ordinary jury trials; and therefore it might be proper to allow fees one-half larger than those the auditor allowed. Where this would make the fee so many guineas and a half, a half guinea more to be given.

Agents for Pursuers—Hamilton, Kinnear, & Beatson, W.S.

Agents for Defender—Macnaughton & Finlay, W.S.

Tuesday, July 19.

FIRST DIVISION.

CATTONS *v.* MACKENZIE.

(*Ante*, pp. 250, 410.)

General Disposition—Entailed Estate—Evidence—Intention—Special Conveyance. The disponee under a general conveyance, which included a special conveyance of certain lands, claimed not only the latter but also an entailed estate of great value, on the ground that the disponer was not bound by the fetters of the entail, and intended to convey the entailed estate. *Held*—(1) it was advisable to decide the latter point first; (2) other deeds executed by the disponer were competent evidence of his intention; and (3) they negatived the idea that he intended to deal with the entailed estate.

The late Hugh Mackenzie, Esquire, died on 30th July 1869, possessed of the entailed estate of Dundonnell, valued at about £150,000, and of various other heritable subjects. He held Dundonnell as institute under an entail executed by his father in 1838; and on the death of the latter, in 1845, he completed a feudal title to the lands, and continued in possession till his death. In 1848 he purchased the estate of Mungusdale, otherwise called Monkcastle, adjacent to the entailed estate of Dundonnell, at the price of £7000, and he continued to possess that estate on a fee-simple title until his death. He executed considerable improvements on this property, and it rose rapidly in value, till in the year 1854 it was worth about £15,000. Mr Mackenzie never married. He left, however, a natural daughter, Miss Mary Mackenzie, who was married in November 1868 to Mr Alfred Catton.

By trust-disposition and settlement in 1854 Mr Mackenzie disponed to trustees the estate of Mungusdale or Monkcastle, adding to his special conveyance a conveyance in these terms, viz.: "as also all and sundry lands and heritages, goods and gear, debts and sums of money, and in general the whole estate and effects, heritable and moveable, real and personal, of what kind or nature soever, or wheresoever situated, presently belonging or which shall pertain and belong to me at the time of my decease, and the whole vouchers and instructions, writs, titles, and securities of and concerning my said estate and effects, and all that has followed or may be competent to follow thereon," and by the deed he nominated his trustees to be his executors. At the date of this deed, besides the estate of Mungusdale or Monkcastle, Mr Mackenzie was possessed of personal property of the value of about £6000, and was in the enjoyment of the entailed estates, with a large and increasing rental. He was also possessed of a small fee-simple heritable property, consisting of a superiority in Dingwall, which he sold in 1869, a few months before his death, for £50. By the second purpose of the trust, the trustees were directed to "hold the residue and remainder of my said whole heritable and moveable means and estate, particularly and generally before disponed, or the prices or produce thereof," in trust for his daughter, and to make payment to her of the free rents, interest, or annual produce "of said residue," half-yearly, at Whitsunday and Martinmas, until she should attain the age of twenty-five years or be married. By the third purpose the trustees were directed upon his daughter's marriage, or the completion of her twenty-fifth year, to dispone to her, exclusive of the *jus mariti* and right of administration of her husband, "the said residue of my said whole heritable and moveable means and estate, including my said estate of Mungusdale. It being my intention that my trustees shall have full power and discretion to retain the said estate of Mungusdale, and farm-stocking thereof, or stocking of my other farms, during the subsistence of this trust." The deed also contained power to the trustees "to sell and dispose of my said estate of Mungusdale, and other heritages hereby conveyed, or such part thereof as they shall think proper." By codicil of 22d February 1864, annexed to this trust-deed, Mr Mackenzie, adverting to the circumstance that by the third purpose of the trust-deed the conveyance of the residue was directed to be made to Miss Mackenzie, without reference to her heirs, assignees, or disponees, explained and directed that the disposition and conveyance of the residue of his means and estate directed to be executed by the foregoing trust-disposition and settlement should be in favour of his daughter, and her heirs, assignees, and disponees whomsoever, "it being my wish and intention that she and her heirs shall succeed to everything I may leave, and that she shall have unlimited power to dispose thereof as she pleases."

By tack, dated 4th December 1855 and 5th February 1856, "it is contracted and agreed upon between Hugh Mackenzie, Esquire of Ardross and Dundonnell, heritable proprietor of the lands and others after mentioned, being part of the entailed estate of Dundonnell, on the one part, and Miss Mary Mackenzie, his daughter, presently residing with him at Dundonnell House, on the other part; that is to say, the said Hugh Mackenzie has set, and in consideration of the yearly rent after mentioned, for himself and the heirs of entail succeeding to him in the entailed estate of Dundonnell, hereby lets to the said Mary Mackenzie, and her heirs and assignees whomsoever," for twenty-one years, certain parts of the farm lands of Dundonnell; "which tack the said Hugh Mackenzie binds and obliges himself, and the heirs of entail succeeding to him in the said lands, to warrant to the said Mary Mackenzie and her foresaids at all hands and against all mortals: For which causes, and on the other part, the said Mary Mackenzie binds and obliges herself, and her heirs and successors whomsoever, to make payment to the said Hugh Mackenzie and his foresaids of the sum of £530 sterling yearly in name of tack-duty: And the said Mary Mackenzie binds and obliges herself and her foresaids to flit and remove herself, family, and servants, goods and gear, forth and from the said possession at the expiry of this tack, and to leave the same void and redd, to the effect the said Hugh Mackenzie and his foresaids, or others in their name, &c." By another tack of the

same dates Mr Mackenzie let to his daughter, in similar terms, for a rent of £70, certain other farm lands of Dundonnell estate; "but excepting the mansion-house of Dundonnell, office-houses, garden or mains, which are not hereby let." Both tacks contained a power of sub-letting, or of appointing managers of the farms.

In October 1860 Mr Mackenzie presented a petition, in which he styled himself heir of entail in possession of the entailed estate of Dundonnell, to have an excambion made of certain of the entailed lands. After a good deal of procedure, authority was granted, and in January 1866 he executed a contract of excambion between himself, on the one part, "as heir of entail in possession of the entailed estate of Dundonnell and others, situated in the parishes of Lochbroom and Contin, and counties of Ross and Cromarty, under and in virtue of a deed of entail, in the form of a procuratory of resignation, executed by the deceased Murdo Mackenzie, late of Ardross, then of Dundonnell," and himself, on the other part, "as heritable proprietor in fee-simple of the lands of Aultchonier and others." By this excambion the lands of Aultchonier were added to the entailed estate in place of the lands and fishings of Gruinard.

In his daughter's marriage-contract in 1868, Mr Mackenzie, in contemplation of the marriage, conveyed to trustees the lands of Monkcastle or Mungusdale, Strathuashalag, &c., as also "the following parts and portions of the entailed estate of Dundonnell, now acquired by the said Hugh Mackenzie in fee-simple;" as also another "portion of the entailed estate of Dundonnell," which he had acquired in fee-simple by the above mentioned excambion. The date of entry was his death, and the purposes the benefit of the spouses, who were to have a power of apportionment of the trust-estate. The trustees were provided "with power also to expend, from the capital of the trust, such sums as may be deemed necessary for the permanent improvement, development, or preservation of the trust-property, or in building or repairing a residence at Gruinard, or farm houses or steadings, or in fencing, planting, or draining, or otherwise."

After Mr Mackenzie's death Mrs Catton, as disponee under her father's trust-disposition, having received an assignation thereof from the trustees, made up a title by notarial instrument under the Titles Act of 1868, and fruitlessly sought to oppose the service of the next heir of entail to the estate of Dundonnell. She and her husband now raised a declarator to have it found that the entail of Dundonnell was invalid on certain grounds, and that Mr Mackenzie by his trust-disposition of 1854 conveyed the estate to the trustees therein named. The Lord Ordinary (MACKENZIE) held the entail valid, and assoilzied the defender.

The pursuers reclaimed.

WATSON and DUNCAN for them.

SOLICITOR-GENERAL, SHAND, and HUNTER in answer.

At advising—

LORD PRESIDENT—The pursuer Mrs Mary Catton, who is the natural daughter of the late Hugh Mackenzie of Dundonnell, raises this action, with consent of her husband, against the defender, who is a brother of Hugh Mackenzie, and his real heir-substitute of tailzie in the entailed estate of Dundonnell, and who has made up his title as such heir, and the object of this action is to have it declared,—first, that the entail of Dundonnell, under which the defender has made up his titles, is not a valid deed of entail in terms of the Act 1685, and is invalid and ineffectual—(*Reads from first declaratory conclusion*); and consequently that, under the Entail Amendment Act, the entail is invalid altogether, and was not binding on the late Hugh Mackenzie, who, notwithstanding the entail, really held the estate in fee-simple. The second conclusion is for declarator—(*Reads second conclusion*). The other conclusions of the summons are subsidiary, and do not require further notice. For the success of Mrs Catton's claim she must make out the soundness of both conclusions,—(1) that the entail is invalid; and (2) that Hugh Mackenzie intended to convey, and did in legal effect convey, the entailed estate of Dundonnell by his general disposition and settlement. If the entail is not liable to objection the pursuer's case fails; and if it is liable to objection, but it is shown that it was not Hugh Mackenzie's intention to convey the estate of Dundonnell by his testament, her case equally fails.

The question always occurs in such cases, which point is to be first considered? In the present instance I think it is desirable to consider the second point first. If that action is determined against the pursuer, her action necessarily fails, and it would become unnecessary to consider the validity of the entail. There is a certain awkwardness in pronouncing on the validity of the entail, because, if the estate is not conveyed by the general disposition and settlement, and if we thought the entail invalid, that would be deciding by anticipation a question which may hereafter arise between the heir in possession and the next heir of entail, in such a way as not to be *res judicata* between them. The second question, then, is first to be considered.

In considering this question it is necessary to keep in view the position of Hugh Mackenzie. He had succeeded to the estate in 1845, and had made up his title under the deed of entail. Besides the entailed estate, which is of considerable value, he was also, at the date of the general disposition, in possession of the smaller estate of Mungusdale, valued at about £20,000, and this was the only unentailed property he then had, except a small superiority in Dingwall. At this time he was 51 years of age, and his daughter was 15 years of age. In these circumstances, he proceeds to make this general disposition and settlement in favour of his daughter. He gives "to and in favour of William Forbes Skene, W.S., Edinburgh, and Mary Mackenzie, my daughter, presently residing in family with me, or the acceptor or survivor of them, and to such other person or persons as shall be assumed in manner after mentioned, or as I shall nominate as trustees by any separate writing under my hand (the major part alive and accepting at the time, if more than two, being always a quorum), as trustees, for the ends, uses and purposes after mentioned, and to their, his or her assignees, all and whole," certain lands, describing them; "the whole lands hereby described being presently let as one farm, under the general denomination of the farm of Mungusdale or Monkcastle, as presently possessed by James Mackenzie, tenant thereof." Now the general words of conveyance said to carry the estate follow the special conveyance in these terms:—"As also all and sundry lands and heritages, goods and gear, debts, and sums of money, and in general the whole estate and effects, herit-

able and moveable, real and personal, of what kind or nature soever, or wheresoever situated, presently belonging, or which shall pertain and belong to me at the time of my decease." It is one of the points which has been made in the case that the words of general conveyance follow on the special conveyance, and one canon of construction which may be applied to such cases is, that words of general conveyance are not to be stretched so as to comprehend subjects not of the same kind as those contained in the special conveyance, and that is relied on by the defender. At the same time it is not conclusive against the intention of the maker of the deed to comprehend within the larger words anything which he had power to convey. But there are other parts of the deed relied on by the defender with more strength. The first purpose of the deed is to pay debts, &c., and then the trustees are directed to "hold the residue and remainder of my said whole heritable and moveable means and estate, particularly and generally before disponed, or the prices or produce thereof, in trust for behoof of my daughter, the said Mary Mackenzie, and make payment to her of the free rents, interest, or annual proceeds of said residue, under deduction of the expenses of management, at two terms in the year, Whitsunday or Martinmas, beginning the first term's payment thereof at the first of these terms that shall happen six months after my death, and so forth half-yearly at said terms until my said daughter shall have attained the age of twenty-five years complete, or be married, whichever of these events shall first happen." Then, "Upon the said Mary Mackenzie attaining the age of twenty-five years complete, or upon her marriage, whichever of these events shall first happen, I appoint and direct my said trustees, whenever required by her, to dispone, assign, convey, and make over to the said Mary Mackenzie, at her own expense, but exclusive of the *jus mariti* and right of administration of any husband to whom she may happen to be married, the said residue of my said whole heritable and moveable means and estate, including my said estate of Mungusdale and the stocking of my farms, or any of them, should the same not have been sold by virtue of the powers hereinafter written, or the price or produce thereof if sold, it being my intention that my said trustees shall have full power and discretion to retain the said estate of Mungusdale and farm stocking thereof, or stocking of any of my other farms, during the subsistence of this trust, or such part thereof as they shall think proper, the free rents or annual proceeds of the same being applied as aforesaid."

Then he gives a variety of powers to his trustees, and, among others, "power also to my said trustees, if they shall deem such desirable or expedient, to sell and dispose of my said lands and estate of Mungusdale and other heritages hereby conveyed, or such part thereof as they shall think proper."

Now, it certainly is remarkable, if Mr Mackenzie intended to comprehend within the general words of conveyance the larger estate of Dundonnell, that he should deal with that as part of the residue, while he speaks with more respect of the small estate of Mungusdale. Supposing the general conveyance to comprehend Dundonnell, the only way in which he has directed it to be disposed of is, by conveying it as part of the residue to his daughter. But then he has some special provisions as to Mungusdale. He gives his trustees power to retain Mungusdale, and also special power to sell it, and, though the power of sale is so expressed as to apply to this entailed estate, if within the general conveyance, the power to retain is confined to Mungusdale, and thus the trustees are in this position, that they would have a discretionary power to retain Mungusdale but none to retain the family estate of Dundonnell. The testator was anxious that, if the trustees thought right, Mungusdale should be kept, but he had no anxiety as to Dundonnell. Further, in speaking of Mungusdale and the farm stocking, there is this remarkable form of expression, that the trustees are to have "full power to retain the said estate of Mungusdale and farm stocking, or stocking of any of my other farms." The discretion is not to retain any of his other farms, but merely the stocking on them.

These observations occur on the construction of the deed itself, unfavourable to the idea that Hugh Mackenzie intended to comprehend the entailed estate of Dundonnell in the general conveyance. They do raise in my mind a very strong presumption that it was not his intention, as heir in possession, to convey the estate to his daughter, or to deal with it at all by this deed. But while this might probably of itself be sufficient for the defender's case, there are many other circumstances to be taken into consideration, as showing the probable intention of the maker of the deed, and these are to be gathered, not from general evidence or parole proof, but from other deeds of the maker of this deed, relating to the entailed and unentailed lands. We are entitled, I think, to look at every deed executed by him dealing with the entailed and unentailed lands to see whether it was in his mind to convey the entailed estate by the general words of conveyance, or whether, after the deed was made, it was in his mind that he had conveyed it.

The best way of dealing with these instruments is to take them in the order of their date; and in the first place come the two tacks which were made by Mr Mackenzie in favour of his daughter, at a time when the daughter was still very young. He made the testamentary deed in question in 1854, when she was only fifteen years of age; and these tacks being made in the years 1855 or 1856, she could not be more than sixteen or seventeen at the time. She had given to her the tacks of large sheep farms, and they had upon them very valuable stock. It was rather a singular gift to make to a young lady of these tender years. She could not be expected to have the will or the physical ability to deal with such subjects for herself; and one must look for the motives of these tacks to something else than the ordinary inductive clause of granting such deeds. They are both substantially the same except in one particular. In the first tack Hugh Mackenzie, for himself and the heirs succeeding to him in the entailed estate of Dundonnell, let "to the said Mary Mackenzie, and her heirs and assignees whomsoever," certain portions of the Dundonnell farm. Then follows a description of the lands, and this tack "the said Hugh Mackenzie binds and obliges himself, and the heirs of entail succeeding to him in the said lands, to warrant to the said Mary Mackenzie and her foresaids at all hands and against all mortals; for which causes, and on the other part the said Mary Mackenzie binds and obliges herself, and her heirs and successors whomsoever, to make payment to the said Hugh Mackenzie and his foresaids of the sum of £530 sterling yearly in name of tack-

duty, payable at two terms in the year." She also binds herself to "flit and remove herself, family, and servants, goods and gear, forth and from the said possession at the expiry of this tack, and to leave the same void and redd, to the effect the said Hugh Mackenzie and his foresaids, or others in their name, may enter thereto immediately, and peaceably possess the same in all time thereafter, and that without any previous warning or process of removing to be used against her or them for that effect." It will be observed that the distinction here taken between Mary Mackenzie and her heirs and assignees, as representing the parties interested in the lands as tenants, and Hugh Mackenzie and the heirs of entail, as interested in the tack as landlords, is preserved throughout, and there is always reference back in speaking of the lessor to him and his aforesaids, meaning thereby the heirs of entail, and, in speaking of the lessee, to Mary Mackenzie and her heirs whomsover. Now, it is very easy to see on the face of this deed that the object was to confer a benefit on Mary Mackenzie, if possible, at the expense of the heirs of entail, and this deed was executed after the general disposition. But what was the use of this, if he had already by his general disposition conveyed the whole estate to her?

The object of these tacks would at once have come to an end if he had succeeded in doing that. Then, in the other tack, the only difference is, that as that was a tack of subjects immediately adjoining the mansion-house of Dundonnell, and had been occupied by Mr Mackenzie, he thinks it necessary, for the purposes of security, specially to except from it "the mansion-house of Dundonnell, office-houses, garden or mains, which are not hereby let," obviously for the purpose of saving the residence of the heirs of entail from being carried in favour of his daughter even by this temporary right.

But very shortly after this, in the year 1860, Mr Mackenzie instituted certain proceedings with the view to an excambion, by which he proposed to exchange certain fee-simple lands which he had by that time acquired for certain portions of the entailed estate, liberating them from the fetters of the entail, and subjecting to the fetters of the entail the fee-simple lands he had acquired. These proceedings began in the year 1860, it is important to notice, though the deed of excambion is not executed till 1866. Now, it is needless to say, in passing, that no man who supposes himself to be a fee-simple proprietor would take the trouble of entering into such proceedings as these to invoke the authority of the Court to excamb certain lands held by himself in one character for certain lands held by himself in another character. A man cannot enter into a contract of excambion with himself in one and the same character. In order that a man may make an excambion he must possess two distinct and separate characters as proprietor. Notwithstanding, in 1860 he presented a petition to the Court, asking power to make this excambion, saying that it would be "highly convenient and advantageous for him, and for the heirs of entail succeeding after him under the said deed of tailzie, and beneficial to the said entailed estate, that the lands and fishings of Gruinard, and the parts of the lands of Dundonnell therein described, should be excambed for the said lands of Aultchonier, therein and hereinafter described, and that he was desirous of availing himself of the enactments of the above-mentioned statutes for that purpose, and that he made the said application to their Lordships for authority to make such excambion, and to execute, at the sight and with the approbation of their Lordships, a contract or other deed giving effect to the proposed excambion of the foresaid lands and to others respectively, or such part or parts thereof as should be equivalent in value the one to the other." This led, of course, to the usual investigation in such cases; and on a report of persons of skill the Lord Ordinary in the end granted warrant to Mr Mackenzie to make excambion. He executed the deed in 1866, by which he as heir of entail "excambs, alienates, and dispones, from himself and the heirs of entail substituted to him in the deed of entail before mentioned, to and in favour of himself, and his heirs and assignees whomsoever, heritably and irredeemably, all and whole the following parts and portions of the entailed estate of Dundonnell, situated in the counties of Ross and Cromarty, particularly described in the said instrument of sasine in favour of the said Hugh Mackenzie as heir of entail foresaid," and, on the other hand, "in consideration of the conveyance above written, the said Hugh Mackenzie, as heritable proprietor in fee-simple of the lands after disponed, hereby excambs, alienates, and dispones, from himself and his heirs and successors, to and in favour of himself as heir of entail foresaid, and the heirs of entail substituted to him, according to the destination contained in the foresaid deed of entail, heritably and irredeemably, all and whole," his unentailed lands mentioned, and these he conveys to the heirs of entail "with and under the conditions, provisions, restrictions, and clauses contained in the said deed of entail," &c.

Now, this seems to me to be a very important point in the present question, because by this deed Mr Mackenzie actually conveyed to the heirs of the destination in the deed of entail certain lands possessed by him in fee-simple; but those very lands which he so conveys to the heirs of entail in the destination, under all the fetters of the entail, are part of the estate that Mrs Catton says is carried by the general conveyance in the deed of 1854. Now, how is it possible to maintain that? After the deed of 1854 Mr Hugh Mackenzie himself, who is supposed to have conveyed everything to this lady, conveys a part by the excambion to the heirs of entail under the fetters of the entail. Here is the simple case of a special conveyance of the estate in competition with the general conveyances. Suppose this had been a conveyance by Mr Mackenzie of the entire entailed estate instead of a part; would that not have been absolutely conclusive? Could anybody have maintained that the special conveyance would not override the general conveyance? It is exceedingly difficult to see how Mrs Catton is going to extricate her rights. She cannot take the lands of Aultchonier on that footing, because they are the subject of a special arrangement. Is not the answer at once conclusive, that the conveyance of a part of the entailed estate shows that Mr Hugh Mackenzie intended not that that part of the estate alone should descend to the heirs of entail, but that the entire entailed estate should descend according to the same destination?

Mr Mackenzie made a codicil to his general settlement on the 22d of February 1864, while his petition for excambion was in Court. But before it had been carried through, and before he had executed his deed of excambion, one would think,

if it was his intention that the entailed estate, or any part of it, should be carried by his general disposition—his attention being called to the condition of the entailed estate by the proceedings going on in Court,—he would have taken some notice in the codicil of the entailed estate; but he does nothing of the kind. He says, first, "I explain and direct that the disposition and conveyance of the residue of my means and estate, directed to be executed by the foregoing trust-deed, shall be in favour of my daughter Mary Mackenzie, within designed, and her heirs, assignees, and disponees whomsoever, it being my wish and intention that she and her heirs shall succeed to everything I may leave, and that she shall have unlimited power to dispose thereof as she pleases, and in the event of her being married before the execution of such disposition and conveyance, it shall be competent for my said trustees, if desired by her, to settle the said residue in her marriage-contract upon her and her husband in liferent, and her children in fee, and, failing children, to any person or persons she may at any time during her life appoint; or the said marriage-contract may be in such other terms as the said Mary Mackenzie may desire." Now, what he contemplates here is, that the residue, that is to say, the general estate he had left to Miss Mackenzie, his daughter, over and above the fee-simple lands—the estate, in short, carried by the words of the general conveyance—should be made the subject of a settlement in her marriage-contract; and certainly, if he had intended that the entailed estate should form part of that, one would have expected it to be mentioned. One would have expected him so say that the heirs of entail in the destination should be ousted, in order to the settlement of that estate on Mary Mackenzie's marriage; and yet there is not a word about it.

Still, however, Mary Mackenzie comes to be married in her father's lifetime; and here comes another opportunity of adjustment of the entailed estate, if it is to be consigned to her. Her marriage-contract is dated 18th November 1868, and it contains a conveyance, but not a general conveyance. It contains a special conveyance with reference to the lands which had been specially conveyed by the disposition of 1854. It contains also a special conveyance of the Gruinard lands and fishings, and it contains nothing else in the way of conveyance or settlement in the usual manner. It contains, however, provision that "in the event of any debts remaining heritably secured over said lands of Mungusdale or Gruinard at the death of the said Hugh Mackenzie, he hereby binds and obliges himself, his heirs and successors, within six months after his death, to pay to the trustees under these presents a sum equivalent to such debts, which they shall pay off accordingly;" and then there is a declaration, "that the lands conveyed, or the price thereof, if they should be sold, should be held in trust for the liferent use of Mary Mackenzie and Alfred R. Catton," and then on the death of the survivor the fee shall be held and applied to the children of the said Mary Mackenzie. Then there is a provision that Mary Mackenzie may, failing children of the marriage, dispose of the trust-estate, failing which it is to revert to Hugh Mackenzie. There is another provision also which gives power to the trustee to expend from the capital of the trust such sums as may be deemed necessary for the permanent improvement of the trust property in building or repairing the residence at Gruinard, or in various other ways. Now, taking the provisions of the marriage-contract together, they suggest certain views which are strongly confirmatory of the impression which one receives from Mr Mackenzie's trust-disposition and settlement. There is no mention of the entailed estate from beginning to end of the marriage-contract. It is not settled on the spouses or heirs, but great care is taken of the settlement of the two small estates of Mungusdale and Gruinard, and it is intended to give the spouses power, if they see their way to it, to give these properties to one child, under burden of money provisions among the other children. There is power given to build and repair the residence at Guinard, showing that the spouses and the issue of their marriage are to be the lairds of Guinard and Mungusdale. Now, the notion of saying that this was done by Mr Mackenzie, but at the same time that he had in his repositories a general conveyance which would have the effect of giving to Mary Mackenzie the entailed estate of Dundonnell, it is impossible to believe; and therefore the conclusion I draw from the examination of the deeds in which Mr Mackenzie was concerned and his actions, is, that it was not and could not have been his intention to convey by means of the general disposition of 1854 the entailed lands or estate or any part of them.

I shall only say, in conclusion, with reference to the previous cases of this kind which have come before the Court lately, that while the present case does not in circumstances resemble the case of *Thoms* or *Hepburn*, it is certainly much more like the case of *Hepburn* than that of *Thoms*. In the case of *Thoms* there was no circumstance of any great weight to lead to the supposition that it was not the intention of the party to convey everything he had the power to convoy. In the case of *Hepburn* the intention of the maker of the general disposition was gathered from the nature of the general deed itself to be, not to convey the entailed estate, but to leave it to descend in the terms of the entail. In this case, while there is very strong and perfectly conclusive evidence against the intention of the maker of the deed to comprehend the entailed estate within it, that is not to be gathered from the deed itself taken alone, but is also to be gathered from the other deeds which the maker of that deed had made. I think we are entitled to look for the intention of the maker in the other deeds he made, and therefore I arrive without the least hesitation at the conclusion that this entailed estate was not carried by the general disposition of 1854; and, having formed that opinion, I think it unnecessary, for the reasons I have stated, to give any opinion as to the objections that have been stated as to the validity of the will.

Lord Deas—Murdo Mackenzie executed a deed of entail of the estate of Dundonnell in July 1838 in favour of Hugh his eldest son, and their heirs and successors. Hugh was infeft, and he died on 30th July 1869, leaving a trust-disposition and settlement, dated 4th July 1854. His natural daughter Mrs Catton is residuary legatee under that trust-disposition and settlement; and she wishes to have it found and declared that that trust-disposition and settlement carried to her the estate of Dundonnell, on the footing that there was a defect in the entail, in one respect at all events, and that in virtue of section 43 of the Rutherfurd Act, it was in the power of the heir in possession

to dispose of the estate, and to convey it to her accordingly.

It is not disputed that the deed of entail contains in the outset the three cardinal prohibitions against selling, pledging for debt, and altering the succession, and it is not disputed that it contains irritant and resolutive clauses which sufficiently protect the estate against the violation of these prohibitions, if there had been nothing else in the deed to take away the effect of these provisions and clauses. But it is said that between the prohibitory clauses and irritant and resolutive clauses there is introduced a power to grant provisions to younger children, which is of the nature of an exception from the prohibitions, and which exception is itself made the subject of certain protective clauses; and that, in consequence of that exception, the fee of the estate might be burdened or even sold, or part of it all events, for payment of these provisions, and that consequently that is a defect in the entail, and that the terms of the 43d section of the Rutherfurd Act come in, and make the entail invalid altogether.

It is said, on the other hand, that this may be read as the ordinary power to grant provisions affecting only the next heir, and that the prohibitory clauses being complete, and the irritant and resolutive clauses being duly applicable to them, even on the supposition of a defect in the entail, it is not such a defect as lets in the operation of the Rutherfurd Act.

These are the respective contentions of the parties.

It is not necessary, in the view your Lordship has taken, to consider the question of the validity of the entail, because, assuming all that is said against it, it is still necessary to consider whether the trust-disposition and settlement of Mr Hugh Mackenzie conveys the estate of Dundonnell, because if it does not it is not desirable to raise the other question, as there is no party with whom to try it. Upon that question, therefore, I have formed no opinion, and I agree with your Lordship that it is not necessary or desirable at present to do so.

I am of opinion that, assuming all the objections to the validity of the deed of entail to be sound, this deed of Hugh Mackenzie does not convey the entailed estate. Everything there belonging to him is conveyed by the dispositive clause; but it is settled that, notwithstanding the generality of these words of conveyance, it does not follow that a general disposition and settlement will convey every estate which the granter might convey, more particularly that it will not evacuate the existing destination of an entailed estate.

The only difficulty in such cases is as to what kind of evidence is admissible. It is admittedly a question of intention. If a man conveys a special estate, there is no question as to what he meant—the difficulty only arises where there is a general conveyance. But it has never been doubted that we may look to the deed itself to see what he meant to convey. Now, when there is a conveyance of a special estate, and no mention of any other, there arises at once on the face of the deed a presumption that the granter did not mean to convey any other. That presumption holds very strongly here, where the special estate is worth only about £20,000, and the other about £150,000. The purposes of this general disposition and settlement are mainly the payment of debts, and the conveyance of the residue to the truster's daughter; and there is a discretionary power given to the trustees to borrow, to excamb, and to sell. Now, though there is no absolute limit to what they are to have the power of selling and of retaining respectively, it is impossible to read this deed without seeing that the estate of Dundonnell did not come within the scope of the truster's contemplation. Then there is the codicil, which, as your Lordship has shown, clearly points to the same conclusion. So that if the case stood there, with nothing more to found upon, it would be very difficult to come to the conclusion that this gentleman meant to convey the estate of Dundonnell.

But there are a great many other deeds of his, which it is unquestionably competent to look at in a question of intention. There is the deed of excambion, proceeding expressly on the footing that these lands forming part of the estate of Dundonnell, are still under the fetters of the entail. Then there are the leases to his daughter, in 1855 and 1856, of farms belonging to that estate, and containing warrandice by him and the other heirs of entail, plainly implying that the entail was to stand after his death. It is very likely that if he had thought he had the power to evacuate the destination of the entail he would have attempted to do so. But not knowing that he had the power, it cannot be held that he intended to exercise it. It is very plain that he did not know that he had any such power, and he could not intend to do what he was not aware of his having it in his power to do.

I have no doubt that the evidence of these deeds, and of the judicial proceedings taken by Mr Mackenzie in reference to the lands, is all perfectly competent in determining the question of his intention, and I think with your Lordship that it is impossible to read them and think that he ever imagined he could convey the entailed estate. I therefore entirely concur in the result arrived at by your Lordship.

LORD ARDMILLAN—It has all along appeared to me that the first point to be considered is the effect of the general disposition of 1854. And I concur with your Lordship in holding that the general disposition does not convey the estate of Dundonnell. The question as to how far a general disposition will evacuate a previous destination, is one as to which no inflexible rule can be laid down. The very question assumes that the words of the general disposition are sufficient to carry the subjects, but the point to be determined is, whether these words are to receive effect so as to evacuate the destination? In such cases as that of *Hepburn*, where the mere reading of the deed provides sufficient elements for forming an opinion, there can be no difficulty. I do not say that the present case is so clear. But there are other cases in which the words of the deed are not sufficient of themselves to bring out all the elements by which the Court can come to a decision as to whether the particular estate is included in or excluded from the conveyance, and then it is competent to look at other probative deeds executed by the same party, for the purpose of ascertaining therefrom, if possible, the intention of the granter of the deed. Here we have a whole series of deeds which I think leave no doubt as to Mr Mackenzie's intention. It is clear that the tacks in 1855 and 1856 are granted by one who considers himself to be an heir of entail, bound to preserve the family estate for the succeeding heirs of entail.

Still more is it clear that the excambion is executed by one who, having acquired an estate in fee-simple, proposes that it shall be merged in his entailed estate, while certain portions of the latter are relieved from the fetters of the entail. It would be very difficult to frame two deeds which would show more clearly that the granter believed himself to be dealing with two interests as certain to emerge at his death—on the one hand the interest of his daughter and her heirs and assignees, and on the other hand, the interest of the succeeding heirs of entail. Mr Mackenzie obviously deals with his estate of Mungusdale as the only fee-simple estate he had it in his power to bequeath, except those portions of land which he had withdrawn from the entailed estate. All this strongly supports the presumption, arising from the trust-deed itself, that the granter did not intend to convey the estate of Dundonnell by his deed of 1854.

On the question of the validity of the entail I think it better to say nothing.

LORD KINLOCH—The present action concludes for a decree of declarator—1st, that the deed of entail of the lands and estate of Dundonnell, executed by Murdo Mackenzie on 14th July 1838, is invalid and ineffectual; 2d, that the lands of Dundonnell and others contained in that deed were validly conveyed to the pursuer Mrs Catton by the trust-disposition *mortis causa* of her father, the late Hugh Mackenzie, dated 4th July 1854.

It is necessary that the pursuers should succeed in showing the entail to be invalid before they can make out that the lands are conveyed by the *mortis causa* disposition. But the converse does not follow that, because the entail is shewn to be invalid, therefore the lands are contained in the *mortis causa* disposition. The entail may be invalid and yet the heir in possession might not intend to convey the lands away to any other than the heirs of entail. The lands may still not be comprehended in his *mortis causa* disposition. It is therefore, as I think, the fitting course in the present case, to consider, first, whether, assuming that the late Hugh Mackenzie had power, notwithstanding the entail, to alienate the lands, he in reality did so? If, even on that assumption, the conclusion is reached that the lands were not contained, nor intended to be contained, in the *mortis causa* disposition, it is unnecessary to consider the objections to the validity of the entail. Not only so, it would be anomalous and incorrect to pronounce on the validity of the entail where the pursuers had no interest to contest it. The objection to the entail is a general one, affecting it in a question with all the heirs of entail—being in substance that certain of the prohibitions are either in themselves ineffectual or not sufficiently fenced, and so the whole entail invalid. And this is a question to be tried between the heirs of entail; not with the pursuers; who, if the entailed estate be not comprehended in the general disposition, have no legal right to raise it.

I am of opinion that, even assuming the entail to be invalid, the entailed lands cannot be held to be comprehended in Hugh Mackenzie's trust-disposition. And I therefore shall say no more in regard to the validity of the entail than that the pursuers have not satisfied me that it is in any point whatever invalid or ineffectual.

The true question to be disposed of regards the effect of Hugh Mackenzie's *mortis causa* settlement, considered as a general disposition of all lands and heritages either then belonging or which should belong to him at the time of his death. There cannot be any doubt of this general disposition being *habile* to convey the entailed estate if within the power of Hugh Mackenzie to alienate. On the other hand, it is equally undoubted that such a general disposition may be construed as not comprehending a specific heritable estate if it shall plainly appear from the terms of the deed, viewed in connection with the circumstances in which it was executed, that this estate was not intended to be contained in it. This has been decided in several cases, and may be considered a fixed rule of law. It is by the controlling force of this rule that a general disposition is prevented from being made, what otherwise it might often be made, the instrument of injustice and wrong, and the means of frustrating, not promoting, the true intention of the granter.

It becomes a special question in the circumstances of each case, whether the property brought in question is or is not to be considered as comprehended within the terms of the general disposition. In the recent case of *Thoms* v. *Thoms* I held, with the majority of the Court, that the property was so comprehended. The peculiarity of that case was that the general disposition was of the most unqualified and absolute terms possible; containing within itself nothing which could derogate from its most comprehensive application. It was simply—"I, Alexander Thoms, for the love and favour I have to my daughter Robina Thoms, and for certain other good causes and considerations, do hereby give, grant, assign and dispone to and in favour of the said Robina Thoms, and the heirs whomsoever of her body, and to the disponees and assignees whomsoever of the said Robina Thoms, whom failing to my own nearest heirs and assignees whomsoever, heritably and irredeemably, all and sundry the whole property, heritable and moveable, real and personal, of whatever kind and denomination soever at present belonging or that shall belong to me at the time of my decease." The question arose as to an estate bearing to be vested in the granter by way of entail, but the entail of which was beyond all doubt defective. There was offered no evidence of intention extrinsic to the deed, except some expressions contained in a letter, which I considered inadmissible evidence, and immaterial if admitted. In this condition of things, the question to be decided was whether the estate in question should be held excluded from the general disposition, which unquestionably was framed to comprehend it, without proof of any intention on the part of the granter to exclude it; on the contrary, with the presumption attached to every general disposition, that it is intended to comprise everything which the granter has power to alienate, whether from completeness of title, or defectiveness of fetters. I came to a very clear conclusion that, without any evidence of intention to counteract the presumptions of the deed, the estate in question could not be held excluded from the conveyance in the general disposition. And the judgment pronounced in accordance with this view I continue to hold a sound judgment.

The present is a case of an entirely different character. There is not here a mere general disposition with nothing contained in the deed to indicate that it was restrained within its legally comprehensive scope. The trust-disposition by Hugh Mackenzie conveys to trustees in the first

instance, by specific description, his unentailed lands of Monkcastle; and it is only after this specific conveyance that he introduces a general disposition of all his estate, heritable and personal, belonging or which might belong to him at the date of his death. It is against all reasonable probability that, whilst conveying in this specific form the estate of Monkcastle, not worth more than £20,000, he should intend to comprehend the estate of Dundonnell, admittedly worth more than £150,000 in a supplementary clause of all lands and heritages. The conclusion is far more rational that the clause was intended to sweep up any minor pieces of heritage which might belong to him at his death, such as was a superiority in Dingwall, estimated at £50. If a conveyance of Dundonnell had been in the granter's view he would presumably have disponed it in the same specific terms with Monkcastle; and would most probably have given to it the first place in the deed. His not mentioning or alluding to the estate of Dundonnell throughout the whole trust-disposition cannot reasonably be accounted for except on the supposition that he never thought of conveying or attempting to convey it. The whole clauses of the deed are accordant only with this supposition. Very peculiarly so are those which describe the property conveyed, after satisfying its primary purposes, under the general name of "residue"—a phrase which could not easily be conceived to include the estate of Dundonnell without further mention. The conveyance which he directs the trustees ultimately to make to Mrs Catton is of "the said residue of my said whole heritable and moveable means and estate, including my said estate of Mungusdale, and the stocking of my farms or any of them." It is impossible in reading these words to conceive that, in the contemplation of the granter, they comprehended the estate of Dundonnell.

Ten years after the execution of this deed, being on 22d February 1864, Hugh Mackenzie added a codicil, in which, by way of removing all doubts as to his intention in the deed, he explains "that the disposition and conveyance of the residue of my means and estate, directed to be executed by the foregoing trust-deed, shall be in favour of my daughter Mary Mackenzie within designed, and her heirs, assignees and disponees whomsoever, it being my wish and intention that she and her heirs shall succeed to everything I may leave, and that she shall have unlimited power to dispose thereof as she pleases." He also gives power to his trustees, in the event of her marriage, to settle "the said residue" by her marriage-contract, on her and her husband in liferent, and the children in fee, and, failing children, any person she may appoint. It is said, and not unreasonably, that the purpose of this codicil was to supply the words "her heirs and assignees," which did not occur in the trust-disposition, and the want of which had raised some difficulty. However that may be, here was an explanatory codicil intending to clear his meaning in his trust-settlement; yet it contains not a word concerning the estate of Dundonnell, as to which it required more explanation than about anything else whether it was intended to be comprehended within the terms of the conveyance or not. The omission in this explanatory codicil of all reference to Dundonnell strongly confirms the reference that Hugh Mackenzie never thought of comprising it in his general disposition. He says indeed that it is his wish and intention that his daughter and her heirs shall succeed to everything he should leave. But this, which is not stronger, nor perhaps so strong, as the terms of the general disposition itself, never can be held equivalent to a declaration that Dundonnell is contained in the conveyance. This would be to interpret what is obscure by what is still obscurer.

The case does not, however, rest here; for there are besides a whole series of deeds and transactions, running over the life of Hugh Mackenzie down almost to the day of his death, importing the very reverse of an understood inclusion of Dundonnell in the general disposition. I conceive that these are competent evidence in the question of intention. I do not consider parole evidence of any oral explanations made by him of his meaning in his deed to be admissible. And letters containing such explanations I would consider simply part of such parole evidence. But deeds and transactions engaged in with regard to his estates, particularly this estate of Dundonnell, and proved by the documents (including letters) passing at the time, I consider to form part of the historical circumstances from which fairly to gather his intentions in the *mortis causa* settlement left by him at his death.

A portion of these deeds consists of tacks in his daughter's favour of part of the entailed estate of Dundonnell, and expressly so described, the tacks bearing to be granted by Hugh Mackenzie "for himself and the heirs of entail succeeding to him in the entailed estate of Dundonnell." These tacks extend for twenty-one years from Whitsunday 1855, and are still current. The inference at once occurs, that this was a proceeding not likely to be followed by one who had already made over to his daughter that very estate in property, and was intended, on the contrary, to give her a beneficial interest, extending beyond the period of his own life, in an estate which he knew devolved upon others. He is further proved to have been engaged in proceedings for borrowing money on the estate of Dundonnell as an entailed estate, and to have largely carried through improvement transactions under the Entail Statutes. One proceeding is especially noticeable,—viz., a contract of excambion, by which he exchanged certain fee simple lands for a portion of the entailed estate, and expressly dispones those fee simple lands "to and in favour of himself as heir of entail foresaid, and the heirs of entail substituted to him according to the destination contained in the foresaid deed of entail." On the other hand, he conveys the entailed lands to himself, his heirs and assignees, in fee simple. No transaction can more clearly indicate than this the preservation of the estate of Dundonnell separate and apart from all his other heritable property to the heirs of entail in that estate. It seems very extravagant, almost absurd, to say that he intended to embrace that estate as fee simple property in the general dispositions, when he is found actually taking from his fee simple lands to keep up, if not to enlarge, the entailed estate for the benefit of the heirs of entail.

On 18th November 1868, which is within about eight months of his death, Hugh Mackenzie became a party to his daughter's contract of marriage with her present husband, Mr Catton. By this contract of marriage he settled on his daughter, through the intervention of a trust, the unentailed lands of Monkcastle, and also the lands formerly within the entail, but acquired in fee simple by the excambion, described expressly in the con-

tract as "parts and portions of the entailed estate of Dundonnell now acquired by the said Hugh Mackenzie in fee simple." No conveyance is made of the entailed estate of Dundonnell or any part of it, although this was eminently the time when he would expressly have done so, if he really had the intention of giving it to his daughter now ascribed to him. In her marriage-contract was emphatically the place for a prominent conveyance of Dundonnell, but none such occurs in it.

There are two conclusions which I think fairly to be deduced from these circumstances. The first is, that whatever objections may now be started to the entail of Dundonnell, Hugh Mackenzie down to the day of his death believed himself to have held the lands of Dundonnell under the fetters of a strict entail. Nothing short of this belief can, I think, account for his acting as he did. But this is an important item of evidence in the question whether he intended to embrace the lands of Dundonnell within the general disposition. If he believed that he could not validly alienate these lands, this affords a strong presumption against his entertaining the thought of doing so. In many cases, as for instance that of *Thoms*, it remains altogether uncertain whether the granter of the general disposition knew of the flaw in the entail; and it the flaw is undoubted, the presumption is rather in favour of his knowing of its existence. In the present case I think his actings render it undoubted that Hugh Mackenzie had no idea of there being a flaw in the entail, and possessed a full conviction of its validity. The circumstance adds greatly to the presumption that he never intended to comprise the entailed estate within the general disposition.

But farther, I think the actings of Hugh Mackenzie infer the strongest positive conclusion that in purpose and intention the lands of Dundonnell were not only not included in, but expressly excluded from, the general disposition. This again I think the only supposition on which his conduct can reasonably be accounted for. When I connect the terms of the general disposition with the transactions which took place from the date of that deed down to his death, I attain a firm and complete conviction that no such thought was ever present to the mind of Hugh Mackenzie as that of the lands of Dundonnell being comprehended in the general disposition of 4th July 1854.

But to reach this conviction disposes of the question before us, so far as I am individually concerned, and must do so equally with the rest of the Court. If it be proved to the satisfaction of the Court, by competent evidence, that the property brought in question was not intended by the granter to be included in the general disposition—on the contrary, was intended to be excluded from it—the Court is not only entitled but bound to declare that the words of the disposition, however general, do not comprehend it.

I am of opinion that the Lord Ordinary's interlocutor should be affirmed so far as it assoilzies the defender. But the grounds on which I reach this conclusion are different from those assigned by the Lord Ordinary.

Agents for Pursuers—Murray, Beith & Murray, W.S.

Agents for Defender—W. F. Skene & Peacock, W.S.

Tuesday, July 19.

GLENDONWYN *v.* GORDON.

Entail—Institute—Fetters—Conveyance—Intention.

By deed of entail, A, in the event (which occurred) of his decease without heirs of his body, conveyed certain lands to his wife in liferent and to B in fee. The first condition of the entail was that B, and "the whole heirs of entail and substitutes above written," should assume a certain name. The fetters of the entail were directed only against "the heirs of entail or substitutes above written." B, after possessing the estate, died, leaving a deed whereby she conveyed to C certain lands *nominatim*, and also generally her whole heritable and moveable estate. In several previous deeds which B granted in security of borrowed money she styled herself heiress of entail in possession of the said lands, and as such bound by the fetters of entail. *Held* (reversing Lord Jerviswoode)—(1) that B had not intended by the deed in question to convey the said entailed lands to C, for the reason that she was not aware that she possessed them as absolute fiar. (2) That the fetters of entail did not apply to B, the conditional institute, and that she possessed the said lands as absolute fiar.

In this action William R. D. Scott of Glendonwyn, of Old Chalton, Kent, with concurrence of his curator, sought (1) to have it declared by judicial decree that the irritant and resolutive clauses of a deed of tailzie, of date 25th March 1825, executed by Frederick Maxwell, of certain lands of Parton and others, were not directed against Xaveria Glendonwyn, the conditional institute of the entail, but only against the substitutes of entail; (2) that she was absolute fiar of these lands; and (3) that by disposition and settlement, dated 22d February 1834, she conveyed these lands to her nephew Frederick James Glendonwyn, father of the pursuer, and his heirs; and (4) he craved that the lands should be judicially declared to belong absolutely to him, as only child and nearest heir of his said father.

By the deed of entail above referred to Frederick Maxwell, "for certain good causes and considerations, in the event of my decease without heirs of my own body, gave, granted, and disponed from him, his heirs and successors, to and in favour of Agnes Glendonwyn or Maxwell, my wife, in liferent, during all the days of her life, and after her decease to Xaveria Glendonwyn, second daughter of the deceased William Glendonwyn of Parton, and the heirs whatsoever of her body, whom failing, to the second son of Sir James Gordon of Letterfourie, Baronet, by Dame Mary Lucy Elizabeth Glendonwyn, his spouse, and the heirs whatsoever of his body, whom failing," &c. The deed of entail was granted "always with and under the conditions, provisions, restrictions, exceptions, irritancies, declarations and reservations" therein contained. The first of these was in the following terms:—"With and under this condition, that the said Xaveria Glendonwyn, and the whole heirs of entail and substitutes above written, shall be bound and obliged to bear and retain the surname of Glendonwyn after their obtaining possession of the said lands and estate in virtue hereof, along with their other surname, arms and designation." The prohibitions against alteration of the order of succession, alienation, and contrac-