was given? My answer is that there was not. The money was paid into Paul's account at the Stock Exchange, and no consideration was given for it at all. The argument submitted to us on behalf of Paul sought to bring up something like a valuable consideration. The Lord Ordinary states the defenders' first contention thus:—"The defenders admit that Paul was liable for the balance arising on all the transactions; but they say that in a question between him and Martin, the latter was the true debtor on the balance arising on the irregular transactions, that he discharged that debt, and that they have no concern with the source from which the money came, or the means by which it was obtained. They urge that they are in the same position as if Martin, had borrowed the money and had applied it in payment of his own debt." That argument is unsound, for Martin was not the debtor in the sums we find brought out against him in the Stock Exchange statement for the week; that clearly shows Paul's obligation. .It may be that if parties had known what was going on Martin might have had to relieve Paul, but he was in no sense the debtor to the Stock Exchange. Another ground on which it is said that a valuable consideration was given is this:—That now it appears that at that date Martin, having embezzled £9000, did by this payment discharge in part what was a debt due by him. But that was not the real nature of the transaction. Paul did not know he was creditor at all, and it is impossible by subsequent investigation to rear up a debt of this sort. On the whole matter I am of opinion that no valuable consideration was given, and that therefore we should adhere to the Lord Ordinary's interlocutor.

The Court adhered.

Counsel for Pursuer—J. Guthrie Smith—Readman. Agents—Ronald, Ritchie, & Ellis, W.S.

Counsel for Defenders — Burnet — Alison. Agents—J. W. & J. Mackenzie, W.S.

Saturday, March 10.

FIRST DIVISION.

PETITION—WATT, PHILIP, & COMPANY.

Bankruptcy—Sequestration—Error in Notice—19 *and* 20 *Vict. cap.* 79.

The Sheriff awarding sequestration under the Bankruptcy Act, appointed a meeting of creditors to be held on a certain specified day for the purpose of electing a trustee and commissioners. The day fixed by the Sheriff, however, did not leave sufficient time to insert the statutory notice of meeting in the *Gazette*, and thereafter to allow the statutory interval to elapse before holding the meeting. On an application by the bankrupts and certain of their creditors, praying the Court to fix another day, the Court granted the prayer of the petition *periculo petentis*.

Counsel for Petitioners — Alison. Agents — Webster, Will, & Ritchie, S.S.C.

Saturday, March 10.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

MACKENZIE *v.* KIRKPATRICK AND OTHERS.

GORDON AND OTHERS (SHARPE'S TRUSTEES) *v.* MACKENZIE AND OTHERS.

Succession — Trust—Destination—Revocation—Deed of Restriction—Construction.

A proprietor who held an estate under an entail which had been declared ineffectual against alienations, disponed his estates to trustees in favour of his brother A. in liferent allenarly and the heirs whomsoever of his body in fee, whom failing to his brother W. in liferent and the heirs whomsoever of his body in fee, whom failing to the heirs whomsoever of the body of a deceased sister, whom failing to his sister G. and the heirs whomsoever of her body, whom failing to "my nearest heirs and assignees whomsoever, the eldest heir-female secluding heirs-portioners and succeeding always without division throughout the whole course of succession." The truster subsequently executed a deed of restriction whereby he revoked, cancelled, and annulled "the said destination and order of succession in so far as regards the persons called and appointed to succeed after my brothers therein named, and the heirs of their bodies, declaring it to be my will and intention that the destination and order of succession in the said trust-disposition and settlement shall not take effect beyond my said brothers and the heirs of their bodies, and that the person or persons further called to the succession shall have no right or claim to the same, but shall be entirely excluded therefrom, and are hereby excluded accordingly; reserving to myself full power to call and appoint (or name) a new series of heirs to my said estates after my said brothers and the heirs of their bodies, by any writing under my hand, which shall have the same force and effect as if contained in the said trust-disposition and settlement: And I hereby declare that the foresaid trust-disposition and settlement, in so far as not hereby restricted, shall remain in full force and effect."—*Held*, upon the terms of the deed of restriction, and also in view of the circumstances under which it was executed, that the ultimate destination to "heirs and assignees whomsoever" was not recalled.

Succession—Property—Trust—Fee and Liferent.

M. conveyed his landed estates to trustees in favour of his brother A. in liferent allenarly and the heirs whomsoever of his body in fee. A. having died without issue —*held* (1) that M.'s trust-deed having contained no effectual disposition of the fee, the estates passed to his heir as at the date of his death; (2) that the conveyance in M.'s trust-deed to A. in liferent allenarly did not prevent A. from taking the estates as heir of M.; and (3) that the estates were effectually conveyed by A.'s *mortis causa* trust-deed.

These were four actions brought to determine certain questions in reference to the succession to the estates of Hoddom in Dumfriesshire, in the following circumstances:—

Matthew Sharpe of Hoddom in 1768 executed a disposition and deed of entail of the estate of Hoddom, in which he called to the succession, failing heirs of his own body, Mr Charles Kirkpatrick and his heirs-male. Matthew Sharpe died without heirs of his body, and was succeeded by Mr Kirkpatrick, who took the name of Sharpe and became Charles Sharpe of Hoddom. The said Mr Charles Sharpe had four sons, viz., Matthew (afterwards General Sharpe) Charles Kirkpatrick, Alexander Renton, and William, and five daughters. None of the sons ever married. Two of the daughters married, viz., Jane, who married Sir Thomas Kirkpatrick, Bart. of Closeburn, and Grace Campbell, who married the Reverend William Riland Bedford, rector of Sutton-Coldfield, in the county of Warwick.

Mr Charles Sharpe of Hoddom died in 1813, and his eldest son General Sharpe succeeded him. General Sharpe in 1832 brought an action in the Court of Session for the purpose of having it declared that the irritant clauses in the entail of the estates were defective, and insufficient to prevent the heir in possession from selling or otherwise disposing of the estate. In this action the Court of Session pronounced decree of declarator on 12th June 1835, which decree proceeded upon a judgment of the House of Lords, finding "that the disposition and deed of entail is not sufficient to prevent the said appellant and the other heirs of entail from selling or otherwise disponing or burthening with debt the said entailed estate, or from gratuitously alienating or disposing of the same;" and ordered and adjudged "that the several interlocutors complained of in the said appeal be, and the same are hereby, reversed;" and further ordered "that the said cause be remitted back to the Court of Session in Scotland to do therein as shall be just and consistent with this judgment."

The Court of Session decree following thereon found "that the pursuer has full and undoubted right and power gratuitously to alienate and dispose of the foresaid lands and others contained in the said two dispositions and deeds of entail in any manner he may think proper, and to grant and execute all dispositions, conveyances, deeds, and writings whatsoever which may be requisite or necessary for effectually conveying the whole or any part or parts of the said lands and others to any person or persons whatsoever, and in any manner that he may think proper; and that the defenders or any of them have no claim or demand of any description against the pursuer, or against his heirs and representatives in the event of his death, for or in respect of such alienations or disposal of the said lands and others, or dispositions or other writings which may be granted or executed by the pursuer."

General Sharpe executed a trust-disposition and settlement, dated 25th December 1841, whereby he conveyed his whole estate to trustees, of whom at the date of this action John Ord Mackenzie of Dolphinton, W.S., was the sole survivor. General Sharpe directed his trustees to convey his estates according to the following destination contained in the eighth purpose of the trust:—"To and in favour of the said Alexander Renton Sharpe in liferent for his liferent use allenarly, and the heirs whomsoever of his body in fee, whom failing to the said William John Sharpe in liferent for his liferent use allenarly, and the heirs whomsoever of his body in fee, whom failing to the heirs whomsoever of the body of my deceased sister Dame Jane Sharpe or Kirkpatrick, wife of the said Sir Thomas Kirkpatrick, whom failing to my sister Mrs Grace Campbell Sharpe or Bedford, wife of the Reverend William Riland Bedford, rector of Sutton-Coldfield, in the county of Warwick, and the heirs whomsoever of her body, whom failing to my nearest heirs and assignees whomsoever, heritably and irredeemably, the eldest heir-female secluding heirs-portioners and succeeding always without division throughout the whole course of succession."

On 6th September 1843 General Sharpe executed a deed of restriction whereby he revoked, cancelled, and annulled the "said destination and order of succession in so far as regards the persons called and appointed to succeed after my brothers therein named and the heirs of their bodies, declaring it to be my will and intention that the destination and order of succession in the said trust-disposition and settlement shall not take effect beyond my said brothers and the heirs of their bodies, and that the person or persons further called to the succession shall have no right or claim to the same, but shall be entirely excluded therefrom, and are hereby excluded accordingly; reserving to myself full power to call and appoint (or name) a new series of heirs to my said estates after my said brothers and the heirs of their bodies, by any writing under my hand, which shall have the same force and effect as if contained in the said trust-disposition and settlement: And I hereby declare that the foresaid trust-disposition and settlement, in so far as not hereby restricted, shall remain in full force and effect." General Sharpe died on 12th February 1845, survived by his three brothers; and on his death his trustees entered into possession of the estates. Charles Kirkpatrick Sharpe, the eldest of the three brothers, died on 17th March 1851, without leaving issue. Alexander Renton Sharpe, the next younger brother, died on 1st May 1860, without leaving issue, and without having obtained any conveyance of the estates in his favour from General Sharpe's trustees.

Upon the death of Alexander Renton, William Sharpe completed titles to the estates in the following manner:—A portion of the estate was held of the Crown, and the remaining portions of subject-superiors, and to the latter the trustees of the deceased Matthew Sharpe had made up titles by a conveyance from Charles Kirkpatrick Sharpe, who at their request obtained himself served heir in special, and in virtue thereof, and under precepts of *clare constat*, took infeftment in the said portions. In regard to these portions of the lands, William John Sharpe completed a title by special service to Charles Kirkpatrick Sharpe, as his heir of tailzie and provision, dated the 6th, and recorded in Chancery the 8th, and in the General Register of Sasines the 26th February 1861, and he also expede a general service as heir of line to the said Charles Kirkpatrick Sharpe, dated the 5th February 1861. He further expede a special service as nearest and lawful heir of tailzie

and provision of General Matthew Sharpe on the same dates as his special service to Charles Kirkpatrick Sharpe, and a general service as heir of line and of conquest to General Matthew Sharpe, dated 10th and recorded in Chancery 14th June 1861.

On 11th May 1870 William Sharpe executed a trust-disposition and settlement by which he disponed to trustees the estates of Hoddom, and also the whole means and estate, heritable and moveable, which should belong and be addebted to him at the time of his decease. He directed and appointed his trustees, "as soon after my death as it can conveniently be done, to sell and realise the whole of the said trust-estate and effects hereby conveyed, including the said estate of Hoddom," and he gave full power to the trustees "to sell and dispose of the same in such lots and portions as they shall consider most advantageous, and either by public roup or private bargain, or otherwise at their discretion, and for the best price or other prices that may be had and obtained for the same, and upon such advertisements as to them shall seem beneficial and expedient, and for that purpose to enter into articles of roup and minutes of sale, to grant dispositions containing procuratory of resignation, a clause binding my heirs in absolute warrandice, and all other usual clauses, and to execute all and whatever other deeds may be requisite and necessary for rendering the sale or sales so made effectual," &c. The trustees were directed to pay the truster's debts, and apply the residue of the estate in the manner to be specified "in any writing under my hand, at any time in my life, or even upon deathbed." The trustees were also named executors. There was a codicil to this deed, of date 28th November 1874, recalling the appointment of one of the parties named as trustees. The trustees who had accepted and survived at the date of this action were Mr Henry Gordon, sheriff-clerk of Dumfriesshire, and Mr John Gillespie, Writer to the Signet. The latter was subsequently named as a *sine quo non* trustee. William Sharpe further executed a deed entitled Instructions to Trustees Testamentary, which was dated 13th June 1870. It narrated the deed of trust, which was mentioned as in the hands of John Gillespie, (who was therein named as a trustee *sine quo non*). It gave directions to the trustees as to the most expedient manner of selling the estates of Hoddom. It gave various special legacies to relatives, and as to the residue of the estates provided thus:—And "finally, so far as I see at the present moment, I desire and require my trustees to pay over the residue of my whole estate, excepting as before excepted and bequeathed, to Sir Thomas Kirkpatrick, Baronet, presently abroad, and the Reverend Riland Bedford, my nephews, equally among them, or rather between them, share and share alike, declaring, as it is hereby declared and provided, that if any single one of the persons herein named as beneficiaries or legatees shall object or raise legal objections to this my deed of settlement, in any shape, their or his benefit under the same shall cease and fall, and no claim upon my funds or estate shall be available to them or him, but be forfeited and divided, or accrue to the residue which may fall to my legatee not objecting."

William Sharpe died on 18th December 1875 without ever having married.

In these circumstances William Sharpe's trustees brought an action against John Ord Mackenzie, as sole surviving trustee of General Matthew Sharpe, for the purpose of having it declared that the pursuers had a good and undoubted right to the estates in virtue of William Sharpe's trust-disposition and settlement, and that the defender was bound to execute and deliver to the pursuers a trust or other conveyance of the estates for the purposes mentioned in William Sharpe's trust-disposition and settlement. The summons further concluded for decree against the defender to deliver to the pursuers a disposition of the estates "in the terms and to the effect foresaid, or in such other terms as may be approved of by the Court."

The defender Mr Mackenzie pleaded that he could not be ordained to convey to the pursuers the estates held by him as trustee of General Sharpe until their right thereto had been duly ascertained in a process in which all parties having interest were called. William Sharpe's trustees therefore raised another action in the same terms as the first, but calling as defenders, besides Mr Mackenzie, Sir Alexander Muir Mackenzie of Delvine, Baronet, who was the heir entitled to succeed under the tailzied destination of 1768, and also Sir Thomas Kirkpatrick of Closeburn, Baronet, and the Reverend William Kirkpatrick Riland Bedford, William Sharpe's nephews, and the beneficiaries under his trust-deed. To this action Sir Alexander Muir Mackenzie entered appearance and lodged defences. Sir Thomas Kirkpatrick and Mr Bedford did not enter appearance.

A third action was then brought, at the instance of Sir Alexander Mackenzie against Sir Thomas Kirkpatrick and Mr Bedford, for declarator that the pursuer had a good and undoubted right to the estates, and that the defenders or either of them had no right thereto. Sir Thomas Kirkpatrick and Mr Bedford having pleaded that all parties were not called, Sir Alexander Muir Mackenzie brought a supplementary action in which he called both sets of trustees as defenders.

The position taken up by Sir Thomas Kirkpatrick and Mr Bedford in defence to the action at the instance of Sir Alexander Muir Mackenzie is explained by articles 11 and 12 of their statement of facts (which were identical), to the following effect:—"(11) The defender has not made any claim to the said estate of Hoddom and others except in so far as he has an interest therein in virtue of the said trust-disposition and settlement of the said William Sharpe. The defender maintains that William Sharpe was vested with the right and title to the said estates, and that he by his said trust-deed effectually disposed of the same, and the defender claims the benefits conferred upon him by that deed. (12) If, however, it should be held, contrary to the wish and contention of the defender, that William Sharpe was not vested with the fee or right to the lands and estate in question, and that he did not effectually convey them by his said trust-deed, then, but in that case only, the defender maintains that the ultimate destination in General Matthew Sharpe's trust-deed to his own nearest heirs and assignees whomsoever was not revoked by his deed of restriction, and that the defender has right to the said estates as nearest heir (as he is in fact the nearest heir) to the said General Matthew Sharpe."

Sir Alexander Muir Mackenzie pleaded—"(1) The destination contained in the testamentary deed of Matthew Sharpe the younger having received full effect as regards the liferents thereby constituted, and being now exhausted, the succession to the said lands and estate is now regulated by the deeds of entail executed by Matthew Sharpe the elder and Richard Mackenzie in 1768 and 1823 respectively, so far as the destination therein prescribed is unexhausted. (2) In respect that the pursuer Sir Alexander Muir Mackenzie is nearest heir of tailzie and provision under the said entails of 1768 and 1823, the pursuer is, by survivance of William Sharpe, vested in the personal fee of the said estates. (3) The destination in the trust-disposition of General Matthew Sharpe having been revoked by deed of restriction in so far as regards the persons called after his brothers and the heirs of their bodies, the defenders have no right or title to the said lands. (4) On the assumption that the beneficial fee of, or radical right to the estate remained, in the *hæreditas jacens* of General Matthew Sharpe, the right thereto devolved on the heirs of provision under the entail in their order."

Sir Thomas Kirkpatrick and Mr Bedford pleaded—"(2) Assuming, as pleaded by the pursuer, that the destination contained in the testamentary deeds of General Matthew Sharpe was ineffectual except as regards the liferents therein specified, and is now exhausted, the beneficial fee of, or radical right to, the lands and estate in question remained in his *hæreditas jacens;* and having been validly taken up by the services condescended on, and conveyed by William Sharpe's trust-deed, the defender ought to be assoilzied. (3) Or otherwise, the defender is entitled to absolvitor, in respect that, upon a sound construction of the deed of restriction executed by General Matthew Sharpe, the ultimate destination contained in his trust-deed to his own heirs and assignees whomsoever was not recalled, and that the defender is entitled to the lands and estate in question, as the nearest heir of General Matthew Sharpe. (4) The action cannot be maintained, in respect that the tailzied destination was evacuated by the decree of declarator pronounced by the Court of Session, dated 12th June and extracted 3d July 1835, which proceeded on a judgment of the House of Lords, of date 8th April 1835, or by the deeds condescended on, or one or more of them."

The Lord Ordinary pronounced decree in terms of the conclusions of the libel in the actions at the instance of William Sharpe's trustees, and in the actions at the instance of Sir Alexander Muir Mackenzie, his Lordship assoilzied the defenders, adding the following note:—

"*Note.*—General Sharpe held the estate of Hoddom under an imperfect entail, and it was found by decree of declarator, dated 12th June 1835, that he possessed all the rights of an absolute proprietor. He died in February 1845, leaving a trust-settlement dated 25th December 1841, by which he conveyed the lands of Hoddom for the purposes therein stated. The eighth direction of the trust-deed is thus expressed—'So soon as my said trustees shall have paid my debts and the whole legacies bequeathed by me, and sufficiently secured the various annuities owing or bequeathed by me, they shall immediately denude of the lands and others hereby conveyed, and of the whole trust-funds and estate which may be vested in them, and convey the same *omni habili modo*, but subject to the liferent of Hallguards and others in favour of the said William John Sharpe, to and in favour of the said Alexander Renton Sharpe in liferent for his liferent use allenarly, and the heirs whomsoever of his body in fee, whom failing to the said William John Sharpe in liferent for his liferent use allenarly, and the heirs whomsoever of his body in fee, whom failing to the heirs whomsoever of the body of my deceased sister Dame Jane Sharpe or Kirkpatrick, wife of the said Sir Thomas Kirkpatrick, whom failing to my sister Mrs Grace Campbell Sharpe or Bedford, wife of the Reverend William Riland Bedford, rector of Sutton-Coldfield, in the county of Warwick, and the heirs whomsoever of her body, whom failing to my nearest heirs and assignees whomsoever, heritably and irredeemably, the eldest heir-female secluding heirs-portioners, and succeeding always without division throughout the whole course of succession.'

"On 6th September 1843 General Sharpe executed a deed of restriction. It is in these terms—'I, General Matthew Sharpe of Hoddom, considering that in December 1841, or about that time, I executed a trust-disposition and settlement regulating the succession of my heritable estates, and being now resolved to restrict the destination and order of succession therein contained, I do hereby revoke, cancel, and annul the said destination and order of succession, in so far as regards the persons called and appointed to succeed after my brothers therein named and the heirs of their bodies; declaring it to be my will and intention that the destination and order of succession in the said trust-disposition and settlement shall not take effect beyond my said brothers and the heirs of their bodies, and that the person or persons further called to the succession shall have no right or claim to the same, but shall be entirely excluded therefrom, and are hereby excluded accordingly; reserving to myself full power to call or appoint (or name) a new series of heirs to my said estates after my said brothers and the heirs of their bodies, by any writing under my hand, which shall have the same force and effect as if contained in the said trust-disposition and settlement: And I hereby declare that the foresaid trust-disposition and settlement, in so far as not hereby restricted, shall remain in full force and effect.'

"On the death of General Sharpe the trustees made up a title to the lands conveyed by the trust-deed, partly under the direct conveyance contained in the settlement itself, and partly under a conveyance which they obtained from Charles Kirkpatrick Sharpe, the immediate younger brother of the truster, who at their request served himself heir of entail and provision. They have not yet denuded of the estate, and it is held by Mr John Ord Mackenzie as the last surviving trustee.

"General Sharpe was survived by three brothers, Charles Kirkpatrick Sharpe, Alexander Renton Sharpe, and William Sharpe. They were the successive heirs of provision under the investiture upon which the estate was held, and they all died without issue. William was the last survivor. He died on 18th December 1875. On

his death the succession to the estate of Hoddom, assuming the investiture to remain unaltered, would have opened to the pursuer, who has accordingly raised the present action to have it declared that he has right to that estate, and that the trustees of General Sharpe are bound to convey it to him.

"Besides the trustee of General Sharpe, the defenders are—1st, William Sharpe's trustees; 2d, Sir Thomas Kirkpatrick and the Reverend W. K. R. Bedford, who are the heirs-portioners of General Sharpe as at the present time. The trustees of William Sharpe claim the estate under a trust-deed and settlement executed by him on 11th May 1870, and the other defenders are willing to allow that claim. But they at the same time plead such rights as they individually possess for the purpose of excluding the claim of the pursuer.

"Before his death William Sharpe had made up titles in his person as heir of entail and provision under the investiture upon which General Sharpe had held the estate. Thereafter he conveyed the lands to trustees for purposes to which it is unnecessary to refer.

"In this state of matters the question is, whether the succession to the estate is regulated by the former investiture, or whether that investiture has been evacuated either by the deed of General Sharpe or by the deed of William Sharpe? The pursuer contends that the deed of restriction revoked the whole destination contained in General Sharpe's trust-deed, including the destination to his own nearest heirs and assignees; that William Sharpe's right was limited to a bare liferent; and that by consequence General Sharpe's trust-deed had not the effect of evacuating the entailed investiture, and that William Sharpe as a liferenter merely could not dispose of the estate. The success of the pursuer depends on his being able to establish two propositions, viz.—1st, that the destination in General Sharpe's trust-deed to his own nearest heirs and assignees was recalled; and 2d, that William Sharpe was effectually excluded from the succession as nearest heir of tailzie and provision. For, if the destination to heirs remains effectual, the pursuer is necessarily excluded; and if William Sharpe was entitled to take up the estate as heir of tailzie and provision, it is not disputed that he has effectually disposed of the estate to his trustees.

"1. On the first of these questions the Lord Ordinary has found considerable difficulty in forming an opinion. He inclines, however, to think that the destination to General Sharpe's nearest heirs has not been recalled. He reads the words of revocation as applicable to the *successio prædilecta*, of which the destination to heirs whatsoever does not form a part. For in giving his estate to his heirs whomsoever the truster cannot be understood as selecting any class of heirs, but merely as declaring that the estate shall descend as the law directs, and it is difficult to hold that he intended to exclude the succession of his own nearest heirs.

"2. But if it be assumed that General Sharpe revoked the destination in favour of his own heirs, his trust-deed did not dispose of the fee of the estate. It is true that in certain events (which did not occur) it would have disposed of the fee; but as it has happened it did no more than confer a successive liferent on Alexander Renton Sharpe and William Sharpe. If the fee is not disposed of, it must, as the Lord Ordinary thinks, descend to the heirs under the investiture on which it was held. Their rights could not be excluded except by a conveyance to others. It seems to the Lord Ordinary to be immaterial that during the lifetime of William Sharpe it was uncertain whether or not the fee was disposed of. The fact remains, though now only ascertained, that there was no effectual conveyance of the fee of the estate, and hence, in the opinion of the Lord Ordinary, the rights of the heirs of investiture were unaffected.

"The pursuer argued that the trust-deed had the effect of recalling or superseding the destination so far as William Sharpe was concerned. But it appears to the Lord Ordinary that the right of an heir, whether an heir-at-law or an heir of provision, can only be defeated by a conveyance to another. This is settled as regards an heir-at-law, and the Lord Ordinary sees no difference between the case of legal succession and succession under a destination. Both must equally take effect unless the estate of the ancestor has been otherwise conveyed.

"3. William Sharpe made up his titles as heir of entail and provision. Had the trust-deed contained an effectual conveyance of the fee this title would have been of no avail. But as it turned out that the fee was undisposed of, the title seems to the Lord Ordinary to be unexceptionable. As the purposes of the trust-deed, except as regards the liferent given to Alexander and William Sharpe, failed altogether, the case as regards the fee is the same as if the trust-deed had contained no purposes, or as if it had never been executed. It was therefore open to the heirs of the investiture to make up their title in ordinary form. But inasmuch as William Sharpe survived the Conveyancing Act of 1874, it seems of no consequence whether his title was complete or not, for by the 9th section of that Act a personal right vested in him which enabled him to transmit the estate."

Sir Alexander Muir Mackenzie reclaimed, and argued—General Sharpe's deed of restriction had the effect of cutting out of his trust-deed the whole destination (including that to heirs and assignees whomsoever) after the destination to William in liferent and the heirs of his body in fee. This was apparent from the following considerations:—(1) The seclusion of heirs-portioners in the trust-deed made the destination to heirs whomsoever also a sort of *successio prædilecta*. (2) The expression in the trust-deed "throughout the whole course of succession" obviously applied to the destination to heirs whomsoever as well as to the other parts of the destination, and the expression the "said destination and order of succession" in the deed of restriction should therefore be read as applying to the same thing. (3) The fair meaning of the words "person or persons" in the deed of restriction made them applicable to the whole destination and trust-deed, for heirs whomsoever secluding heirs-portioners were as much persons as heirs-male *nascituri* of a sister. Besides there was only one person called *nominatim* to the succession. The effect, then, of General Sharpe's trust-deed as limited by the deed of restriction was (as events had turned out) to cut Charles Kirkpatrick out of the succession, to restrict Alexander Renton and William to a liferent, and then to let in the heirs of entail. It was

argued that this was equivalent to saying that mere words of disinheritance could exclude from succession. That was not a sound criticism There was an absolute conveyance of the fee by General Sharpe to his trustees, who held the fee, first, for the issue of Alexander or William if they had issue, and, if they had not, for the heirs of entail, passing over Charles, Alexander, and William. These persons were not disinherited, but the estates were absolutely conveyed away from them. If this argument was sound it was not disputed that Sir Alexander Muir Mackenzie was the heir of entail entitled to succeed.

William Sharpe's trustees argued—It was not necessary for them to state argument as to the effect of General Sharpe's deed of restriction. Whatever its effect, they were entitled to succeed. Take the case, in the first place, that the deed of restriction revoked the ultimate destination to heirs whomsoever. Then General Sharpe's trust was conditional upon there being issue of his brothers. If there was no issue (which event happened) the trust was abortive. In such a case the truster was not divested of the radical right or beneficial fee which remained in his *hæreditas jacens*. In the case of trust for creditors it was settled that the radical right remained with the truster, and the principle upon which that rule was founded, viz., that notwithstanding the trust a portion or the whole of the estate might remain, was equally applicable to a case of this sort.—*Eddestone's Creditors*, January 14, 1801, M. App. *voce* Adjudication, No. 11; *M'Millan* v. *Campbell*, March 4, 1831, 9 S. 551, aff. 7 W. and S. 441; *Gilmour* v. *Gilmour's Trustees*, July 3, 1873, 11 Macph. 853; *Cumstie* v. *Cumstie's Trustees*, 13 Scot. Law Rep. 594 (Lord President's opinion, p. 607). If, then, the ultimate destination in General Sharpe's deed was revoked, the person entitled to the estates on the failure of issue of William Sharpe was the heir of entail—but the heir of entail not as at William Sharpe's death, but as at General Sharpe's death, or the first heir of entail thereafter who took up the right by service.—*Soutar* v. *Macgregor*, January 22, 1801, M. App. Implied Wills, No. 2; *Lord* v. *Colvin*, 23 D. 111, 3 Macph. 1083; *Stone's Trustees* v. *Gray*, May 29, 1874, 1 R. 953; *Balderston* v. *Fulton*, January 23, 1857, 19 D. 293. If the ultimate destination in General Sharpe's trust-deed was not revoked the heir whomsoever must also be looked for as at the General's death. In either view, William was actually in right of the fee of the estate, for he had expede service in every possible character. But it was said that William being restricted to a liferent allenarly could never have any private interest in the estate. But it was settled law that nothing except an actual and effectual conveyance to some one else could exclude an heir-at-law. So, if the ultimate destination in General Sharpe's deed did not stand, William was not excluded, for he then took as heir-at-law. The same principle applied if the ultimate destination stood. The liferent allenarly under General Sharpe's deed could not prevent William taking as heir of entail if that deed proved abortive.—*Lord* v. *Colvin* (*supra*); *Balderston* v. *Fulton* (*supra*); *Stoddart* v. *Thomson*, February 5, 1734, Elchies *voce* Succession, No. 1; *Blackwood* v. *Dykes*, February 26, 1833, 11 S. 443; *Sinclair* v. *Traill*, February 27, 1840, 2 D. 694; *Maxwell* v. *Wyllie*, May 23, 1837, 15 D. 1005.

Sir Thomas Kirkpatrick and Mr Bedford accepted the argument of William Sharpe's trustees, but argued alternatively—If it should be found that William Sharpe's trustees had no right to the estates, still Sir Alexander Muir Mackenzie was not entitled to succeed. The ultimate destination to heirs whomsoever in General Sharpe's trust-deed was not revoked by the deed of restriction. (1) The wording of the deed of restriction was against the pursuer's contention. The expression "order of succession" when applied to a special destination in a disposition meant the order pointed out by the disponer, as distinguished from the order pointed out by law failing any such special destination. Then the word "appointed" was inconsistent with the pursuers' contention. To "appoint" heirs-at-law was a contradiction of terms. Finally, the reservation of power to the General to appoint "a new series of heirs" threw light on what was revoked. It was a "series of heirs," an expression totally inapplicable to "heirs whomsoever." (2) If the ultimate destination was revoked, then the tailzied destination revived, but that was inconsistent with the plain intention of General Sharpe, who had all along shown himself inimical to the entail,—having first had it declared invalid as an entail, and then having made a destination which revoked the tailzied destination. (3) The destination to heirs whomsoever was a clause of style, (originally a clause of retour) inserted without any special directions, and not part of the *successio predilecta*. If the ultimate destination stood the entail was at an end, and Sir Alexander Muir Mackenzie could not succeed.

At advising—

Lord Justice-Clerk — The different actions which are now before us raise in substance the same question. They relate to the right to succeed to the estate of Hoddom, and involve the consideration of the true import and effect of several deeds of settlement and conveyance relative to that estate. The parties to the dispute, although nominally four, are substantially only two—the trustees of William Sharpe, who died in 1874, and Sir Alexander Muir Mackenzie, who claims the estate as heir of the old investiture under which it was held—and the question is, Whether the estate of Hoddom was validly conveyed by William Sharpe to his trustees, or whether at his death it devolved on Sir A. Muir Mackenzie?

The old investiture under which Sir A. Muir Mackenzie, whom I shall call the pursuer, claims, is an entail executed in 1769 by Matthew Sharpe, who was then the proprietor of the estate. By the terms of that instrument, which was intended to be a strict entail, the entailer called to the succession, failing heirs of his body, Charles Kirkpatrick and the heirs-male of his body, whom failing a long series of substitutes, of whom it is not disputed that the pursuer is now the nearest, and the destination terminates with the granter's nearest heirs and assigns whatsoever. The entailer died without issue, and Charles Kirkpatrick, afterwards Charles Sharpe, made up titles to the estate, and died leaving four sons, of whom General Matthew Sharpe was the eldest. He succeeded his father in 1813, and also completed his title to the lands under the entail, and possessed them until his death in 1845.

In 1832 General Sharpe brought an action in this Court for the purpose of having it declared that he was entitled to alienate, burden, or convey the lands as if he were a fee-simple proprietor. The alleged defect in the entail on which he founded was an error in the syntax of the irritant clause—probably occurring in transcription, —by which it was said to be left doubtful what nominative was to govern part of the clause. The Court held the error was only a clerical one, and the sense not doubtful. But this was altered in the House of Lords, and in pursuance of their judgment the Court on applying it found—[*reads ut supra*]. The words in this decree are unusually broad; but it is not unimportant to remark that they cover nothing but alienation and burdening. The destination in the entail still remained fenced by a prohibitory clause, which this judgment did not touch; and as the law then was understood, it was, to say the least of it, doubtful whether as long as this investiture remained it would have been safe to have risked a violation of the prohibition. It does not appear that General Sharpe had any intention of alienating the estate beyond that of carrying it to a different series of heirs; and the course he followed, probably under advice, was the execution of a deed of trust, which is dated in 1841, the import and legal effect of which is one of the most important elements in the decision of this case. The object of that trust-deed, in so far as it was to take direct effect, was the payment of debts and legacies, and the securing of certain annuities after the death of the granter. It was entirely a *mortis causa* conveyance. For these purposes the estate of Hoddam and others were conveyed by a formal title to the trustees therein named, of whom Mr Ord Mackenzie is the last survivor, but they were directed after these purposes were fulfilled to denude of the trust and to convey the estates thus vested in them to Alexander Renton Sharpe, the third surviving son of Charles Sharpe, and brother of the granter, in liferent for his liferent use allenarly and to the heirs whomsoever of his body in fee, whom failing to William John Sharpe, who was the youngest of the brothers, in liferent for his liferent use allenarly and the heirs whomsoever of his body in fee, whom failing to the heirs whomsoever of his two sisters Jane Sharpe and Grace Campbell Sharpe, and the heirs whomsoever of their bodies in succession, whom failing to his nearest heirs and assignees whomsoever.

It seems sufficiently certain that but for the ultimate destination to his own heirs and assignees this deed, as it stood, would simply have interposed the successive rights of liferent and fee conferred by it between the granter and the other substitutes called in the existing investitures of the estate. There is no mention of the old investiture in the trust-deed, nor are there any other words from which it could be inferred that the granter had any intention of interfering with it beyond the interest of the persons thus favoured. But the conveyance to his own nearest heirs and assignees of course, if effectual, would entirely have extinguished the former investiture and left the succession to the estates to depend entirely on the conveyance which the trustees were thus directed to execute.

For reasons which do not appear, it seems that before his death General Sharpe had altered his intention with regard to the descendants of his sisters, and he accordingly executed a deed or instrument in which he recals the instructions given to his trustees to include them in the conveyance which the trustees were directed to grant when the purposes of the trust were fulfilled, and cancels and revokes the destination and order of succession in "so far as regards the persons called and appointed to succeed after my brothers therein named and the heirs of their bodies." The peculiar phraseology of this deed of restriction I shall advert to afterwards. But it may be assumed that the testator's primary object in executing it was to exclude these persons from the succession, and that he had no intention beyond this of reviving the old destination, or in any way impairing the validity or effect of the trust-deed itself, by which he certainly meant to supersede it. Whether this, however, be the true import of the words remains to be considered.

General Sharpe died in 1845. The trustees made up a title, in so far as they thought they could effectually, to the lands conveyed. But it is important to mention a fact which has a considerable bearing on the questions now at issue, that the two brothers on whom these liferent rights were conferred were neither of them the next heir of the old investiture. There was a third and elder brother, the well-known Charles Kirkpatrick Sharpe, who was the next heir entitled to succeed under the former destination, and who was entirely excluded by the conveyance directed by the trust-deed. In order to fortify their title to the lands, the trustees applied to Charles Kirkpatrick Sharpe to obtain himself served as nearest heir of provision to his brother General Sharpe. Charles Kirkpatrick Sharpe accordingly in 1845 executed a disposition of the whole lands to the trustees, in which he reserves any right which he himself might have in regard to them, and conveys them to the trustees for the purposes of the trust, and makes them his procurators to have him served as nearest heir of line and provision to his brother. From the statement on the record on this head I gather that this procuratory was only used as regarded some of the lands; but from the deed having temporarily fallen aside the account of it given is very imperfect. It is, however, in my opinion, an important element in the case, and it has now been recovered.

The trust, which has now lasted for 33 years, has not yet been wound up, and no conveyance has been granted by the trustees—not because they had any power to hold after the debts and legacies had been paid and the annuities provided for, but from some practical considerations which are of no importance here. Charles Kirkpatrick Sharpe died in 1851. Alexander Renton Sharpe made up no title to the estate, and died in 1860 without issue. On his death William Sharpe expede a service as nearest heir of provision to his brother Charles, who died last vest and seised in the estate, subject to the burden of the trust-right; and he also served to his brother General Sharpe as nearest heir of provision in the lands to which the service of Charles did not apply, and also served to the General as heir of line and conquest. While his title so stood, he executed a trust-conveyance of the estate of Hoddom to trustees, with directions to sell the estate and apply the proceeds in the manner directed by his settlement. The question we have now to determine is, Whether

these trustees, or the pursuer as the heir of investiture, are now entitled to the estate?

If the destination in the trust-disposition of 1845 still subsists and is effectual, there can be no question that the pursuer must fail, because the destination in the old investiture was truly extinguished. There can be no question that by his own nearest heirs and assigns whatsoever, General Sharpe meant to call his heirs-general, and not the heirs of investiture. But the pursuer contends that the words of the deed of restriction import not only a recal of the substitution in favour of the descendants of the granter's sisters, but also a recal of the ultimate destination in favour of his own nearest heirs and assigns. The Lord Ordinary has repelled this plea, and in doing so he decides in conformity with opinions expressed in a former litigation connected with this estate, by Lord Jerviswoode in the Outer House and Lord Ardmillan in the First Division (not reported). Although no direct judgment was given on it, I have come, with little hesitation, to think that the construction is one which the words of the instrument will not admit. I have already pointed out that the judgment of the House of Lords left the prohibition against altering the order of succession in full force. It might have been made a serious question, on the principles established in the cases of *Oliphant* (June 7, 1816, F.C.) and *Lindsay* v. *Earl of Aboyne*, (H. of L., Sept. 5, 1844, 3 Bell's App. 254), whether the trust-disposition as originally executed was anything but an alteration of the order of succession, and so ineffectual *inter hæredes;* although no such question can now arise seeing that the title in the trustees derived from Charles Sharpe became fee-simple in their persons by virtue of the Entail Act of 1848. But it cannot be assumed that having done what he could to extinguish and sopite the old investiture, he had any intention of reviving it. Neither can I suppose that he would recall the ultimate destination to his own heirs for the purpose of letting in those of the entailer. But apart from these considerations, the phraseology of the instrument seems to indicate the intention of the maker of it beyond reasonable doubt. It refers to persons "appointed and called" to the succession—it speaks of the "persons further called to the succession" having no right, but being "entirely excluded therefrom." The granter reserves to himself "full power to call and appoint a new series of heirs" to his said estate "after my said brothers and the heirs of their bodies, by any writing under my hand, which shall have the same effect as if contained in the said disposition and settlement." These expressions seem to indicate quite clearly that his sole intention in executing this deed of restriction was to exclude the specific persons so called and appointed and their heirs from the succession, and to call and appoint a new series in their place between his brothers and the heirs of their bodies and the ultimate destination. To cancel the ultimate destination merely to replace it, would not have been to call or appoint a new series; nor is it reasonable to suppose that whoever might compose the new series the ultimate destination would not have been the same.

These expressions, moreover, are not appropriate to such a destination. "Heirs and assignees" are hardly "called and appointed." The law calls and appoints the first, and a new exercise of power the second. The destination to heirs whatsoever merely amounts to a declaration that the disponer has no personal or direct selection to make, and wishes his property to descend as the law may direct.

I feel, therefore, no difficulty in holding that the ultimate destination directed by the trust-deed remained entirely in force.

Having formed a clear opinion on this point, it might be unnecessary to proceed to the second view, on which the Lord Ordinary has decided, but I shall make one or two remarks on this aspect of the question, as I think that the pursuer's case on this head is quite as hopeless as on the other.

If we are to suppose that the directions contained in the trust-deed enjoined the trustees to execute a conveyance only to these two brothers in succession, in liferent for their liferent use allenarly and the heirs of their bodies respectively in fee, it is manifest that the trust-deed contained no effectual disposition of the fee in the event of there being no heirs of the bodies of the two brothers, and that therefore the beneficial right to the fee must be looked for elsewhere. If there was no subsisting investiture, that beneficial right was vested at once in the heir-at-law of the granter, and that from his death. If, on the other hand, there was a subsisting investiture, then it may be that the right of fee vested in the heir of that investiture. But this right was not suspended, as seemed to be the impression, until it should be seen whether the brothers had issue. There was no fiduciary fee in the liferenters. The fee vested at once, and became an operative right from the date of General Sharpe's death. It is now settled law that where one who is the nearest lawful heir at the time serves to an ancestor, although there be a nearer heir *in spe*, his right in the case of fee-simple lands or of intestacy becomes absolute notwithstanding that a nearer may afterwards be born—as was held in the case of *Grant*, March 9, 1826, F.C. Even where the succession is tailzied, it was held in the *Carnock* case (*Stewart* v. *Nicolson*, Dec. 2, 1859, 22 D. 72) that the remoter heir acquires an active title by his service, although he may be under obligation to denude in the event of a nearer heir coming into existence. Assuming, then, on this hypothesis, that the old investiture still subsisted, and that the trust was a mere burden on the radical right of fee, the heir in right of this fee under the old investiture was Charles Kirkpatrick Sharpe, who took up the right by a valid service, and disponed the fee to the trustees for their trust purposes. By doing so it may be that he postponed his own right to the liferent of his brothers, and the fee in their possible issue. But meantime the radical fee was vested in him, and from him it was transmitted to William Sharpe, who made up his title by service to his brothers. If, then, there was nothing to exclude Charles Sharpe's right to the fee, there was little to exclude that of the heir of Charles Sharpe, in whom the lands were vested in fee-simple at his death, and from whom they descended to his heir. William Sharpe was therefore fully entitled to vest the estate in himself and to deal with it; and I cannot doubt that he has dealt with it effectually. In either view there is no room for the pursuer's claim. The fee, being undisposed of, vested at once in the nearest heir, whether at law or under the investiture, whatever may have been the obli-

gations incumbent on him should a nearer heir have been born.

In this view it is plain that the restriction of William Sharpe's right to a liferent allenarly under the trust-deed could not possibly deprive him of his brother's succession, with which the trust-deed did not deal. The recent case of *Cumstie* (cited *supra*) has no application. A conveyance to one for his liferent use allenarly will effectually exclude him from the fee if it be given to some one else, and a destination to the heirs whatsoever of the life-renter is a clear gift to some one else, seeing that no man can be his own heir. But a destination to one in liferent allenarly and the heirs of the granter in fee will not necessarily exclude the life-renter from the fee, should he ultimately come to be his heir.

Lord Ormidale—Although there are here no less than four actions which appear to have become necessary for the purpose of calling into Court various parties that they might have an opportunity of being heard for their interests, all of them relate to the same matter, and raise the same question, viz., whether Sir Alexander Muir Mackenzie is now entitled to succeed to the estates in dispute as nearest heir of tailzie and provision under the entail thereof executed by Matthew Sharpe the elder in 1768.

The Lord Ordinary has found that Sir Alexander Muir Mackenzie is not entitled to succeed to these estates, and has stated, correctly I think, that before he could be held entitled to do so he would require to make out—1st, that the destination in General Sharpe's trust-deed of 1841 to his own nearest heirs and assignees was recalled; and 2d, that the General's brother William Sharpe was excluded from the succession as nearest heir of tailzie and provision.

Although in regard to the first of the matters there may be some nicety, and even difficulty, I have come, without much hesitation, to concur with the Lord Ordinary in opinion that the destination in General Sharpe's trust-deed to his own nearest heirs and assignees was not recalled. It was at the instance of General Sharpe that the deed of entail of 1768 had been set aside by this Court following upon a judgment pronounced in the House of Lords, and his right declared of selling, burdening, or gratuitously disposing of the entailed estates to whomsoever he pleased. Accordingly, availing himself of this, his undoubted right, the General executed the trust-disposition of 1841 disposing of the estates to trustees for certain purposes, and among others to be settled successively on his two brothers Alexander Renton Sharpe and William John Sharpe in liferent, and the heirs of their bodies in fee, whom failing to the heirs of the body of his two sisters Lady Kirkpatrick and Mrs Bedford, whom failing to his "nearest heirs and assignees whomsoever." There is certainly no indication in this destination—but the contrary—of an intention or desire on the part of General Sharpe to revive the deed of entail of 1768 which he had succeeded in setting aside, or the order of succession in that deed. Nor was this pretended on the part of Sir Alexander Muir Mackenzie.

But, then, it was argued for him—and on this his case entirely depends—that by the deed of restriction which the General afterwards executed in 1843, the destination in his trust-deed of 1841, after that portion of it relating to his brothers and the heirs of their bodies, was entirely swept away and put an end to, not even excepting the concluding part of it to his "nearest heirs and assignees." Now, I am unable to arrive at this conclusion, and I think there are various considerations which operate so strongly in an opposite direction as to prevent it being adopted. It appears to me to be contrary to every fair presumption that General Sharpe should have intended by his deed of restriction indirectly to have opened the way to a revival of the destination in the entail of 1768 which he had been at such pains to set aside, especially as nothing is stated, or appears to have occurred, to induce him to do so. But I would prefer to rely upon the terms of the deed of restriction itself rather than any speculative view of the General's intention. He does not simply recall or restrict the destination or order of succession in his trust-deed—"after my brothers therein named and the heirs of their bodies," although this would have been not only quite sufficient to effect his object supposing it to have been that contended for by Sir Alexander Muir Mackenzie—but the language he actually employs—and it was probably selected and adopted purposely in order to prevent it being supposed that such was his object—is very different. He says that he revokes, cancels, and annuls not merely the order of succession "after my brothers therein named and the heirs of their bodies"—but he says that he revokes, cancels, and annuls the destination and order of succession "in so far as regards the persons called and appointed to succeed after my brothers therein named and the heirs of their bodies." I think the words "persons called and appointed to succeed," as thus used by the General, are very significant, and denote, I think, by fair and reasonable implication, if not expressly, that he did not mean to revoke, cancel, or annul the concluding part of the destination to his "nearest heirs and assignees whomsoever." And this view, I think, is materially strengthened by the declaration which he adds, to the effect that it was his will and intention that the destination and order of succession "shall not take effect beyond my said brothers and the heirs of their bodies, and the persons further called to the succession shall have no right or claim to the same, but shall be entirely excluded therefrom, and are hereby excluded accordingly, reserving to myself full power to call and appoint (or name) a new series of heirs to my said estate after my said brothers and the heirs of their bodies."

In short, looking at the whole of the restrictive clause, and keeping in view its precise terms, I can entertain little or no doubt that General Sharpe intended that it should apply, as the Lord Ordinary says, to the *successio prædilecta* alone, and that it would be putting an unnatural construction on his language to hold that it applies to "heirs and assignees," which cannot, I think, in any reasonable sense be said to be "persons called and appointed," or named. Besides, it appears to me so difficult to hold that he intended to exclude the succession of his own heirs that I would require something much stronger to that effect than what appears in the deed in question to entitle me to do so.

If, then, I am right in holding, as I do, that the Lord Ordinary's view is sound on the first point referred to by him, that is enough for the decision of the case, without entering upon the second

point. At the same time, were it necessary to deal with the second point, I should be disposed, as at present advised, to say that in regard to it I concur in opinion with the Lord Ordinary and your Lordship, and for the same reasons.

Lord Gifford—There are in this case four separate actions, two of them at the instance of the testamentary trustees of the late William Sharpe, Esq. of Hoddom, and the other two actions at the instance of Sir Alexander Muir Mackenzie of Delvine, Baronet.

The question really raised in these actions is,—Who is the party now entitled to the estate of Hoddom, in Dumfriesshire, which was entailed in 1768 upon a certain series of heirs, but the deed of entail of which was by final decree, pronounced in June and July 1835, found to be imperfect and invalid as a deed of strict entail. I shall advert to the terms of the decree immediately.

The two principal claimants to the estate of Hoddom are, first, the trustees of the late William Sharpe, who allege that they have right to the estate in virtue of his trust-disposition and settlement, and who maintain that at the time of his death William Sharpe was absolute fiar of the estate, and entitled to dispose of it at pleasure.

The other claimant of the estate is the pursuer of the second set of conjoined actions, Sir Alexander Muir Mackenzie of Delvine, Baronet, who alleges that the destination in the original entail of 1768 still subsists, and that he is entitled to the estate as the nearest heir of entail now in existence.

There are other two parties who claim the estate in an alternative form, namely, Sir Thomas Kirkpatrick of Closeburn, Baronet, and the Rev. Mr Bedford, rector of Sutton-Coldfield. Both these parties, however, adopt the pleas of William Sharpe's trustees, and it is only in the event of its being found that at the date of his death William Sharpe was not the absolute fiar of the property that they then maintain that they are entitled to the estate as the heirs whomsoever of General Matthew Sharpe, who is maintained to have been absolute fiar of the estate, and to have evacuated the entailed destination by his trust-deed and deed of restriction dated in 1841 and 1843.

In the view which I take of the case, however, it will not be necessary to consider the pleas of Sir Thomas Kirkpatrick and Mr Bedford, for I am of opinion that the real competition arises between William Sharpe's trustees and Sir Alexander Muir Mackenzie.

I think that the result reached by the Lord Ordinary is the right one, and that the pursuers in the first action—the trustees of the deceased William Sharpe—are the only parties entitled to the estate in fee-simple, and that for the purposes specified and declared in the late William Sharpe's trust-disposition and settlement. I assume for the purposes of the present discussion that Sir Alexander Muir Mackenzie is now the nearest heir of entail in existence under the original entailed destination of 1768. This indeed is not admitted on record, but it is not said that any nearer heir of entail exists, and I assume that Sir Alexander is ready to prove his propinquity either by service or in any other competent form, and the real question is in reference to Sir Alexander Muir Mackenzie's claims—whether the entailed destination of 1768 still subsists, or whether it has not been effectually evacuated and changed under the decree of 1835 and the various deeds which followed thereon.

If the entailed destination still subsists, and if it has not been effectually altered or superseded by the deeds executed by General Matthew Sharpe and by William Sharpe, his brother, then Sir Alexander Muir Mackenzie must succeed, he always making up his title as heir of entail *in habili forma*. On the other hand, if the entailed destination contained in the original deed of entail of 1768 was effectually evacuated and superseded either by the testamentary deeds of General Matthew Sharpe or by those of William Sharpe, then William Sharpe's trustees now take the estate for behoof of the beneficiaries under his trust-deed, and the additional pleas of Sir Thomas Kirkpatrick and Mr Bedford only come into play as corroborating William Sharpe's trust-deed, which Sir Thomas Kirkpatrick and Mr Bedford wish to confirm.

Now, in the whole circumstances of the case, and although questions of considerable nicety and difficulty have arisen, I am of opinion that the original entailed destination of 1768 was effectually evacuated and superseded, that the late William Sharpe was, at his death on 18th December 1875, absolute fiar of the estate, entitled to dispose of it at pleasure, and that he effectually did so by his trust-disposition and settlement.

If the deed of entail of 1768 had been a valid and effectual deed of strict entail, containing all the necessary prohibitions, and duly fenced by irritant and resolutive clauses, then of course on the death of William Sharpe the entailed succession would open to Sir Alexander Muir Mackenzie, whom I assume to be next heir of entail. But the important fact is that by final judgment of the House of Lords and of this Court it has been found that the entail of 1768 was not valid and effectual as a deed of strict entail. By the judgment of the House of Lords in an action at the instance of General Matthew Sharpe, dated 18th April 1835, it was finally found, reversing the judgment of the Court of Session (1 Shaw and M'Lean, 594)—"That the disposition and deed of entail is not sufficient to prevent the said appellant (General Matthew Sharpe) and the other heirs of entail from selling or otherwise disponing or burthening with debt the said entailed estates, or from gratuitously alienating or disposing of the same,"—and the House of Lords reversed the previous judgments of the Court of Session, and remitted to that Court to do in the cause as might be just and consistent with the judgment of the Court of Appeal. Acting under this remit the Court of Session on 12th June 1835 pronounced a final judgment, in which they recalled the previous interlocutor, and gave decree of declarator in favour of the pursuer General Matthew Sharpe.—[*quoted supra*].

Perhaps it may be doubted whether this judgment of the Court of Session does not in some degree go beyond or further than the terms of the judgment of the House of Lords, but it is quite consistent with the judgment of the Court of last resort, and to whatever criticism it may be exposed I think it is now too late to challenge or impugn it in any way. It was a decree *in foro*, to which all the present parties or their predecessors were called; it was keenly litigated both in

this Court and in the House of Lords, and the final decree of the Court of Session has now stood unchallenged for more than forty years as declaring the law affecting the original entail. I think it is vain therefore to contend that the decree of declarator of 1835 is not absolutely binding as conclusively fixing the legal rights of General Matthew Sharpe and of all the subsequent heirs of entail. The words of the decree must be read literally, and they fix that he and the other heirs of entail may dispose gratuitously of the whole estate, and may grant and execute gratuitously "all dispositions, conveyances, deeds, and writings whatsoever which may be requisite or necessary for effectually conveying the whole or any part or parts of the said lands and others to any person or persons whatsoever, and in any manner that he may think proper."

I am of opinion that in the exercise of the power so declared General Matthew Sharpe was entitled to make, grant, and execute not only present or *inter vivos* deeds of alienation, whether onerous or gratuitous, but also *mortis causa* deeds of disposal, gratuitously conveying the estates to other persons, or to another series of heirs than that specified in the original entail, and therefore I think he was entitled to execute, and did validly execute, his trust-disposition and settlement of 25th December 1841. A *mortis causa* disposition and settlement is in its form a present conveyance alienating and disponing the lands, and although the granter's liferent and power to alter are always reserved, and the deed does not come into operation till after the truster's death, the deed is still a conveyance gratuitously disposing of the lands.

I am aware that a distinction has sometimes been taken between a present deed of alienation and a *mortis causa* settlement, the latter being sometimes regarded not as an alienation, but merely as an alteration of the order of succession; and there are cases where a tailzied proprietor had power to alienate, but had no power to alter the order of succession. None of these cases, however, apply, I think, to the circumstances before us. They were not referred to at the bar, and no argument was addressed to us to the effect that General Matthew Sharpe had no power under the decree to make a *mortis causa* settlement effectually disposing of the entailed estates "in any manner he might think proper." I am therefore of opinion that General Matthew Sharpe's trust-disposition and settlement was a valid and effectual exercise of the power of which, by the final decree of 1835, he was declared possessed.

Now, the new destination contained in General Matthew Sharpe's trust-settlement terminated after a number of persons specially called with the general destination over, "whom failing, to my nearest heirs and assignees whomsoever, heritably and irredeemably," and I cannot doubt that if this trust-deed or this ultimate clause of it still stands, it would effectually evacuate the whole destination in the original entail of 1768. I do not think that this was seriously contested, and indeed it was conceded at the bar that if General Matthew Sharpe's trust-disposition and settlement had stood alone without the codicil or deed of restriction no right would have remained in any of the members of the original tailzied destination of 1768.

But there arose what formed the principal and perhaps the most important plea maintained in argument—that arising upon General Matthew Sharpe's deed of restriction of 1843. By this deed General Sharpe, on the narrative that he was resolved "to restrict the destination and order of succession" contained in his trust-deed of 1841, did thereby "revoke" &c.—[*reads clause quoted supra*].

Now, I agree with the Lord Ordinary and with both your Lordships that the deed of restriction did not revoke the destination to the nearest heirs whomsoever of the truster. I think that the restriction only applies to persons specially called, but not to the general destination to heirs whomsoever. In reality the general destination "to my nearest heirs and assignees whomsoever" is not a calling of persons at all. The recall which is made is a recall of the persons called to the succession, or order of succession, mentioned in the trust-deed, and does not refer to any legal result which would happen if that order is exhausted, and the truster reserves to himself the right to name a new series of heirs in place of those taken from the trust-deed.

Now, in construing this we are dealing with a trust-deed and codicil. We are tied to no special rules except that we are to gather the intention of the truster. We are not construing the entail—we are construing the trust-disposition and settlement and codicil; and if I gather from one of those deeds what is the true intention of the testator, I am bound to take it. I cannot see that the intention of the testator was to revive the old destination, for the effect of that would be to exclude his own nearest heirs, and to send the estate to a cousin six or seven times removed. Sir Alexander Muir Mackenzie's claim is then at an end, for he is not the heir of General Matthew Sharpe. He must get rid of that first difficulty before his claim can be affirmed.

But I agree with your Lordship in the chair that we may look at the alternative point—that even if we were wrong in this interpretation, and if he did recall the whole of the ultimate destination so as to allow the original entailed destination to come in, what would be the right of parties? The original entailed destination would in that sense be a mere simple substitution of the destination unfettered in any way, and as the result would be that as Matthew Sharpe terminated his special succession upon his brothers in liferent for their liferent use allenarly, and the heirs of their bodies in fee, and as neither of them had any heirs of their bodies, he did dispose of the fee. The fee was vested in his trustees, and is still vested in them—a fiduciary fee it must be, for the benefit of those for whom they held, and the result would be that it would go to the heir absolute, then to Renton Sharpe, and then to William. The only two that we have to deal with are Charles Kirkpatrick Sharpe and William. Now both of these have made up titles. Charles Kirkpatrick made up a general title as heir of taillie or provision; no doubt that was a general title, but the fee of the estate was in the trustees of Matthew Sharpe, and that general service was just to entitle him to take the succession. Now he conveyed his right to William Sharpe. But apart from that, when William Sharpe came to be the sole surviving heir of tailzie in that line of it—apart from that line in

which Sir Alexander Muir Mackenzie claims—then Charles Kirkpatrick Sharpe made up another title as heir of provision under the taillie of 1768, and another title as heir whatsoever of Matthew Sharpe. Now under one or other of these there is no doubt that William Sharpe was fully vested in the whole of the subjects, and he disposed of them under his trust-disposition and settlement under which his trustees now claim. Even if he had not made up these titles, the recent Conveyancing Act put an end to the matter, because that Act declares that such a conveyance shall take effect without service, and thus William Sharpe became fully vested in the fee of the whole estate, and entitled to deal with it as he liked, and he has done so. Therefore I think the Lord Ordinary is right on both parts of the case in declaring the full right of William Sharpe's trustees to the estate, and in excluding Sir Alexander Muir Mackenzie from all right and title to it.

The Court pronounced these interlocutors:—

"The Lords having heard counsel on the reclaiming note for Sir Alexander Muir Mackenzie against Lord Rutherfurd Clark's interlocutor of 9th November 1876, Refuse said note, and adhere to the interlocutor of the Lord Ordinary: Find the defenders William Sharpe's trustees, and Sir Thomas Kirkpatrick, and the Rev. W. K. R. Bedford, entitled to additional expenses; and remit to the Auditor to tax the same and to report, and decern."

"The Lords having heard counsel on the reclaiming note for Sir Alexander Muir Mackenzie against Lord Rutherfurd Clark's interlocutor of 9th November 1876, Refuse said note, and adhere to the interlocutor of the Lord Ordinary: Appoint the defender John Ord Mackenzie to lodge in process a draft of the disposition to be granted to the pursuers, and allow the same to be seen by all concerned: Find the reclaimer liable in additional expenses, and remit to the Auditor to tax the same and to report, and decern."

Counsel for Sir Alexander Muir Mackenzie—M'Laren—Keir. Agents—Lindsay, Howe, Tytler, & Co., W.S.

Counsel for General Sharpe's Trustee—Fraser—Gloag. Agents—Mackenzie & Kermack, W.S.

Counsel for William Sharpe's Trustees—Kinnear—G. R. Gillespie. Agents—Gillespie & Paterson, W.S.

Counsel for Sir Thomas Kirkpatrick—Balfour—Low. Agents—W. & J. Cook, W.S.

Counsel for Mr Bedford—Trayner. Agents—Gillespie & Paterson, W.S.

Tuesday, March 13.

FIRST DIVISION.

[Bill Chamber.

BRITISH LINEN COMPANY *v.* GOURLAY (ALEXANDER & BAIRD'S TRUSTEE).

Bankruptcy—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79) *sec.* 65—*Right in Security.*

A. shipped to a foreign port a quantity of goods of G., to whom the bills of lading were handed, on condition that A. was to receive against the shipment the sum of £2957. G. was given right to hypothecate the goods to his order, and to request his correspondent in the foreign port to remit the proceeds on realisation, likewise to his order. G. was bound to account to A. for any surplus, and was entitled to claim from him any deficiency which might arise. G. handed the bills of lading, and also a duplicate letter of lien and a letter of hypothecation, to a Bank as collateral security for bills held or discounted, or to be held or discounted, by the Bank, bearing the names of A. and G. The Bank were given power to realise and exercise all rights of ownership over the goods. Thereafter G. drew bills to the amount of £2957 on A., who accepted them. The Bank discounted the bills, and G. handed the money to A. A portion of the goods were realised and the proceeds remitted to the Bank, when A. became bankrupt, and the Bank claimed upon his estate for the balance of the £2957.—*Held* that as G. with whom alone the Bank transacted, was holder of the bills of lading, the Bank were entitled to regard him as owner of the goods, and could not be said to hold any security over the estate of A., which, under the 56th section of the Bankruptcy Act, they were bound to value and deduct in order to draw a dividend.

This was an appeal by the British Linen Company against the deliverance of the trustee on the sequestrated estates of Alexander & Baird, merchants in Glasgow. The following were the circumstances of the case as stated by the Lord Ordinary in the note to his interlocutor:—"In December 1874 the bankrupts Alexander & Baird shipped 43 cases of silks, and one sample case in name of Galbraith, Reid, & Company, who are merchants in Glasgow, by the steam-ship 'Irrawaddy,' for Rangoon, to be delivered to Messrs Galbraith, Dalziel & Company of Rangoon.

"The bills of lading of these goods were executed on 16th December 1874, and were on 21st December handed to Messrs Galbraith, Reid, & Company, on the condition that Alexander & Baird were to receive against the shipment £2957, Messrs Galbraith, Reid & Company having full liberty to hypothecate the goods to their order, and to request their friends in Rangoon to remit the proceeds on realisation, likewise to their order; Messrs Galbraith, Reid & Company being bound to account for any surplus, and being entitled to claim for any deficiency which might arise.