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-

tion of debt were in the following terms:—"With and under this limitation and restriction, that it shall be noways lawful to nor in the power of any of the heirs of entail or substitutes above written to innovate, alter or infringe this present deed of entail, or the order of succession thereby established, or to do or grant any other act or deed that may infer any alteration or change of the same, directly or indirectly; and with and under this limitation and restriction, that it shall not be lawful to nor in the power of any of the said heirs of entail or substitutes, to sell, dispone, alienate, burden, dilapidate or put away the lands and others above written, or any part thereof, either irredeemably or under reversion, or to contract debts, grant bonds, or any other writs, deeds or securities, or to do any act, civil or criminal, that shall be the ground of any adjudication, eviction, or forfeiture of the said lands, or any part thereof, or anywise to affect and burden the same; nor shall the said lands and estate, or any part thereof, be affectable by or subject to any terces or courtesies to the wives or husbands of the heirs or substitutes above written or any of them;" but with and under the exception of power to grant provisions to younger children, and liferent localities to wives and husbands. The irritant and resolutive clauses were in the following terms:—'And with and under these irritancies following, viz., that if any of the heirs of entail or substitutes above written shall contravene any of the conditions, provisions, or limitations and restrictions contained in this entail, either by failing or neglecting to fulfil and perform the said conditions, and every one of them, or by acting contrary to the said limitations and restrictions, or any of them (excepting as is above excepted), that in any of these cases the person so contravening by failing and omitting to obey the said conditions, or acting contrary to the said limitations, or any of them, shall, for him or herself only, forfeit," &c. Frederick Maxwell, the granter of the said disposition and deed of entail, died in 1823 without heirs of his body, so that the condition upon which the said disposition and deed of entail was granted was purified. The deed took effect, and the lands and others contained in the disposition and deed of entail devolved, on his death, under the destination therein contained, upon his wife, Mrs Agnes Glendonwyn or Maxwell (who survived him, but died without taking infeftment) in liferent, and Xaveria Glendonwyn, the institute or conditional institute, in fee. After the death of the said Mrs Agnes Glendonwyn or Maxwell, who died in 1835, Xaveria Glendonwyn was infeft in the said lands. The said Xaveria Glendonwyn, who died on 4th October 1858, by disposition and settlement, dated 22d February 1834, "for the favour and affection which I have and bear to my nephew Frederick James Scott, Esq., presently residing at Parton, and for other good causes and considerations," gave, granted, assigned, and disponed to and in favour of the said Frederick James Scott, his heirs and assignees whomsoever, heritably and irredeemably, all and sundry lands and heritages, debts, heritable and moveable heirship moveables, and whole goods and gear, sums of money and effects, and in general her whole means and estate, heritable and moveable, of whatever nature or denomination, or wherever situated, then belonging, or which should belong to her at the time of her death, with the whole vouchers, instructions and conveyances of the said debts, and the writs and evidents of her said heritable estate. The said Xaveria Glendonwyn farther, by said disposition and settlement, nominated and appointed the said Frederick James Scott to be her sole executor and universal legator.

The contention of the pursuer was, that by this deed Miss Glendonwyn conveyed to her nephew the lands of Parton, of which he alleged she was absolute proprietor.

Mr Scott was declared bankrupt on 20th December 1860 and died intestate shortly afterwards. After his death his creditors were paid by the realisation of a portion of his estate, and the trustee was discharged. The principal defender in the case, Sir Robert Gordon, obtained decree of special service to the estates in dispute on 17th May 1859, as nearest heir of tailzie to Miss Glendonwyn, and has since continued in possession of the lands. The allegation of the defender was that Miss Glendonwyn possessed the lands until her death, subject to the prohibitions and irritancies of the deed of entail, and not as absolute proprietrix; that she never considered herself free from the fetters of the entail, and had not intended by her deed of 22d February 1834 to convey the lands in question to her nephew, but only those lands of which she believed herself to be absolute proprietrix. The sixth plea in law of the defender was as follows:—"The said Xaveria Glendonwyn having from the date of the entailer's death down to her own death, as well prior as subsequent to the date of her succession to the said entailed lands and estate, understood and believed that the same were strictly entailed, and that she was entitled to succeed to, and after her succession that she possessed the same as heiress of entail, and that upon her death they descended to the defender as next heir of entail; and having throughout her life dealt with the same, and acted and transacted on that footing, she neither conveyed nor intended to convey the same by the disposition and deed of settlement executed by her and founded on by the pursuer."

The Lord Ordinary (JERVISWOODE) pronounced this interlocutor:—

"*Edinburgh, 22d February* 1870.—The Lord Ordinary having heard counsel and made avizandum and considered the debate, with the record, productions, proof adduced, and whole process, Finds, 1*st*, That under a sound construction of the disposition and deed of entail dated 5th March 1821, which was executed by the deceased Frederick Maxwell, and is set forth and referred to in the first four articles of the revised condescendence, the respective prohibitions therein contained against alteration of the order of succession, and against alienation and contraction of debt, are not directed against or applicable to Xaveria Glendonwyn, who is named in the record, and who was the institute in the fee of the lands and estate disponed under the said disposition and deed of entail, and that the said prohibitions are not so framed as, in point of law, to operate as effectual prohibitions against, or as a bar to the exercise by her of the ordinary powers of alienation and disposition competent to the proprietor of lands, or other the like heritable subjects, held under a fee-simple and unlimited title; 2d, that the defenders have failed to prove facts relevant and sufficient to establish that it was not the intention of the said Xaveria Glendonwyn to convey to and in favour of the now deceased Frederick James Scott, the father of the pursuer, the said lands and estate

by and under the disposition and settlement executed by her, which is dated on the 22d February 1834, and of which No. 8 of process is an extract; and 3dly, with reference to the preceding findings, sustains the first five pleas in law set forth on the part of the pursuer, and repels the first seven pleas for the defenders: and appoints the cause to be enrolled, that parties may be heard as to the application of the present interlocutor to the conclusions of the summons, and in regard to further procedure in the action, reserving meanwhile the matter of expenses.

"*Note.*—The questions which are here raised, and which have been discussed in a full and satisfactory manner before the Lord Ordinary, have arisen in relation to a state of circumstances not of very common occurrence; and consequently the Lord Ordinary cannot say that the case is in his apprehension a clear one, or that other views than those on which he has acted may not be ultimately and rightly taken. He has, however, after consideration, come to the conclusion that the deed executed by Miss Glendonwyn was framed on the footing of conveying to her nephew Frederick James Scott every right, heritable or otherwise, which she herself held; and consequently, that if she was truly the party entitled to hold as her own the lands now in question, it must follow that they formed subjects falling within the conveyance by her in favour of her said nephew.

"Now, as respects the important question which seems thus to lie at the root of the merits of the present contention, the Lord Ordinary has come to be of opinion that Xaveria Glendonwyn, the institute (subject to the liferent of the entailer's widow) under the entail contained in the deed of Frederick Maxwell, was not only not in point of law subjected to or affected by the conditions and the irritant and resolutive clauses and obligations which the entailer provides, and which he lays upon the heirs of entail as such; but that the just interpretation of the deed is, that it was the positive intention of the framer of it to exempt Xaveria Glendonwyn from every prohibition and condition, with the exception of the special condition that she should bear and retain the name of Glendonwyn. On no other view does it seem possible, in the Lord Ordinary's apprehension, to account for the omission of the name of the disponee or institute in the entail from every prohibitory, irritant or resolutive clause contained in the deed, with the exception of that regarding the obligation to bear and retain the name of Glendonwyn. That all the clauses of the deed are not applicable to her seems abundantly clear; and if she was, in consequence, unfettered as respects the power of disposition, the Lord Ordinary must hold it to follow, while the case of *Thoms* v. *Thoms* stands as an authority, binding upon him and probably upon this Court—provided the view on which the Lord Ordinary has here proceeded be in other respects approved—that the right which she herself held passed under her deed to her own disponee, the father of the pursuer."

The defender reclaimed.

The SOLICITOR-GENERAL, ASHER, and MACDONALD for reclaimer.

KEIR in answer.

At advising—

LORD PRESIDENT—This is a case, generally speaking, of the same description as that which we have just decided, although the circumstances are, of course, very different. The general disposition founded on by the pursuer in this case was executed by Miss Xaveria Glendonwyn in the year 1834. She was institute in possession under an entail which was made by her uncle by marriage, Mr Frederick Maxwell, in the year 1821. It was contended by the pursuers that the fetters of the entail do not apply to Miss Xaveria Glendonwyn as the institute, and consequently that she was to all legal effect proprietor; and, in the second place, that being thus fee-simple proprietor of what is called the entailed estate, she did, by her general conveyance in 1834, settle that estate upon her nephew Frederick James Scott, who was the father of the present pursuer.

Now, in order to appreciate the question raised on Miss Xaveria's general conveyance, it is necessary to attend to some circumstances connected with the family history. In the beginning of the century a William Glendonwyn was the proprietor of the entire barony of Parton, and he had no sons, but three daughters, the eldest of whom, Mary, was married to Sir James Gordon of Letterfourie, the defender's father. Xaveria was the second, of whom mention has already been made, and who died unmarried; and the third was Ismene, who was married to Mr William Scott. In 1809 William Glendonwyn, the proprietor of the barony of Parton, sold that estate to his son-in-law William Scott, and there seems to have been some family misunderstanding upon the subject, or at least some family jealousy of this sale, which was thought not to be altogether an honest transaction; but an attempt to reduce the sale was unsuccessful. Afterwards, however, Scott became bankrupt before he had settled the price of the estate, and the consequence was that the sale went for nothing, and the estate came again to be judicially sold. Upon this occasion it was exposed in lots. There were three lots apparently,—one called the Cowgarth Lot, a second called the Parton Place Lot, and a third called the Boreland Lot. The Cowgarth Lot was purchased by Mr Frederick Maxwell, who was married to William Glendonwyn's sister, Agnes Glendonwyn, and was consequently, as I said before, the uncle by marriage of Miss Xaveria Glendonwyn and her sister. The Parton Place Lot was bought at the judicial sale by Miss Xaveria herself, and she subsequently acquired also the third lot, called the Boreland Lot. Mr Frederick Maxwell after a time bought additional lands—to what extent does not exactly appear, but it seems to have been to a considerable extent; and after he had acquired these additional lands he made the entail in question, on the 5th of March 1821, by which he entailed the Cowgarth Lot and the other lots which he had subsequently acquired. He had no family of his own, but his wife was alive, and therefore he made the destination of the estate as follows:—failing issue of his own body, he gave the estate to his widow in liferent, and to Xaveria and the heirs whatsoever of her body, whom failing to the second son of Sir James Gordon of Letterfourie, Mary Glendonwyn's husband, and the heirs of his body; after him, to his next immediate younger brother and the heirs of his body in the order of seniority. Then failing the sons of Sir James Gordon, the estate went to the daughters of Sir James in their order—the eldest heir-female taking in preference to her sisters—and the heirs of their body; and failing all the descendants of Sir James Gordon and Mary Glendonwyn, then to Ismene Glendonwyn and the heirs of her body. After that there are some

farther substitutions, which it is needless to follow out. Now, Miss Xaveria succeeded on the death of the entailer, which occurred in 1823; but she did not then make up any title; the widow's liferent subsisted over the entire estate; and it rather appears that she took no steps towards making up a title, even immediately after the death of the liferenter, who died in 1835, for Miss Xaveria's infeftment in the deed of entail bears date in 1842. Sir James Gordon, whose sons were called after Miss Xaveria and the heirs of her body, had four sons. His eldest son being heir to Letterfourie, was not called to the succession of Parton Place at all; but his second and other sons were called, as I have explained. The second and third sons of Sir James died without issue, and the defender was the fourth son, and thus came to be the next heir of entail after Xaveria and the heirs of her body. Now, under this entail Xaveria possessed the estate for a considerable number of years, and she had at the same time a fee-simple estate of her own, consisting of those portions of the barony of Parton which she had bought at the judicial sale and afterwards, viz., Parton Place and Boreland; and her nearest relatives were her two nephews,—the defender, who was the son of Sir James Gordon, and the person entitled to succeed after Miss Xaveria herself, and the father of the pursuer, Frederick James Scott, who was the son of Ismene Glendonwyn, the third daughter of William Glendonwyn. Now, without inquiring into what were the terms on which Miss Xaveria Glendonwyn lived with these two nephews, which would be travelling out of the deeds before us altogether, it is quite plain what her natural position in regard to them was. One of them—the son of her eldest sister—was the heir of entail next after herself to the entailed estate. The other nephew was a postponed substitute in the same destination, but had no prospect of succeeding to the entailed estate; and it is not disputed that to that other nephew, Frederick James Scott, she left her fee-simple lands. But then it is contended by Mr Scott's son, the present pursuer, that she not only by that deed left his father her unentailed or fee-simple lands, but gave him the entailed estate also, by force of the words of general conveyance contained in her deed. It certainly strikes one as rather a startling result that, having two relatives very near her, the one being descended from an elder sister, and the other from a younger, she should give to the one nephew the whole estates which she possessed, both entailed and fee-simple, and leave the other without a shilling, although he was the heir next entitled to succeed under the destination or tailzie under which she herself held as institute. But such undoubtedly would be the effect of the construction which the pursuer desires to put on Miss Xaveria's disposition of 1834. There is not a great deal of light to be got from that disposition itself upon the question, what was the intention of Miss Xaveria Glendonwyn, but it is not immaterial to observe, and it is one of the points which distinguish this case from the case of *Thoms* v. *Thoms*, that in that deed there is a special conveyance as well as a general conveyance. In the case of *Thoms* there was no room for any distinction between one estate and another, for it was a general disposition only, and there was no reason for saying that the granter of that deed had any particular estate in his mind more than another, his object being to convey everything that he had, whatever that might be. But here, as in the case of *Catton* v. *Mackenzie*, there is a disposition of particular portions of the estate belonging to Miss Xaveria, viz., those lands which she held in fee-simple,—the lands of Parton Place, the lands of Boreland, and others. There is a point of difference again between this and the case of *Catton* v. *Mackenzie*, in so far as in Miss Xaveria's deed the words of general conveyance precede the special conveyance, while in the other case they followed them. This deed runs thus—"I give, grant, assign, and dispone to and in favour of the said Frederick James Scott and his heirs, &c., all and sundry," and then follows the special conveyance of Parton Place and Boreland. Now, the observation which I made upon the deed in the previous case of *Catton* v. *Mackenzie*, that general words following particular words must receive a certain limited interpretation, will hardly apply to the present deed. On the other hand, it is impossible to say that the occurrence of a special conveyance of particular lands in a deed of this kind is not an element of great importance as bearing upon the construction of the deed. Looking to the relation in which the defender and the pursuer's father respectively stood to Miss Xaveria Glendonwyn, it certainly commends itself to one as the more natural and probable intention of Miss Xaveria that she should leave the fee-simple lands to that nephew who stood farther down in the destination of the tailzied estate, while she left the tailzied estate itself to descend according to the provisions of the deed of entail; the other alternative, that she meant to give both the fee-simple lands and the entailed estate to the one nephew, appearing on the other hand to be unnatural, and therefore improbable. But still, all that partakes a little too much perhaps of the nature of conjecture to limit and restrain the legal effect and construction of words of general conveyance; and if we were confined entirely to a consideration of the terms of this deed itself, coupled with a consideration of the circumstances in which Miss Xaveria stood at the date of making it, and her relation to the parties who are competitors for the entailed estate, I cannot say that I should arrive with any very great confidence at the conclusion that the entailed estate was not intended to be comprehended in this deed. But I find myself relieved a good deal from any difficulty in which I should have been placed had the case been confined to what I have now stated, by some other proceedings of Miss Xaveria Glendonwyn herself. It is necessary to be very careful in travelling beyond the deed in a case of this kind—to be sure that we are not letting in incompetent evidence to fix the intention of the maker of the deed, and so its proper construction. There is a great deal of evidence brought forward here, both in the shape of letters and other documents, which I think it would be very unsafe to rely upon. A great many letters are quoted on the record to which I shut my eyes entirely, and I should wish it to be distinctly understood that my opinion is not founded upon any piece of evidence except what I am going specially to notice. Miss Xaveria Glendonwyn, although she had both an entailed estate and an unentailed estate, seems rather to have been in the way of wanting money more than once—indeed it is plain enough from the deed to which I am about to refer that she was very urgently in want of money, and had to pay a very high price for it. We find that in the year 1850, for example, she borrowed from a person of the name of James

Aitken a sum of £500, and she granted in security of that loan an assignation to a policy of insurance for £499, 19s., with an obligation to pay the premiums upon that policy; and in security of her obligation to repay the principal sum with interest, and also the premiums of insurance, she disponed to James Aitken and his foresaids, heritably but redeemably, those parts of Parton which are within the entail, the lands of Cowgarth and the lands of Kirkland of Parton, and also the lands of Kerricks and others, which, though not part of the barony of Parton, are within the entail. But she conveyed these "always with and under the conditions, provisions, reservations, and clauses prohibitory, irritant, and resolutive, specified and contained in a disposition and deed of entail dated the 5th of March 1821, &c., in my favour, dated in 1842." Again, the very next year, in 1851, she borrowed a sum of £1500 from Major Alexander M'Laren, and she assigned a policy of insurance for the same amount which she had effected on her life, the annual premium of which was £123, 8s. 9d.; and in security of her obligations she infeft Alexander M'Laren in an annuity or annual rent of £253 sterling, payable furth of the lands of Cowgarth, the lands of Kirkland of Parton, and the lands of Kerricks and others, but providing "that as I hold the said lands and heritages above described under settlements of strict entail, whereby I am prohibited from alienating and encumbering the same to the prejudice of the subsequent heirs of tailzie; therefore it is declared always by me, and the said Major Alexander M'Laren by acceptance of these presents hereby agrees for himself and his foresaids that no adjudication, diligence, or other process to follow on the personal obligations which I have come under for payment of the said annuity, interest, and penalty, or upon this sight and security, shall affect the said lands and heritages, or the rents, maills, and duties thereof, except during my life, nor shall these presents, nor any process, diligence, or execution to follow hereon, any way affect the said lands and heritages, or operate to infringe the right of any other person or persons when they succeed, or become entitled to succeed to me as heir of tailzie in the said lands and heritages, except in so far as they may otherwise represent me; but this present real security, and the assignation to the rents and duties after written, and all process of diligence and execution following upon the same, or upon the personal obligation granted by me hereinbefore contained, shall at and immediately upon my decease become *ipso facto* void and null as against the said lands and heritages, and the heir of tailzie succeeding thereto." Again, in 1855 Miss Glendonwyn borrowed another sum of £500, and she granted a security for it in like manner over the entailed lands; declaring "but as I hold the said lands and others, second, third, and fourth above described, under settlements of strict entail, whereby I am prohibited from alienating and encumbering the same to the prejudice of the subsequent heirs of tailzie, it is hereby specially provided and declared by me," &c., very much in the same terms as the last deed to which I have referred. Lastly, in the year 1856 Miss Glendonwyn had occasion to become a party to a transaction in which she represented the heirs of entail and the entailed estate, upon occasion of a translation by the trustees of one William Johnstone of a certain entailer's debt, the nature of which it is not necessary particularly to specify, but she in that deed, as heiress of entail in possession of the lands and others hereinbefore conveyed, ratifies and approves to Dr Alexander Anderson "and his foresaids the whole conveyances and transmissions of the said bond and disposition in liferent and security hereinbefore recited, with this translation of the same, and declare the said whole writs to be good, valid, and sufficient, and free from all ground of challenge or eviction, or exception whatsoever: And further, as heiress of entail in possession of the said lands and others, I hereby confess and admit that the said principal sum of £1166, 13s. 4d., and interest thereof from and after 15th May 1856, and penalties corresponding thereto, as debts of the entailer, form, in virtue of the said bond and disposition in liferent and security, and transmissions thereof, a real heritable security over and upon the said lands and others hereinbefore described." Now, this is rather a remarkable series of deeds, and they suggest various considerations, which are certainly unfavourable to the case of the pursuer. Had Miss Xaveria Glendonwyn been under the impression that she, as institute of tailzie, was not bound by the fetters, it is not conceivable that she would have borrowed money on such securities as these deeds disclose, because the interest which she was made to pay for that money appears from some of these deeds to be somewhere between 8 and 9 per cent., including premiums of insurance which she had to pay. That was borrowing at a very ruinous rate unquestionably; and if she had possessed the lands in fee-simple, or could have dealt with them as fee-simple lands, she not only could have got her money much more easily, but she could have got it at half the price. That is perfectly conclusive of her view, that she was not in a position to deal with the estate as fee-simple. But farther, throughout the whole course of these deeds she speaks of herself as heiress of entail, and not merely in general terms, but as being so tied up by the fetters of the entail that she could not, without committing a contravention, grant this security otherwise than as a security to endure only for her own lifetime. And again, in that last deed, where she confirms the translation of an entailer's debt, she interposes entirely as heiress of entail; she confesses the existence of the debt for the heirs of tailzie, and as a burden upon them, and not upon her own heirs and successors in her fee-simple lands. And throughout the whole of these deeds she betrays the most thorough conviction that she is not in a condition to affect these lands in any way, except in so far as concerns her own life-interest as heir of entail. Now, is it conceivable that a lady who was convinced of her fettered condition so thoroughly as to encounter all the ruinous expense, and at the same time to proclaim herself as a fettered heiress of entail—is it conceivable that that same lady, when she executed the deed of 1834 containing the words of general conveyance to which I have already referred, intended by the words of general conveyance to dispone gratuitously the entailed estate to one of her nephews who was not entitled to succeed after her, to the prejudice of the other nephew who was the heir entitled to succeed under the entail? I have come to the conclusion that it is impossible so to read the words of general conveyance in the circumstances in which Miss Xaveria was placed, and therefore it does not become necessary to deal with the question which has been raised on the construction of the entail. At the same time, that question is not of the same kind as that which occurred in the

case of *Catton* v. *Mackenzie*. In the case of *Catton* v. *Mackenzie* the objections to the entail were of such a nature that they may hereafter form the subject of contention and litigation between the heir in possession and the substitute; but here the objection to the entail is only that the fetters did not apply to Xaveria Glendonwyn, the institute. There is no objection to the entail otherwise, so far as I understand; and therefore we may be at liberty to indicate our opinion upon that question without interfering with any subject of dispute likely hereafter to arise, because the question whether the fetters apply to the institute can never be raised again. I shall only say, in regard to that question, that I have found it impossible to distinguish between this case and the *Duntreath* case; and if the pursuer had succeeded in satisfying me that the entailed lands were intended to be comprehended in Miss Glendonwyn's general conveyance, I should have held that she was in a condition, notwithstanding the provisions of the entail, to deal with the estate as fee-simple. There are points of distinction no doubt—which were very well pressed in the course of the argument—between this case and the *Duntreath* case, but they are too thin and subtle, I think, for a satisfactory distinction; and if it had been necessary to do more than merely indicate an opinion on that subject, I should have been prepared to decide that the fetters of this entail were not binding upon the institute. On the other ground, however, I am of opinion that the defender is entitled to be assoilzied.

Lord Deas—In this case it appears that Mr Frederick Maxwell executed the deed of entail before us on 5th March 1821. Miss Xaveria Glendonwyn is the institute. The entailer died in 1823; the widow died in 1835; and Xaveria Glendonwyn, who then came into the beneficial possession of the estate, completed her feudal title by infeftment in 1842. She died in 1858, leaving a disposition and settlement, dated 22d February 1834, in favour of her nephew Frederick James Scott, who survived her, and who now claims the entailed estate. Of course the party claiming the estate must make out two things, first, that the entail is defective; and second, that the disposition which she left was intended to convey, or must be held as having been intended to convey, that estate. The alleged defect in this entail is quite different from the alleged defect in the entail in the case of *Catton* v. *Mackenzie*. The only objection stated here is that the fetters of the entail do not apply to Xaveria Glendonwyn, the institute. That question, if not decided now, can never rise again; because the power to deal with the estate is a power in Xaveria Glendonwyn only, and she being dead there is no other party with whom the same question can arise, and therefore there is no room for the same delicacy in giving our opinion on that subject as there was in the case of *Catton* v. *Mackenzie*. I am disposed to think with your Lordship that the fetters of that entail must be held not to have applied to the institute. It is not quite the same with the *Duntreath* case. There is a stronger implication here that the entailer considered herself to come under the denomination of heiress of entail than in the *Duntreath* case, and more particularly that implication may be here very strongly founded upon from the procuratory of resignation, and the precept of sasine. It is very difficult to read these as not implying that the entailer so understood it. I think the substance of decision in the *Duntreath* case is, that no implication will do from other parts of the deed, and if it were necessary to decide this question, I do not see much difficulty in holding that Miss Xaveria Glendonwyn might have evacuated the destination in that entail if she had chosen so to do. But the material question is whether she did it; and I am of opinion with your Lordship that she did not evacuate that destination. Upon the face of the deed she disponed specially certain lands belonging to her, and she does not specially dispone this entailed estate. That is a very important fact, which appears upon the face of the deeds; and having commented upon that in the case of *Catton* v. *Mackenzie*, it is not necessary to repeat my observations here. Moreover, upon the face of this deed she takes the nephew to whom she conveys the special lands bound to use the name and arms of Glendonwyn of Parton—that is, the arms of the heirs of entail in the entailed estate of Parton. It is very difficult to suppose that when she put in that clause she was contemplating that he was to be himself the heir in the entailed estate of Parton, in which case he would have borne the name and arms in virtue of that. Then it takes him bound to pay her debts and funeral expenses, and likewise the legacies which she might leave in this deed. That, I think, looks very much as if she considered, with reference to the estate of Parton, that she was dealing with him as a mere heir of entail. Then there is the fact that she had two nephews, an elder and a younger. The elder was the heir of entail in the estate of Parton, and the younger, to whom alone she made this conveyance, is the disponee under the deed. Now, the fact that she had two nephews, though it does not appear on the face of the deed, is unquestionably capable of being proved if it were disputed. Parole testimony would be quite admissible to prove the fact that she had two nephews. All we have here is, that she had there two nephews, and that the eldest is heir of entail to the estate of Parton, and that she does not say anything expressly against his getting that estate, and that she conveys all her other heritable estates specially to her other nephew. She does not say that she does so because the elder nephew was to get Parton, but I think we may draw that inference. If it is said we are not to draw that inference, it would be incumbent on the party maintaining that to show some reason for supposing that she intended to disinherit her elder nephew and give her whole estate to the other. No such reason is suggested. I do not say that they might not have gone further, and proved the terms on which she was with these two nephews, so as to show some decided reason why she wanted to cut off one altogether. I do not see anything against the competency of that; but be that as it may, we have no such proof or offer of proof. In the absence of any such allegation, the fair presumption is that she had no dislike, but that she had the same regard for the elder as for the younger, and gave the one the one estate because the other was to get the other estate. The fact about the two nephews just shows to my mind that there may be things which it is quite competent to prove even by parole testimony in a case of this kind; just as I had occasion to observe in the case of *Thoms*, if it had been disputed that the young lady was the natural daughter of Mr Thoms, or that he believed her to be so, I cannot suppose that that was incapable of being

proved. I have no doubt that that sort of fact might have been proved in any way. In this case we have a great deal on the face of the deed, and still more when taken in connection with the fact I have now alluded to. But we have here prohibitive deeds, the terms of which are quite inconsistent with the supposition that she considered that this entailed estate was to be carried by the deed of settlement. The deed of settlement was made in February 1834, and the bond for £1500 to Major M'Laren is executed in November 1851, three years after the date of the deed which is said to carry away the estate, and that bond narrates "that as I hold the said lands and heritages above described under settlement of strict entail, whereby I am prohibited from alienating and encumbering the same to the prejudice of the subsequent heirs of tailzie." Nothing could be more explicit than that. In the same way the bond of disposition and security in December 1855 sets forth that the assignation which she there grants "shall, at and immediately upon my decease, become *ipso facto* void and null as against the said lands and others, second, third and fourth above described, and the heir of tailzie succeeding thereto, and the rents thereof, other than the rents which would belong to my executors if they had not been assigned by me by these presents; and so far as regards the said lands and others, second, third and fourth before described, these presents shall be no further binding on me during my life than is consistent with the entail of the said lands, so that no irritancy may be incurred by my granting these presents, or by any diligence which may follow hereon." Then we have the translation of the entailer's debt in May 1856, which goes entirely to support the same thing. On the face of these deeds, therefore, it is quite plain that she did not consider that her deed of 1854 had conveyed away that estate; it is exceedingly probable that she did not suppose there was any power in her to convey away the estate; but I make the same observation which I did in the case of *Catton*, that an heir of entail in possession who executes a trust-deed of settlement, not imagining that he or she has any power to deal with the entailed estate, cannot be held to have intended to evacuate the destination of that estate. There are many general deeds of settlement or general trust-deeds *inter vivos* by heirs of entail long since dead which might be put forward to receive effect if it were held that wherever there was a flaw in an entail enabling the heir of entail to leave the estate by such general disposition, he had actually done so. The fact that she did not suppose there was any flaw in the entail to be taken advantage of would be of itself conclusive against the intention to convey, if there was evidence that she did not intend or contemplate that that result was to follow. As to the letters founded on here subsequent to the deed, from 1851 to April or May 1858, if it was necessary to found on them I am not prepared to say that they are not admissible evidence. I do not look upon these letters as parole testimony, or as the same with statements alleged to have been made by the deceased lady in her lifetime. The reason why statements of that kind would not be admissible evidence is, in my opinion, the danger of that sort of evidence misleading us from the actual truth. The risk that you do not get the statement so correctly is one thing, the risk that statements made in that sort of way may not have been the deliberate expressions of the views and intentions of the party is another thing. It is for reasons of that kind, I take it, that we do not admit in a question of this kind evidence of statements said to have been made, and which may or may not have been made. That does not apply to the deceased about those business transactions with anything like the same strength; I doubt if it applies at all to letters such as we have here, written which she was entering into, and in which she expresses herself just as clearly as she does in the deeds themselves. It is impossible to read these letters without seeing that she went into these transactions on the footing, either that she had not the power to deal with the entailed estate, or that she did not intend to deal with it. It is not so much that she did not wish to do so, but that she did not consider she had the power to do so. If these deeds had disappeared or had never existed at all, I should have been slow to come to the conclusion that we could not look at these letters in a question of this kind, whether it was or was not her intention by this deed to evacuate that destination. I do not consider the decision in the case of *Thoms* to be an authority to the contrary of that. There was a letter by the deceased in that case which was attempted to be founded on in the argument, a letter which I think little or no weight can be attached to, because it might have been written for a purpose; and if there was any ground to suppose that these letters were written to accomplish some sinister purpose, or to deceive the person to whom they were addressed, the objection would immediately rise that they were not evidence of the view or intention of the parties. I see nothing of that kind on the face of the letters here. I had occasion to refer, in the case of *Thoms*, to various authorities on the matter of the admissibility of evidence; and it is unnecessary to go over them again. I adhere to the general views which I stated in the case of *Thoms;* and although I came to the conclusion in the very peculiar circumstances of that case, and on the grounds I stated with some difficulty, that the general disposition there was to be held to convey that estate, that is quite consistent with the general law which I stated at the same time, and likewise with the general law as laid down in particular by Lord Curriehill. With that opinion I very much concur, with this exception, that I do not give the same force which he did to the fact of the title having been made up by the institute under the fetters of the entail; but in the general view which Lord Curriehill stated with reference to the kind of evidence which is admissible I entirely concur; and if there be any difference with reference to that, it would be perhaps that I may be disposed to go a little further than his Lordship thought it necessary to do, for I am of opinion that all facts and circumstances which afford real evidence of the intention of the granter of the deed may be competently proved. It is not the parole testimony that proves intention. The parole testimony, in so far as parole testimony is admissible, proves merely the facts and circumstances, and you draw the inference from these. For instance, suppose it was proved by parole testimony that this lady had two nephews standing to her in the same relation and position, it is not the parole testimony that bears upon the intention; but the fact is proved, and then we draw the inference. It is in that sense I hold that parole testimony can be admitted in any case of this kind,—parole testimony to prove the facts and circumstances which are ca-

pable of affording real evidence of the intention. To that extent I am of opinion that all the authorities go in favour of the admissibility of the evidence; and, with respect to the *onus probandi*, I do not think there is much difference in the position of the party claiming upon the deed and the party disputing the claim upon the deed. The fact and circumstances fall to be ascertained; and however the *onus* may be thrown on one or the other, I do not think there is very much difference between the position of the party founding on the deed and the party not founding on the deed, in respect of ascertaining what was the intention of the granter of the deed. It is not going contrary to the words of the deed to prove that it was not intended to convey this estate. All the length the law goes is that the deed is *habile* to convey the estate if that was intended—but it cannot be held that upon the face of the deed the estate is conveyed; that must always be open to inquiry, and very little shifts the *onus* one way or other; and the question whether it was intended to be conveyed or not must be decided upon the whole written evidence, and upon the facts and circumstances of real evidence; upon the result of these altogether depending whether the estate is carried by the deed or not. It was on that footing I came to the conclusion in the case of *Thoms*, with great difficulty, that the estate was not conveyed. On the same footing I come here to the conclusion that this estate is not conveyed. I should add, that I come to that conclusion altogether apart from these letters.

Lord Ardmillan—I am of opinion that the objection to this entail is good. I do not say that this is precisely the case of *Edmonstone of Duntreath*. It is perhaps in some respects not so strong, but I think the principles laid down in the case of *Duntreath* go to the entire maintenance of the judgment which is now to be pronounced. As I understand that case, it was decided, in the first place, that the presumption is for the liberty of the successive owners of the estate under the destination, and therefore that the fetters cannot be imposed by implication; secondly, that the institute to whom the estate is conveyed, and to whom the succession of heirs is substituted, is a disponee in fee-simple, unless his right is effectually limited and restricted by the fetters; thirdly, that the institute is not brought within the fetters of the entail by the use of terms in a clause directed against the heirs of entail, but that unless implication is held as equivalent to expression, the institute is free; and lastly, that the fetters of entail cannot be laid upon the institute by implication only. Now, if I am correct in holding that these principles are laid down in the case of *Duntreath*, I think there is no doubt that here the fetters of entail were not laid upon Miss Xaveria Glendonwyn, and consequently that she was in a position to dispone the estate of Cowgarth as much as the estate which she held in fee-simple. Then we come to the question, did Miss Xaveria Glendonwyn effectually convey the estate of Cowgarth by the deed which she executed? I do not intend to go over the ground which both of your Lordships have traversed. It appears to me that upon that deed alone we can scarcely get sufficient indications of a clear intention in the matter. There is a special conveyance of Parton Place and other lands that are mentioned, and there is no phrase used which can be construed as including the lands of Cowgarth. Now, Cowgarth was part of the barony of Parton, so was Parton Place, but it is quite distinct. Cowgarth and Parton Place are separate properties, and the one is conveyed by the deed of entail, and the other by the general disposition. But if there be not sufficient indication within the deed itself, how far can we go in seeking for such evidence? I have no doubt at all that such facts as the existence of these two nephews, and their relation to Miss Glendonwyn were perfectly legitimate matter of inquiry, even though it were necessary to prove them by parole evidence. Evidence that a person referred to in a deed is a son or a daughter or a nephew is perfectly competent. It is the proof of a fact which may be necessary to understand the deed. That is not matter of dispute. The deed of entail itself goes very far to instruct it. You have therefore the fact in this case,—having the son of the elder sister, and the son of the youngest sister to deal with,—having an estate which is entailed, and an estate which is not entailed, it was dealing in terms with the estate that was not entailed, and the question is, did she mean to give the whole to the son of the youngest child? Then again come the deeds and probative writings. It is very manifest that if Xaveria Glendonwyn had been proprietor of the estate of Cowgarth in fee-simple, she could have borrowed the money which she was anxious to borrow on much more favourable terms, and would have had to pay much less for it, and the deeds by which she got the loan on the footing of giving no other security than she could give as an entailed proprietor are very important pieces of evidence in gathering her intention with reference to this general disposition. In regard to the letters, I am disposed to divide these letters into two parts, and to hold the one portion of the letters quite legitimate evidence, but I have great doubts about the other. Where letters are connected with the carrying out of the transactions to which the probative writings relate, so as to form part of the *res gestæ*, or the real evidence in the case, I think the letters are not incompetent to do that. A letter in regard to the loan upon the security of her life interest in the entailed estate is not evidence if it stand alone, but must be considered with reference to what she did in effecting that loan, and so considered, it is not unimportant. But I should hesitate very much in admitting letters unconnected with it, just as I would hesitate very much in admitting parole evidence of persons who heard the maker of the deed say what he intended to do. I doubt whether that is real evidence. In this case I think some of these letters are admissible, on the principle that they are in their nature and terms connected with the carrying out of the transactions into which we can legitimately inquire. On these grounds, I agree with your Lordships.

Lord Kinloch—In this case, as in that of *Catton* v. *Mackenzie*, decided by us to-day, there are two questions raised—(1) Whether the entail under which Miss Xaveria Glendonwyn held the lands of Cowgarth was or was not effectual to prevent her alienating these lands? (2) Whether, supposing it invalid, she did or did not comprehend the lands in her general disposition of 22d February 1834 in favour of the pursuer's father?

In regard to the first question the case is so far differently situated from that of *Catton* v. *Mackenzie*, that the objection to the deed of entail is not a general one affecting the entail in the person of every heir-substitute, but applies exclusively to the case of Miss Xaveria Glendonwyn, who is alleged

as institute to have been free from the fetters of the entail. That lady being dead, the question is not a general one affecting all the heirs of entail, but only arises to the effect of settling the present controversy; and the same difficulty as to pronouncing on it does not arise as in the other case. I think myself permitted, therefore, to say that I am of opinion that Miss Xaveria Glendonwyn was clearly institute in the entail. She is direct disponee in the disposition. The disposition is indeed granted only "in the event of my decease without heirs of my own body." But this only made her conditional institute, and placed her in a well-known legal category. I consider it fixed by the opinions in the case of *Fogo* that not merely is a direct disposition in favour of such a conditional institute valid, but that infeftment may at once be taken on it without the necessity of an intermediate declarator, or any other form of proceeding. Xaveria Glendonwyn being thus institute in the entail, I am of opinion, and that without any doubt, that the fetters in the entail are not effectually directed against her in that character.

This assumes that, notwithstanding the entail, she had all the powers of a proprietor in fee-simple in the way of alienating the lands of Cowgarth. The question still remains whether she did actually alienate these lands?—in other words, whether they are to be held included in, or excluded from, the general disposition of all lands and heritages in favour of the pursuer's father?

This is a question of evidence in regard to her intention when executing the general disposition. For here, again, the case wholly differs from that of *Thoms*, in which there was nothing before the Court but an absolute and unqualified general conveyance, and, in addition, the mere fact of the granter having been infeft on a defective entail, as to which there was no evidence of intention to exclude the lands from the unlimited scope of the conveyance.

The evidence in the present case is perhaps not so strong as is that in *Catton* v. *Mackenzie*, but it is sufficient to produce in my mind the same full conviction that Miss Xaveria Glendonwyn never for a moment intended to include the entailed lands of Cowgarth in her general disposition, but, on the contrary, intended their exclusion. The case simply stands here—Miss Xaveria Glendonwyn was proprietor of entailed lands, her successor in which was a nephew, the son of an elder sister. She was also possessed of certain unentailed lands called Parton Place and others, which she was desirous of settling on another nephew, the pursuer's father, the son of a younger sister. The question is, whether by her *mortis causa* settlement she not only settled Parton Place on the one nephew, but deliberately and of set purpose took from the other nephew the entailed lands which otherwise descended to him?

I am of opinion that the evidence wholly negatives any intention of doing so. There is no mention made in the general disposition of the entailed lands of Cowgarth. Undoubtedly the deed begins with a general conveyance of all her lands and heritages; but this is followed up by a special conveyance of the unentailed property; and of no other heritages; which presumably would not have happened had she intended the lands of Cowgarth to be comprehended. There is a mass of evidence, altogether conclusive, that down to the day of her death she believed the lands of Cowgarth to be held by her under fetters which she could not break. And from this arises the strong presumption that what she thought she could not do she did not intend to attempt. She dealt with the estate as validly entailed, particularly under the pressure of pecuniary exigencies, which would have made it extremely convenient for her to deal with it as held in fee-simple. She borrowed money on the estate, at the great additional cost which such a transaction imposes on an entailed proprietor; and in the bonds she granted she set forth her fettered condition in very distinct and emphatic terms. In that to Major M'Laren, in 1851, she expressly stated, "I hold the said lands and heritages above described under settlements of strict entail, whereby I am prohibited from alienating and encumbering the same to the prejudice of the subsequent heirs of tailzie." In that to Colonel Scott, of 25th December 1855, she repeated, "I hold the said lands and others under settlements of strict entail, whereby I am prohibited from alienating and encumbering the same to the prejudice of the subsequent heirs of tailzie." This expression of present incapacity fully implies, retrospectively, a non-existence of past purpose. She further appears in several ways to have transacted with the next heir of entail as having that character vested in him undoubtedly and indefeasibly.

I draw from these circumstances the unhesitating conclusion that Miss Xaveria Glendonwyn, believing to the day of her death that she had no power to alienate the entailed lands, did not intend them to be included in her general conveyance of 1834; on the contrary, intended them to be excluded from that conveyance, and reserved to her nephew and the other heirs of entail called in the deed of entail. And on this ground I am of opinion that the Lord Ordinary's interlocutor should be altered, and decree of absolvitor pronounced.

LORD PRESIDENT—Then we recall the interlocutor; sustain the fifth plea in law for defender; and in respect thereof assoilzie and decern.

Agents for Pursuer—Macdonald & Roger, W.S.
Agents for Defender—H. & H. Tod, W.S.

Tuesday, July 19.

SECOND DIVISION.

POTTER AND OTHERS *v.* HAMILTON AND OTHERS.

Actio Popularis—*Liability to pay Costs*—Domini Litis—*Caution*—Res Judicata. *Held* (Lord Justice-Clerk diss.) in an *actio popularis*, the object of which was to obtain the removal of certain obstructions placed upon a statute labour road, and to maintain the right of free passage for the public, that three members of the public whose daily wages averaged 4s. 3d. a day, who had an interest to pursue the action, and who had the control of the action, were entitled, notwithstanding the judgment in the case of *Jenkins*, to pursue without finding caution.

Opinion indicated that in such an action final judgment would be *res judicata* as to the rest of the public.

Observations on the case of *Jenkins*.