir of the family with what has fallen to the heirs *in mobilibus*—feeling, I say, very strongly that this was according to the equity and policy of the law—even although both heritage and moveables descended from the grandfather—the father having died young—I addressed myself on that account the more anxiously to the consideration of the law, and the result of my consideration, so far as I have not indicated it already, and perhaps with some degree of repetition, I shall now state.

The late Sir John Sinclair by his will directs his testamentary trustees to pay one-third of the residue of his estate to his son Alexander, "and to his heirs, executors, and successors." Alexander predeceased the testator, leaving three children, who are parties to this case, and their father's undoubted "heirs, executors, and successors." The question is, Whether the eldest, Sir John Sinclair, is entitled to a share of the bequest in his grandfather's (the late Sir John) will without collating his life interest in the lands and estate of Barrock, to which he succeeded as heir of entail on his grandfather's death?

The entail of Barrock was made by the late Sir John in 1851, in pursuance of an arrangement on which it had immediately before been disentailed, and the destination under which the present Sir John succeeded on his grandfather's death in 1873 is in these terms—"whom failing to Alexander Young Sinclair, . . . my second son, and the heirs-male of his body"—that is the destination under which the fourth party here, the heir of entail in possession, succeeds. It is under a destination to the heir-male of his father's body. He thus took the estate under a conveyance to the heirs-male of his father's body, and this conveyance was made, as it happens—though I think the circumstance immaterial—by his grandfather, to whom he immediately succeeded by reason of his father's predecease. And it is not doubtful that he thus had an advantage by primogeniture over his father's younger children, none the less that it was secured to him by deed of entail. The residue of the grandfather's estate immediately in question being personalty, it is clear, and was admitted, that the conditional institution of the "heirs, executors, and successors" of Alexander, who predeceased the testator, operates in favour of Alexander's personal representatives or heirs *in mobilibus*, just as certainly as the destination which I have quoted from the entail of Barrock operated in favour of his heir in heritage—the heir-male of his body.

Now, although a man's children are all equally near of kin to him, and so *prima facie* are all entitled to share in his moveable succession as his heirs *in mobilibus*, or to take such a bequest by anyone, even a stranger, to their father's heirs *in mobilibus*, yet the law of primogeniture and our system of entails is modified by the familiar rule that the eldest son, if he has taken or succeeded to heritage by reason of his primogeniture, shall be excluded from the class of heirs *in mobilibus*, unless he shall choose to purchase his inclusion by collating the heritage with the younger children. Now, this again is a qualification upon his exclusion which I have represented as a modification of the law of primogeniture. He is excluded from the class to which he otherwise belongs as a modification on the law of primogeniture. But there is a qualification upon this exclusion, which is, that he may bring in the heritage and share it with the others who are equally near of kin with him, and then he shall share the moveables with them. Your Lordship has observed that it never was supposed that he could be compelled to collate. Certainly not; if he could be compelled to collate, there would practically be an end to the law of primogeniture or the advantages of it, because wherever he took more by the law of primogeniture than the share of the whole family property, heritage and personal together, he would be always called upon to collate. There would then be an equal division in almost every case, whether he had the lion's share or not. But he cannot be compelled to collate. And it is there that the law of primogeniture still operates—at least as a great many people think—of course we do not here express any opinion upon such questions—with injustice and hardship, and if the heritage is a great deal more than the share effeiring to one of the children or the family, the heir takes it all the same, and the younger children may go with little approaching to nothing. On the other hand, if there is very little heritage, then the law enables the heir by giving it up—making it "hotch-pot" with the moveables—to return into the position of one of the next-of-kin or one of the younger members of the family.

The question we have to decide is, whether or

not this rule is applicable in the circumstances of this case? And before examining the arguments *hinc inde* on the question, I cannot avoid remarking that the case, in my view of it, is clearly within the policy and equity of the rule.

The first proposition on which the eldest son, the third party, relies is, that he took Barrock, not as heir to his father but as heir to his grandfather, which is true in this, more or less, material sense, that he served heir to his grandfather in conformity to the rule of our feudal law which requires that the service shall be to the proprietor last infeft, and he must have done so equally although his father had survived and possessed the estate for years, if he died uninfeft—a case of frequent occurrence. But his right was as heir-male of his father's body, *i.e.*, as his father's eldest son, or by reason of his primogeniture among his father's children, and in this capacity he was served heir to his grandfather and took the estate.

But in applying the doctrine of collation, it is the substance of the thing, and not the technicality of feudal title, that is regarded, and this is illustrated in various circumstances, but quite uniformly, by all the cases. Thus, it has long been settled that the heritage need not have been inherited, but that heritage taken by immediate voluntary conveyance (favouring the primogeniture) excludes the eldest son from the class of heirs *in mobilibus* unless he shall choose to collate. Now, I do not regard this as unimportant, and this, I think, is what Lord Justice-Clerk Hope meant in the case of *Blair*—that it is not necessary to collation that there shall have been intestacy; for it was decided long before the case of *Blair*, and was known as familiar law, that the heritage need not have been inherited, but may have come by voluntary deed, if it came to the heir.

Lord Justice-Clerk—If he was heir-of-line.

Lord Young—Yes, surely. But it need not have been intestate. Intestacy was not required.

Again, it has been decided that the same result follows the taking of heritage under an entail made by a remote ancestor or a stranger—similarly favouring the primogeniture—although in that case the estate was taken neither by the law of succession, which the entail superseded, nor the will of the immediate predecessor, who was powerless in the matter, and except for merely technical purposes only a liferenter. Lastly, it has been held immaterial that the heritage taken by the heir or eldest son of a family never belonged to his father or other ancestor—was not his heirship at all—but was taken directly and immediately from a stranger who made a deed similarly favouring the primogeniture. It was so decided in the case of *Blair*. Agreeing with that case as according to the principle, policy, and equity of the rule under consideration, I must regard it as an authority, and I should not feel at liberty to depart from it, even if I had doubts about it. But if it is an extension of anything that had been decided before, it is an extension in conformity with the principle, and in conformity with the reason and the policy, of the rule which I have referred to—and the rule is not by any means unique. It is founded upon a principle which has received application under a variety of circumstances. It is well illustrated in English law as well as in ours, where they speak about equity requiring something to be brought into hotch-pot if anything is claimed.

It was so decided, I say, in the case of *Blair*. In that case a stranger, by his deed, as the Court construed it, gave his heritage to the heir in heritage of Mr Blair, and his personalty to his heirs *in mobilibus*, and it was held that the heir, although undoubtedly one of his father's heirs *in mobilibus*, and taking nothing from his father at all, could not be included in the class with respect to the stranger's personalty except on condition of collating the heritage coming to him from the same stranger. I am unable to distinguish the present case from that of *Blair*, in a sense favourable to the heir's argument, by reason of the circumstance that both the heritage and the personalty came in that case from a stranger, and here from a grandfather. Nor, having regard to the case of *Little Gilmour*, can I make a distinction on the ground that here the heritage is taken by deed of entail executed by the grandfather in pursuance of an onerous, as I assume, disentail arrangement, while there it was taken under a voluntary deed. The substantial fact, material to the doctrine of collation—regarded as a reasonable and equitable doctrine—is the same in both cases, viz., that heritage is given to and taken by the eldest son and heir of a certain person as such, *i.e.*, in that character, or by reason of his being so, and certain personalty to the heirs *in mobilibus* of the same person. The policy, equity, and reason of the doctrine require, in my opinion, that the heir shall with respect to the personalty be excluded from the class of heirs *in mobilibus*, unless on the equitable condition of collating. I am unable to think that the decision in *Blair's* case would have been different on the question of collation had the testator there made an entail of his heritage in favour of the heir-male of Mr Blair's body, and by separate deed given his personalty to Mr Blair's heirs *in mobilibus*. It would have made the conclusion simpler on another branch of the case, but would not have affected the question of collation. But how then would that case have differed from this? The gist of the decision undoubtedly is, that it is immaterial to the question of collation that both heritage and personalty have come from a stranger—provided the first is given to the heir in heritage, and the latter to the heirs *in mobilibus*—and that it is also immaterial that the ancestor to whom they are heirs has left nothing to be taken by either.

Upon these grounds I am unable to arrive at the same conclusion as your Lordships on this third question. And I confess I think the result to which in law I am disposed to come is in accordance also with the equity of the matter as well as the policy of our law. The father of a family of three dies in their infancy, during the lifetime of his own father, the grandfather of his infant children. Upon his death the family heritage and the personalty come to them. In such circumstances I shrink from the notion that the heir who takes the estate is to share the moveable fund with the younger children without collation. The personal estate to be divided amounts to about £12,000, and the heritable estate to about £2000 or £3000 a-year. It is easy to see what the result will be. The genius of our law on this matter is that the heir taking the heritage shall not share the £12,000 with the younger children.

LORD CRAIGHILL—There are set forth in the Special Case four questions on which the opinion and judgment of the Court are asked, but in reality there are only two upon which we have to come to a judicial determination. For the counsel for the parties of the first part admitted at the debate that the party of the second part—the heir of entail now in possession, the eldest son of Alexander Young Sinclair—was not bound to make payment of the £1000 in question. That question, therefore, upon this admission may be answered in the affirmative.

The third and fourth questions again are alternative, and the answer to the one involves also the answer to the other. There are thus practically only two questions upon which parties have joined issue, and these I shall now proceed to consider.

I. The first is, Whether the party of the first part, as representing the personal representatives of the late Alexander Young Sinclair, is liable for the sum of £1000 which is in controversy? This depends on the obligation undertaken by Alexander Young Sinclair in a deed called the minute of arrangement and agreement set forth in the Special Case. The import of this deed, however, cannot, as I think, be truly gathered from its provisions alone. It refers to previous deeds, and the character and comprehension of these must be taken into account in determining the true import of the last minute of arrangement and agreement.

The first of the earlier agreements was concluded in March 1856, and was between Sir John Sinclair of Dunbeath, the heir of entail then in possession of the estate of Barrock, and John Sinclair junior, his eldest son and next heir of entail. What we there find is that Sir John had built a meal mill at How, on the entailed estate, at a cost of £700; that he and his eldest son had agreed that this sum should be borrowed; that the interest thereof during his life was to be paid by Sir John, "the said John Sinclair junior becoming bound to pay the principal sum and interest falling due thereon after the death of his said father;" and that upon those considerations it was agreed (art. 3) "that the said principal sum, with the interest falling due thereon, shall be paid by the said John Sinclair junior on his succeeding to the said estate." The succession to the property was thus a condition of John Sinclair junior's liability, though the opening clause of the agreement sets forth no such condition, but simply bears that John Sinclair junior had become bound to pay the principal sum and interest to fall due after his father's death. This is the result, and the only result, which in the circumstances could be considered either reasonable or natural, and yet we only reach it by qualifying what is said in one part of the minute by what is elsewhere disclosed.

The second of the agreements to which Sir John Sinclair and his sons were parties was concluded in December 1856, between him and Alexander Young Sinclair, his second son. This agreement sets forth in the preamble the arrangement with John Sinclair junior relative to the cost of the mill at How, and strange to say his obligation is there described as one "by which he became bound to pay the principal sum, with the interest thereon, after the death of his father"—the condition of succession to the estate being left to be assumed—"and that it is proper that in the event of the said Alexander Young Sinclair succeeding to the property he should in a similar manner become bound to pay the principal sum and interest falling due after his succession." Parties agreed (art. 3) that in the event of Alexander Young Sinclair's succession the principal sum and interest falling due after his succession should be paid by him. This obligation, however, was limited by the condition (art. 4) that there should be no claim under this agreement if the debt should be paid by John Sinclair, the elder brother of Alexander. Thus, again, in the case of Alexander, as it had been in the case of John, we have succession to the entailed estate recognised as the condition upon the fulfilment of which the obligation undertaken was to come into operation.

The third of the deeds is a minute of arrangement and agreement concluded in 1861 between Sir John Sinclair on the one side, and his son Alexander, who by the death of his brother had become next heir of entail, and George Sinclair, his second surviving son, on the other side, being that the effect of which is submitted for our determination. The consideration set forth requires special attention, and it is, that "parties considering that an agreement was entered into during the lifetime of John Sinclair, then the eldest son and nearest and lawful heir of entail of Sir John," whereby the said Alexander Young Sinclair became bound in the event of the death of his elder brother, and of Alexander succeeding to the estate of Barrock, to content and pay the £700, being the cost of the meal mill at How, with interest to become due after the death of his father; and further, considering that Sir John had also expended on another part of the entailed estate an additional sum of £1400, for which, or any part thereof, Sir John had not taken, and did not intend to take, any steps to burden the entailed property, it is just and reasonable that Alexander, his nearest and lawful heir of entail, and George, as at present the next in succession to him, should do something, though what should be done is not expressed, therefore the two sons engaged and agreed as follows:—"*Primo*, to corroborate and confirm the said agreement between Sir John and Alexander in the whole heads and contents thereof, and of new, Alexander, in the event of him or the heirs of his body succeeding to the entailed estate, and the said George in the like event, bound themselves respectively, and their heirs and successors, to content and pay the said sum of £700 to the executors of their father, with interest from and after his death."

Now, how are these two parts of this agreement to be reconciled—that in which the previous agreement with Alexander is corroborated, and that in which the foregoing obligation is expressed? The obligation corroborated bound Alexander only in the event of his succession to the property; the latter in words binds him, not only in that event, but in the event of the succession opening to heirs of his body. Was this last really intended? I think it was not, because the clause of obligation sets forth that the obligation is entered into of new. This it could only be if it was the same obligation as the one corroborated. In this contrariety of provision, and remembering that words of apparently general

obligation had in the previous agreement to be restricted by words occurring elsewhere, my opinion is that an obligation for the £700 in the agreement in question was not intended to be operative unless upon condition that either Alexander in the one case, or George in the other, should succeed to the entailed succession.

Alexander and George, in the second place, by this deed of arrangement and agreement, in consideration of other improvements than the erection of the mill at How, "respectively as aforesaid became bound, and they obliged themselves and their heirs and successors succeeding to the entailed estate as aforesaid for the further sum of £1000." This is the obligation we are asked to construe. The task is perhaps more difficult than the interpretation of the obligation as to the £700, because some of the elements which exist in the latter are absent upon this occasion, but, on the other hand, there is one at least now present which previously was absent. Here the heirs and successors of Alexander and George succeeding to the estate are to be bound according to the mere words of the obligation. But this was a thing which neither could accomplish. Neither Alexander nor George was in possession, and if either had been, he could not have bound the heirs of entail directly; he could only have burdened the estate in the way prescribed by statute. This obligation, if it was thought about, was therefore one which must be taken to have been known to be ineffectual. Alexander and George, however, bound themselves respectively, but, as I think, only in the event of their succession. The words referable to the obligation for £1000 are as open to construction as those which have relation to the £700, and thinking that the former as well as the latter are susceptible of interpretation, I come to the conclusion that as Alexander did not succeed, there is not on any ground an operative obligation by which his executors are affected.

II. The next question is, Whether the third part of the residue of Sir John Sinclair's estate, payable to the heirs, executors, and successors of his son Alexander under his trust-deed, is divisible equally among the children of the latter—the parties of the third and fourth parts—without collation—that is to say, collation of his life-interest in the entailed estate by the party of the third part—the eldest son of Alexander—who after his father's death succeeded as heir of entail to Barrock on the death of his grandfather Sir John Sinclair, the testator? This question must, I think, be answered affirmatively.

We are dealing here not with intestate but with testate succession, and the terms of Sir John's settlement as exhibiting his intention are the things, and the only things, by which our judgment must be governed.

Now, Sir John left the third of the residue of the succession carried by his settlement "partly in consideration of the burdens his son Alexander will be subjected to at his succeeding to the said entailed estate of Barrock," to Alexander, his heirs, executors, and successors. These last were thus conditional institutes, and it happened that they became the legatees through the predecease of their father. Who were the heirs, executors, and successors of Alexander who have succeeded? The question is answered, as I think, once we know that the residue, the third of which forms the legacy in question, is moveable succession. The children of Alexander, who are his next-of-kin, are the legatees, and in this case the eldest son of Alexander must be counted as one of the number. Had he separated himself from the rest by taking something as the heir of his father, one of two things must have happened—either he could not claim a share of the legacy, or, if he did, the heritage he took from his father must have been thrown into the fund for division; but there was no heritage, and all the children are consequently of the next-of-kin.

This, apart from the explanation as to the making of the bequest, would have been the result, but when we turn to what is stated by Sir John as to the motive by which in part he was influenced, we find that the inheritance of the entailed estate was not and could not be a condition contemplated by the testator as one by which the succession to the legacy was to be affected. It is said, indeed, that the eldest son of Alexander was the heir of entail, who took Barrock on the death of his grandfather, and that consequently, as the legacy in question is a part of Sir John's succession, he must be separated from his brothers and sisters, who alone are to be regarded as their father's next-of-kin. But this view is fallacious, and the fallacy consists in the assumption that the eldest son of Alexander took Barrock as the heir of his father, and not merely as the heir at law of his grandfather. And what he takes as such cannot change the rights or the character he possesses as one of the children, or heirs, executors, and successors of his father. There is another consideration which seems to me to be conclusive against the idea upon which the opposite opinion is rested. The succession to the entailed estate is said to be the succession of Sir John, and the succession to the legacy in question is also the succession of Sir John, and upon the conjunction of these two circumstances the argument for collation is rested. But if this argument is to prevail, the next-of-kin of Sir John, and not a certain number of the children or next-of-kin of his son Alexander, are the parties for whose benefit collation is to be introduced. Such a result is not contended for by any party, and the effect of it would be to dislocate entirely the testamentary provisions by which the testate succession of Sir John is to be regulated. The case of *Blair* (Nov. 16, 1849, 12 D. 97) is not an authority against the conclusion at which I have arrived. Whether after the settlement which in that case gave rise to the litigation had been construed, and it was found that the portion of the residue consisting of heritage belonged to the heir-at-law of Colonel Blair, and the moveable part to the next-of-kin of the latter, the heir even on collation was entitled to claim a share of moveables, is a question as to which the Judges were not agreed, and upon it there is, as I think, room for difference of opinion. But taking the decision as we find it, it here has no application. The heir of Colonel Blair did assert his character of heir-at-law to his father, and having done so he could not without collating what fell to him as such claim to participate in the moveable succession. But here the eldest son of Alexander Young Sinclair is never heard of as his father's heir-at-law, much less does he ask or get any share of the bequest in dispute in that character

And consequently the doctrine of collation is outside the circumstances of the present case. There is, as I think, no authority for the opposite opinion. All authority, rightly understood, is, as I think, against it. We may or may not think it a right thing that the distribution should be in this way, inasmuch as the heir-at-law, or the man who should have been the heir-at-law had there been anything for him to take in that character, is the heir of entail now in possession of the family property. It would seem more desirable perhaps in one way that he should not be able to participate with brothers and sisters in the moveable succession; but this consideration cannot be allowed to affect the question, which must be answered according to the recognised rules of law.

The Court therefore were of opinion on the first and second questions that neither of the parties were liable in the payment of the £1000; and further, on the third and fourth questions, that the third part or share of the residue must be distributed equally among the children of Colonel Alexander Sinclair; and that the party of the third part was not bound to collate heritage.

Counsel for the Parties of First Part—Solicitor-General (Balfour)—Gloag. Agent—James Mason, S.S.C.

Counsel for the Parties of Second, Third, and Fourth Parts—Mackintosh—Lorimer. Agents—H. & H. Tod, W.S.

*Tuesday, June 7.*

## SECOND DIVISION.

### UNITED INCORPORATION OF MASONS AND WRIGHTS OF HADDINGTON, AND DICKSON, PETITIONERS.

*Burgh Act (9 and 10 Vict. c. 17)—Abolition of Exclusive Privileges of Trade Incorporation—Incorporation Affected by the Act.*

Procedure in petition to sanction special resolutions of incorporation affected by the abolition of exclusive privileges of members of trades incorporations in burghs.

Nature of alterations in management and application of funds of such incorporation sanctioned by the Court.

The Act 9 and 10 Vict. cap. 17 (Act for the abolition of the exclusive privilege of trading in burghs in Scotland), after providing by sec. 1 that from and after its date all exclusive privileges and rights of trading shall cease, and that it shall be lawful for any person to carry on any trade or handicraft in any burgh without being a burgess of such burgh, or a guild brother, or a member of any guild, craft or incorporation, and by sec. 2, that notwithstanding the abolition of such exclusive privileges such incorporations shall retain their corporate character, provides by sec. 3—"Whereas the revenues of such incorporations as aforesaid may in some instances be affected, and the number of the members of such incorporations may, in some instances, diminish by reason of the abolition of the said exclusive privileges and rights, and it is expedient that provision should be made for facilitating arrangements suitable to such occurrences: Be it therefore enacted that it shall be lawful for every such incorporation from time to time to make all bye-laws, regulations, and resolutions relative to the management and application of its funds and property, and relative to the qualification and admission of members in reference to its altered circumstances under this Act, as may be considered expedient, and to apply to the Court of Session by summary petition for the sanction of the said Court to such bye-laws, regulations, or resolutions; and the said Court, after due intimation of such application, shall determine upon the same, and upon any objections that may be made thereto by parties having interest, and shall interpone the sanction of the Court to such bye-laws, regulations, or resolutions; and the said Court, after due intimation of such application, shall determine upon the same, and upon any objections that may be made thereto by parties having interest, and shall interpone the sanction of the said Court to such bye-laws, regulations, or resolutions, or disallow the same in whole or in part, or make thereon such alterations, or adject thereto such conditions or qualifications, as the said Court may think fit, and generally shall pronounce such order on the whole matter as may to the said Court seem just and expedient; and such bye-laws, regulations, or resolutions, subject to such alterations and conditions as aforesaid, shall be, when the sanction of the said Court shall have been interponed thereto, valid and effectual and binding on such incorporations, provided always that nothing therein contained shall affect the validity of any bye-laws, regulations, or resolutions that may be made by any such incorporation without the sanction of the said Court, which it would have been heretofore competent for such incorporation to have made of its own authority or without such sanction."

The United Incorporation of Masons and Wrights of Haddington was founded by gift and letters-patent under seal of cause of the Magistrates and Town Council of Haddington at a period long prior to the year 1647, when the old charter having been lost, a new charter or gift was granted by the Magistrates and Town Council of new erecting and creating the incorporation with the usual rights and powers and privileges. Until the passing of the Act of Parliament above quoted, the corporation had numerous members, and had acquired certain property, heritable and moveable. After the date of that Act, however, the number of members gradually diminished, till in 1881 Andrew Dickson, joiner in Haddington, was the only surviving member resident in Scotland. No meeting of the incorporation had taken place for eighteen years, and no member had been admitted for twenty-seven years. This petition was in these circumstances presented by Dickson in terms of sec. 3 of the Act, 9 and 10 Vict. c. 17, above quoted, for the sanction of the Court to certain resolutions as to the future disposal of the funds. The petitioner stated with regard to the past management of the incorporation that "the incorporation has been long accustomed to clear off first all necessary charges, and then to distribute part of its annual revenue among members in distress and the widows and children of those members who had left their families in poor circumstances. Help thus afforded was not demanded as a right, but allowed as a charity.