[1st *July* 1833.]

No. 28.

JANE WHITTET or GREIG and others, Appellants.—*Lord Advocate* (*Jeffrey*)—*Solicitor General* (*Campbell*).

GEORGE RICHARDSON JOHNSTON and others, Respondents.—*Dr. Lushington*—*Murray*.

Testament—Substitute and Conditional Institute.—1. A testator, by his deed of settlement, conveyed his whole property to his daughter, under the burden of paying 2,500*l.* to each of his two grandchildren at majority; and in case of the death of either of them without children, the survivor to succeed to the share of the predeceaser; and in the event of the death of both without children, the testator's daughter "to succeed to the whole of what "is herein provided to them." The daughter granted an heritable bond to the grandchildren for their provisions, with the same destination as in the settlement; one of them died in minority, unmarried and intestate, but the other survived majority, and called up the money in the bond, but died unmarried and intestate, before receiving payment—Found (affirming the judgment of the Court of Session) that the representatives of the grandchild who survived majority (and not the testator's daughter) were entitled to succeed to the provisions; and that the heritable bond being merely a corroborative security made no change on the rights of the parties under the settlement.

Question, whether the destination was a substitution or a conditional institution?

2. A grandmother directed her trustees to pay the residue of her estate to her grandson, at Martinmas after his majority, and failing his surviving that term, or, if he did

survive it, failing his specially disponing the same, to accumulate the residue for behoof of the children of the testatrix's daughter; the grandson survived majority several years, and obtained payment directly from the debtor of the testatrix of a sum due to her, which he commingled with his other funds, and he died unmarried and intestate—Held, that this sum belonged to the representatives of the grandson, and not to the children of the daughter of the testatrix.

1ST DIVISION.
Lord Corehouse.

THE late John Whittet, of Potterhill, had two daughters, — Jane, now Mrs. Greig (the appellant), and Margaret, who married Mr. William Glen Johnston, residing in Perth, and died in August 1800, leaving two children, John Johnston and Wilhelmina Johnston. On the 12th May 1802, John Whittet executed a deed of settlement, by which he conveyed "to and in favour of "the said Jane Whittet, and the heirs of her body, and "her assignees; whom failing, my grandchildren, John "Johnston and Wilhelmina Johnston, equally between "them, and the heirs of their bodies; whom failing, "to my sister's children, Henry and Janet Johnston, "equally between them; whom failing, my own nearest "heirs and assignees whomsoever," his whole property, heritable and moveable, and in particular, certain lands and houses situated in the parishes of Kinnoull and Kinnaird, "But always with and under the burdens "and provisions after mentioned, viz,—Primo, The "said Jane Whittet and her foresaids shall pay all "my just and lawful debts, and the expenses of my "death-bed sickness and funeral. Secundo, The said "Jane Whittet and her foresaids shall pay to each of "my grandchildren, John and Wilhelmina Johnston, "the sum of 2,500*l.* sterling at the first Whitsunday

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" or Martinmas after they respectively have attained " the age of twenty-one years complete, with the legal " interest of the same, from and after the first term of " Whitsunday or Martinmas after my death, aye and " until the same is paid; it being provided that in the " event of the death of either of the said John and " Wilhelmina Johnston without lawful children the " survivor shall succeed to the share of the predeceaser; " and in the event of the death of both without lawful " children, the said Jane Whittet and her foresaids " shall succeed to the whole of what is herein provided " to them; and in this event of the said Jane Whittet " succeeding to the whole of the said 5,000*l.* provided " to the said John and Wilhelmina Johnston between " them she shall be bound to pay, at the Whitsunday " or Martinmas after the death of the longest liver of " the said John and Wilhelmina Johnston, the sum of " 1,000*l.* to William Glen Johnston, their father," &c.

These several provisions were declared to be in full to William Glen Johnston and John and Wilhelmina Johnston of all claims competent to them through the grantor's decease, and the deed contained a nomination of tutors and curators. Mr. Whittet died sometime before Whitsunday 1803, while his two grandchildren were in infancy, and his daughter, the appellant, was in minority.

In 1804 the appellant, with consent of her curators, granted an heritable bond in favour of the infant legatees, John and Wilhelmina Johnston, in corroboration of and in similar terms with her father's settlement, on which infeftment followed. Again, on 6th January 1810, she, being then of age, executed a new heritable bond in favour of the grandchildren, in similar terms with the

former, which had been agreed to be renounced. This new bond, like the former, narrated Mr. Whittet's settlement, and the clauses as to the provisions to his grandchildren; and, in conformity with it, the appellant bound herself "to make payment to each of the said John "and Wilhelmina Johnston of the sum of 2,500*l.* sterling, "at the first Whitsunday or Martinmas after they "respectively have attained the age of twenty-one years "complete, with the legal interest of the same from and "after the term of Whitsunday in the year 1803, being "the first term after the death of the said John Whittet, "aye and until the said several sums become due re-"spectively, and yearly and termly thereafter until "the payment thereof, the said principal sums making "in whole to the said John and Wilhelmina Johnston "between them the sum of 5,000*l.* sterling of princi-"pal; providing always, as it is hereby provided and "declared, that, in case of the death of either of the "said John and Wilhelmina Johnston without lawful "children, the survivor shall succeed to the share of "the predeceaser; and in the event of the death of both "without lawful children, I, and my heirs, executors, "and assignees, shall succeed to the whole of the said "sums," &c. This bond was followed by infeftment.

Wilhelmina Johnston, while still in minority, died in July 1814, unmarried and intestate. Her brother attained majority on 19th July 1820; and on 30th December of that year, an adjustment of accounts took place between him and the appellant (now Mrs. Greig) and her husband, by which the balance due to the former, on his own and his sister's provisions, with interest, was found to amount to 7,047*l.* 3*s.* 9*d.*

On 6th February 1821 John Johnston executed a dis-

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charge of the heritable bond of 1804, in so far as related to the lands of Kinnaird, being satisfied with the sufficiency of the security afforded by the lands of Pitkindie and Ballairdie. By this deed he declared, that quoad these lands the bond should "subsist in full "force and effect in the whole heads, tenor, clauses, "and contents of the same in favours of me, and my "heirs, executors, and successors, aye and until the "said principal sum of 5,000*l.* sterling, interest and "penalties, should be fully paid."

Having resolved to visit the Continent on account of his health, he executed a factory and commission, dated 31st August 1825, in favour of Mr. Henry Johnston, with power to "uplift, receive, pursue "for, and discharge, assign or convey all and sundry "debts and sums of money, and others whatsoever, "due and addebted to me by bond, bill, account, or "in any other manner of way, compound, transact, "or agree for the same, or renew the present, or "take new securities for all or either of the said "debts, in the same manner as I could do myself; and "in particular, and without prejudice to the foresaid "generality, the principal sum due by an heritable "bond, of date the 6th day of January 1810 years, by "Miss Jane Whittet, now spouse to Alexander Greig, "esq., writer to the signet, to and in favour of me, "therein designed John Johnston, and my deceased "sister, Wilhelmina Johnston, for the sum of 5,000*l.* "sterling." He then fully described the debt, as in Mr. Whittet's settlement, and gave "full power to "my said commissioner to grant, execute, and deliver "all requisite discharges and renunciations, assigna-"tions, receipts, or other conveyances, in relation to

" the before specified and all other debts and sums due " to me."

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This factory was delivered with a holograph memorandum as to the management of his affairs, commencing thus:—"First. In regard to the debt due by Mr. and Mrs. " Greig, of which 5,000*l.* is the principal sum contained " in the bond, and 1,000*l.* of interest, converted into " principal at the first term of Martinmas after my " majority in 1820, and upon which sum of 6,000*l.* the " interest has been paid up to Whitsunday 1825, at " four per cent., being the agreed on rate till further " intimation, Mr. Johnston will cause intimate to " Mr. and Mrs. Greig, that the money must be paid " up at Martinmas next; failing which term the sum " of five per cent. must be paid upon the same, and if " not paid is authorized to take all legal steps for re- " covering the same; and beyond the term of Whit- " sunday 1826 it ought not to be allowed to lie."

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On 2d September of the same year, he wrote to Mr. Greig that he had executed the commission for the purposes above mentioned, and a correspondence took place, tending to prove the fact that Mr. Johnston desired to have his money paid up. During the course of it, Mr. Greig, on 16th March 1828, paid 1,000*l.* of accumulated interest, and 300*l.* of arrears. An action of mails and duties was then raised against Mr. Greig and his tenant on 25th January 1827, but before any money was recovered, accounts were received that John Johnston had died on 10th March 1826 intestate.

The appellant, Mrs. Greig, thereafter procured herself served heiress of provision in special to him as to the heritable bond of 5,000*l.*, and completed her title by a precept of clare constat and infeftment. She also

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made up a title by a precept of clare constat and infeftment, as heiress of provision in special to Wilhelmina Johnston's half of the provision. Shortly afterwards the respondent George Richardson Johnston, (who was the eldest son of Mr. William Glen Johnston by a second marriage, and who was therefore brother consanguinean of John Johnston and Wilhelmina Johnston,) purchased brieves from Chancery, directed to the sheriff, for serving him nearest and lawful heir of line and of conquest in special to them; but Mr. and Mrs. Greig appeared, and objected to the services, on the ground that the fee was already full by Mrs. Greig's infeftments; and the sheriff substitute, on 26th May 1828, sustained the objection, and dismissed the claims.

George Richardson Johnston advocated the brieves, but in the meantime, took out other brieves, directed to the magistrates of Edinburgh, and obtained himself served heir of line and of conquest in general to John Johnston and Wilhelmina Johnston, and thereupon raised an action of reduction of Mrs. Greig's titles, and these processes were conjoined.

In the meantime another question arose in the following manner:—John Whittet, by his settlement, gave power to his widow to test upon 500*l.* at her pleasure. On 12th December 1814, she executed a trust deed and settlement, by which she conveyed her whole property to trustees for the purpose of being sold, with directions to lend out the proceeds, after payment of her debts and expenses, and "to take the vouchers thereof in favour "of them, for the uses and purposes expressed in the "present trust." She then directed, that the funds "shall, "with the accumulated interest thereon, be paid to the "said John Johnston, at the first term of Martinmas

" immediately after he shall attain the age of twenty-one " years complete; but failing his surviving that term of " Martinmas, or, if he should survive that term, then " failing his specially disponing the same himself, I " appoint, in both of these events, my said trustees to " accumulate the said trust funds, adding the interest " thereto annually, until the first term of Whitsunday or " Martinmas after the children already born, or who shall " be born, of my daughter, the said Jane Whittet, shall " all attain the age of twenty-one years complete, and " then to pay the said trust funds and accumulated " interest to such of them as shall be alive at that term, " equally, share and share alike; and should only one " survive, to pay the whole to him or her."

The trustees were appointed tutors and curators to John Johnston and to the children of the appellant, in so far as concerned the provisions, and also to be the sole executors. The widow died on 24th October 1821, being upwards of a year after John Johnston had become major. Her estate was entirely moveable, and consisted partly of a debt, specially conveyed, due by Mr. John Miller. An inventory of the estate was given up by one of the trustees, in which that debt was included. In the above factory granted by John Johnston, this debt was mentioned in the following terms, as one which his factor was empowered to recover:—" Also the sum of " 468*l.* 16*s.* 9*d.* due to me by open account, by John " Miller, esquire, Lincoln's Inn, London, conform to " the state thereof annexed to his letter to me, dated " 2d of January 1824, together with whole interest " due, or which may become due thereon in time " coming."

In the holograph note of instructions which he de-

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livered to his factor, he referred to the same debt in the following terms:—" 5. As to the debt due by Mr. " Miller, London, instructions have been given to John " and James Miller, writers in Perth, to correspond " with him on the subject."

The factor received payment, on 21st November 1825, from Mr. Miller, of 511*l.* 5*s.* 7*d.*, being the amount of the debt, with interest. John Johnston gave no other special instructions as to the disposal of this money; but, by his note of instructions, he authorized the factor (without saying from what fund) to pay two bills of 300*l.* and 200*l.* which he had signed for Mr. Glen Johnston, his father, on receiving a bond and disposition in security for the amount. The factor applied the money received from Mr. Miller in payment of these two bills; and for repayment of the amount, he took from Mr. Glen Johnston an heritable bond payable to John Johnston, " and his heirs and assignees whomsoever."

The debt which had thus been due by Mr. Miller was now claimed by Mr. and Mrs. Greig, for behoof of their children, as substitutes under Mrs. Whittet's deed, and by Mr. Glen Johnston for behoof of his younger children of the second marriage, as executors of John Johnston, their brother consanguinean. To try this question, and also to try the question of right to the 1,300*l.*, of which the factor had received payment from Mr. Greig, and which was claimed by Mr. Glen Johnston's younger children, and also by Mr. and Mrs. Greig, the factor raised a process of multiplepoinding and exoneration, which was conjoined with the other processes. They were reported on cases to the First Division of Court, who being equally divided in opinion the follow

ing queries were sent to the other Judges: — "1. "Whether, by virtue of the deed of settlement executed "by old Mr. John Whittet, dated 12th May 1802, in "relation to the provision of 5,000*l.* now in dispute "between these parties, Mrs. Greig is entitled to suc- "ceed to it under the substitution or destination in her "favour? Or, whether the settlement is to be con- "sidered as a conditional institution, and that, as John "Johnston survived the term of payment, and died with- "out issue, the succession opened to his own heirs and "representatives? 2. Whatever would have been the "right of succession, if the provision of 5,000*l.* had "vested on old Whittet's settlement, whether the con- "duct of John Johnston, in regard to the heritable "bond taken to him by his tutors for said 5,000*l.* "operated as a confirmation of the destination therein "contained in favour of Mrs. Greig? 3. Supposing "John Johnston to have thereby adopted and confirmed "the destination in favour of Mrs. Greig, whether his "subsequent conduct and instructions to his factor, on "the eve of his going abroad, and the conduct and "proceedings of his factor and agent, and also the "conduct and proceedings of Mr. and Mrs. Greig, "operated as an extinction of said destination, so as "to open the succession to the 5,000*l.* to his own heirs "and representatives? 4. Whether, in all the circum- "stances of the case, the right to the 5,000*l.* in dispute "belonged, upon John Johnston's death, to his legal "representatives, or to Mrs. Greig? Whether, by the "trust deed and settlement of Mrs. Whittet, dated 12th "December 1814, and the subsequent proceedings "thereto, the sum of 300*l.* &c. ought to be laid out for "behalf of Mrs. Greig's children till they shall come of

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" age, and to be then divided between them? Or, " whether said sum now belongs, or ought to be paid, to " the heirs and representatives of John Johnston?"

On considering the questions remitted to them, the consulted Judges gave opinions*, and the Court pronounced this interlocutor on 28th June 1831:—" The " Lords having resumed consideration of the revised " cases for the parties, with the record, and whole pro- " cess, together with the opinions of the other Judges, " they, in the reduction and declarator, reduce, decern, " find, and declare in terms of the conclusions of the " libel; in the advocation, remit to Lord Corehouse, " the Ordinary in the case, to advocate the brieves, to " alter the interlocutor of the sheriff, and to remit to " the junior permanent Lord Ordinary to be Judge in " the services, and to proceed with the same; in the " multiplepoinding and exoneration, rank and prefer " George Richardson Johnston, James Charles John- " ston, Charles Richardson Johnston, David Johnston, " Thomas Glen Johnston, Henry Johnston, John Ri- " chardson Johnston, Georgina Johnston, and Harriet " Johnston†, upon the funds in medio, in terms of their " respective claims and interest, and decern in the " preference and against the raiser; and upon his " accounting for or paying the said funds in medio to " them, exoner and discharge him in terms of the libel; " but reserving all questions of preference or division " between the pursuer, advocator, and claimants before " named, inter se, and decern; further, find no ex- " penses due to either party."

Mrs. Greig appealed.

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* See these Opinions, 9 S. D. B. 806.

† Children of Mr. Glen Johnstone.

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Appellants.—By virtue of the substitution contained in Mr. Whittet's deed of settlement, and renewed in the subsequent securities, the appellant, Mrs. Greig, in consequence of both Wilhelmina and John Johnston dying without lawful children, succeeded to the provision of 5,000*l.* By the acts which John Johnston performed, after he became of age, and more especially by the discharge and renunciation of 6th February 1821, he not only homologated the deed of settlement, but plainly evinced his knowledge that the substitution in Mrs. Greig's favour still subsisted, as well as his desire that it should continue effectual. It was therefore incompetent for the respondent George Richardson Johnston to obtain a service either as heir of Wilhelmina Johnston, or as heir of John Johnston.

Again, by virtue of the substitution contained in Mrs. Whittet's trust disposition and deed of settlement, as John Johnston died without having "specially disponed" the trust funds, the whole of these funds fall to be accumulated till the first Whitsunday or Martinmas after Mrs. Greig's youngest child shall attain majority, and to be then equally divided among her surviving children.*

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* Binning v. Creditors of Auchenbreck, 15th Dec. 1749, Mor. 6337; Omey v. M'Larty, 19th Nov. 1788, Mor. 6340; Ersk. ii. 3, 49; Ersk. ii. 2, 14., 1. 7, 39; Sir Geo. Mackenzie, iii. 8, 20; Stair, iii. 5, 51; Ersk. iii. 8, 44; Campbell v. Campbell and Macmillan, 12th June 1740, Mor. 14855; Craigie & Stewart's Rep. i. p. 2. p. 343; Fowke v. Duncans, 1st March 1770, Mor. 8092; Ersk. iii. 8, 47; Bruce v. Bruce, 2d June 1829, Shaw and Dunlop, vii. p. 692; Ersk. ii. 2, 16. iii. 9, 9; Cuninghams v. Glen, 27th Feb. 1812, F. C.; Ersk. ii. 9, 64, 66; Bell, 4th edit. v. ii. p. 6. sect. 3, 4; Binning, 21st Jan. 1767, Mor. 13,047; Wood, 26th June 1789, Mor. 13,043; Magistrates of Montrose, 21st Nov. 1738, Mor. 6398; Wallace, 28th Jan. 1807, Mor. No. 6, App. v. Clause; Baillies, 4th June 1822, F. C.; Ersk. iii. 9, 6., ii. 2, 6, 9., iii. 8, 20; Stewart's Answers to Dirleton's Doubts, 2d edit. p. 20. Ersk. iii. 9, 6; Fleming, 6th June 1798, Mor. p. 8111; Ersk. iii. 8, 20; Stewart's Answers, p. 25; Stair, iii. 3, 22; Evan's Trans. of Pothier, Ob. p. 2. c. 3. t. 1. sec. 3. foot note; Ersk. iii. 9, 14.

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Respondents.—The right to the 5,000*l*. vested absolutely in John Johnston, upon his attaining majority, and thenceforth the declaration as to that right eventually devolving upon Mrs. Greig, became ineffectual. Even although the contingent destination had been a substitution, such substitution would have been revoked or extinguished by the acts of John Johnston and his factor, after he had attained majority. Requisitions for payment were made upon Mr. and Mrs. Greig by John Johnston, and they cannot be allowed to found upon their own failure to pay these sums, in terms of their obligation, in order to defeat the rights of his representatives. In like manner the provisions under the deed of Mrs. Whittet vested in John Johnston, and now belong to his legal representatives.*

LORD CHANCELLOR.—My Lords, this case, which has been argued with very great learning on both sides, is one which has been considered important in the Court below, both as regards the amount of property and as regards the principle of law involved. My Lords, I do not intend at present to urge your Lordships to come to a final decision on this question, but I shall state the

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* Oswald, 18th June 1680, Mor. Dic. 2948; Ballantyne, Dec. 1687, Mor. 2953; Watt, 8th Dec. 1702, Mor. 2954; Lord Reyston, 16th Feb. 1715, Mor. 2955; Drummond, 7th July 1738, Mor. 3002; Primroses, 26th Feb. 1754, Mor. 3002; Mitchelson, 15th Nov. 1820, F.C.; Hamilton, 8th Dec. 1687, Mor. 14,850 and 6346; Smith, 14th Dec. 1710; Denholm, Jan. 1726; Brown v. Coventry, 2d June 1792; Bell's Cases; Ersk. iii. 8, 44. note, 465; Haldane, 15th Feb. 1753, Mor. 3308; Blair, 9th Feb. 1742; Brown's Sup. vol. v. p. 718; Inst. de Legat, l. 2, f. 20, sect. 21; De Reg. Jur. l. 161; Ersk. iii. 3, 85., iii. 9, 9; Hutchison v. Drummond, 20th Jan. 1697, Mor. 2995; Ersk. iii. 3, 9; Douglas, Heron, and Company v. Reddich, 1st March 1793, affirmed, Mor. 11,045; Stair, iii. 2, 53; Bank. i. 519, sec. 127; Ersk. ii. 3, 49.

view which I at present take of the main question of law—I mean that respecting the substitutional condition, whether the words in question make out the conditional institution or the substitution; and I shall state to your Lordships very shortly why I wish to have a little further opportunity of considering one or two of the cases which bear upon that point. My own opinion undoubtedly is, that the principle of law laid down in Brown v. Coventry*, as applicable to this case, is clearly established by that decision as the general rule of the law of Scotland on these questions, and may be reconciled with the principle laid down in the other cases. Upon the former of those questions I entertain little or no doubt; it is upon the latter—the possibility of reconciling Brown v. Coventry with the other cases, particularly the case of Campbell v. Campbell†—it is on this that I wish to have further time.

My Lords, I take it there hardly ever was a case which underwent more full discussion than the case of Brown v. Coventry. It appears to have excited great attention among the Judges of the Court below; they seem to have felt that the law at the time was not a little fluctuating, not fixed upon such a steady and secure basis as might have been desirable; and they therefore applied themselves to the consideration of the question with an attention proportioned to the importance of the principle of law involved in it, and to their feeling of the necessity that this principle should be finally settled. Those Judges were men of the greatest learning and ability that at any period ever

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* 2d June 1792, Bell's Cases.

† 12th June 1740, Mor. 14,855, Cr. & St. p. 343.

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adorned the Scottish bench. The Lord Justice Clerk Braxfield, and Lord Eskgrove, very eminent lawyers of great experience in Scotch law,—those and the other learned Judges applied themselves in disposing of that question, and I find that they and their brethren gave an unanimous decision upon the subject; one of them expressing a hope that now the question might be held to be ultimately decided, and never be contested. Now, what is the rule to be extracted from the decision in that case? Taking the opinions of all the learned Judges, and the arguments and reasons on which they are supported, I consider the rule to be this,—that though true it is by the Scotch law you may provide a substitution in personal estate—though true it is you may provide, what the Roman law prohibited you from doing, for the heir of an heir—yet in every case of doubt the presumption is not only strong, but overruling, against the substitution, and in favour of the conditional institution; not that any express form of words is necessary to create a substitution—not that there is any technical form of expression which shall alone amount to a valid declaration of the intention of the party disposing of his property to exclude conditional institution, and to provide substitution—but that, taking the words which he uses, and taking, as in every other case, the whole instrument together, and, according to the ordinary and sound rule of construction, to give each part its meaning from a view of the whole taken together, you are to discover so plainly, so undeniably, so undisputably, the meaning of the party to make substitution, as leaves you no room for doubt; and in that case only, you have a right to say that he has created a substitution touching the personal estate. If, then, the

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words which he uses are capable of either sense,—if the whole of the disposition is so framed that it may be applicable either to the one or to the other,—I take the rule in the case of Brown v. Coventry to be, that you are to construe it as a conditional institution, and not a substitution. In short, it must be exclusive—the instrument must be such as to exclude conditional institution before you can say that the substitution has been validly constituted.

Now, I have stated to your Lordships that there is some doubt remaining in my mind how far this principle,—that is, how far the case of Brown v. Coventry is reconcileable with the earlier case of Campbell v. Campbell. Undoubtedly it would be a painful alternative to be reduced to ask your Lordships to depart from one of those precedents, or from the other, because both of the decisions rest upon very high authority; one of them, indeed, upon an affirmance of the judgment of the Court below, pronounced in this House, and pronounced at a time when your Lordships were advised by no less a Judge than Lord Eldon. Nevertheless, supposing it to be found impossible to reconcile these two cases, it is not to be doubted that Brown v. Coventry has uniformly been held to be law,—that the very Judges against whose argument the authority in that case might be adduced in the present admit, explicitly admit, its weight; and one of those learned Judges describes it as a decision not now to be questioned, and as having for forty years past regulated the conduct of the King's subjects in Scotland and their advisers. It would be vexatious indeed, then, were we forced to make the authority of such a decision bend before the earlier case of Campbell v. Campbell. But I am by no means clear

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that the two cases are irreconcileable. It appears to have been the opinion of my Lord President Campbell that they are not so. I may take it, again, to have been the general opinion of the learned Judges who decided the latter of the two cases that they were not irreconcileable, for Campbell v. Campbell was distinctly pressed upon the Court in the argument of Brown v. Coventry. It was dealt with by, I think, more than one of the learned Judges, but explicitly by Lord President Campbell; and he endeavoured to distinguish the two by a view of the circumstances of the earlier case, and by contrasting them with the case then at the bar—I mean Brown v. Coventry. Whether or not the reasons which appear in the printed case here to have been the foundation of the argument at your Lordships bar are consistent altogether with the distinction taken by the Lord President Campbell to which I have just referred, and whether or not the report of Lord Kilkerran in that case, which goes upon somewhat different reasons from those stated in the printed appeal case—whether or not that fuller report of the reasons of the Court below is also reconcileable with the distinction taken by Lord President Campbell, and upon which he differs in the second case,—I will not now stop to inquire. These are among the matters which I wish to have an opportunity of investigating before I finally dispose of this case. Lord President Campbell seems to have thrown some doubt upon the authority of Campbell v. Campbell; he does not state it so strongly as the note of Kilkerran states with respect to the other case, that of Christie in the year 1681, nor does he state it so strongly as he himself states the case of Lane v. Nichol; he does not state that that is not law, but throws very con-

siderable doubt, sufficient doubt to give one a strong inclination to believe that his Lordship was not quite satisfied with the decision of Campbell v. Campbell; for I think the last remark he makes upon it is, that it does not appear clearly upon what ground the money was given. Be that as it may, those are among the points that I wish to have an opportunity of looking further into, and I think it is very possible that the two cases may be found to be reconcileable. As at present advised, undoubtedly, on the first point, my opinion goes with the Court below, considering the principle to be established in the case of Brown v. Coventry; and that in the present case there is no distinctive intention shown to provide a substitution—that there is nothing here which excludes much more than the possibility of a conditional institution; that upon the whole, therefore, I agree with the learned Judges in the Court below in holding it to be a conditional institution. I will not trouble your Lordships with the grounds of that opinion further than to state, that my opinion upon this, and the reasons of that opinion, are most distinctly expressed in the earlier part of the opinion of one of the learned consulted Judges, Lord Cringletie. My Lords, on the other points I shall not trouble your Lordships with any observations. Upon the last point as to the 511*l.*, I have no doubt whatever, and I feel no hesitation in agreeing with the learned Judges in the Court below. The only ground on which I wish your Lordships to favour me with time further to consider this question is that which I have stated.

LORD WYNFORD.—My Lords, it is not my intention, after what has been said by my noble and learned friend, to press your Lordships for an immediate deci-

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sion; but I confess to your Lordships that my mind is made up upon another point, giving the go-by to the point upon which my noble and learned friend has addressed you with so much ability. I am prepared humbly to submit to your Lordships that the judgment of the Court below ought to be affirmed. But, my Lords, upon the first point, after what my noble and learned friend has said, I will not venture to deal with that opinion, but will only state what my present impression is. If we had merely to look at the instrument itself, I think that none of us should have any doubt that the instant these parties became of age, it, in the language of the law, became a vested interest, and belonged to that party. My Lords, it happens that too much light is apt to dazzle the eye; and I think, upon questions of this sort, too much learning is very much apt to puzzle that which is in itself perfectly clear. My Lords, if you look at the words of this instrument, I think no individual at this time of day would doubt. I am quite sure, on the construction of instruments, pretty much the same rule pervades in one part of the island as the other. The words are these:—"With and under the burdens and "provisions therein specified, and particularly with "the burden of paying to each of my two granchildren, "viz. me the said John Whittet Johnston, therein de- "signed John Johnston, and Wilhelmina Johnston my "sister, the sum of 2,500*l.* sterling; at the first Whit- "sunday or Martinmas after we had respectively "attained the age of twenty-one years complete, with "the legal interest of the same from and after his "death, aye and until the same was paid; it being pro- "vided that, in the event of the death of either of us "without lawful children, the survivor should succeed

" to the share of the predeceaser; and in the event of " the death of us both without lawful children, she " the said Jane Whittet, and her heirs, executors, and " assignees, should succeed to the whole of what was " therein provided to us." Now I should think it perfectly clear, if it were not for the conflicting decisions, that that means " should die previous to her attain- " ing the age of twenty-one;" but undoubtedly, as my noble and learned friend has stated, that case of Campbell v. Campbell would lead one to a contrary conclusion. It is impossible to forget the high authority by which that case was decided. I think at this time of day we have not very clearly before us the manner in which that case was argued before this House; but it does seem to me, I confess, notwithstanding the high authority by which it was decided, to be a most extraordinary decision; but that principle which we act upon, I believe, in both parts of the island,—namely, that the intention is to govern—is the true principle. Here a young man comes from the East Indies—his father is an old man in Scotland — he supposes his father to be dead; and what does he do? He says, "If, contrary to my idea upon the subject, my " old father should be dead, that it may not be a " lapsed legacy I give it to my daughter." It is quite clear what he meant; that if his father was alive, his father should take it absolutely; but that if the father was dead, in order to prevent a lapsed legacy, it should go to the daughter. I say, if that case is good law, it is very difficult to distinguish it from the present. That case was under the consideration of the Court in the case of Brown v. Coventry, which case appears to have been sanctioned by this House, and appears to have

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been sanctioned by the general approval of the Scotch bar from the time it was pronounced down to the present time. According to that case, the principles upon which that case was decided are very clearly and distinctly stated; the distinction was made between real and personal property; real property in Scotland is governed by the feudal law and custom of Scotland; personal property in Scotland is governed by a different law, namely, by the Roman law; they proceed accordingly in that case; they say, if it was real property, you are to presume it was the intention of the party to grant what is called a substitution; if personal property, it is to be presumed to be the intention of the party to give an immediate and complete interest in it at once; and unless there are words so strong as to leave no doubt, personal property, though real property, would be settled in this manner, personal property remains unfettered at the disposal of the party. This appears to me a clear, plain, rational principle, that cannot be departed from without producing great prejudice to the people of Scotland under the administration of justice. But, my Lords, I confess, though I doubted about these points for some time in consequence of those conflicting cases, I am still not desirous of finally deciding the matter, though I think it would be difficult for me to bring myself to form any other opinion than that which I have now expressed. The ground which struck me before I heard the argument of the counsel for the respondents, on which I think this judgment ought to be maintained, is, that this man Johnston did get the complete possession and dominion of this property, and that therefore there is an end of the entail. My Lords, I do not put it upon the instru-

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ment that was executed, for I agree with the Judges in the Court of Scotland that that could have no effect with respect to the entail—that which took place during the minority of Johnston. But when Johnston came of age, what does he do? When he is of age he executes a deed, which the other party accepts; therefore it is a deed between both parties, by which the security is confirmed upon the estates in Scotland, he taking all the benefit of the security which these different estates gives him, but certainly giving a different destination to the property secured; for in the clause of that instrument it is distinctly stated, that from that time this property is to be considered for the benefit of him, his heirs, executors, and successors. Now, Mr. Murray cited to your Lordships two cases. It appears to me that it did not want the authority of any case whatever; but if it did, those two cases have completely decided it, as I think. It appears to me, that where the word "heirs" is used in any instrument, unless there are other words to show that that does not mean heirs of line, it ought to be taken to mean heirs of line; but if there be any doubt about the word heirs, there is the word "executors." Now, with respect to the word "executors," it appears to me that it is impossible to put any other construction upon that than that it must mean a gift of the property; the destination is, that it is to go to his executors, and not the executors of any other person—not the persons who take as executors under any other deeds. But if it were possible to entertain any doubt on this point, the two cases of Douglas, and a name which does not immediately occur to me, nor is it necessary to mention it, completely settle that point. By those two cases it was decided by the high

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authority of this House, that if the word "heirs" be mentioned it must mean "heirs of line," unless the contrary be shown by some words that are to be found in some instrument, either in the instrument itself, or some instrument connected with and controlling the instrument itself. In that case it was proposed to offer parole testimony. I was a good deal surprised that an attempt should be made here to control any instrument at the bar of this House by parol testimony. The House, however, in that case rejected the parol testimony, and decided that, according to the words of the instrument, it was to be taken as heirs of line. Then if it is to be taken as heirs of line, has not a different destination been given to this property? Is it possible to consider, subsequent to this, that this money was not as completely reduced into the possession of this party as if it had actually found its way into the pocket of the person entitled, and been by him, after it had been so found in his pocket, applied to different purposes? Getting rid, therefore, of all doubt and difficulty on the other point, I have no hesitation in saying I agree with Lord Cringletie, who has given an excellent judgment on this part of the case; and though the other Judges do not speak upon it, his judgment is confirmed by the judgments of the other Judges, that this is such an alteration of the destination as destroys the deed.

Adjourned.

LORD CHANCELLOR.—My Lords, there are several cases which now stand for the decision of your Lordships, the first of which is that of Whittet v. Johnston, a case of great importance in point of amount, as well as in respect of the principle it involved, and on which the learned Judges in the Court below were somewhat divided in

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their opinion; the Judges in the First Division of the Court of Session having been equally divided in opinion, the learned Judges of the Second Division and the permanent Lords Ordinary were consulted. The questions were considered by them, and ultimately judgment was given that it was only a conditional institution. My Lords, this case was very fully argued at the bar; and after the argument some observations were addressed to your Lordships by my noble and learned friend, whose assistance your Lordships had when the question was considered, and also by myself, and it stood over for further consideration, with a desire, if possible, to reconcile the principle of the judgment in this case and also the principle of the judgment in another case in which a question of the same description arose, — Brown v. Coventry, in 1792, with the case of Campbell v. Campbell, decided in the Court of Session as far back as nearly a century ago, namely, in 1740, and afterwards affirmed on appeal by your Lordships. That was a case most gravely considered; and I was desirous of being enabled to see that there was no discrepancy between the rules which governed the decision in the Court below as well as here in that case, and the principles upon which the case of Brown v. Coventry depended. That case was argued very much upon the principles of the English law. My Lords, I do not mean to say that all the difficulty I felt is entirely removed; the further consideration of the cases has not enabled me to say that I can satisfactorily get over the difficulty which then occurred to me, and to see the principles on which the Court proceeded so clearly as I could wish; nevertheless, as I stated before, it is some satisfaction to me to know that the case of Campbell v. Campbell was not

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passed over in disposing of this question in Brown v. Coventry; on the contrary, it was distinctly before the Court, and it is distinctly referred to in the judgment of one of the learned Judges, Sir Ilay Campbell, in the course of his observations on that case. Ever since the year 1792 Brown v. Coventry has been the law of the Court, and I know no instance in which it has ever been called in question. I am therefore of the opinion, which I held when I last addressed your Lordships upon this subject, that, notwithstanding the apparent difference to which I then adverted, your Lordships must proceed on that case. The circumstances are not precisely the same; still it is difficult, but I do not say it is impossible, to reconcile them. If, however, there may be considered to be some difference in the principle, admitting for the moment the law to have been somewhat changed, I am not, under the circumstances, prepared to advise the House to go back to the antecedent case of Campbell v. Campbell. Having entered fully into the case on the former occasion, I will now only move your Lordships to affirm this judgment.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House; and that the interlocutors, so far as therein complained of, be and the same are hereby affirmed.

RICHARDSON and CONNEL — ALEXANDER DOBIE, Solicitors.