seems to me to admit of no reasonable explanation other than that he had misapplied the money. If the fact that the interests remained unpaid had come to the knowledge of the trustees, I do not think that they would have discharged their duty by directing the factor to pay the interests. They would have been bound to see that he paid them immediately, and if he did not, to remove him from his office. In that case they would probably have recovered what was due to the trust, and they would have prevented any future loss.

The Court adhered, and found the pursuer liable in expenses since the date of the interlocutor reclaimed against.

Counsel for the Pursuer—Salvesen—A. S. D. Thomson. Agents—Finlay & Wilson, S.S.C.

Counsel for the Defender William Carruthers — Craigie — Macphail. Agents — Mackenzie & Black, W.S.

Counsel for the Defenders James Glegg and Hector Forbes — Baxter — Abel. Agents—W. & J. L. Officer, W.S.

Wednesday, June 26.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

MOUBRAY'S TRUSTEES *v.* MOUBRAY AND OTHERS.

Entail—Direction to Entail—Destination—Heirs Direct or Collateral.

Robert Moubray left a holograph writing, in which he directed that the income of his estate should be accumulated after his death until it reached a certain sum, and that his trustees should then purchase lands therewith, and entail the same on his "heirs direct or collateral," so long as the estate of Cockairney was theirs. When that estate was not any longer in the possession of the Moubrays, the estate which was to be purchased was to go to another family, provided the family of Moubray of Cockairney no longer existed in Scotland. At the time when the required sum had been accumulated the estate of Cockairney was held by trustees for behoof of William Moubray, the testator's heir-at-law, and his heirs-male.

Held (*aff.* judgment of Lord Kincairney) (1) that the testator had provided for the execution of a valid entail, in respect that the direction to entail the lands upon his "heirs direct or collateral" imported a destination to his heirs in blood, and that this destination differed from the legal order of succession; and (2) that the estate of Cockairney was, in the sense of will, in the possession of the testator's heir-at-law.

Succession — Will — Successive Holograph Writings—Construction.

By holograph writing dated in 1867 a testator directed that the income of his estate should be accumulated until the whole reached the sum of £40,000, and that his trustees should then purchase lands, and entail the same on his "nearest of kin." By holograph writing dated in 1868 the testator directed that the income of his estate should be accumulated until the whole reached the sum of £41,000, and that his trustees should then purchase lands therewith, and entail the same on his "heirs direct and collateral."

Held that the later deed superseded the earlier, and was to be construed without reference to it.

Robert Frederick North Bickerton Moubray, who resided at Cockairney, in the county of Fife, died on March 31st 1875 leaving certain holograph testamentary writings dated in 1867 and 1868. By the first of said writings, dated 10th June 1867, Mr Moubray provided—"This is my last will and testament. I beg Coutts and Co. will continue to re-invest twice a-year my balance in their hands less £10, ten, if that is necessary to keep the account with them open; and my trustee or trustees, when it has amounted to £40,000, forty thousand pounds, will buy lands in Fife in the western district, or as near the estate of Cockairny as may be, and entail said lands on my nearest of kin in the strictest way admissible by the law of Scotland. I leave my snuff-boxes to my two brothers William and Edward, and any other trifles I may leave among my sisters, married or single. I leave my brother William Hobson Moubray, living at Otterston, my testamentary executor, or, if he should die before me, my next blood or collateral relative, and beg my remains may be interred by him in the funeral ground of Cockairny in the Dalgety Church (old yard)."

On 18th November 1868 Mr Moubray executed another holograph writing in these terms—"Should the estate of Cockairny be no longer in the possession of my relatives by blood in regular succession, when the forty or forty-five thousand pounds have accumulated, I desire that sum may be devoted to the purchase of land as near to the estate of Upwood, Hunts, as may be, and such lands to be strictly entailed on the possessor of the lands of Upwood and Wood Walton in the same manner according to the law of England, as correspondingly it would have been if invested in lands adjacent to Cockairny, Fife, as above."

The last holograph writing dated 30th April 1868 was in these terms—"This is my last will and testament. I beg Messrs Coutts and Co., London, will continue to reinvest twice a-year any balance in their hands on the conditions if necessary of keeping ten pounds at the disposal of my trustees in their hands; and when the sum invested shall be sufficient to realise forty-one thousand pounds, my trustees shall have power to realise through Messrs Coutts

and Co. that sum, and to take a present opportunity of investing that sum in lands in the county of Fife as near to the estate of Cockairny as possible, and as strictly as the law of Scotland will allow to entail such lands purchased as above on my heirs direct or collateral so long as the estate of Cockairny is theirs. When it is not any longer in the possession of the Moubrays, the estate purchased as above may become the hereditament of the Hussey family of Woodwalton, Herts, always provided the family of Moubray of Cockairny no longer exists in Scotland, having become extinct, and the name in this latter case to be adopted by Hussey shall as regards the lands to be acquired as above be 'Hussey Moubray.' I name my nearest male relative my heir, and bequeath to him as heirlooms the gold chain given me by my grandfather." . . .

The testator left personal estate to the amount of £20,866, 16s. 2d. He left no heritable estate. He was survived by his brothers William Hobson Moubray and General Edward Moubray, by five sisters, and by the children of two sisters who predeceased him.

Upon the testator's death his brother William Hobson Moubray accepted the office of executor, and in 1882 he assumed three other trustees to act with him. In the same year, doubts having arisen as to the true meaning of the testamentary writings, and conflicting claims having been made on the trust-estate, the trustees brought an action of multiplepoinding to have the rights of parties determined. The amount of the fund *in medio* was stated to amount to £26,000 or thereby.

Upon July 13th 1883 the Lord Ordinary (M'LAREN) found that "until the expiration of a period of twenty-one years from the testator's death, or until the accumulated fund shall amount to the sum of £41,000, the right of the institute does not vest, and no decision can in the meantime be given as to the legal effect of the direction to entail, or the persons (if any) entitled to be named in the destination."

William Hobson Moubray died in 1885 survived by two sons—Captain William Henry Hallowell Carew Moubray and Arthur Moubray, and nine daughters. One of his daughters, Mrs Philipps, had predeceased him. General Edward Moubray died on March 17th 1882 survived by his widow and one son, Robert George Moubray.

Upon February 14th 1894 the sum of £41,000 having been accumulated, the action of multiplepoinding was awakened by the testator's surviving trustees. Claims were lodged by the following parties:—(1) Captain William Carew Moubray, eldest son of William Hobson Moubray, who claimed payment of the whole fund *in medio* as heir-at-law of the testator, on the ground that the destination "on my heirs, direct or collateral, so long as the estate of Cockairny is theirs," was not a tailzied destination, but merely an expression of the legal order of succession which was incapable of being fenced under the Act 1685, c. 22. (2) The representatives of General Edward Moubray, who maintained, *primo*, that the direction to entail was ineffectual, and that, upon a sound construction of the holograph writings, *et separatim* under the provisions of the Entail Acts, the "heirs, direct or collateral" called by the testament fell to be ascertained at the date of the testator's death, and were—William Hobson Moubray and General Moubray, jointly. (3) Arthur Moubray, the younger son of William Hobson Moubray, who maintained that the fund *in medio* should be invested by the trustees in the purchase of lands, "and that the said lands should be settled by deed of entail at the sight of the Court upon Captain William Henry Hallowell Carew Moubray and the heirs of his body; whom failing the present claimant and the heirs of his body; whom failing the nearest in kindred of the truster in terms of the directions of the truster, or at all events that the said lands should be so settled as to be beyond the disposal of the said Captain William Henry Hallowell Carew Moubray." (4) Selina Mary Philipps and Ivor Philipps, grandchildren of William Hobson Moubray, who maintained that the direction to entail was invalid, and that in terms of sec. 13 of the Entail Amendment Act 1875 the whole estate vested in William Hobson Moubray at the testator's death, and was carried to William Hobson Moubray's trustees, to be distributed as part of his moveable estate.

Upon October 30, 1894, the Lord Ordinary (KINCAIRNEY) pronounced this interlocutor —"Finds (1) that the late Robert Frederick North Bickerton Moubray, by his testamentary writings, whereof No. 13 of process is an official copy or extract, directed that his funds should be accumulated until they reached the sum of £41,000, and that the accumulated sum should be invested in the purchase of lands in the county of Fife, as near the estate of Cockairnie as possible, and that such lands should be entailed; (2) that the said funds have now reached the said sum, and that the time for purchasing said lands and executing said entail has arrived; (3) that the said testamentary writings import a direction to entail the lands when purchased on the heirs in heritage of the testator, being the heirs of his blood in the order of heritable succession; (4) that the destination so directed is a valid and effectual tailzied destination; (5) that the deed of entail falls to be executed in favour of the claimant Captain William Henry Hallowell Carew Moubray as institute, and the heirs of his body, whom failing, in favour of the claimant Arthur Moubray and the heirs of his body; whom failing, as may be hereafter determined: Therefore repels (1) the claim for the said Captain William Henry Hallowell Carew Moubray; (2) the claim for Arthur Moubray, as executor of the deceased General Edward Moubray and others as amended; (3) the claim for Selina Mary Philipps and others: Sustains the principal claim for the said Arthur Moubray so far as consistent with the foresaid findings: Appoints the cause to be enrolled for further procedure: Grants leave to reclaim."

"*Opinion.*—This multiplepoinding brought for ascertainment of the rights of parties under the testamentary writings of Mr R. F. N. B. Moubray, who resided at Cockairnie, in the county of Fife, was signeted on 15th June 1882. A judgment was pronounced by Lord M'Laren on 13th July 1883 to the effect that no decree could be given as to the effect of the testator's directions to entail until the sum of £41,000 had been accumulated, and the action was therefore allowed to lie over. That sum has now been reached, and the case has been anew prepared and submitted for judgment.

"The record is new, and some of the present claimants were not represented before Lord M'Laren.

"The testator died without issue in 1875, survived by two younger brothers, William Hobson Moubray and General Edward Moubray, by five sisters, and by the children of two deceased sisters. William Hobson Moubray died in 1885, survived by several children. His eldest son was Captain William Moubray, his second Arthur Moubray. General Edward Moubray died in 1882, having left only one child, Robert George Moubray.

"William Hobson Moubray was the testator's heir-at-law at the testator's death. His eldest son, Captain Moubray, is now the testator's heir-at-law.

"The testator's testamentary writings are of a very informal character. They are written on three pieces or fragments of paper. The first piece of paper contains the wills or bequests bearing dates in 1867, and the beginning of the writing which bears the two dates 18th November 1867 and 18th November 1868, which writing is concluded on another fragment of paper. The will bearing date 30th April 1868 is written on a separate sheet.

"By Lord M'Laren's judgment it was determined that all these writings are separate testamentary acts. And at the debate it was assumed that his Lordship's judgment to that effect was final in the Outer House.

"The present claimants are—(1) Captain Moubray, eldest son of William Hobson Moubray, who maintains that the testamentary writings contain no effectual direction to entail, and that in virtue of these writings, he being now the testator's nearest heir, is entitled to a fee-simple estate, and therefore to payment in money of the whole accumulated fund. (2) Arthur Moubray, his brother, who maintains that there is a good direction to entail, and that the testator's trustees ought to purchase land, and settle it in strict entail in the terms stated in his claim. Alternatively, he states a claim on the footing that there is intestacy. (3) The representatives of General Edward Moubray, who claim that the heirs of the testator, called by his testament, are to be ascertained at the date of his death, and were William Hobson Moubray and General Edward Moubray. They maintain that there is no effectual direction to entail, and on that footing they claim one half of the estate. They state alternative claims, one of which is on the footing of intestacy. (4) Grandchildren of William Hobson Moubray maintain that the whole estate vested in William Hobson Moubray at the testator's death and was carried to William Hobson Moubray's trustees, to be distributed as part of his moveable estate. Alternatively they claim on the footing of intestacy.

"I had the benefit of a very able argument in support of the claims of each of these parties. The principal questions are these—(1) Do the testamentary writings contain an effectual direction to entail, and, if so, on whom, and in what terms? (2) If not, did the right to the fund vest *a morte testatoris*, and, if it did, did it vest in William Hobson Moubray only, or in him and his brother Edward equally? Or (3) did it vest when the appointed fund was accumulated, and not till then, and in that case would the whole fund be payable to Captain Moubray, now the testator's heir-at-law? Or (4) should the estate be divided as intestate succession? I suppose that, before Lord M'Laren, this view was supported on the ground that the writings were not testamentary, but were mere notes or jottings, but that view has been negatived by Lord M'Laren, and was not resumed, and intestacy was supported on the ground that the testator's directions were void from uncertainty, and inextricable, and they are certainly extremely obscure.

"The first of these questions, if answered affirmatively, will supersede the rest, and comes first in order, because the main desire of the truster—indeed, in some sense, his whole desire—was manifestly that his funds should be accumulated and invested in the purchase of land, and that the land should be settled in strict entail. The primary question therefore is whether his directions and the expressions of his desire are sufficient to enable the Court to carry them into effect.

"It was maintained that they are not, because the testator's direction in the writing dated 30th April 1868 is to entail the lands purchased on the testator's heirs 'direct or collateral.' And it is maintained that that is the same as a direction to entail on his heirs whatsoever or general, and it is maintained to be settled law that a deed purporting to entail lands on heirs whomsoever or heirs-general is not an entail. This is, no doubt, settled law, and it is not necessary to do more than quote the more recent cases referred to by which the point was authoritatively decided—*Leny* v. *Leny*, 28th June 1860, 22 D. 1272; *Macgregor* v. *Gordon*, 1st December 1864, 3 Macph. 148; *Gordon* v. *Gordon*, 2nd March 1866, 4 Macph. 501; *Gordon* v. *Gordon's Trustees*, 28th October 1881, 9 R. 50. The point is indeed so well settled that it is expressed as law in the 13th section of the Act 38 and 39 Vict. cap. 61.

"The only question open is whether the direction is a direction to entail on heirs-general or heirs whatsoever.

"I consider that in order to solve this question, I am bound to read and take into

account the whole of the testamentary writings. I was referred to a passage in Lord M'Laren's opinion, where it is said that in considering whether the testator had effectually directed an entail to be executed of his accumulated estate his Lordship founded entirely on the writing of April 1868.

"With much deference, I am unable to see that the testamentary writings can be dealt with in that manner. I think I must read them all as one will, and reconcile them if I can, although, no doubt, if reconciliation on any point be wholly impossible, I suppose that that which was the later written would prevail. Still, in considering this point I must begin by reading the will earliest in date, which bears the date 10th June 1867. By that deed the testator desires that lands should be bought in Fife, in the western district, as near the estate of Cockairnie as might be, and entailed on his nearest of kin in the strictest way admissible by the law of Scotland. If the term nearest of kin were to be interpreted in the ordinary way, this would not be a good direction to entail, not because such a destination would be equivalent to a destination to heirs whomsoever, or would carry the estate out of the blood and kindred of the testator, which it would not, but because it would be a direction to entail on several individuals, like a direction to entail on heirs-portioners, which when reached brings an entail to an end, and by which it is impossible that a tailzied destination could be begun. But in the case of *Connell* v. *Grierson*, 14th February 1867, 5 Macph. 379, it was held that a destination in favour of the entailer's 'nearest of kindred' imported a destination to the entailer's nearest blood relation according to the rules of succession in heritage. It is not, I think, necessary to consider whether the destination in the first of Mr Moubray's wills to his nearest of kin would, if it stood alone, be read as a destination to the nearest blood relation according to the rules of succession in heritage. But the case of *Connell* v. *Grierson* proves that that would be a possible reading. At all events a destination to next-of-kin is clearly a destination to kindred or relatives by blood, and is therefore in that respect more confined than a destination to heirs whomsoever. But there is in another part of the testamentary writings, which together form Mr Moubray's will, another destination of the lands to be purchased, viz., the direction in the separate writing of 30th April 1868 to entail the lands purchased 'as strictly as the law of Scotland will allow . . . on my heirs direct or collateral so long as the estate of Cockairny is theirs.'

"If that destination were read alone, it would be difficult to dispute that it is a destination to heirs whomsoever. But I do not think it necessary or indeed legitimate to read it alone. I can see no sufficient reason for holding that it recals or supersedes the prior destination. On the contrary, I take it that it is necessary to read these two destinations together; and, reading them so, I think the conclusion legitimate that the direction is to entail in favour of the testator's heirs direct or collateral, being his nearest of kin—that is to say, in favour of his nearest heirs being his relations in blood, or otherwise as in the case of *Connell* v. *Grierson*, of his nearest and blood relation according to the rules of succession in heritage.

"It appears to me that this view receives support from the subsequent sentence, which seems to be of the nature of a glossary or interpretation clause—'I name my nearest male relative my heir,' and also (when one understands how he and his family stood related to the lands of Cockairnie) by the words 'so long as the estate of Cockairny is theirs,' which follow the destination to heirs direct or collateral. I understand that when he wrote his deed that estate belonged to his brother, William Hobson Moubray, and when the testator says, 'so long as the estate of Cockairny is theirs,' he certainly means so long as the estate of Cockairnie belongs to the Moubrays. Then in the writing which bears the double date, the testator provides for the event of the estate of Cockairnie being no longer in the possession of 'my relatives by blood in regular succession' when the sum at which he aimed had been accumulated, and in that case he directs another destination.

"On the whole, I am of opinion that the destination in this case is not, according to the sound construction of the whole testamentary writings, a destination to heirs whomsoever, but to heirs in heritage of the testator's blood.

"Indeed, when one is comparing one clause with another of the testator's writings, and considering the meaning of his somewhat lame efforts to express himself, one cannot but feel that there is, after all, no uncertainty whatever about his meaning to a certain extent, and that he most certainly meant to direct an entail to his nearest heirs in blood—that is to say, William Hobson Moubray if alive, and the heirs of his body, whom failing, to Edward Moubray if alive, and the heirs of his body.

"I think, therefore, that the argument that the direction to entail is bad because it is a direction to entail on heirs-general or heirs whomsoever must be repelled.

"But there is another difficulty arising from the references made in the deed to the estate of Cockairnie. Considering the great importance attached by the truster to that estate, the information given about it on record is exceedingly scanty. It appears to have been the residence of the testator, and the property of William Hobson Moubray. An extract of William Hobson Moubray's trust-deed has been lodged in process, and it appears that he dispones his whole estates to trustees, and that with reference to his estate of Cockairnie he directs them to hold it (and other subjects) for his eldest son and the heirs-male of his body, whom failing, his second son or other sons in their order respectively, and the heirs-male of their bodies respectively, but

subject always to the condition that the heir who should succeed after the truster to estates in the county of Huntingdon, called Upwood and Woodwalton, should not also take Cockairnie, and he directed his trustees to hold Cockairnie for his children respectively as before mentioned until the succession to the estates of Upwood and Woodwalton should open, and upon that event, or upon the death of the truster, the said William Hobson Moubray, if the succession to Upwood and Woodwalton had opened to him, they should convey the estate of Cockairnie and others to the child entitled thereto under that destination other than the heir of entail who should succeed to Upwood and Woodwalton. There is no direction to entail Cockairnie.

"The record tells nothing at all about the state of possession of Upwood and Woodwalton.

"I hold that under this deed it is impossible to say that the estate has passed from the possession of the Moubray family, and consequently I hold that the destination in favour of the 'Hussey family' or possessors of Upwood and Woodwalton, does not come into operation. Richard Hussey Hussey, who was called in this action as heir of entail in possession of the estates of Upwood and Woodwalton, has not appeared. I hold therefore that, as the sum appointed has been accumulated, and as the estate of Cockairnie is still in possession of the Moubrays, the time for investing the accumulated money in the purchase of lands and for executing an entail of these lands, if that be possible, has arrived.

"If, then, a deed of entail is to be executed, the question arises whether a clause ought to be inserted giving effect to the words 'so long as the estate of Cockairnie is theirs.' That appeared to me at first a question of considerable difficulty, but I am of opinion that there ought not to be such a clause. I am disposed to think that these words, followed by the words, 'when it is no longer in the possession of the Moubrays,' are substantially a repetition of the words, 'should the estate of Cockairnie be no longer in the possession of my relatives by blood in regular succession when the £40,000 or £45,000 have accumulated,' in which case the testator destined the lands to be entailed otherwise. I think both forms of expression were meant to point to a condition of matters at the date when the entail fell to be made in which the entail to the Moubrays was not to be made at all, but that they do not express a condition which the testator desired to be inserted in the deed of entail when it was made. Taking that view, I do not endeavour to frame a clause which, as a condition in the entail, would give effect to the testator's various expressions of his desire on this subject. I rather think it would prove impossible to do so.

"But if it be correct to read this clause as merely a declaration that the entail is not to be made in favour of the Moubrays, if, when the date for making it arrives, that family be not in possession of Cockairnie, and be extinct in Scotland, the difficulty caused by the clause disappears, for I think it clear that the relation of William Hobson Moubray's sons towards Cockairnie is such as to admit of the fulfilment of the truster's desire.

"I think, therefore, that the testator's directions to purchase lands with the accumulated money and to entail them must be implemented.

"I see no reason to doubt that the institute in the destination must be Captain William Moubray. It was argued by certain of the parties that, in respect of the provisions of the 28th section of the Entail Amendment Act (11 and 12 Vict. cap. 36), any entail would fall to be dated from the date of the granter's death. But if there is to be a strict entail, that is of no consequence, for in any view, seeing that William Hobson Moubray is dead, his son, Captain William Moubray, must of necessity be the first heir in the entail. I have not been informed that his right is affected by the provisions of William Hobson Moubray's trust-deed in reference to Upwood and Woodwalton.

"I am therefore of opinion that the pursuers are bound in implement of the directions of the testator, to purchase lands as near to Cockairnie as possible, and to entail these lands on the testator's nearest heirs in heritage being of the testator's blood. That will no doubt be accomplished by executing an entail in favour of Captain William Moubray and the heirs of his body; whom failing, Arthur Mowbray and the heirs of his body. When the lands have been purchased it will then be proper to adjust the deed of entail, and then to consider the further and ultimate terms of the destination and the clauses, if any, with reference to heirs-portioners or otherwise which it may be right to introduce into the deed.

"This construction of the testamentary writings of course negatives all the other claims, and it is therefore unnecessary to consider the difficult questions which were argued on the footing that there was no effectual direction to entail." . . .

The claimant, Captain William Carew Moubray, reclaimed.

In the Inner House a joint-minute of admissions was lodged for the parties in these terms:—"That the lands of Cockairnie in the west of Fife form the ancient family estate of the Moubrays of Cockairnie. They were possessed at the commencement of this century by Sir Robert Moubray, who in 1814 acquired the adjacent lands of Otterston, and thereafter possessed Cockairnie and Otterston as one estate. There is a mansion-house upon each. He died on 10th October 1848.

"Sir Robert's younger brother, Richard Hussey Moubray, succeeded to the lands of Upwood and Woodwalton in the county of Huntingdon, and took the name of Hussey Hussey, and as Sir Richard Hussey Hussey he possessed them under an English entail until his death in 1842, when he was succeeded by his son Richard Hussey Hussey, now the heir in possession. The present

proprietor of the English estates was thus the nephew of Sir Robert Moubray, and first cousin of the testator, Robert Frederick North Bickerton Moubray (who was Sir Robert's eldest son), and he was in possession of Upwood and Woodwalton when the testator wrote his testamentary deeds. Under the English entail it is understood that, failing issue of Mr Richard Hussey Hussey (who is unmarried, and is believed to be about 80 years of age), the testator would have succeeded to the English estates if he had survived.

"On the death of Sir Robert Moubray in 1848 it was found that he had left the estates of Cockairnie and Otterston, which he held in fee-simple, to trustees, with directions to secure to his wife, and after her death to his unmarried daughters, the liferent of the mansion-house of Cockairnie, and to convey his estates (passing over his eldest son, the testator, for whom he provided otherwise) to his second son, William Hobson Moubray, and the lawful issue of his body; whom failing to his youngest son and daughters in their order. He directed that, in the event of the estate of Woodwalton devolving upon his son William Hobson Moubray, his lands of Cockairnie and Otterston should go to his youngest son, it being his wish that his estates in Fife should not be united with the estate of Woodwalton. His trustees in 1851 conveyed the estates to his son William Hobson Moubray accordingly with this destination and direction. In 1867 William Hobson Moubray conveyed the estates to himself and his heirs and assignees whomsoever, free of any condition relating to the devolution of the estates. He was thus fee-simple proprietor of the Scotch estate when the testator (his elder brother) wrote his testamentary deeds.

"William Hobson Moubray was in possession of the estates when the present action was raised, and died in 1885, leaving a trust-disposition and settlement, which has been printed, and to which reference is made. In terms of article 7 thereof his trustees now hold the estates of Otterston and Cockairnie for the use and behoof of his eldest son, Captain William Henry Hallowell Carew Moubray, and the heirs-male of his body, whom failing, of his second or other sons in their order respectively, and the heirs-male of their bodies respectively, subject to the liferent use by the sole surviving daughter of Sir Robert Moubray of the mansion-house of Cockairnie, and to the liferent use by the widow of William Hobson Moubray of the mansion-house of Otterston, and also subject to the condition that in respect that William Hobson Moubray was the next heir to the estates of Upwood and Woodwalton, and that it was his wish that the heir who should succeed after him to these estates should not also take the estates of Otterston and Cockairnie, his trustees are to convey Otterston and Cockairnie to the child who may be entitled thereto, other than the heir who shall succeed to Upwood and Woodwalton.

"The reclaimer is married. There are six younger sons of William Hobson Moubray surviving.

"William Hobson Moubray would, it is understood, have succeeded to the English estates had he survived Mr Richard Hussey Hussey, his first cousin, and the reclaimer is now believed to be the next heir entitled to succeed."

The arguments of the parties appear sufficiently from the opinions of the Lord Ordinary and Lord Rutherfurd Clark.

Cases cited—*Stoddart* v. *Grant and Others*, June 28, 1852, 1 Macq. 163; *Grant* v. *Stoddart &c.*, February 27, 1849, 11 D. 860; *Sibbald's Trustees* v. *Greig*, January 13, 1871, 9 Macph. 399; *Collow's Trustees* v. *Connell and Others*, February 23, 1866, 4 Macph. 465; *Connell* v. *Grierson*, February 14, 1867, 5 Macph 379; *Tronsons* v. *Tronsons*, November 21, 1884, 12 R. 155; *Black* v. *Auld*, November 5, 1873, 1 R. 133; *Gordon* v. *Gordon's Trustees*, March 2, 1866, 4 Macph. 501; *Cowan* v. *Cowan*, March 19, 1887, 14 R. 670.

At advising—

The LORD JUSTICE-CLERK read the following opinion of LORD RUTHERFURD CLARK (who was not present at the advising) as the judgment of the Court:—Two points are settled by the cases of *Leny* v. *Leny* (22 D. 1272) and *M'Gregor* v. *Gordon* (3 Macph. 148). These are (1) that an entail cannot be made in favour of an individual and his heirs whatsoever, and (2) that a direction to make such an entail is a direction to do what is legally impossible. In either case the estate is held in fee-simple and under no destination.

The legal proposition on which they depend is, that an estate which descends accordingly to the succession appointed by law cannot be made subject to the fetters of an entail. In other words a conveyance on which such a succession follows is nothing more than a conveyance to a single individual. For a disposition to A is the same in legal meaning and effect as a disposition to A and his heirs. The omission of the words "and his heirs" does not detract from the deed. Nothing is added by inserting them. Consequently there is no destination. It follows that the will of the disponer ceases to operate when his disposition is feudalised, and that the succession is thereafter regulated by the law alone. No heir takes under the conveyance. As the succession opens, the estate is taken up by service as heir-at-law to the person dying last vest and seized. There can be no service as heir of provision, and an heir of entail is necessarily an heir of provision.

These cases also show that in such a conveyance, or in the direction to make such a conveyance, the word "heirs" must receive its ordinary meaning, notwithstanding the purpose of the disponer or truster to make an entail. A strong effort was made by Lord Curriehill to induce the Court to adopt a different construction, but it signally failed.

The question is, whether the case which is before us falls under this rule, and in considering it I take the document of 30th April 1868 to be the will of the testator. In a previous paper, dated 10th June 1867, he

had directed the lands to be entailed on his "nearest of kin." But in my opinion it was superseded by the direction to entail "on my heirs direct or collateral," and I do not see how I can take any aid from it in the construction of what I conceive to be the only existing will.

Let us see what disposition the trustees would be bound to make in the due execution of their trust. They must convey in favour of an individual, for if they did not the conveyance would be inoperative. They would therefore be bound to dispone to the person who at the date of the disposition was the heir of the testator. So far all is clear enough. The question is, whether they would be justified in disponing to that person only. If they would not, a distinction immediately arises between this case and those to which I have referred.

They would not be justified in executing such a disposition unless it fulfilled the purpose of the truster in so far as it was capable of being legally fulfilled. We have seen that when the direction is to convey to A and his heirs, it is immaterial whether the conveyance is to him alone or to him and his heirs, because the direction, whatever the purpose of the truster may have been, does not enable the trustees to do anything more than to dispone an estate which is to descend according to the legal succession. Before we can hold that it would in this case be sufficient to convey to one person, we must be satisfied that the testator meant that the conveyance which he directed should be so conceived, or that he has given no instruction by which the legal order of succession can be displaced.

I think that the testator intended that the conveyance should be in favour of a series of heirs. He directed an entail to be made, and it is plain that that purpose could not be carried out by a conveyance to a single person. His estate is to be given to his heirs "so long as Cockairny is theirs," and he has provided that on the failure of such heirs, or, to use his own language, "when the family of Moubray of Cockairny no longer exists in Scotland," it is to devolve on the Hussey family. I am not considering the effect of these clauses. But I cannot doubt that the testator meant to create a destination in favour of a series of heirs, and that his intention would not be carried out by a disposition to one person. It follows that a disposition to his immediate heir alone would not be in conformity with his intention, and that it could only be justified by showing that the trustees had not the power of doing more.

The series of heirs whom he intended to succeed were his own heirs. I think therefore that the disposition, in order to be in accordance with his directions, must be in favour of the immediate heir and the other heirs of the testator. If we take Captain Moubray to be the immediate heir, it would be—not to him and his heirs—but to him, whom failing to the other heirs of the testator. There is no illegality in taking in taking the conveyance in these terms, and such a conveyance is very different in form from one which disponses without any destination at all.

We have next to determine whether under such a conveyance the estate would descend according to the rule of legal succession, and we must keep in view that the heirs of the testator and of his immediate heir must be the same persons. But notwithstanding this identity, it seems to me that the heirs of the testator are called as heirs of provision to the disponee, for they take as his heirs, and not as heirs of the disponee. I do not think that their relationship to the institute or to one another creates any difficulty in regarding them as heirs of provision. In most entails the successor is the heir-general of his predecessor. But his title must be made up as heir of provision. For every heir must take the estate in the character in which he is called. In the present case I am assuming that the trustees are bound to convey to Captain Moubray and the other heirs of the testator. On the death of Captain Moubray the heir entitled to succeed would no doubt have right to expede a service to him as his heir-at-law. But he would not be entitled to take up the estate as such heir, because he is called only as the heir of the testator. He must therefore serve as heir of provision.

The typical instance in which an estate not subject to any destination passes out of the blood of the disponee is that which is stated by Lord Rutherfurd in the case of *Primrose*. The disponee is succeeded by a daughter and only child. She marries and is succeeded by an only child who dies intestate predeceasing its father. The estate is taken by the father as the heir of his child. The question is, whether this would happen under a disposition to Captain Moubray and the other heirs of the testator. If it did not, the estate would not descend according to the course of legal succession. I think that it would not happen, because by the disposition the heirs of the testator are alone called, and called in their order, so that the succession is regulated by the conveyance, and not by the law. The heir of no owner can take unless he is also the heir of the testator. Relationship to the testator is the condition of succession.

It may be said that the father would take on the principle that "*hæres hæredis mei est hæres meus.*" But I agree with the late Lord President (*Leny*, 22 D. 1289) in thinking that the maxim "has never been recognised in our system in any other sense or to any other extent than this—that where rights of a neutral character (as heritable or moveable) are rendered heritable *destinatione—e.g.*, a bond secluding executors—the subject remains in its provisional character heritable until the heritable destination is altered by someone having the right of creditor in the instrument, and every one who takes up the succession to this debt as heir is, in a certain improper sense, said to take it up under the destination, and so, as *hæres heredis*, to be the heir of the original creditor, who, by the terms in which he took his bond, made that heritable *quoad* succession which *sua natura* was moveable." His Lordship uses this language in order

to show that by virtue of the maxim no heir is called to the succession under a conveyance to an individual and his heirs, and that in consequence it cannot apply when the succession is regulated *provisione legis*. But the reasons which I have given seem to me to furnish a more sufficient ground for the exclusion of the father in the case which I have supposed.

I am of course aware that an entail comes to an end when the succession opens to the heirs whomsoever, and I have already said that an entail cannot begin if the lands are disponed to the institute and his heirs-at-law. The reason is that in either case the succession is regulated by the law, and that such a course of succession cannot be the subject of an entail—*ratione cessante cessat ipsa lex*. The rule does not apply where the legal succession is displaced. For in that case the succession is governed by the disposition, and the heirs take as heirs of provision.

It is said that no man can have more than one heir-at-law, and therefore that there can be no destination to heirs-at-law. I assent to the first part of that proposition, but I assent to the latter only in the case where the legal succession remains unaltered. To every man there is only one succession, and therefore one heir. This is as true in entailed as in legal succession. The several heirs of entail take as the heirs of their immediate successor though they are immediately designated by the relationship to an individual. They are usually called as the heirs of his body, or as his heirs-male, or in some similar form. But that form of words really expresses no more than a particular relationship. It does not denote that one person has more than one successor. Take the destination as being to A and his heirs-male. On the death of A, he is succeeded by his heir-male. There can be no second succession to him. When the succession again opens the estate is taken up by the heir of the last proprietor, though his right to succeed is ascertained by his relationship to A. It must be the same under the disposition with which I am dealing if I am right in holding that there is a destination in favour of the heirs of the blood of the testator.

But the case stands on a broader foundation. We are not construing an actual disposition. We have to settle the disposition which the testator directed to be made, and if in the bare form in which I have conceived it, it does not carry out his instructions, we must make such additions or alterations as will attain that end. I have shown that he instructed that there should be a destination, and the only possible destination is that the estate should descend to the persons who are his own heirs in blood. His desire that the estate should pass to the Hussey family on the failure of the Moubrays of Cockairnie is, I think, sufficient to show that he meant that no one should succeed who was not within the meaning of that phrase a Moubray of Cockairnie, and therefore that no one should succeed who was not his own heir—not in the sense of being his successor—but in the sense of relationship. There is no difficulty and no illegality in giving effect to this intention, and if it received effect, the ordinary course of the legal succession is necessarily excluded. If in the cases of *Leny* and *Macgregor* the Court had been able to put this construction on the disposition or on the trust-deed, the decision I think would have been different, for the Court proceeded on one ground—that the legal succession was unchanged.

I am therefore of opinion that the testator has given directions under which a valid entail may be made. That is possible wherever the legal succession is altered. For every heir who succeeds must take as heir of provision. It is of no importance that the succession is for a long term, or it may be always coincident with the legal succession. That happens or may happen in many entails, of the validity of which there can be no question. The material point is that on the occurrence of certain events the coincidence will cease, and therefore that the legal succession is excluded.

A question was raised—whether any person was entitled to take because the estate of Cockairnie is under trust, and therefore does not belong to any heir of the testator. The purpose of the trust is to secure that the heir of W. H. Moubray, the last owner, should be excluded from Cockairnie if he succeeded to the English estates of Upwood and Woodwalton. Until the succession to these estates shall open, Mr Moubray's eldest son, and the heir of his body, &c., are to have the beneficial liferent of Cockairnie, and on the opening of the succession the trustees are to convey Cockairnie to the next heir. The intention of the testator, whose will we are considering, was that the estate which he created was to be enjoyed along with Cockairney, and it will I think receive effect, if the entail which he directed is executed in favour of Captain Moubray as institute. I prefer so to hold rather than to take what I conceive to be the only other possible course, viz., to delay the execution of the entail until an heir of the testator be in title the proprietor of Cockairnie. I think that Cockairnie may be considered to be Captain Moubray's in the sense of the will, because he is in the beneficial enjoyment of it. It was the purpose of the testator that the two estates should be enjoyed together, and we must, if we can, see that the entail shall be executed at the time appointed by the testator.

Of course the entail will contain a clause of devolution, by which in the event of the heir in possession succeeding to the English estate, the estate shall devolve on the next heir who takes the estate of Cockairnie.

The Court adhered.

Counsel for the Claimant Captain Moubray — D.-F. Pearson — C. K. Mackenzie. Agents—Gillespie & Paterson, W.S.

Counsel for the Representatives of General Moubray — Vary Campbell —

Graham Stewart. Agents—Menzies, Bruce-Low, & Thomson, W.S.

Counsel for the Claimant Arthur Moubray—Dundas—J. H. Millar. Agents—Melville & Lindsay, W.S.

Counsel for the Claimants S. & J. Philipps—M'Lennan. Agent—William Gunn, S.S.C.

Thursday, June 27.

FIRST DIVISION.

[Sheriff of Chancery.

FULTON *v.* EGLINTON.

Process—Ex parte Proceeding—Unopposed Petition for Service—Res judicata.

Held that the decision of the Sheriff of Chancery, dismissing a petition for service which no party appeared to oppose, did not constitute *res judicata* to the effect of excluding a second petition for service by the same person.

On 10th September 1883 William Stephen John Fulton, 2 Salisbury Square, Edinburgh, presented a petition to the Sheriff of Chancery for service as nearest and lawful heir of tailzie and provision in general to Archibald, 11th Earl of Eglintoune, Lord Montgomery and Kilwinning, who died in 1796 without leaving any male issue. The petitioner averred that the deceased Earl had a younger brother, James Montgomery, who predeceased him, and who was otherwise called James Fulton or Fultoune of High Warwickhill, Dreghorn, Ayrshire. He maintained that he was the great grandson of James Montgomery and great-great-grandson of Alexander, ninth Earl of Eglinton, and contended that as such he was the nearest and lawful heir-male of tailzie and provision in general to Archibald, 11th Earl of Eglinton under a series of titles enumerated in the petition.

No appearance was made for the existing Earl of Eglinton, and on 15th February 1884 the Sheriff of Chancery (MUIRHEAD) pronounced the following interlocutor:—"Finds that the petitioner has failed to establish that his great-grandfather, James Fulton of Fultowne, designed in the petitioner's service to him in 1877, as 'farmer in High Warwickhill, Dreghorn, Ayrshire,' was a lawful son of Alexander, 9th Earl of Eglinton, and younger brother of Archibald, 11th Earl: Therefore refuses to serve as craved, dismisses the petition, and decerns."

On 14th March 1893 Mr Fulton presented another petition to the Sheriff of Chancery, craving the Court to serve him as heir to Archibald, 11th Earl of Eglinton as in the former petition. The petitioner made the same averments of fact as previously, but founded his claim on a new document.

Answers were lodged by the Earl of Eglinton, who pleaded *res judicata*.

On 2nd March 1895 the Sheriff of Chancery (WALLACE) dismissed the petition in respect that "in the present petition there is no relevant averment of *res noviter veniens ad notitiam*, and that the judgment of 15th February 1884 is *res judicata*."

The petitioner appealed, and argued—There could be no *res judicata* in an *ex parte* petition where no appearance was made for any other person.

At advising—

LORD PRESIDENT—I think that the Sheriff's interlocutor cannot stand. The only operative finding is that a previous judgment of the Sheriff of Chancery is *res judicata*. Now, the proceedings in the former petition are printed in the appendix, and it appears that the petition was an *ex parte* proceeding on the part of the present petitioner which the Sheriff disposed of without appearance being made for the Earl of Eglinton. *De facto*, the Earl of Eglinton had been served years ago, but without two parties being in the field no judgment can be *res judicata*. I think therefore that the case must go back to the Sheriff, all pleas of parties being left open.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court sustained the appeal and remitted to the Sheriff.

Counsel for the Appellant — Party. Agent—Party.

Counsel for the Respondent—Rankine—C. K. Mackenzie. Agents—Blair & Finlay, W.S.

Thursday, June 27.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

GRIERSON, OLDHAM, & COMPANY, LIMITED *v.* FORBES, MAXWELL, & COMPANY, LIMITED.

Contract—Assignation—Title of Assignee to Sue on Contract.

The defenders entered into a contract by which they agreed to pay a firm of wine merchants the sum of £200 per annum by half-yearly instalments for the advertisement in their wine list of a non-intoxicating wine, in which the defenders were interested. Before the second instalment had been paid the wine merchants transferred their business, including the benefit of all contracts to which they were entitled, to a limited company.

Held (*aff.* judgment of Lord Kincairney) that, as the contract involved mutual obligations and *delectus personæ*, it was not assignable, and that the company had therefore no title to enforce it against the defenders.

Upon 1st January 1894 Messrs Forbes, Maxwell, & Company, who were the patentees of a non-alcoholic wine named "Mersano," entered into an agreement