My ground of judgment can be very shortly explained. In the declaration sent in by the defender to the bank on the 7th March he declared—"I cashed a £100 bank-note to a stranger on Saturday, March 4, 1882, between the hours of 11 and 12 a.m. He asked for £20 notes, and in error I declare I gave £100 notes in mistake; after I served the first customer I had at no time £100 in £20 notes; consequently the error of £900 short, as I gave £1000 in lieu of £100." This account of the matter appears to me to be conclusive against the defender. There is the giving of notes, not merely without counting the number of notes given, but there is also the giving without looking at their denomination. These things could not have happened if there had been ordinary prudence or reasonable care or diligence in the transaction of the business of the bank. In the first place, what is called by the witnesses, the "feel of the fold" was unobserved or disregarded. Mr Harvie, the secretary of the bank, tells us:—"I think it a most improbable thing that any man should have handed away ten £100 notes in a parcel instead of five £20 notes in a parcel, without feeling the difference. A £100 note is the same size as a £20 note, but the notes are put up in different quantities or 'folds.' When a parcel of £20 notes is made up there are five notes in the 'fold,' but as regards the £100 note there are ten in the 'fold.' The paper is the same; the difference is that there are double the number of sheets of paper." Had there been reasonable attention to the work in hand, the difference between the "feel of the fold" of the ten £100 notes given, and what would have been the "feel of the fold" of the £20 notes asked for, must have attracted attention and prevented the mistake which was committed. And in the second place, what was done was done in the knowledge that at the time the smaller notes were asked in exchange for a £100 note the defender had not five £20 notes in his till. He had begun in the morning with four; he had got two more; he had paid away three; and thus three were all that remained. Had the defender given any, even the smallest, consideration to the business on which he was engaged—much more so, if he had counted or looked at the denomination of the notes he gave away—the error which occurred could not possibly have been committed. But it was committed; and therefore there is no escape from the conclusion that there was on the defender's part want of ordinary prudence—of reasonable care or diligence in the transaction of the business of the bank. Several cases were cited at the bar, but neither these decisions nor any of the *dicta* of the Judges by whom they were decided, affect, as I think, the grounds of judgment on the present occasion. The result is that, in my opinion, the bank must prevail. We may be sorry for the defender, but the law must have its course in his case as in others; and accordingly, as I think, judgment must pass against him for the sum which the bank lost through his carelessness in the transaction of their business.

LORD RUTHERFURD CLARK—I am of the same opinion. I think it fair to the defender to say that I acquit him of dishonesty, but not of gross negligence. That is the ground of my judgment.

The LORD JUSTICE-CLERK concurred.

LORD YOUNG was absent.

The Court granted decree in terms of the conclusions of the action.

Counsel for Pursuers (Respondents)—Trayner—Readman. Agents—Ronald & Ritchie, S.S.C.

Counsel for Defender (Appellant)—Mackintosh—Lang—M'Kechnie. Agents—Smith & Mason, S.S.C.

Friday, November 3.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

EARL OF NORTHESK, PETITIONER.

Entail—Succession—Testamentary Deed—Heirs Whatsoever—Heirs Whatsoever of the Body—Flexibility of term "Heirs Whatsoever"—Necessary Implication.

Terms of deeds of entail on a construction of which *held* that the term "heirs whatsoever" was intended to mean, and must be read as meaning, "heirs whatsoever of the body."

An entailer executed on the same date two deeds of entail of properties named E. and L. belonging to him. The deeds of entail reserved the granter's liferent, and were recorded on the same date after his death. In both deeds the granter destined the estates conveyed by each to himself in liferent, and his eldest son and the heirs-male of his body in fee, whom failing to his second son and the heirs-male of his body, whom failing to his other sons born and to be born in their order of seniority and their heirs-male respectively, whom failing to the heirs whatsoever of the body of his eldest son. Thereafter, in the entail of E., occurred the words "whom failing to the heirs whatsoever of the said J. J. C. (the entailer's second son), whom failing to the heirs whatsoever of the body of the said S. T. C. (the entailer's third son)." Then followed a series of further substitutions in favour of the heirs whatsoever of the bodies of the entailer's other sons born and to be born, whom failing to his daughters in their order of seniority and the heirs whatsoever of their bodies, whom failing to other substitutes named or to be named. The destination in the entail of L. was to the entailer's sons and their heirs-male and the heirs whatsoever of the body of the eldest son as in the entail of E., after which the destination was to "the heirs whatsoever of the body of the said J. J. C., whom failing to the heirs whatsoever of the said S. T. C." The entail then proceeded in terms similar to those used in the entail of E.

Part of the estate of L. was acquired by a railway company under parliamentary powers, and the compensation consigned under the Lands Clauses Consolidation (Scotland) Act 1845. The heir in possession of the two estates having executed permanent improvements on both E. and L., applied to the Court for authority to uplift the consigned money in repayment of his expenditure on both estates. *Held*, on a construc-

tion of the deeds of entail, that for the purposes of the application these must be regarded as identical, since it appeared by necessary implication that the words "heirs whatsoever" in the passages from the two entails above quoted were used by the entailer as equivalent to "heirs whatsoever of the body," and *authority granted* to the petitioner to uplift and apply the money consigned as compensation for L. in the manner proposed.

This was a petition by the Right Hon. George John Earl of Northesk for authority to uplift and apply consigned money in repayment of expenditure on permanent improvements on the entailed estates of Ethie and Lunan, both situated in the county of Forfar, of which estates he was heir in possession under two separate deeds of tailzie.

Prior to June 1879 the North British, Arbroath, and Montrose Railway Company, afterwards amalgamated with the North British Railway Company, acquired three separate portions of the entailed lands of Lunan, held under the Lunan entail, the compensation therefor being fixed under the Lands Clauses Consolidation (Scotland) Act 1845 at a sum amounting in all to £2475, 0s. 11d., which sum was consigned in bank on 14th June 1879.

The petitioner had expended upon permanent improvements on Ethie and Lunan a sum ascertained and reported by the reporter appointed by the Lord Ordinary to amount to £3121. This sum was expended on five farms, of which two were part of Lunan, and the remaining three were part of Ethie. The amount expended on the Lunan farms was £928, 6s., on the Ethie farms £2193, 4s. 6d.

The petitioner, on the ground that the destinations in the two entails were in effect precisely the same, asked leave to uplift in repayment of the sum of £3121, 10s. 6d., being the total amount of these two sums, the sum of £2475, 0s. 11d. consigned in bank as above stated.

The 26th section of the Act 11 and 12 Vict. c. 36 (the Rutherfurd Act), enacts that "In all cases where money has been derived, or may hereafter be derived, from the sale or disposal of any portion of an entailed estate in Scotland, or of any right or interest in or concerning the same, or in respect of any permanent damage done to such estate under any private or other Act of Parliament . . . where the heir in possession of such entailed estate could by virtue of this Act acquire to himself such estate in fee-simple by executing and recording an instrument of disentail as aforesaid, it shall be lawful for such heir to make summary application to the Court in manner hereinafter provided for warrant and authority, and the Court upon such application shall have power to grant warrant and authority to and in favour of such heir of entail for payment to such heir of such sums of money as belonging to himself in fee-simple, but if such heir shall not be entitled to acquire such estate in fee-simple, then it shall be lawful for such heir with the approbation of the Court to lay out such money or any portion thereof in or towards payment of any money charged on the fee of such entailed estate under this or any other Act, or in redemption of the land-tax affecting such entailed estate, or in permanently improving the same, or in repayment of any money already expended in such improvements," &c.

The petitioner was of full age, and not subject to any legal incapacity. The three next heirs were his three sons—Lord Rosehill, a minor, the Hon. Douglas Gordon Carnegie, and the Hon. Ian. L. A. Carnegie, pupils. Mr G. M. Paul, W.S., was, by interlocutor pronounced in the course of these proceedings, appointed by the Lord Ordinary to be *curator ad litem* to Lord Rosehill and *tutor ad litem* to his two brothers. No answers were lodged.

The Lord Ordinary remitted to Mr John Galletly, S.S.C., to examine and report upon the deeds produced, and upon the regularity of the proceedings. He reported that the application and whole procedure was regular and proper with the exception of a point of difficulty arising under the two destinations, that difficulty being whether they could for the purposes of the application be regarded as identical.

The Ethie entail and the Lunan entail were executed of the same date, 13th June 1815, by the grandfather of the petitioner. They were not recorded till 27th June 1832, after the entailer's death. In the Ethie entail the granter destined the lands of Ethie "to myself in liferent, and to the said William Hopetoun Carnegie, commonly called Lord Rosehill, my eldest son, and the heirs-male of his body in fee; whom failing to John Jarvis Carnegie, my second son, and the heirs-male of his body; whom failing to Swynfen Thomas Carnegie, my third son, and the heirs-male of his body; whom failing to any other son or sons to be procreated between me and the said Mary Countess of Northesk, successively in their order according to their seniority, and the heirs-male of their bodies successively; whom failing to any other son or sons to be procreated of my body in any subsequent marriage, successively in order according to their seniority, and the heirs-male respectively to be procreated of their bodies successively; whom failing to the heirs whatsoever of the body of the said William Hopetoun Lord Rosehill; *whom failing to the heirs whatsoever of the said John Jarvis Carnegie; whom failing to the heirs whatsoever of the body of the said Swynfen Thomas Carnegie*; whom failing to the heirs whatsoever of the bodies of any other son or sons to be procreated between me and the said Mary Countess of Northesk successively, in order according to the seniority of such sons; whom failing to the heirs whatsoever respectively of the bodies of any son or sons to be procreated by me in any subsequent marriage successively in order according to the seniority of such son or sons; whom failing to Lady Mary Carnegie *alias* Long, my eldest daughter, wife of   Long, and the heirs whatsoever of her body; whom failing to Lady Anne Letitia Carnegie, my second daughter, and the heirs whatsoever of her body; whom failing to Lady Elizabeth Margaret Carnegie, my third daughter, and the heirs whatsoever of her body; whom failing to Lady Jane Christian Carnegie, my fourth daughter, and the heirs whatsoever of her body; whom failing to Lady Georgina Henrietta Carnegie, my fifth daughter, and the heirs whatsoever of her body; whom failing to the other heirs whatsoever to be procreated of my body; whom failing to the Honourable George Carnegie, my brother-german, and the heirs whatosever procreated or to be procreated of his body; whom failing to any person or persons to be named by

me in any nomination or other writing to be executed by me at any time of my life; and failing of such nomination or other writing of the person or persons to be therein named and their heirs, then to the person having right for the time to the title or honour of Northesk or Rosehill, or any other title or honour enjoyed by me, and the persons succeeding thereto, in all time coming, in virtue of the destinations and rights of the said titles and honours: Declaring that in case my titles and honours shall happen to divide or separate or devolve to different persons, then the person succeeding to the highest title of dignity enjoyed by me, upon failure of all my heirs of tailzie before mentioned or to be named and appointed by me, shall have right and be entitled to succeed to my lands and estates before specified, my intention being that in that case my said lands and estates shall belong to the person succeeding to the highest title of dignity presently enjoyed by me; whom failing by the extinction of all my titles and honours, then to my heirs-male whatsoever; whom failing to my own nearest heirs whatsoever and their assignees, the eldest heir-female and the descendants of her body always excluding heirs-portioners and succeeding still without division throughout the whole course of succession of heirs whatsoever as well as of heirs of provision."

The Lunan entail was in exactly similar terms but for two differences, which were—(1) The Hon. George Carnegie, instead of being called as in the Ethie entail after the heirs whatsoever to be procreated of the entailer's body, was called at a much earlier period of the destination, viz., immediately after the sons to be procreated of the body of the entailer in any subsequent marriage and the heirs-male of their bodies. He was there called in these terms—"whom failing to the Honourable George Carnegie, my brother-german, and the heirs-male of his body." (2) The other difference occurred at the point in the destination almost immediately following that just mentioned. After the heirs whatsoever of the body of Lord Rosehill the Lunan entail ran, not as in the Ethie entail, "whom failing the heirs whatsoever of the said John Jarvis Carnegie, whom failing to the heirs whatsoever of the body of Swynfen Thomas Carnegie," but "*whom failing to the heirs whatsoever of the body of the said John Jarvis Carnegie, whom failing to the heirs whatsoever of the said Swynfen Thomas Carnegie.*"

At the date of this application the Hon. George Carnegie was dead without leaving heirs of his body; the Hon. John Jarvis Carnegie was still alive; Swynfen Thomas Carnegie was dead without leaving heirs-male.

Mr Galletly in his report called the attention of the Lord Ordinary to the difference between the destinations in order that his Lordship might determine whether the petitioner was entitled to uplift the whole sum consigned, or only the £928 which had been expended on permanent improvements upon the estate of Lunan.

The curator and tutor *ad litem*, without appearing by counsel before the Lord Ordinary, lodged a minute, in which he brought before the Lord Ordinary that "the consigned money is the price of ground taken from Lunan, whereas the permanent improvements were made mainly upon Ethie. Failing the petitioner and his issue, and the entailer's two younger sons and their issue male, the estate of Lunan is destined to the heirs whatsoever of the body of the entailer's second son, whereas Ethie is destined to the heirs whatsoever of such second son. There may thus in no long time be a split in the succession to these estates. They may, however, be held to be one entailed estate so far as the three minor heirs for whom I am tutor and curator are interested in them, as the divergence would arise upon a subsequent part of the destination. But it is for the interest of these minor heirs that the petition should be refused so far as concerns Ethie improvements, because if the heir in possession is entitled to repayment from the consigned fund he will get back from the estate the whole of his expenditure, whereas if his only remedy is to charge the fee by bond and disposition in security he will get back two-thirds of the amount and no more."

The Lord Ordinary found that the petitioner had expended in permanent improvements on Lunan the sum of £928, 6s. mentioned above, and authorised him to uplift that sum with interest from bank, and to lodge in process the usual deed of acknowledgment and discharge bearing that he had received the said sum in repayment of the sum expended on Lunan, and discharging the estate and the succeeding heirs of entail. *Quoad ultra* his Lordship reported the petition and procedure to the First Division.

He added this note:—"The petitioner is heir of entail in possession of the estates of Ethie and Lunan, both situated within the county of Forfar.

"Part of the estate of Lunan was taken for the purposes of the North British, Arbroath, and Montrose Railway Company. The compensation payable for the land so acquired has been fixed at £2475, 0s. 11d., and that sum has been consigned in terms of the provisions of the Lands Clauses Consolidation (Scotland) Act.

"The petitioner has expended the sum of £3121, 10s. 6d., in executing permanent improvements on both estates. In the present application he asks the Court to authorise the consigned sum to be applied towards payment of these improvements.

"The estates of Ethie and Lunan are held under two separate deeds of entail, both dated 13th June 1815, and recorded in the Register of Tailzies 27th June 1832, and both executed by the same person, but with an apparent difference in the destinations.

"The Lord Ordinary has given effect to the application in so far as the said improvements have been ascertained to have been made on the estate of Lunan. The competency of the application *quoad ultra* depends upon the construction and effect of the destination, and involves a question which the Lord Ordinary thinks it undesirable to decide in the Outer House in an unopposed application.

"If the destinations in the two entails are really different, it is not maintained that the compensation payable for land taken from one can be applied in repayment to the proprietor of moneys expended in improving the other. But the petitioner contends that the destinations, although they differ in terms, are truly identical; and if so, that the two estates being entailed at the same time, by the same person, upon the same series of heirs, and under the same conditions, are, for

the purposes of this application, to be treated as one, in accordance with the decision of the Court in the case of *Maitland*, 23d February 1854, 16 D. 651.

"The destination in each entail is to the granter in liferent and his eldest son Lord Rosehill, and the heirs-male of his body in fee; whom failing to his second son John Jarvis, and the heirs-male of his body; whom failing to his third son Swynfen Thomas, and the heirs-male of his body; whom failing to any other sons to be procreated of his then existing marriage, in order of seniority, and the heirs-male respectively to be procreated of their bodies; whom failing to sons to be procreated of any subsequent marriage, in order, and the heirs-male of their bodies.

"At this point in the destination the first variation occurs. In the Lunan entail the next heir called is the Honourable George Carnegie, the entailer's brother, and the heirs-male of his body. In the Ethie entail the next heirs are the heirs whatsoever of the body of Lord Rosehill, who in the Lunan entail are called immediately after the heirs-male of the body of George Carnegie. But in the event which has happened this variation is of no practical importance, since George Carnegie has died without the succession having opened to him, and without leaving heirs of his body.

"At the next stage the variations occur which give rise to the present question.

"In the Ethie entail the heirs called after the heirs whatsoever of the body of Lord Rosehill are the heirs whatsoever of the said John Jarvis Carnegie, whom failing the destination is to the heirs whatsoever of the body of Swynfen Thomas; whom failing to the heirs whatsoever of the bodies of other sons to be procreated in their order; whom failing to the entailer's eldest daughter Lady Mary Carnegie, and the heirs whatsoever of her body; whom failing to four other daughters named, in order, and the heirs whatsoever of their bodies respectively and successively; whom failing to the heirs whatsoever of the entailer's body; whom failing to the Honourable George Carnegie and the heirs whatsoever of his body; whom failing to persons to be named.

"In the Lunan entail the destination is to the heirs whatsoever of the body of the said John Jarvis Carnegie, whom failing to the heirs whatsoever of the said Swynfen Thomas; and failing them the destination proceeds in the same terms to the same series of heirs as in the Ethie entail, except that the Hon. George Carnegie is not called after the heirs whatsoever of the entailer's body, but the heirs whatsoever of the body of the said George Carnegie are called in that place, and failing them persons to be named by the entailer, as in the Ethie entail.

"The result is that in the Ethie entail the heirs whatsoever of John Jarvis Carnegie are called before the heirs of the body of Swynfen, while in the Lunan entail the heirs whatsoever of Swynfen are called before the heirs of the body of other sons to be procreated of the entailer's body, and before the entailer's daughters and the heirs of their bodies. If that part of the destination therefore should take effect according to its terms the estates may diverge and go to different heirs. But the petitioner contends that the words 'heirs whatsoever' are flexible, and that in this place they must be construed, according to the manifest intention of the entailer, to mean heirs whatsoever of the body, on the same principle on which 'heirs-male' has been construed to mean heirs-male of the body instead of heirs-male general.

"The Lord Ordinary would have difficulty in giving effect to an argument founded upon the supposed flexibility of the term heirs whatsoever, if these words have been designedly used by the entailer. They have been the subject of much discussion in recent cases, and, so far as the Lord Ordinary is aware, there is no case in which they have received the interpretation for which the petitioner contends, or any similar interpretation. The result of the authorities is stated by Lord Cowan in the case of *M'Gregor* v. *Gordon*, 3 Macph. 168. 'These words,' says his Lordship, 'have a fixed legal meaning attached to them. They are equally comprehensive with the word "heirs" generally, and in every case, with an exception to be immediately noticed, mean those heirs whom the law points out as entitled to succeed.' The exception to which he refers is explained in a subsequent paragraph—'There is but one state of circumstances connected with the succession which may affect the construction of a destination to heirs whatsoever. It is where titles to an estate, or to heritable rights relative thereto, have been taken in these terms by a party already vested with or having right and title to the property under prior investitures destining the estate to a particular class of heirs, as to heirs-male. Intention has in such cases been held to give a limited meaning to the destination in collateral or ancillary deeds to heirs whatsoever, and to carry the subjects to the heirs-male called to succeed by the primary or radical titles.' But even if the words may be construed to mean heirs whatsoever of the body, there is difficulty in giving them that construction in the present destination; or where the maker of an entail has designedly used distinct technical terms having different meanings, applying one term to the heirs of a particular *stirps*, and the other to the heirs of another *stirps* occurring immediately afterwards in the destination, it is not to be presumed that he meant one and the same class of heirs in each of these two cases.

"But, on the other hand, there is great force in the petitioner's argument that it would be inconsistent with the manifest intention of the entailer to call the heirs-general of John Jarvis Carnegie in the Ethie entail, or the heirs-general of Swynfen Carnegie in the Lunan entail, before the heirs of the bodies of younger sons, and before the entailer's daughters. It is said to be improbable that a series of heirs-substitute called as proper heirs of taillie should be postponed to the heirs whatsoever of a previous substitute who if the succession opened to them would take the estate in fee-simple. It is also material to observe that the effect of the destination in certain contingencies would be to carry the estate away from the immediate descendants of the testator, and even from his own daughters, to strangers in blood. Or if this did not happen, the nearest heirs-general of John Jarvis Carnegie in the one case, and the heirs-general of Swynfen Carnegie in the other, would be the same persons who are called to the succession next in order after these heirs are exhausted. It would be inconsistent,

therefore, with the design and structure of the entail to call heirs whatsoever at this stage. The inference is that the words 'of the body' were omitted by a mere mistake, and if so, there seems sufficient ground for the petitioner's contention that the defect may be supplied by implication.

"On the whole, therefore, the Lord Ordinary would have been disposed to grant the application. But an interlocutor to that effect would not have been taken to review; and since his decision, if erroneous, might infringe upon the rights of persons who are not parties to the process, and whose interests are not protected, he has thought it proper to report the petition.

"The petitioner in support of his argument referred to *Tinnoch* v. *M'Lennan*, 26th November 1817, F.C.; *Ker* v. *Innes*, 5 Paton's App. 320; *Halliday* v. *Maxwell*, 4 Paton's App. 346; and *Braid* v. *Waddell*, 22 D. 433."

In the Inner House the curator and tutor *ad litem* was represented by counsel.

Argued for the petitioner—There was no real difference between the destinations in the Ethie and Lunan entails. The cases of *Cochrane*, Dec. 11, 1850, 13 D. 293, and *Maitland*, Feb. 23, 1854, 16 D. 657, were in point, while the case of *Lockhart*, June 26, 1852, 14 D. 150, which occurred under the Montgomery Act, was a decision on an analogous question, which was in the petitioner's favour. The term "heirs whatsoever" was to be interpreted in consonance with the context —*M'Lachlan* v. *Campbell*, 1757, M. 2312, and cases in the Lord Ordinary's note. In the *Roxburgh* case (*Ker* v. *Innes*, cited *supra*), indeed, "heirs-male"—a term not less technical than "heirs whatsoever"—had been interpreted by the context in a manner similar to that contended for. These entails were of a testamentary character, and must be read in accordance with the granter's intention. It would be reading them against his intention to assume that he purposely placed at an early period of the destination words which, literally taken, would defeat the right of the substitutes for whom he anxiously provided in the succeeding branches. For the purposes of this application, at all events, the entails might be read as identical.

Argued for the tutor and curator *ad litem*—The term "heirs whatsoever" was not flexible, or at least had never been so read previously. In any event, it could not be subject to construction without such necessary implication as Lord Eldon explained to be necessary to give a technical word another than its proper meaning. The cases of *Tennant* v. *Bailey*, 1770, M. 14,941, *rev.* 2 Pat. Ap. 243, and *Stuart* v. *Stuart's Trustees*, 2 Sh. Ap. 149 (Lord Gifford's opinion), were against the petitioner, and so also was the *Dalswinton* case (*Leny*, June 28, 1860, 22 D. 1272), and the various cases relating to the Cluny entail—*Gordon* v. *Gordon's Trustees*, March 1, 1862, 24 D. 687; *M'Gregor* v. *Gordon*, March 7, 1863, 3 Macph. 148; *Gordon* v. *Gordon's Trustees*, March 2, 1866, 4 Macph. 101; *Gordon* v. *Gordon's Trustees*, October 28, 1881, *aff.* July 26, 1882, 19 Scot. Law. Rep. 33 and 899. The terms of the entails showed that they were not meant to be identical. The position of the Hon. George Carnegie in the one as compared with the other showed this clearly. Besides, the case of *Farquhar*, Nov. 29, 1839, 1 D. 120, shows that even if they were meant to be identical the Court will not be ready to correct an entailer's errors so as to keep up the fetters of an entail.

At advising—

Lord President—The petitioner here is heir of entail in possession of the two estates of Ethie and Lunan, which are held by him under two separate deeds of entail which were executed on the same day. It appears that a part of the estate of Lunan was taken by the North British, Arbroath, and Montrose Railway Company, the compensation payable for the land so acquired being about £2475, which is now consigned in bank. On the other hand, it appears that the petitioner has expended £3121, 10s. in executing permanent improvements, not on Lunan only, but partly on Ethie also, and he now proposes that the compensation money shall be applied in extinguishing the sum expended on improvements on both the estates. Now, if the two entails are identical in destination, then there is no reason why the petition should not be granted. The Lord Ordinary has allowed the application so far as regards the sums expended on Lunan, but has reported to us the further question as regards Ethie. This question depends on whether the destinations in the two entails are to be regarded as identical. We start with the very important consideration that the destinations in the two entails were obviously not intended to be precisely the same, for in the Ethie entail the brother of the entailer—the Hon. George Carnegie,—and the heirs-male of his body, are not called in the same part of the destination as in the Lunan entail. In the one case—the Ethie entail—he is not called till after the heirs whatsoever of the entailer's body, while in the other—the Lunan entail—he is called much earlier, immediately after the heirs-male of the body of the entailer's sons. If the destinations were to take effect in this respect, it is quite plain that the order of succession could not be said to be identical. It so happens, however, that the Hon. George Carnegie died without heirs of his body, so that that branch of the destination has failed in both cases, and we are entitled to read the entails as if in each case that branch of the destination did not exist. The only effect of this destination to the Hon. George Carnegie occurring at all is to show that the testator had no intention of making the destinations of the two entails absolutely identical. Now, though this branch has failed in both cases, there are in the two destinations some other circumstances of difference with which we are here more particularly concerned. In the one entail the destination, after providing that the estate shall go to the granter in liferent, and his eldest son Lord Rosehill and the heirs-male of his body in fee, and so on successively to the sons of his then marriage in their order, and the heirs-male of their bodies successively in fee, proceeds thus—"whom failing to any other son or sons to be procreated of my body in any subsequent marriage, successively in order according to their seniority, and the heirs-male respectively to be procreated of their bodies successively, whom failing to the heirs whatsoever of the body of the said William Hopetoun, Lord Rosehill, whom failing to the heirs whatsoever of the said John Jarvis Carnegie." That is the way in which the destination runs in the Ethie entail. Then that entail goes on—"whom failing to the

heirs whatsoever of the body of the said Swynfen Thomas Carnegie, whom failing to the heirs whatsoever of the bodies of any other sons to be procreated" of his then present marriage, successively in order of seniority, whom failing to the heirs whatsoever of the bodies of any son or sons to be procreated of any subsequent marriage, successively in order according to seniority, whom failing to the granter's daughters in their order and the heirs whatsoever of their bodies, whom failing to the other heirs whatsoever of the granter's body, "whom failing to the Honourable George Carnegie, my brother-german, and the heirs whatsoever procreated or to be procreated of his body, whom failing to any person or persons to be nominated by the granter, and failing such nomination, to the person having right for the time to the titles and honours of Northesk or Rosehill." So in this Ethie entail we find introduced, immediately before the institution of the heirs whatsoever of the body of Swynfen Thomas Carnegie, a different expression, viz., "the heirs whatsoever of John Jarvis Carnegie," from that which occurs as to any of the other sons. Then, oddly enough, in the Lunan entail the destination is to "heirs whatsoever of the body" of John Jarvis Carnegie, while it is the "heirs whatsoever" of Swynfen Thomas Carnegie that are called.

In both deeds there thus occurs at a very early part of the destination a branch which, if it should come into operation, would necessarily put an end to the entail. The petitioner's case is that this is a blunder, and a blunder so obvious that he is entitled to have it rectified. He maintains that it is quite obvious that it was intended to add the words "of the body" in each case, but that they have dropped out. That contention raises a question of importance and difficulty, and one that may arise hereafter in the course of the succession to these entailed estates, between the heirs who may be instituted for the time, and no judgment which could be pronounced now would be binding on them as *res judicata* when it does arise, since we have not before us the parties between whom it may be raised. Still the petitioner is entitled to have the question decided for the purposes of this application. Now, these deeds of entail are testamentary deeds, for though they were executed in 1815, they were not recorded in the granter's life, and the course of the destination being to the granter in liferent and his eldest son in fee, I think there is no doubt that we may treat them as testamentary in character. Therefore, so far as this question arising under the destination is concerned, the question to be decided is one of intention, and we apply to it the ordinary rules for the construction of testamentary deeds, and not the rules applicable to the consideration of the fetters of a strict entail. There are one or two considerations which operate powerfully in support of the petitioner's contention. It would be singular if the entailer really intended to introduce into the Ethie entail the heirs whatsoever of one of the persons called, and not the heirs whatsoever of his body, seeing that subsequently to that introduction there is a long destination, in every branch of which he has called the heirs whatsoever of the bodies of the substitutes called. Of course if by "heirs whatsoever" are meant in that one passage heirs whatsoever in the strict sense, and not heirs whatsoever of the body, then in the event of the succession opening to them the entail must come to an end, and all the numerous and carefully worded subsequent branches of the destination would become of no use, and never could operate. It would be difficult to say that according to the will and intention of the maker of the deed that entail was meant to come to an end at so early a stage, and yet it must be so if the words "heirs whatsoever" are to receive the meaning they ordinarily bear in an entail. The words "heirs whatsoever" are certainly of a technical signification, like "heirs" used alone, or "heirs-at-law" or "heirs of line," and all refer to succession to heritable estate according to legal rules. In some cases the Court has adhered to that meaning of "heirs whatsoever," though there were some indications of intention that notwithstanding the destination to heirs whatsoever the succession should still be entailed. In these cases, particularly in the cases of *Leny* and *Gordon*, there was nothing in the deeds to justify the Court in saying that the terms "heirs whatsoever" were to be used in any but the ordinary sense, still less that heirs whatsoever of the body were intended to be called under the designation heirs whatsoever, and that the omission of the words "of the body" was from any blunder or mistake. That is the question here, and while it is clear that in ordinary circumstances the words "heirs whatsoever" have but one signification and effect, still I think that in such circumstances as in those of the present case the words may receive another than their ordinary meaning. There is no doubt that "heirs-male" is a term which has been construed to mean, "heirs-male of the body," and yet "heirs-male" is as technical an expression as "heirs whatsoever." The meaning of "heirs whatsoever" is just heirs according to the legal order of succession, while "heirs-male" means heirs according to the male branch of the succession. The meaning of the one is just as fixed as the meaning of the other, and yet heirs-male has been held capable of meaning "heirs-male of line" because it was apparent from the context that such was the meaning of the maker of the deed. Proceeding, then, on the ground I have indicated—that the granter of these deeds did not intend the entail to come to an end when the estate opened to John Jarvis Carnegie—I think we are entitled to hold that he meant "heirs whatsoever of the body." This view is strengthened by observing the care taken in the later part of the destination to make sure that the entail should not fall, but, if possible, should always be kept up in connection with the title and honours of Northesk; for we find that after providing against the possibility of the estate being no longer conjoined with the titles and honours of Northesk or Rosehill, the granter goes on to say—"Declaring that in case my titles and honours shall happen to divide or separate and devolve to different persons, then the person succeeding to the highest title of dignity enjoyed by me, upon failure of all my heirs of tailzie before mentioned, or to be named and appointed by me, shall have right and be entitled to succeed to my said lands and estate before specified, my intention being that in that case my said lands and estate shall belong to the person succeeding to the highest title of dignity presently enjoyed by me."

I cannot say that I have no difficulty in the case, and I am well aware of the importance of

adhering to the general rule that nothing but necessary implication will entitle a Court to read "heirs whatsoever" or similar terms in any but their technical sense; but I think I am not going beyond the rule laid down by Lord Eldon in the *Roxburgh* case, when he says that in construing deeds "You are to adhere to that as the intent which is the *prima facie* obvious meaning of the words, unless you are by fair reasoning, by strong argument, by that which amounts to necessary implication or declaration plain, driven out of the obvious meaning."

I confess I find it altogether impossible to believe that it could be intended to bring in heirs whatsoever in the place in which they occur with the effect of bringing the entail to an end.

I am therefore for giving effect to the remaining branch of the prayer of the petition.

Lord Mure—The question here depends upon whether there is an essential difference between these two destinations. If they are different, then the passages which your Lordship has referred to about the Hon. George Carnegie and the place at which his name is introduced (in the early part of the destination in the one entail, and much later in the other) might have been important. But that question is not now before us, for that gentleman died without any heirs, and the entail is now at an end as far as he is concerned. Now, looking at these destinations, we find that in both deeds the words heirs whatsoever are always followed by the words "of the body," with one exception in each case, and that being so, the question we have to decide is, what is the meaning in the place where it occurs of the expression "heirs whatsoever" without the words "of the body." Now, I am quite aware that in the ordinary case "heirs whatsoever" is a term sufficiently distinct and fixed. It is a term to which its ordinary meaning was given in the case of *Gordon.* But in pronouncing judgment in that case I do not think that the Court had any materials in the deeds before them to put any other than the usual construction upon the words. Here it is different, for we have words which afford a key to the construction of the term as the granter intended to use it. In the case of *Gordon* Lord Cowan uses certain observations, which are quoted by the Lord Ordinary, and are as follows—[*His Lordship here quoted the passages printed supra in note of Lord Ordinary*]. If it was competent in that case to have recourse to the earlier titles of the estate to see what was meant by a term, it is still more competent in this case to refer to expressions in this deed itself which may explain the sense in which the term is used. Once that is admitted, it is clear that there is no inconsistency between this case and that of *Gordon.* I agree with your Lordship that it is inconceivable that the maker of this deed of entail could have intended it to come to an end by the use of this expression, at least if we are to expect him to be in the least consistent with the expressions of his intention in the same deed. It would be inconsistent with the rest of the same destination so to hold. Now, no reason can be suggested for the omission except a mistake or caprice, and I do not think it likely that this entailer would be so capricious as to leave out these words "of the body" advisedly in the very deed in which he so carefully does his best to make a good entail, and therefore I incline to the other conclusion, that it was an omission of the writer to insert after "heirs whatsoever" the words "of the body." And thus construing the deed on the principle of Lord Cowan in the *Cluny* case, I think that heirs of the body were really intended. Lord Eldon in the *Roxburgh* case proceeds on the same doctrine. He says (5 Pat Ap. 460)—"It does appear to me to be the plain and manifest intention of the author of this deed, when he used the words 'heirs-male' in the clause as to the daughters, to mean 'heirs-male of the body,' and unless there be some rule of law which says that the author of a deed shall not tell you by the deed itself that by 'heirs-male' he means 'heir-male of the body'—some rule of law which says that if he uses the words 'heirs-male,' though he tell you he means heir-male of the body, he has bound you to strike out of the instrument all the explanatory context, all explanatory provisions, all the explanatory plan and form of the instrument, as the Lord Ordinary said in the *Marquis of Tweedale's* case—unless there be some such rule of law, it does appear to me that the opinion of the great majority of the Court of Session" (which had construed heirs-male to mean in the particular deed heirs-male of the body) "is the right opinion."

I think, then, that the decision proposed is consistent with the views of Lord Eldon and Lord Cowan which I have referred to, and I agree that the application ought to be granted.

Lord Shand—I am of the same opinion. No doubt "heirs whatsoever" has a fixed legal technical meaning, that being "the heirs which the law points out." Though that is so, that does not prevent a testator or entailer from using the words in a more limited sense, just as he might in his deed expressly declare "by the term heirs whatsoever I mean what are ordinarily called heirs of line." There would be no doubt as to his meaning in such a case. In this case that was not done expressly, but substantially we have what is tantamount to it. Your Lordship has noticed the different elements which go to the solution of the question. I have little to add. If the destination to heirs whatsoever in the Ethie entail is to be read literally, the tailzie comes to an end in the person of John Jarvis Carnegie, and so also if the words are read in a literal sense in the Lunan entail, that entail comes to an end on the succession of Swynfen Thomas; and yet the entailer provides anxiously by a long series of special destinations for the succession of his daughters and the heirs whatsoever of their bodies to the entailed estate. It is inconceivable that the words "heirs whatsoever" are used in their ordinary legal sense, followed as they are by such destinations. In the next place, notwithstanding the testator's anxious provisions for the succession, to read the words "heirs whatsoever" in their usual sense might lead to the estate going to strangers. Thirdly, every other substitute is called with the heirs whatsoever of his or her body. There is not a single case of "heirs whatsoever" except one in each entail; and finally there is a declaration in the deeds that the estates shall go to the person having the titles and honours of the family. I am of opinion that by necessary im-

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COMMENTARY

ON THE

BILLS OF EXCHANGE ACT, 1882;

BY

W. D. THORBURN, ADVOCATE;

CONSISTING OF

INTRODUCTION, EXPLANATORY NOTES,
APPENDIX, CONTAINING ACTS RELATING TO BILLS,
CHEQUES, AND NOTES;

ALSO

FORMS, &c., AND COPIOUS INDEX.

THIS work is intended to give the requisite information to persons interested in Bills and Notes, and in the difficult questions which arise as to these important documents. The Notes will, it is hoped, be found useful by members of the Legal Profession, and by Merchants and Bankers. The Act, while in the main codifying the Common Law of the two countries, has assimilated some points, but has left the Laws dissimilar in one or two particulars. In several cases the Laws of the two countries, which have long been substantially the same, have been altered or modified.

The annotations to the Act have been prepared with the object of assisting the student of this lengthy Act—(1) by constant reference to other sections of the Act; (2) by quoting or referring to the decision of Courts of Law in England and Scotland, as explanatory of the common law principle now embodied in the Statute, or illustrative of its application; (3) by pointing out the new provisions of the Act, and their effect in modifying the common law; (4) by describing those branches of the law which are declared not to be affected by this Act, *e.g.*, the rules in bankruptcy, the sexennial prescription, and law of summary diligence in Scotland, and the law of limitation of action in England, as well as notices of the points of difference between English and Scotch Law as to the capacity of minors and married women, and the powers of partners.

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plication "heirs whatsoever" on the one occasion in which it is used in each case ought to be read as equivalent to heirs whatsoever of the body.

LORD DEAS was absent.

The Court pronounced this interlocutor :—

"Having heard counsel for the petitioner and for the curator and tutor *ad litem* of the minor and pupil children, respondents, Remit to the Lord Ordinary to grant the prayer of the petition so far as not disposed of."

Counsel for Petitioner—Mackay—H. Johnston. Agents—Lindsay, Howe, & Co., W.S.

Counsel for Curator and Tutor *ad litem*—Maconochie. Agents—Dundas & Wilson, C.S.

Friday, November 3.

FIRST DIVISION.

SPECIAL CASE—GRANT AND OTHERS.

Succession — Trust — Conditio si sine liberis decesserit—*Great-Great-Grandchildren.*

A testatrix bequeathed to trustees a sum of money for behoof of her two grand-daughters A and B, and "to such of their children as may be in life at the death of the survivor." A died without issue. At the death of B her surviving children claimed the whole fund under the terms of the deed of trust, to the exclusion of the children of two daughters who had predeceased her. *Held* that the *conditio si sine liberis decesserit* applied, and that therefore these children were entitled to participate in the bequest as representing their mothers.

By deed of trust dated 23d January 1832, and having reference to a last will and testament previously executed, the late Mrs Mary Hamilton Nisbet directed her executrix under the latter deed to transfer to certain parties named, as trustees "for behoof of my grandchildren Lady Harriet Matilda Bruce and Lady Lucy Grant, or the survivor in liferent, and to such of their children as may be in life at the death of the survivor equally among them, and failing children then to my own nearest heirs in fee," the sum of £12,000, which by two subsequent codicils was increased to £20,000. The trust was created under the declaration that if one of her grand-daughters, Lady Harriet Matilda Bruce should succeed to certain entailed estates during the existence of the trust, then the trustees were to hold the fund for the sole use and behoof of her other grand-daughter, Lady Lucy Grant, and her children. Lady Harriet Matilda Bruce did not succeed to the entailed estate referred to. She died on 31st August 1857 without leaving issue. Lady Lucy Grant was married and had issue. She died on 4th September 1881, and the trust-fund aforesaid, amounting to £20,189, 8s. 11d., then fell, in terms of the deed of trust and relative codicils, to be divided amongst her children. Lady Lucy Grant was survived by five of her children, as well as by several grandchildren, the issue of two married daughters who had predeceased her. A question then arose whether under the terms of the deed of trust the children of the two daughters of Lady Lucy Grant who had predeceased her were entitled to any share of the £20,000. A Special Case was presented to the First Division, the first parties to which were the five surviving children of Lady Lucy Grant, the second parties the children of her two daughters who had predeceased her, and the third parties the trustees acting under the trust-deed.

The question submitted for the opinion and judgment of the Court was—"Whether the five parties of the first part, the children of the said Lady Lucy Grant who were alive at the date of her death, are entitled to the whole of the said trust-fund; or Whether the child of the said Mrs Anne Grant or Brooke, and the children of the said Mrs Lucy Grant or Feilding, as representing their respective mothers, are entitled to participate equally in the said fund along with the said five parties of the first part?"

Argued for the first parties—This is not a case in which the *conditio si sine liberis* could apply; if so, it would overturn the words of the deed—"Such of their children as may be in life at the death of the survivor." Children as a class were thus not called to the succession, but only those who are alive at a certain time. This excluded the claim of the second parties. The parents here are not instituted, as they have failed to comply with the condition; how then can the children take as conditional institutes? To apply the *conditio* here would be to extend it further than it had yet been extended.

Authorities—*Douglas' Exrs.*, Dec. 5, 1869, 7 Macph. 504; *Gauld's Trustees* v. *Duncan*, Mar. 20, 1877, 4 R. 691.

Argued for the second parties—The *conditio si sine liberis* applied. The parties claiming were in the direct line, and not the collateral. The testatrix stood *in loco parentis* to them, and there was no residue clause in the deed. This was in effect a family provision. The third parties' contention only carried the *conditio* one step further than it has hitherto been admitted.

Authorities—*Wallace*, 1807, M. "Clause" App. No. 6; *Thomson's Trustees* v. *Robb*, July 10, 1851, 13 D. 1326; *Christie* v. *Patersons*, July 5, 1822, 1 Sh. 543; *Rhind's Trustees*, Dec. 5, 1866, 5 Macph. 104; *Haliday* v. *M'Callum*, Nov. 9, 1869, 8 Macph. 112; *Blair's Exrs.* v. *Taylor*, Jan. 18, 1876, 3 R. 362; *Gauld's Trustees, supra; Bogie's Trustees* v. *Christie*, Jan. 26, 1882, 9 R. 453.

At advising—

LORD PRESIDENT—This Special Case has arisen out of the construction of a deed of trust made by Mrs Mary Hamilton Nisbet in 1832. It appears from the narrative that Mrs Nisbet had by a will—presumably an English will from the language used—left her whole personal estate to her only daughter Mrs Ferguson, and the object of the deed of trust in question was, out of the personal estate, to take a sum of £12,000 of 3½ per cent. consols, under the powers reserved under the will, and to dispose of it for the benefit of her grand-daughters. The words of the deed are—"I hereby direct and appoint the said Mrs Mary Ferguson, or any executor or executrix I may hereafter appoint, or failing such appointment, the person legally acting in that character, to transfer to James Lord Ruthven, Robert Lord Belhaven, and James Viscount Maitland, or the survivors or survivor, in trust for behoof of Lady