[*22d April* 1833.]

No. 24. WILLIAM ALEXANDER BRYDEN and others, Appellants.—*Lord Advocate* (*Jeffrey*)—*Stuart.*

JESSIE BRYDEN or SAUNDERS and others, Respondents.—*Dr. Lushington*—*Murray.*

Clause—Testament.—Circumstances in which an obscurely worded deed of settlement was interpreted (affirming the judgment of the Court below) to mean, 1. That the division of the property was bipartite, or per stirpes, amongst the families of two nephews; and, 2. That trustees were bound to denude in favour of the minor children of the elder nephew when the eldest child of the younger nephew had attained twenty-one years of age.

Expenses.—Both parties found entitled to their expenses out of the property bequeathed.

1st Division.

Lord Corehouse.

JAMES BROWN of Westwood, who died in 1815 without issue, executed a deed of settlement in 1813, at which time he had two nephews, John and Adam Bryden. John, the elder, who was heir-at-law to his uncle, married Esther Craig in 1809, but had no issue at the time the settlement was made, or at the death of Mr. Brown. Adam, the younger nephew, had died previous to the making of the settlement, leaving two daughters. The deed was as follows:—" I, James " Brown of Westwood, heritable proprietor of the

" lands and others after mentioned, for the love, favour,
" and affection I have and bear to Mary Johnston my
" spouse, and the other persons after named and de-
" signed, and for other good causes and considerations
" me hereto moving, have given, granted, and disponed,
" as I do hereby give, grant, and dispone, from me,
" my heirs and successors, to and in favour of the said
" Mary Johnston my spouse, in life-rent, during all the
" days of her lifetime, in the event of her surviving me,
" all and whole my lands of Westwood, with the whole
" houses, biggings, yards, woods, mosses, parts, and
" pertinents thereto belonging, as presently possessed
" by myself, all lying within the parish of Tundergarth
" and county of Dumfries; and likewise have given,
" granted, and disponed, as I do hereby, with and
" under the conditions, provisions, burdens, restrictions,
" declarations, and reservations after specified, give,
" grant, and dispone, from me, my heirs and successors,
" to and in favour of William Grierson, only son pro-
" create of the marriage between William Grierson in
" Bucklerhole and Jean Johnston, daughter of William
" Johnston of Bengall, James Broatch, eldest son pro-
" created of the marriage between John Broatch in
" Boraxfield and Agnes Johnston, also daughter of the
" said William Johnston, and William Walker, son of
" Alexander Walker in Fourmerkland, and to the sur-
" vivor or survivors of them, equally amongst them,
" not only the foresaid lands of Westwood and perti-
" nents thereof, after the decease of the said Mary
" Johnston my spouse, in the event of her surviving
" me, but also all and whole my land of Scalehill
" and Herds Bogside, together with the whole houses,
" biggings, yards, mosses, muirs, and pertinents thereto

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" belonging, all lying within the parish and county " aforesaid, to be by them or survivor of them occu- " pied and possessed aye and until the eldest surviving " child or children to be hereafter lawfully procreated " of the body of John Bryden, merchant in Lockerbie, " during his present marriage with Esther Craig, or " any future marriage, and the eldest lawful child or " children of Adam Bryden, some time in Smallholm " Burn, deceased, my nephews, or either of them, shall " arrive at the age of twenty-one years complete, at " which period the said William Grierson, James " Broatch, and William Walker, and the survivor or " survivors of them, then in the possession of the said " lands, are hereby expressly bound and obliged, as " they and each of them by acceptation hereof be- " come bound and obliged, to redispone and denude " themselves thereof in favours of the child or chil- " dren of the foresaid John and Adam Brydens before " described; and upon that child or these children " attaining the age of twenty-one years complete as " aforesaid, I hereby revoke, recall, and annul the " foresaid disposition in favour of the said William " Grierson, James Broatch, and William Walker to all " intents and purposes, the same as if it had never been " made and granted, together with all that has followed " thereon in their name and favour; and I hereby " give, grant, and dispone to and in favour of the " children lawfully procreated of the body of the said " deceased Adam Bryden, and the children to be here- " after lawfully procreated of the body of the said John " Bryden, during his present or any future marriage, " equally amongst them, share and share alike, the " heirs male of each of their bodies always excluding

" the female, and in the event of there being no male
" child or children in either or each of their families,
" then and in that case the daughters shall succeed as
" heirs-portioners, and the heirs and disponees of the
" said persons who shall succeed in virtue hereof,
" whether male or female, heritably and irredeemably,
" all and whole the foresaid lands of Westwood, after
" the decease of the said Mary Johnston, in the event of
" her surviving me, as also all and whole the fore-
" said lands of Scalehill and Herds Bogside, with the
" whole houses, biggings, yards, parts, pendicles, and
" universal pertinents of the said respective lands,
" lying and described as aforesaid, together with all
" right, title, and interest whatsoever which I, my
" predecessors or authors, had, have, or may anyways
" claim or pretend to the lands and others above dis-
" poned, or any part thereof, but always with and
" under the conditions, provisions, burdens, restrictions,
" declarations, and reservations before and after spe-
" cified; declaring always, as it is hereby expressly
" provided and declared, that the children brought
" forth by Janet Irving, daughter of John Irving in Sark-
" shields, in consequence of any pretended marriage
" or connexion between her and the said John Bryden,
" nor none of these children's heirs, shall have right,
" title, or interest, in law or in equity, to succeed me
" in any part of my estates, real or personal, as pretending
" to represent the said John Bryden or otherways, and
" I hereby expressly exclude and debar them from any
" succession accordingly. It is likewise hereby expressly
" provided and declared, that the said William Grier-
" son, James Broatch, and William Walker, or the sur-
" vivor or survivors of them, upon the event of the

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" lawful child or children before described of the before-
" designed John Bryden and Adam Bryden, deceased,
" attaining the years of majority, and entering into the
" possession of the lands and others before disponed,
" shall not be bound to account for any of the rents of
" these lands received by them during their possession,
" nor shall any action lie or be competent to the heirs
" of the said John and Adam Bryden against them for the
" same; in which lands and others above disponed, with
" the pertinents, and with and under the conditions, pro-
" visions, burdens, restrictions, declarations, and reserva-
" tions before and after specified, I bind and oblige me,
" my heirs and successors whomsoever, to infeft and
" seise the said Mary Johnston in life-rent, for her life-
" rent use allenarly, and the said William Grierson,
" James Broatch, and William Walker, and survivor
" or survivors of them, and the heirs of the said John
" and Adam Bryden, described in the dispositive clauses
" of these presents, and their foresaids in fee, and that
" by two several infeftments and manners of holding,—
" the one thereof to be holden of me and my foresaids
" in free blench for payment of a penny Scots money,
" upon any part of the ground of the foresaid lands, at
" the term of Whitsunday yearly, if asked only, and
" the other of the said infeftments to be holden from us,
" of and under our immediate lawful superiors thereof,
" as freely as I hold the same myself, and that either
" by resignation or confirmation or both, the one with-
" out prejudice of the other; and for completing the
" said infeftment by resignation I hereby constitute
" and appoint and each of
" them, jointly and severally, my lawful and irrevocable
" procurators, giving, granting, and committing full

" power and warrant for me and in my name to resign
" and surrender, as I hereby resign, surrender, and
" overgive, all and whole the foresaid lands of West-
" wood, Scalehill, and Herds Bogside, as described in
" the dispositive clause of these presents, and herein
" held as repeated, brevitatis causâ, in the hands of my
" immediate lawful superiors of the same, or of their
" commissioners in their name, having power to receive
" resignations, and thereupon to grant new infeftments
" in favour, and for new infeftments of the same to
" be given and granted to the said Mary Johnston in
" life-rent, and to the said William Grierson, James
" Broatch, and William Walker, and survivor or sur-
" vivors of them, and to the heirs of the said John
" and Adam Bryden, before described in the dis-
" positive clause of these presents and their fore-
" saids, in fee, heritably and irredeemably, acts,
" instruments, and documents upon the premises to
" ask and take, and generally every other thing there-
" anent to do which I could have done myself if
" present, or which to the office of procuratory in
" such cases is known to belong, promittens de rata,
" but always with and under the conditions, pro-
" visions, burdens, restrictions, declarations, and reser-
" vations before and after specified, and which are
" appointed to be engrossed in the infeftments and
" charters to follow hereon. Moreover, I hereby as-
" sign and convey to and in favour of the said Mary
" Johnston my spouse in life-rent, and for her life-rent
" use allenarly, during all the days of her lifetime, in
" the event of her surviving me, not only the whole
" rights, titles, and evidents of the said lands of West-
" wood, with all that has or may be competent to follow

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" thereon, but also the rents, maills, and duties of the " said lands, from and after my decease; as also I " hereby give, grant, assign, and dispone to and in " favour of the said Mary Johnston in life-rent, in case " she survive me, all and whole my stock and crop " that may be at my decease upon the lands of West- " wood then in my possession, also my household furni- " ture, blankets, bed, and table linen, and silver plate, " during her life, with power to her to dispose of the " one half thereof as she may think proper, but the " other half thereof, after the decease of the said Mary " Johnston, I hereby give, grant, assign, and dispone " to and in favour of Agnes Bryden, my niece, and her " children, if any, equally between them; and further, " I hereby assign and convey to and in favour of the " said William Grierson, James Broatch, and William " Walker, and to the survivor or survivors of them, " and to the heirs of the foresaid John and Adam " Bryden before described, and their foresaids, not only " the rights, titles, and evidents of and concerning the " said lands of Westwood, and rents, maills, and duties " of the same, from and after the death of the said " Mary Johnston, and the rights, titles, and evidents " of the said lands of Scalehill and Herds Bogside, " with all action and execution competent to me " thereupon, but also the rents, maills, and duties " of the said lands, from and after my decease, with " full power to uplift and discharge them, but always " with and under this restriction and declaration, " as it is hereby expressly conditioned and declared, " that it shall not be in the power of the said Wil- " liam Grierson, James Broatch, and William Walker, " and survivor or survivors of them, to sell, alienate,

" wadset, impignorate, or dispone the foresaid respec-
" tive lands or any part thereof, either irredeemably
" or under reversion, or to burden or affect the same
" in whole or in part with debts or sums of money,
" infeftments of annual rent, or any other burden or
" servitude whatever, or to grant any leases of the
" said lands to a tenant or tenants of a longer endur-
" ance than three years, and that at the highest yearly
" rent that can be obtained therefor at the time; and
" also declaring, as it is hereby expressly provided and
" declared, that upon the said William Grierson, James
" Broatch, and William Walker, and survivor or sur-
" vivors of them, and the heirs male or female before
" described of the said John and Adam Bryden, suc-
" ceeding to me in virtue hereof, conform to the dis-
" positive clause of these presents, shall be bound and
" obliged, as they by acceptation hereof become bound
" and obliged, to pay to the said John Bryden a
" yearly annuity of 20*l.* sterling, beginning the first
" term's payment thereof at the first term of Whit-
" sunday or Martinmas which shall first happen after my
" decease for the year immediately preceding, and so
" on yearly thereafter during his natural life, with a fifth
" part more than each term's annuity of liquidate
" penalty in case of failure; and also to pay my sick-
" bed and funeral expenses, and all my just and lawful
" debts, and the following legacies, which I hereby
" leave and bequeath to the persons after named and
" designed, videlicet," &c.

Then follows an enumeration of particular legacies, after which this clause:—

" And in order to enable the said William Grierson,
" James Broatch, and William Walker, in case they

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" shall enter to the possession of the foresaid lands in " virtue hereof, to discharge the foresaid debts and " legacies, I hereby give, grant, assign, and dispone to " and in favour of them or either of them, whom failing, to the heirs of the aforesaid John and Adam " Bryden, male or female, as before described, all and " sundry debts and sums of money constituted by per- " sonal bonds or bills, decreets, accounts, or otherwise, " arrears of rent, farming utensils, goods, gear, and " effects of every kind and denomination, which shall " belong or be owing to me at the time of my death, " wherever the same may be situated, together with " the whole instructions of the said debts, excepting " and reserving always therefrom, as it is hereby spe- " cially excepted and reserved, the whole stock and " crop, growing or cut, that may be upon the said " lands of Westwood at my decease, and likewise the " household furniture before conveyed and assigned to " Mary Johnston my spouse, and the foresaid Agnes " Bryden and children, surrogating hereby and substi- " tuting the said William Grierson, James Broatch, and " William Walker, whom failing, the heirs male or " female of the foresaid John and Adam Bryden before " described, in my full right and place of the premises, " with power to them, in the order of succession fore- " said, after my decease, to intromit with the said debts " and effects, uplift, discharge, use, and dispose thereof, " the same as I could have done myself if in life. " And considering that I hold a conveyance from " Mungo Dobie, writer in Dumfries, now in Lockerbie, " dated the 13th day of November 1805 years, to an " heritable bond over the lands of Scrogs for payment " of 500*l.* sterling, redeemable, if not paid up before

" my decease, it is my will and I hereby appoint
" that the yearly annuity of 20*l.* sterling, left by me
" to the said John Bryden as aforesaid, shall be paid
" from the annual interest arising therefrom so long as
" the said Mary Johnston my spouse is in life, and at
" her death I hereby give, grant, assign, and dispone
" the said heritable bond of 500*l.* sterling, and convey-
" ances thereof in my favour, to and in favour of the
" lawful children hereafter to be procreated of the body
" of the foresaid John Bryden during his present or
" any future marriage, the lawful children procreated
" of the body of the foresaid deceased Adam Bryden,
" and the children lawfully procreated or to be pro-
" created of the bodies of the before-designed Agnes
" Bryden and Janet Bryden, spouse of Andrew Dickson
" of Shaw, my nephews and nieces, also the surplus
" money, if any, after paying the foresaid legacies and
" every other debt justly owing by me, and that equally
" amongst them, share and share alike. And further,
" as I have full confidence in the integrity of the saids
" William Grierson senior, John Broatch, Alexander
" Walker, and William Martin, I hereby nominate
" and appoint them to be my sole executors and trus-
" tees for the express purpose of seeing this deed of
" settlement carried into full and final execution, and
" who are to receive a reasonable gratification for their
" trouble; declaring that any two of them shall be a
" quorum, and that the persons succeeding, before
" named, while in minority, shall and are hereby bound
" to do no act or deed relative hereto without their
" advice and consent; declaring also, that my said exe-
" cutors and trustees shall not be liable for omissions,
" but only for their own actual intromissions, nor shall

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" they be liable for one another, but each of them for " his own actual intromissions only. And further, I " hereby revoke and alter all former dispositions, assig- " nations, or deeds of settlement executed by me rela- " tive to the foregoing lands of Westwood, Scalehill, " and Herds Bogside; only declaring, that any other " deeds executed by me relative to my other property " not herein mentioned shall stand sure and be as " effectual as if this deed had not been made or granted; " reserving always not only my own life-rent right of the " premises and subjects before disponed, but also full " power and liberty to alter and revoke these presents, " in whole or in part, as I shall think fit, at any time " in my life, or even on death-bed; dispensing with the " not-delivery hereof, and declaring these presents to " be a good, valid, and effectual deed, though found " lying by me at the time of my death, or in the cus- " tody of any person to whom I may entrust the same " undelivered," &c.

On the 14th of July 1813, being two days after the date of this deed, Mr. Brown the testator executed a disposition and assignation, which, inter alia, contained this clause:—

" And now, for the love, favour, and affection I have " and bear to the children to be hereafter described, " and for other good causes and considerations, have " given, granted, assigned, and disponed, as I do " hereby give, grant, assign, and dispone from me and " my heirs, to and in favours of William Grierson in " Bucklerhole, John Broatch in Boraxfield, Alexander " Walker in Fourmerkland, and William Martin, " writer in Lockerbie, as trustees nominated and ap- " pointed by me, for behoof of the surviving child or

" children to be hereafter lawfully procreated of the " body of John Bryden, merchant in Lockerbie, during " his present or any future marriage, and the surviving " child or children of Adam Bryden his brother, now " deceased, my nephews, and their heirs male and " female, equally amongst them, heritably but redeem- " ably, not only all and whole the foresaid two several " annual rents of 25*l.* sterling each, or such annual " rents as shall correspond by law for the time to the " foresaid two principal sums of 500*l.* each, to be up- " lifted and taken at the term specified in the bond " and disposition in security, and heritable bond before " narrated, during the not-redemption forth of all and " whole the foresaid lands of Scrogs, Moss-side, and Moss- " head, and all and whole the lands of Moss-side called " Catsbitt, with the teinds, parsonage, and vicarage of the " said lands of Catsbitt, with the whole houses, yards, " mosses, parts, pendicles, and pertinents of the same, " or any part or portion thereof, but also all and " whole the foresaid lands and others particularly above " specified themselves, and that in real security and " more sure payment to the said William Grierson, " John Broatch, Alexander Walker, and William Mar- " tin, trustees for the child or children of the before- " designed John and Adam Bryden before described, " and their foresaids, equally amongst them, share and " share alike, of the foresaid two principal sums of 500*l.* " sterling each," &c.

Subsequent to the death of Mr. Brown, John Bryden had a family of four sons and four daughters; and by them a declarator was raised against the trustees and the respondents, (the children of Adam Bryden,) concluding "That, " in virtue of the foresaid disposition and deed of settle-

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" ment, on the arrival of any one of the children of the " said John Bryden or Adam Bryden at twenty-one " years of age complete, the pursuer, William Alexan- " der Bryden, has, as the only heir male in heritage " either of the said John Bryden, his father, or of " Adam Bryden, his uncle, right to the whole of the " foresaid lands of Westwood, (burdened with the life- " rent of the disponer's widow,) as also the foresaid " lands of Scalehill and Herds Bogside; or, on said " event, the pursuers, William Alexander Bryden, " Joseph Bryden, James Bryden, and Robert Bryden, " have, as sole heirs male foresaid, right to the whole of " the said lands; or, on said event, the whole pursuers, " William Alexander Bryden, Joseph Bryden, James " Bryden, Esther Bryden, Robert Bryden, and Agnes " Bryden, or one or more, have right to certain shares " or proportions of the said lands, either along with the " said Jessie Bryden and Agnes Bryden, daughters of " Adam Bryden, and also along with any other child " or children who may be procreated of the body of the " pursuer's father, the said John Bryden, during his " present or any future marriage, or along with one or " more of the said persons," &c. And that " the said " William Grierson, James Broatch, and William " Walker ought and should be decerned and ordained " by decreet of the Lords of our Council and Session " to denude themselves of the said lands of Westwood, " Scalehill, and Herds Bogside, or such parts or por- " tion thereof as they may be infeft in or possessed of, " and to redispone the same, with all right and interest " which they have or might have under the foresaid " deed of settlement, to and in favour of the pursuer or " pursuers, or one or more of them, according as they

" may be found to have right to the whole or to certain " shares of the said lands, and that as from the date when " the said Jessie Bryden, or any other of the children " of the said John Bryden and Adam Bryden, shall " reach twenty-one years of age complete," &c.

Lord Corehouse, on the 10th July 1830, pronounced this interlocutor: — " The Lord Ordinary, " having heard counsel for the parties, finds, that by the " settlement of the late James Brown of Westwood, " referred to in the libel, his widow, Mary Johnston, is " entitled to the life-rent of the lands of Westwood: " Finds that the sons born or to be born of John " Bryden are entitled to one half of the said lands of " Westwood, subject to the widow's life-rent, and to one " half of the lands of Scalehill or Herds Bogside, share " and share alike: Finds that the daughters of the late " Adam Bryden are entitled to one half of the lands " of Westwood, subject to the widow's life-rent, and to " one half of the lands of Scalehill or Herds Bogside, " as heirs portioners: Finds that the defenders, the " trustees under the said settlement, are bound to " denude, in terms of these findings, in favour of the " sons of John Bryden, as soon as the eldest son arrives " at the age of twenty-one years, good and sufficient " security being found by the sons then in existence " that the interests of any son or sons who may after- " wards exist shall not suffer prejudice thereby; and " that the trustees are bound to denude, in terms of the " said findings, in favour of the daughters of the late " Adam Bryden, as heirs portioners, as soon as the " eldest daughter attains the age of twenty-one years, " and decerns and declares accordingly: Finds the de- " fenders, the trustees, entitled to expenses of process,

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" to be paid out of the trust estate, and remits the account, when given in, to the auditor to be taxed, " but finds no other expenses due. *Note.*—The settlement admits of various constructions. The dispositive clause could not have been more obscure, though industriously written to conceal the testator's will, and no other clause in the deed throws any light upon it. " The Ordinary has adopted the construction which, upon the whole, appears to him the least objectionable, but with little confidence in his opinion."

All parties having reclaimed, the Court, on the 17th February 1831, pronounced this interlocutor:—" Adhere to the interlocutor reclaimed against, with this " variation, that the trustees were and are bound to denude in favour of the sons of John Bryden, in so far as regards their one half of the properties in question, as at the period when the eldest daughter of Adam Bryden attained the age of twenty-one: Find the pursuers and defenders appearing equally entitled to the expenses respectively incurred by them, out of the properties in question, the first and readiest of the rents and profits thereof; appoint accounts of said expenses to be given in, and remit the same to the auditor to tax and to report; and, quoad ultra, refuse both reclaiming notes, and allow separate extracts to go out at the instance of the daughters of the said Adam Bryden and the sons of the said John Bryden, and decern." *

Against this interlocutor the children of John Bryden brought an appeal.

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* 9 S. D. 457.

Appellants.—If the eldest son of John Bryden is not entitled to the whole lands as the sole heir male of the body of John Bryden or Adam Bryden, the whole lands must belong to the sons of John Bryden, born or to be born, and that to the exclusion both of the two daughters of Adam Bryden and the daughters of John Bryden. Under any circumstances the lands are now divisible among the whole children of John Bryden, born or to be born, and the two existing children of Adam Bryden, equally, or share and share alike. Even though the children of John Bryden were only entitled to one half of the lands amongst them, still there would be no reason for giving the whole to the sons so as to exclude the daughters.* The interlocutors of the Court appealed from are erroneous, and must be reversed, in so far as they direct any part of the expenses of the process to be paid out of the heritable bonds referred to.

Respondents.—The sound construction of the settlement demands that the succession be divided in a bipartite ratio, and that one just and equal, pro indiviso, half thereof be immediately disponed to the respondents, share and share alike, as heirs portioners.

LORD CHANCELLOR.—My Lords, in this case I would move your Lordships that the judgment of the Court below be affirmed; and I do so, as your Lordships will immediately perceive, for this reason,—not because the instrument in question can be thought unambiguous, or

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* Fairservice v. Whyte, June 17, 1789, Morr. 2317 and 14486; Dollar v. Dollar, Dec. 4, 1722, Morr. 13008; Duncan v. Robertson, Feb. 9, 1813, Fac. Coll.

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its construction clear and free from doubt; on the contrary, it is precisely for the opposite reason,—it is because of the great obscurity in this instrument, the great difficulty in coming at what really is the meaning upon the whole case, the inconsistencies which prevailed, and the perfectly inconceivable possibility of the party who made it having had any precise or definite meaning in forming it. The Court below having put a construction upon it,—the learned Judges before whom it came having come to an opinion upon the meaning of the instrument,—I can see no reason to be so far dissatisfied as to prefer any other given construction to that. It is for this reason that I am bound to submit to your Lordships, after a few remarks, the propriety of not dissenting from the decision of the Court below, rather than of adopting it. My Lords, three principal points have been urged on behalf of the appellant, whose case was argued with very great ingenuity by the learned counsel whom your Lordships have just heard. Upon each of those I shall offer a few observations. The first is that which relates to the gratuitous assumption, as it is called, in the Court below, of the word "their," in point of law, being referable, not to John and Adam, but to the children of John and Adam as the antecedent. With respect to the alleged absurdity of the construction put upon it, I would observe, that a fact at that time existing was certainly known to the maker of the instrument, — the death of Adam, at the date of the instrument, without leaving male children. Now, my Lords, first, with respect to the bipartite division, the grounds upon which I think it is fair to contend that the division is excluded per capita, and is to be taken per stirpes, are, in the

first place, the words "each of their bodies,"—the first part of the clause in that portion of it which is said alone to throw doubt on the clause in question, "share "and share alike, the heirs male of each of their bodies "always excluding the female." Now, the female of what? It must be the heirs female of somebody; but then there is nothing, as it appears to me, to supply the words which are wanted, except the words which are found to precede "each of their bodies, the heirs male "of each of their bodies excluding the female." It must mean the same bodies, the heirs female of each. Then we have in the subsequent part the word "child" substituted, — "no male child or children in either or "each of their families." Now, then, my Lords, from the expression in both of these two portions of this material clause, it appears to me that they contemplate the stirpes rather than the capita; but I rest not upon that, but what immediately precedes. Indeed the whole structure of the instrument shows that the party making it had in consideration two families,—that is, the family of John and the family of Adam. It is conveyed in a line, as it were, to the families of John and Adam; and accordingly they are referred to in this as "the children "lawfully procreated of the body of the said deceased "Adam Bryden, and the children to be hereafter law-"fully procreated of the body of the said John Bryden." But, thirdly and lastly, and most materially, with a view to the bipartite division, and the question of stirpes and capita — in favour of stirpes there is this consideration, which presses strongly upon my mind:—If you are to take it per capita, and to deal with all the children of whichsoever of the brothers, in the self-same way —to throw them into one mass, and to treat them as the

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argument for the per capita would do, dividing the property among the whole of them equally, share and share alike,—then observe, my Lords, if you stop short of the portion of the instrument which is said alone to throw any doubt upon it, and which is (for so far I agree with the argument of the appellant) that which renders the construction difficult, and in some respects hardly attainable, in this case,—if you are to stop short, beyond a doubt you must say, in order to be quite consistent with this construction, that the children of both brothers shall take share and share alike. But then comes the preference given of males over females. How can you reconcile that with the distribution per capita, and with the admitted fact, in the first instance, of the two daughters of Adam known to be in existence at the time of Adam's death being recited? How can you reconcile that with the throwing of the whole children of both brothers into one mass, and dealing with them all alike, when nevertheless at the same time you are directed to adopt such a construction as shall, in the event of there being no male child to either of the brothers, give the whole to the daughters as heirs-portioners, or give the whole to the males in preference to and exclusion of the females, though there be males and females in one, and no males in the other? In either of those cases, according to that construction, the daughters of Adam would be absolutely excluded, and the children of John would take alone any share of this kind, because it would stand thus: — There are sons of John,—there are only daughters of Adam;—you are to take the whole children of John and the whole children of Adam, and deal with all alike, and apply that clause, to all alike, giving the preference to the male and excluding the females;—and

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then the result is, that there being the whole mass to be all dealt with in like manner, sons and daughters, it seems immaterial whether the sons and daughters are children of the one, or the sons are all of the one, and the daughters all of the other, for it might have happened that one brother had sons when the other brother had daughters only; and then, in either or all of those cases alike, you will have to exclude the daughters of Adam, and give the whole to the sons of John. Now, that is utterly inconsistent with the fact that Adam had at that time died without leaving sons. I do not go out of the instrument, for his death is recited here — "of the said "deceased Adam Bryden;" and the very first gift, which is clearly part of the clause, is,—"I hereby give, "grant, and dispose to and in favour of the children law- "fully procreated of the body of the said deceased Adam "Bryden, and the children to be hereafter lawfully "procreated of the body of the said John Bryden." It cannot, therefore, treat them all in the same way, and value them all in one number, dealing with them all in like manner, the males as well as the females, without excluding the daughters of Adam, who are nevertheless the first and foremost objects of the bounty in that part of the instrument under which the parties took; and this can only be made clear by having recourse to the last supposition, that "their" is to be referred to the children, and not to the parents.

This leads us to the second of the points to which your Lordships have been directed. Now, I am of opinion, that you cannot say "their" refers to the children, and thus deals with the children, but that it refers to the parents, and not to the children, and this for these two reasons:—Your Lordships see that it is,

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in the first place, in favour of "the children lawfully "procreated of the body of the said deceased Adam "Bryden, and the children to be hereafter lawfully "procreated of the body of the said John Bryden, "equally amongst them, share and share alike, the "heirs male of each of their bodies always excluding "the female." Now, in going on and treating on the same matter, must not "their bodies" be naturally taken in conjunction with the two persons before mentioned—that is, "the heirs-male of each of their"—that is, John and Adam's — "bodies always excluding the female," who have been the last referred to — not in a former clause—not in another part of the instrument, but in the same breath, as it were,—in the very same sentence upon part of which we are now attempting to put a construction. I need hardly stop here to refer your Lordships to a word which was not observed upon by the learned counsel for the appellant. Amongst all the inaccuracies and inconsistencies and repugnances which this clause affords, I hardly stop to mention that the word "always" affords another instance of this,—the "heirs male of each of their bodies always excluding the "female." My mind can apprehend no definite or intelligible meaning of the use of the word "always" here. We know the use of the word "always" in limitations of this description; we know what its ordinary application is. It is with a view to contract an obligation at a future time; it is with a view of prospect to the distribution of rights afterwards. It means, that at whatever time they shall come in esse, the heirs male or heirs female, in the event of there being no male child or children, the eldest daughter or heir female always succeeding without division—that is one ordinary expression; and in the event

of the question of right being, not as respects one heir-portioner over another, but the privilege of males over females, the heirs male or the sons always excluding the daughters or heirs-portioners. No doubt, that is consistent, as it is technically urged, where it is intended to carry the matter perpetually, or at least as long as the term continues; but it has no intelligible meaning when it is applied to one particular punctum temporis in a matter where it is admitted on both sides that every thing bears a reference to that particular date — the coming of age of the eldest son, which I understand is admitted on all hands to be the time of the trustees denuding themselves, and conveying to the person entitled. I can understand "always" in the former sense, in which it is uniformly used, but in this case I can affix no definite meaning to it; but, as far as my observation goes, it is favourable to the construction put, on the behalf of the appellant, upon the word "their" being referable, not to the parents, but to the children; for that would be making some use of the word "always," inasmuch as this construction does not confine you to one particular date; however, that does not appear of itself to be sufficient. Then, my Lords, the second ground upon which I am disposed to object to that construction, and more material indeed than the former, is, when you come to the words "heirs "male of each of their bodies always excluding the "female, and in the event of there being no male child "or children in either or each of their families." Now, "either," must be observed to be indicative, not of any indefinite number—for two is the number by the construction I am now speaking of,—but an indefinite number of families must be the number, according to

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the construction against which I am now contending, namely, the construction which refers the word "their," not to John and Adam, but to the children at any time of John and Adam; but the words are, "either or each of their families." Then I should say that "either or each of their families" means, according to my views of it, either or each of John and Adam's family;—"then and in that case the "daughters shall succeed as heirs-portioners." Now, it was argued, and very ingeniously, by the learned counsel who last addressed your Lordships, and who took to pieces the last part of the respondents case, that the counsel for the respondents put in the words "share and share alike" to suit their purpose, which no doubt they did; and he also contended, that the words, "in that family in which there shall be no male child or "children," after the word "daughters," are equally arbitrary. But, my Lords, you must make sense of he thing, even where it is not plain, by giving some meaning to it. "Then and in that case the daughters "shall succeed as heirs-portioners." Now, two observations immediately arise upon this, each of them in favour of the argument that I am putting. The daughters—but the daughters of whom? What daughters? It must be the daughters of somebody, and it must be the daughters of that family. The last antecedent is, "their "families,"—"in the event of there being no male "child or children in either or each of their families, "then and in that case"—whatever families are there meant—"the daughters shall succeed as heirs-portion-"ers." What daughters? Surely the daughters of that family,—"either or each" being distributive and parting words, and words severing in their nature—

the very office of the words being distributive; and to make matters respective and distributive, and also being distributive of a particular kind between two, rather than among a greater number, it is the daughters of that family shall succeed. Whichever of the families is without male children, the daughters of that family shall succeed as heirs-portioners. But again, heirs-portioners of what? And this is the other observation that I wished to make. They must be the heirs-portioners of something. Heirs-portioners of what? They are to succeed as heirs-portioners—that is, to take portion among themselves. I will not go so far as to say, that in the last limb or the last sentence of the respondents case they have a right to add to the words " shall succeed" these words, " to the share which would " have fallen to the male child or children in that " family, had there been any such." That is one good way of putting it for their purpose; and perhaps we can hardly see any other meaning than that, or something approaching to it. But, without going so far, I should say it must mean heirs-portioners of that share. Portioners implies sharers, and heirs-portioners must be the persons who are to portion among them the share belonging to that family. It is a moiety in fact. It is needless to go to that alleged gratuitous construction of all these words which I have read to your Lordships, but the words must mean heirs-portioners of that moiety. But I take it that the words "heirs-portioners" are inaccurate. Nothing can be more inaccurate than talking of persons taking as heirs-portioners under a settlement. It is not very intelligible, as it appears to me, to speak of heirs-portioners in a division into two portions, one of which portions should go to the females, who should

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take as heirs-portioners, in the event of one family failing in males. Upon the whole, therefore, I am inclined to think that, on the second point, "their" is to be referred to Adam and John, and not to their children.

The third matter, which I stated I should observe upon, is that which appears chiefly to have been pressed on the consideration of the Court below—the fact of Adam's death,—a fact known to the maker of the instrument, for he recited it; and he must have known that Adam had daughters, for he refers to the issue of Adam. But it must be quite evident to your Lordships, from the whole instrument, that it was not a man of business who drew the instrument; nevertheless we must endeavour to understand his view; we must take for granted that he knew something about it; that he had some, however indefinite, meaning attached to it; that he had a consistent meaning, and that his meaning was known to himself. This we are bound to assume, in order to put any construction upon the instrument. The words are,—" and in the event of there being no male " child or children in either or each of their families," that is to say, in the event which has happened with respect to one of the families, inasmuch as Adam has died without male issue, and the event which may or may not have taken place as to John's family,—John being married, but not having any children,—then I provide so and so. But it is a fairly conceivable construction, it implies the grossest inaccuracy in the use of language, because the words that limit are words of contingent and prospective aspect, and they would much more apply to an uncertain than to a certain event, and would apply much more to the future, and what has not happened, than to what has happened, and is finally and irrevocably fixed.

This, my Lords, may be said to be a strong construction; but I think that it leads to as little inconsistency and difficulty as any other would do.

For these reasons I am inclined to think that the Court below has come to a right conclusion; but I am of opinion, at all events, that the conclusion having been come to, — this construction having been given to the instrument by the Court below, and seeing no grounds to adopt another construction as decidedly preferable to it,—I am not prepared to move your Lordships to reverse the decision. I hope I have made myself understood as not by any means undervaluing the weighty arguments used by the learned counsel. So far from wishing to do so, I cannot but own that their reasoning appeared to my mind most ingenious; and when I say ingenious I do not use the word in the sense in which it very frequently is applied; for it is not to be denied that there are solid objections against the construction in question; there are difficulties, serious difficulties, in this construction; but every other construction is encompassed, in my mind, with at least equal, and—as regards any that I have been able to apply my mind to—with greater difficulties; and it is because this one is pressed with, on the whole, less difficulty than any other, that I would move your Lordships not to alter this decision. My Lords, the Court below were quite aware of these difficulties,—they came to their decision with the greatest doubt,—they felt the full pressure of those difficulties. For this reason I shall not of course recommend that any costs should be given; but I go further, and think, that the costs of appeal, as well as in the Court below, should be paid out of the estate. The judgment in the Court below was, that the expenses should be paid out of the

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heritable bonds, but I should think this must be by consent; and therefore I should advise your Lordships to throw the costs upon the estate.

The House of Lords pronounced this judgment:—Find, that the interlocutor of the 17th of February 1831, complained of in the said appeal, ought to be varied in so far as it finds the parties respectively entitled to their expenses out of the heritable bonds therein mentioned: And it is therefore declared, That all such expenses, and also the costs of both parties of this appeal, and the proceedings thereon, ought to be paid out of the first and readiest of the rents and profits of the said lands of Westwood, Scaleshill, and Herds Bogside: And it is ordered, That the said interlocutor, with this variation, be and the same is hereby affirmed.

A. M. M'CRAE—ALEXANDER DOBIE, Solicitors.