[HEARD 27*th June*—JUDGMENT 13*th August*, 1846.]

JOHN CUNNINGHAME, ESQ., of Hensol, *Appellant.*

RODERICK MC LEOD, surviving Trustee appointed by the deceased Anne, Lady Ashburton, *Respondent.*

Deeds.—Writs.—Records.—It is no objection to the validity of a deed, that within the six months allowed by the Statute 1685, cap. 38. after the deed had been given in to be recorded, and an extract of it had been issued by the keeper of the records, as if it had been recorded, but before it had been actually booked in the register, it had been borrowed up from the keeper of the register, and an error in its testing clause corrected by words introduced.

Revocation.—Onerous or Gratuitous—Where the lands of a woman are, by the settlement upon her marriage, limited to the issue of the marriage, and failing such issue, to her "nearest heirs at law," it is in the power of the woman after dissolution of the marriage, by divorce, without issue, to convey the lands away from her heirs at law, as not being parties having an onerous claim under the settlement.

Faculty.—Found that a faculty, reserved in a marriage settlement which directed the trustees of the settlement to execute an entail of lands upon the issue male and female of the marriage, whom failing, to such persons and uses as should be named and appointed by the wife in any deed of settlement or writing executed by her during the subsistence of the marriage, or after its dissolution by the *death* of the husband, was well executed by an absolute disposition, not containing any reference to the faculty, and made after the dissolution of the marriage by the *divorce* of the husband.

ON the 29th of June, 1826, Lady Ashburton made a trust disposition, whereby on the recital of a contemplated marriage between her and Ranald G. Macdonald, and of a contract of marriage between them, whereby Macdonald had renounced any claim for tocher and his *jus mariti* and right of courtesy, and

CUNNINGHAME *v.* MC LEOD.—13th August, 1846.

whereby it was agreed that she should have the power in regard to her estate, real and personal, which by this trust-disposition she reserved to herself, she conveyed her real and personal estate to trustees, of whom the respondent was the survivor, in trust, in the first place, for payment of her debts, and after this, during the joint lives of herself and Macdonald, to pay her the interest and dividends for her own separate use, and upon her own receipt; and, in the event of Macdonald predeceasing her, to pay the interest and dividends to her, her heirs, executors or assignees; but in case she should predecease him, then to hold the annual proceeds in trust for the children of the marriage in such proportions as she should appoint; and in the event of there being no children, for such persons as she should appoint by her last will, or any writing of the nature of a deed of settlement: "Providing "further, as it is hereby declared, that if I shall happen to die "before my said intended husband, it shall be lawful to me, by "any deed of settlement, or by my last will and testament in "writing, or by any codicil or codicils thereto, or any writing "or writings of the nature of a will or codicil, to direct and "appoint any sum or sums of money, not exceeding in whole "the principal sum of ten thousand pounds sterling, to be "levied or raised out of the trust-funds and estate hereby con-"veyed, and to be paid and applied to such person or persons, "and to such intents and purposes as I shall think proper, and "shall, in and by such deed of settlement, will, codicil, or "writing, express or declare, and my said acting trustees or "trustee for the time are hereby directed and required to levy "and raise, and pay and apply the said sum accordingly, not-"withstanding of any thing contained herein to the contrary. "And further, it is hereby specially provided and declared, that "it shall be lawful to, and in the power of my said acting "trustees or trustee, and their or his aforesaid, and they or he "are hereby authorized and directed, as soon as conveniently "may be, to purchase at and for such price or prices as to them

" or him shall appear reasonable and proper, such part or parts " of the estate of Arisaig, in the county of Inverness, including " the mansion-house and grounds belonging to, and at present " in the occupation of, the said Ranald George Macdonald, as " my said trustees or trustee shall think proper; together also " with one or more freehold qualifications entitling the holder " to vote for a member of Parliament for the said county of " Inverness: and in case of my said trustees or trustee being " unable to conclude a bargain for such part or parts of the said " estate of Arisaig, on such terms as they shall think reasonable, " then it shall be lawful to them or him, and they or he are " hereby authorized and directed, as soon thereafter as conveni- " ently may be, to purchase at and for such price or prices as " to the said trustees or trustee shall seem reasonable and " proper, any other landed estate in Scotland that they may " think preferable, and also one or more freehold qualifications " entitling the holder to vote for a member of Parliament within " the county or counties where the lands so to be purchased " may be situated; and either in one purchase or in several " purchases, and to levy and raise the money, which shall be " wanted for making the said purchases respectively, by and " out of the said trust-monies, stocks, funds, and securities, and " to pay and apply the sum or sums of money so to be levied " or raised in such purchase or purchases accordingly. But it " is hereby expressly declared, that it shall not be obligatory " upon my said trustees or trustee, or their and his aforesaid, to " make any such purchase or purchases at and for any greater " price or prices than they or he shall think reasonable: and " further, it is hereby provided and declared that, upon the " completion of the said purchase or purchases of the said " landed estate in Scotland, the disposition or dispositions, or " conveyances thereof, shall be taken to, and in favour of, " my said trustees or trustee, and their or his aforesaid, as par- " ticularly before specified, in their character of trustees or

CUNNINGHAME *v.* MC LEOD.—13th August, 1846.

" trustee, to be held by them in trust, to pay and apply the " rents, issues, and profits thereof to such person or persons " and for such ends, uses, and purposes as I shall from time to " time, notwithstanding my marriage, and whether I shall " remain married or single, appoint, by any writing under my " hand: but not so as to dispose of, or affect the same, or any " part thereof, by any sale, mortgage, or otherwise in the way " of anticipation; and failing such direction or appointment, the " said rents, issues, and profits shall be paid by my said trustees " or trustee into my own hands, for my sole and separate use " and benefit, independently and exclusively of the said Ranald " George Macdonald, or of any future husband after his decease, " and without being in any way subject to the debts, claims, " control, interference, or engagements *jure mariti*, or by right " of courtesy or otherwise, or the debts present or future of the " said Ranald George Macdonald, or of any future husband I " may intermarry with, or to the diligence of their or either of " their creditors; and my own receipt in writing, or the receipt " of any person appointed by me from time to time, whether " married or single, shall be sufficient and valid discharges for " the same to my said trustees or trustee, and their or his afore- " said: and further, as soon as my said trustees or trustee shall " have completed a proper feudal title in their persons to the " said landed estate in Scotland, and freehold qualifications so " to be purchased, it shall be incumbent upon, and I hereby " authorize and require them to execute a deed or deeds of strict " entail of the said landed estate and freehold qualifications, " disponing and conveying the same after my decease (but " always under and subject to all the clauses, prohibitory, " irritant, and resolutive, necessary and accustomed, by the law " of Scotland, according to the most approved styles of convey- " ancing, for constituting a perfect entail, in all points effectual, " according to the act of the Scottish Parliament, passed in the " year one thousand six hundred and eighty-five, chapter twenty-

" second,) to and in favour of the eldest son to be procreated " of the said marriage between the said Ranald George Mac- " donald and me, and to the heirs whatsoever of the body of " such eldest son." Then followed a series of substitutions, which closed with the following: " And failing issue, male or female, " of my said intended marriage, to such person or persons, or " to such uses and purposes, as shall be named and appointed " by me in any deed of settlement or other writing to be exe- " cuted by me, either during the subsistence of my said intended " marriage, or after its dissolution, by the decease of the said " Ranald George Macdonald; whom all failing, to my own " nearest heirs at law. And the said deed of entail shall contain " all the clauses, prohibitory, irritant, and resolutive, usual and " accustomed, by the law of Scotland as aforesaid, so as to make " the same binding and effectual on the disponee or institute, " and on all the heirs of entail, in terms of the said Act of Par- " liament one thousand six hundred and eighty-five, chapter " twenty-second, before referred to. And it shall be incumbent " on my said trustees or trustee to get the said deed of entail " duly recorded, in terms of the said Act of Parliament. Which " subjects before conveyed, with this right and conveyance " thereof, I, the said Anne Selby, Lady Ashburton, bind and " oblige myself and my aforesaids, to warrant to my said " trustees or trustee and their aforesaids, and to their disponees " or assignees at all hands and against all mortals, as law " will."

The trustees accepted of the trust put upon them by this deed, and, in the year 1829, purchased the lands of Arisaig, which they feudally vested in themselves by infeftment.

In the same year, 1829, the marriage between Lady Ashburton and Macdonald was dissolved by a decree of divorce obtained by her, without any issue having been born of the marriage.

On the 12th of July, 1833, Lady Ashburton sent to her

law agent, who was one of the trustees under the deed of 1826, a holograph writing or paper of instructions for her will, in which were the following expressions: "The property of Arisaig "to be left *absolutely* to Lord Cranstoun, *whom failing*, the "property to be sold, and out of the purchase-money is to be "given, &c.:" then followed a variety of legacies: "I make "my brother, John Cunninghame, and Lord Cranstoun, execu- "tors of my will. I reserve the right and power to change the "will, should circumstances render it necessary."

On the 24th of March, 1834, Lady Ashburton, who was then in Paris, wrote out, and signed and sealed in the presence of two witnesses, the following paper: "The deed making out "to put Lord Cranstoun in possession of Arisaig at my death, "not having reached me to be signed by me, and witnessed by "others, may cause a dispute. I here repeat, that I leave him "that property; and, as I may now be in a dying state, I desire "that this paper may be considered as my last will and testa- "ment, which is witnessed by James Elton, Esq., and Dr. "Chermside, my physician."

This paper her ladyship transmitted, on the 28th March, 1834, to her solicitor in London, inclosed in a letter in these terms: "The inclosed was written by me at a time when I was "doubtful whether I could live above a few hours. By mistake "my maid gave me a large teaspoonful of laudanum instead of "red lavender. I am very uneasy at the Scotch deed being "delayed so long; and the paper I now send is to show "what my intentions are, to enable them to be carried into "execution, although the deed is not here. It may not be "made out *according* to law, but my meaning cannot be mis- "understood. I am still too unwell to leave Paris; but on "Saturday or Sunday we hope to be at Fontainebleau, where "we shall remain until we are told we can pass the Jura moun- "tains.

"After all the legacies are paid out of the funded property,

" what will the balance be which remains? My head is " still very much confused, but I hope you will make out my " meaning."

On the 21st May, 1835, Lady Ashburton executed an absolute disposition as " heritable proprietrix of the lands of Arisaig," in favour of James Lord Cranstoun, his heirs and assignees whomsoever, heritably and irredeemably, and obliged herself to procure herself duly infeft, and seised in the lands, and granted procuratory and precept for infefting the disponee in ordinary form. This deed made no reference in any part to the trust disposition of 1826, nor to any right existing in the trustees of that deed, nor to any power reserved to her by it. The testing clause of the disposition, as originally written, bore that it had been signed in presence of " David William Crammord," as one of the instrumentary witnesses.

Lady Ashburton died in July 1835, being survived by Macdonald, her divorced husband, without having obtained from the trustees of the deed of 1826, any conveyance to herself of the lands of Arisaig, or in any other way procured herself to be infeft in these lands.

The disposition in favour of Lord Cranstoun was given in to the keeper of the register at Edinburgh, upon the 8th day of August, 1835, in order to its being recorded, and upon the 11th of that month an extract of the deed was given out by the keeper, as if it had been recorded. In the month of January 1836, the solicitor in Edinburgh of Lord Cranstoun, discovered that the true name of the instrumentary witness who has been referred to, was Crammond, not Crammord. In consequence, he returned to the keeper of the register, the extract of the disposition which he had obtained, and borrowed from him the disposition itself, which had not as yet been entered upon the books of the register, and transmitted it to London, to the solicitor in whose chambers the deed had been prepared and executed, where the following addition to the testing clause

CUNNINGHAME *v.* MC LEOD.—13th August, 1846.

was made by the same person by whom the deed had been written: "The name of the last subscribing witness being "David William Crammond, the letter *r* next the letter *d* in "his last name, as originally written, being a clerical error, "and these fifty-nine words, counting each of the said letters "*r* and *d* as a word in addition to the testing clause, being "written by the said William Clarke."

Afterwards the deed was returned to the record on the 4th February, 1836. An extract of the deed, which was libelled upon in the action to be presently mentioned, bore that the deed had been given in to be recorded on the 8th of August, 1835; but it contained the addition to the testing clause, which has been mentioned; whether this was the original extract with this addition made to it, or a new extract issued after the return of the deed to the register, did not appear.

The respondent, as the surviving trustee under the deed of 1826, brought an action against the appellant, as the heir-at-law of Lady Ashburton, setting forth the deeds which have been detailed, that he had been required by Lord Cranstoun, to convey to him the lands of Arisaig, but that he could not safely comply with that demand without the consent of the appellant, or the decree of the Court; and that the appellant had refused to give this consent. The summons therefore concluded, that it should be found that "in consequence of the "dissolution of the foresaid marriage between the said Ranald "George Macdonald and the said Anne Selby, Lady Ashburton, "by the foresaid decree of divorce, and there never having "been any issue of the said marriage, there was then, and also "at the time of the execution of the foresaid disposition by the "said Lady Ashburton, in favour of the said James Lord "Cranstoun, no person interested in the foresaid lands, supe-"riorities and others, purchased as aforesaid by the pursuers "and the said William Groom, as trustees foresaid, excepting "the said Anne Selby, Lady Ashburton, herself, and that she

" thereby had the full and unlimited power to alter and revoke " the purposes for which the foresaid trust-disposition was " granted by her in favour of the pursuers, and the said " William Groom, and to direct and appoint, or to authorize " and empower them or their aforesaids, to dispone and convey " the foresaid lands, superiorities, and others before described, " with all right and interest belonging or relating thereto, and " to denude of the foresaid trust to that extent, at any time, " and in favour of any person or persons she might think " proper to name;" and that Lady Ashburton, by the disposition of 21st May, 1835, had revoked the authority in the deed of 1826 to the trustees of that deed, to execute an entail of the lands of Arisaig in the manner therein specified; and that the writings left by Lady Ashburton, and particularly the disposition of 21st May, 1835, constituted sufficient directions and authority to the respondent, to convey the lands to Lord Cranstoun, his heirs and assignees, in implement of the disposition and other writings; and that he was bound and ought to execute such a conveyance; and it should be declared that the conveyance, when executed, would form a valid and sufficient title to the lands in the person of Lord Cranstoun.

In the course of this action, the respondent produced the holograph writings by Lady Ashburton, of 12th July, 1833, and 24th March, 1834, upon which he pleaded that even if the disposition of May, 1835, were invalid, these writings excluded the appellant from the succession to Arisaig, and gave Lord Cranstoun a good title to have the lands conveyed to him.

The appellant pleaded in defence to the action:

" I. As the funds under the management of the pursuers were " conveyed to them in trust for certain purposes, and, among " others, for the purpose of being invested in lands to be strictly " entailed on the heirs of the marriage, and on the failure of " them, and of any other parties to be named by Lady Ash-

CUNNINGHAME *v.* MC LEOD.—13th August, 1846.

" burton, on her nearest heirs-at-law; and as the trust-deed " contained no power of revocation, the pursuers are bound " to proceed with the execution of the trust, and to execute a " strict entail of the lands of Arisaig and others, in terms of the " directions contained in the trust-deed.

" II. As the only powers reserved by Lady Ashburton over " the fee of the property conveyed to the pursuers, were to dis- " pose a portion of it to the extent of 10,000*l.*, and to nominate " and appoint other heirs of entail, besides those named in the " trust-deed, during the subsistence of the marriage, or after its " dissolution by the death of Clanranald, the disposition in " favour of Lord Cranstoun is inoperative and ineffectual; 1st, " Inasmuch as it is not a nomination of heirs under the entail, " but a disposition in fee-simple; and, 2nd, Inasmuch as it was " not executed during the subsistence of the marriage, or after " its dissolution by the death of Clanranald.

" III. Even supposing that Lady Ashburton had the power of " revoking the trust-deed, the disposition to Lord Cranstoun is " ineffectual, because it contains no express revocation of that " deed, and because it proceeds upon the assumption, contrary " to the fact, that Lady Ashburton was heritable proprietrix, " and invested with the full fee of the lands.

" IV. The disposition is further inoperative and ineffectual " as a conveyance of heritage, inasmuch as it is not duly tested " in terms of law.

" V. The addition made to the testing clause after the " granter's death, and after the deed had been recorded, is a vitia- " tion affecting the whole deed, and destroying its authenticity.

" VI. The holograph writings of Lady Ashburton are not " effectual to convey the estate of Arisaig to Lord Cranstoun " away from the defender as heir-at-law; nor do they constitute " any such obligation on him as heir-at-law to convey the pro- " perty to Lord Cranstoun, as admits of being enforced by " adjudication in implement, or otherwise.

CUNNINGHAME *v.* MC LEOD.—13th August, 1846.

"The disposition subsequently granted appears indeed to "be at variance with these holograph instructions."

On the 6th February, 1840, the Lord Ordinary, (*Jeffrey*,) pronounced the following interlocutor, accompanied by the subjoined note:—

"The Lord Ordinary, having heard the counsel for the par- "ties on the closed record, and whole process, and made "*avizandum*, Finds, 1mo. That it is not competent for the pur- "suers, under the present summons, which rests the claim of "Lord Cranstoun to the lands in dispute entirely upon Lady "Ashburton's disposition thereof in his favour, of 21st May, "1835, to found upon the holograph writings cited and referred "to in Articles 6, 7, 8, and 9 of the Condescendence for the "pursuers, as separate instructions to her trustees for the set- "tlement of these lands; and that all their averments as to the "purport and object of those writings are therefore irrelevant "and inadmissible in the present process: Finds, 2do. That the "said disposition of 21st May, 1835, was a probative writ when "produced in judgment by the said pursuers in this process, "and must now be admitted, and receive effect, as the genuine "deed of the said Lady Ashburton; and repels the defender's "objection to the sufficiency or regularity of its execution "accordingly: Finds, 3tio. That the trust-disposition and assig- "nation executed by Lady Ashburton on 29th June, 1826, "in contemplation of her marriage with Ranald George Mac- "donald, can be considered as onerous or obligatory on the "granter, only in so far as it contained provisions or destina- "tions of heritage in favour of the issue of the said marriage; "but that, *quoad ultra*, it was purely gratuitous, and liable, *sua* "*natura*, to alteration or revocation by the granter, especially "by acts done or instruments executed after the dissolution of "the said marriage without issue, and when it was consequently "certain that the whole obligatory provisions had been finally "frustrated, and never could come into operation: Finds 4to.

CUNNINGHAME *v.* MC LEOD.—13th August, 1846.

" That this complete restoration of the granter's absolute right " to and control over the disposition of her own property, " which would have emerged at common law, on the total " failure of such issue, is farther secured and provided for, in " this case, by the terms of the said trust-disposition and assig- " nation, in which it is expressly provided, that, on such failure, " the properties conveyed in trust shall be applied, not only for " the benefit of 'such person or persons,' but, generally, 'to " 'such uses and purposes as should be appointed by the said " 'Lady Ashburton, by *any deed of settlement, or other writing,* " 'to be executed by her at any period of her life;' it being " only in the event of her executing no such settlement or " writing that they are to go to 'her nearest heirs-at-law:' " Finds, 5to. That, though the feudal title to the property was " formally in the trustees, and they were bound to hold it, " independent of the will of the truster, in so far as the inte- " rests of the issue of the marriage were concerned, and till the " possibility of such was extinct, they must be considered as " holding it, from and after the period of such extinction, for " behoof of the truster herself only, and for such persons and " purposes as she might specify, in any writing sufficient to " express, and to certiorate them of the tenor and existence of " her wishes and intentions; and that they were in no way " bound, after such failure, to convey the said property only " under the burden and fetters of an entail; but might have " been lawfully called upon to denude thereof, in favour of the " truster herself, or to sell or dispose of the same, and to apply " the price in any way she might be pleased to direct: Finds, " 6to. That the disposition executed by the said Lady Ashbur- " ton, of the 21st May, 1835, in favour of Lord Cranstoun, " which contains not only a direct conveyance of the lands " themselves now in dispute, but also of 'all right, title, and " 'interest, and all claim of right, property, or possession, peti- " 'tory, or possessory, which she herself had, or could claim

CUNNINGHAME *v.* MC LEOD.—13th August, 1846.

" 'or pretend thereto,' is not only a sufficient nomination and " appointment of the said Lord Cranstoun as the person to " whom these lands should be conveyed, on the failure of issue " of the marriage, in terms of the trust-disposition of 1826, but " is also a legal and effectual assignment of the right accruing " to the truster herself, on the occurrence of such failure, to " call on the trustees to denude and convey in her favour; and " that it is not necessary to the validity of such nomination or " assignment, by the law of this country, that it should purport " to be granted in the exercise of any reserved power, or any " special provision of the law; and therefore, and on the whole " matter, repels the defences, and decerns and declares in terms " of the conclusions of the libel: Finds expenses due; Allows " an account to be given in, and remits to the auditor to tax " and report.

" F. JEFFREY."

" *Note.*—The grounds of the first finding are sufficiently " apparent, on comparing the summons and the record. The " second, as to the defect in the testing clause, and the efficacy " of the correction resorted to, admits of more question. The " Lord Ordinary is not quite satisfied that the variance in the " spelling of the witness's name is so great as to be fatal, if not " corrected. But he does not *rest* on this point. He thinks " the case of the Bank of Scotland against Telfer's creditors, " 17th February, 1790, a precise authority for holding, (however " perilous and questionable, upon principle, the doctrine may " appear,) that such errors may be corrected *ex intervallo*, in " the way that was here done, and where much more had " happened since the actual signature and execution of the deed " than can be alleged in this case. In the case of Brown, " (11th March, 1809,) it was shown, in the course of the argu- " ment, that more had been done with the deed before any " proposal was made to supply its defects, than merely giving it

CUNNINGHAME *v.* MC LEOD.—13th August, 1846.

" in to be recorded in the register of the Sheriff Court; and, in " point of fact, it was produced in this Court in its original " defective condition. But, even holding that it was there " found incompetent to correct it, solely on the ground that it " had been put on the Sheriff's register, the Lord Ordinary is " satisfied that this objection would not apply to the present " case, in respect of the special provision in the Act 1685, c. 38, " by which persons giving in deeds to be recorded in the " general register at Edinburgh are entitled to take them back " again at any time within six months after their first ingiving; " and that it depends entirely upon their pleasure whether they " are ever afterwards returned to the record, and in what condi- " tion; the fact being admitted that it was long within the six " months, and in the regular exercise of this privilege, that " the deed was in this case taken back for correction, and after- " wards returned and recorded in its amended form.

" With regard to the other and more general findings, as to " the *construction* of the deeds, and the *powers* of the granter, " there is not much to be added to the grounds set forth in the " interlocutor, which contains all that it is thought necessary to " express as to the *principles* on which the judgment is rested.

" The *authorities* chiefly relied on are those of Gordon and " Harper, 4th December, 1821, and of Hyslop and Maxwell, " 11th February, 1834, (12 *Shaw*, 413,) both of which seem to " be cases *a fortiori* to the present, inasmuch as the properties " there held to be effectually conveyed, by direct dispositions " executed by parties not actually vested in the fee thereof, did " not originally belong in substance and effect, (as is the case " here,) to the parties so disponing, but had been derived from " other persons, by whose act, (and not by their own,) a bene- " ficial interest in them had been acquired. Both these cases " were very deliberately considered; and it is not thought that " their authority, or application to the questions now at issue, " can be much affected by Lord Gifford's reversal of the judg-

" ment of this Court in that of Turnbull and Tawse, decided " here in January 1823, and reversed (see I. *Wilson* and *Shaw's* " Appeals, 80,) 15th April, 1825. The Lord Ordinary must " say, that he cannot help entertaining doubts of the soundness " of the views on which this reversal seems to have proceeded, " and is far from feeling any assurance that the Court would " hold themselves bound by its authority in any similar case. " but, for the present, it is enough to say, that it has truly *no* " *similarity* or application to the present case. There the pro- " perties ultimately conveyed in trust had been originally " destined, in an antenuptial contract of marriage, to the parents " in liferent, and the children of the marriage in fee; but " under such a form of expression as to leave the fee and " onerous disposal of the property in the mother, who at an " after period, conveyed it to trustees for payment of certain " definite and limited debts; the liferent of the whole residue " being then provided to herself, and the fee, on her decease, to " her children then extant, and severally mentioned *nominatim* " in the deed. Having subsequently contracted large additional " debts, she then made a *second* or supplementary trust-deed, " directing the trustees to apply the properties, in the first " instance, to the payment of those new debts also; and this " last deed, being challenged as beyond her powers, by her " children, was sustained by the judgment of this Court, but " ultimately set aside and reduced in the House of Lords. " Now, even holding this last decision to be undoubtedly right, " it is obvious that the claim of the children was there rested " upon grounds, to which it is impossible to pretend that there " is anything parallel in the case of the present defender. The " claimants there were the *immediate children* of the granter, " entitled to provisions out of her funds, not merely *jure naturæ*, " but as having, in point of fact, a *jus crediti* over them, in " terms of the antenuptial contract, liable to be defeated only " by the competition of onerous creditors. In that situation,

CUNNINGHAME *v.* MC LEOD.—13th August, 1846.

" and in implement of this natural and legal obligation, the " mother conveys the fee of certain properties to trustees for " them, (then all existing, and severally named in the settle- " ment,) under the single burden of certain specific and limited " debts; and upon this conveyance the trustees are infeft, for " behoof (in so far as concerned the fee) of the said children " exclusively, and without any reservation on her part, of power " either to revoke or alter generally, or to interpose other " 'persons or purposes' between them and the fee so ultimately " destined. In the present case, on the other hand, the desti- " nation on which the defender relies, is neither to a child or " descendant of the granter, nor to any one having any natural " or legal claim upon her, nor, finally, to any one definite " person known or contemplated at the time as an existing " individual, but merely in the most general terms, and *ultimo* " *loco*, in the event of no special disposition being made, to " whomever might happen in that event to hold the character " of her nearest heir-at-law; and then there is, besides, (which " is *per se* decisive,) the most distinct reservation of power, on " the failure of issue of the marriage, to destine the property to " any persons or purposes she might choose to specify, by any " writing under her hand. It is impossible, therefore, to con " ceive a case, in all its essential particulars, more unlike to " that of Turnbull.

" The Lord Ordinary has always understood, that where a " trust comes to subsist only for the interest and behoof of a " single person, and his heirs or assigns, and especially where " that person is the truster himself, by whose mere will and " gratuitous act it was *quoad hoc* created, and is subsisting, it is " completely in the power of such person or truster to revoke " the trust, and to call on the trustees to denude in his own " favour, or in that of any person he may choose to designate. " This was admitted, upon all hands, to be the rule in the " remarkable case of Torry Anderson, 2d June, 1837, (15 *Sh.*

CUNNINGHAME *v.* MC LEOD.—13th August, 1846.

" 1073,) even where the trust bore, in express terms, to be " *irrevocable*, though the specialty of the trust being in that " case viewed as intended for the protection of a woman about " to marry against the influence or importunity of her husband, " led (though with great difficulty) to the conclusion, that it " could not then be recalled. But, after the *final* failure of " issue of the marriage, it is manifest that the only persons for " whom the trustees could hold, in this case, were the truster " herself, or those whose right depended entirely on her will " and pleasure; that is, her express nominees, or, on failure of " them, those who would take through her, and in her right, " (either from the trustees or her *hæreditas jacens*,) as her heirs- " at-law; and if it would be absurd for the trustees to resist " such a demand, on the ground that there was a vested interest " which they were bound to protect, in her future possible " nominees, who must owe their existence entirely to her " pleasure, there must be the same absurdity in the defender's " notion of there being any such vested interest in 'her heirs- " 'at-law,' who are distinctly postponed to all such nominees, " and whose chance of succession depends exactly as it would " do if there had been no trust in existence, on her forbearance " to execute any such nomination. A man may, no doubt, " make an irrevocable destination in favour of his own *existing* " children, or (by means of a trust) even for those who are yet " unborn. But it is not easy to understand how he can ever " tie up his own hands by a destination *to his own heirs what-* " *soever*; which, in fact, is no destination at all, but precisely " *the negation of all destination*, and incapable, therefore, of " being set up against any act of the party which would be " available if there had been no mention of heirs whatsoever in " the deed.

" A very desperate argument was raised by the defender on " the circumstance, that, in describing the deed by which Lady " Ashburton reserves power to herself (on failure of issue) to

CUNNINGHAME *v.* MC LEOD.—13th August, 1846.

" dispose of the property at her pleasure, it happens to be " stated, with the obvious purpose of making the power as " large and absolute as words could make it, that she might " effectually do this, 'by any deed of settlement, or other " 'writing, to be executed either during the subsistence of her " 'marriage, or after its dissolution, by the decease of the said " 'Ranald George Macdonald,' upon which the defender has " been advised to contend, that, as the marriage was dissolved " in this case, *not by the decease* of the said Ranald George, but " *by his being divorced for adultery*, and as the deed in favour of " Lord Cranstoun was executed while he was still alive, so it " was not in terms of the reservation, and must, therefore, be " disregarded, and found to be utterly null and ineffectual. " This probably does not require any answer, though there are " many that will readily occur. Two only shall be given. In " the *first* place, the expression referred to was plainly intended " only to make it certain that the deed in question might be " competently made by the act of the lady alone, and without " the consent of her husband, even during the subsistence of " the marriage; the true and obvious meaning being, 'as fully " 'and effectually during the subsistence of the marriage, as " 'after its dissolution,' when, by the common rules of law, " there could be no question as to her power. But, *secondly*, " the only mode of dissolving a marriage which is ever contem- " plated or provided for, or which it is *decent* to contemplate or " provide for in a marriage-settlement, is by the *death* of one or " other of the parties. But the *law* has declared, in aid, but " entirely independent of their stipulations, that the conse- " quences of its dissolution by the *delinquency* of either party " shall be in all respects the same as would have resulted from " the natural death of the party offending. Accordingly, " though all provisions of jointure, &c. to a wife are uniformly " declared, in such settlements, to be payable only on the *death* " of her husband, it is perfectly established, that she has access

" to them in the event of his being divorced for adultery or " desertion, exactly as if he were naturally dead; and if this be " the rule as to the provisions which immediately affect his " interests and means of living, it would be strange if it did " not hold as to the wife's *mortis causa* disposition of her own " properties, in the ultimate succession to which he could, in " no event, have any interest or concern.

" F. J."

The appellant reclaimed against this interlocutor, and (on the 26th of June, 1840,) the Court ordered the disposition of 1835 to be brought into Court, and remitted to the deputy clerk register to report "as to the practice that obtains in " recording and booking deeds presented for registration in " the books of Council and Session, and of granting extracts " thereof, whether within, or after, the expiry of six months " from the date of presentment; and as to the practice of with- " drawing deeds from the record, within six months from the " date of presentment, under the provisions in the Act of " Parliament 1685, cap. 38; and, further, to examine and " report what appears in the registers and other books of the " office, relative to the registration of the above-mentioned " disposition, dated May 21, 1835, the said report to be lodged " *quam primum*, and thereafter printed and boxed by the " parties."

The deputy clerk returned the following answer to this remit: "I may begin with stating, that prior to the Act of " Parliament 1685, concerning the registration of writs in the " books of Council and Session, I am not aware that there existed " any positive regulation as to the period from the date of pre- " sentment, within which deeds were to be *booked* or engrossed " *ad longum* in the registers kept for that purpose. Neither " does it appear from any document now remaining, whether " there then obtained any customary practice of withdrawing

CUNNINGHAME *v.* MC LEOD.—13th August, 1846.

" from the keepers of the record, deeds that had been presented " for registration; but that such a practice may have existed, " similar in effect to what was afterward sanctioned and regula- " ted by statute, seems probable. There seems, however, to be " no doubt that, from time immemorial, it has been the usual " and ordinary practice to issue to the '*parties ingivers*,' formal " extracts of deeds, with all the requisite clauses for execution, " without awaiting their regular entry in the registers of the " Court, and bearing the official attestation of having been " 'extracted furth of the records of the Court of Session.'

" By the Act of Parliament 1685, which placed the business " of this department on a regular footing, it was, *inter alia*, " 'appointed, that in each of the three offices for the registration " 'of writs, there should be two minute-books kept, in one " 'whereof there should be set down the title of writs given in " 'to be registrat, the name of the giver in, and the date of the " 'ingiving, and to be subscribed by the clerk or his substi- " 'tute.'—'That all writs so given in should be booked within " 'the space of one year after the ingiving; and if any party, or " 'one employed by him, should desire up a writ given in, with- " 'in six months after its ingiving, then the title of the writ, " 'the name of the party, and the date of both ingiving and out- " 'giving of the said writ, should be inserted in the other " 'minute-book, and be subscribed by the receiver thereof:' " 'that as the one minute-book doth charge, so the other " 'minute-book might discharge the clerk of such writs;'—and " it was further appointed, 'that when these registers are to be " 'given in to the general register house, the two minute-books " 'were likewise to be given in with them, subscribed by the " 'clerk; and the depute appointed by the Lord Register for " 'keeping of the said registers, should subscribe other doubles " 'of the said minute-books, to be kept by the clerks, for the " 'information of the lieges in their offices.'

" These provisions of the Act were ordained to take effect

" from the 1st day of August in that year; and, accord-
" ingly, from that date, minute-books, specifying the titles
" of the deeds given in for registration, together with the
" other particulars required by the statute, (somewhat more
" fully than formerly,) were begun to be framed. On the mar-
" gins of these minute-books there occur entries in these terms,
" ' Principal writ out,' or ' Principal writ delivered up;' and in
" these cases it has been found that the deed referred to never
" has been *booked;* implying of course that the parties
" ingivers had availed themselves of the liberty recognised
" and sanctioned by the statute. That in these cases some
" more formal document must have been taken by the
" keepers for their exoneration, cannot be doubted; but it does
" not appear, after a careful search, that any minute-books of
" the kind prescribed for this purpose by the Act of Parliament
" had ever been framed; none certainly of that kind now
" remain among the public records. The substitute actually
" employed, and adopted probably from the former practice,
" appears to have been, to take an acknowledgment from the
" party ingiver of the redelivery of the deed, and a declaration
" that the extract given out at the time of presentment had been
" delivered up, in order to be cancelled. Of this mode thus
" adopted, the earliest instance now to be found on the books
" of the office is in the year 1707; it is the first of a series
" of similar entries written on the blank leaves of the minute-
" books of *ingivings*, and *responde* books of the different offices,
" preserved in the General Register House. It is in these
" terms:—

" ' 28*th Nov.* 1707.—Taken out of the register by me, James
" ' Ross, writer in Edinburgh, the principal bond granted by
" ' Charles Menzies, W.S., &c., to Christian Blackwood, &c.,
" ' dated 22d February, 1707, presented by me to be registered
" ' 25th November, 1707. The extract being returned to be
" ' cancelled.

(Signed) " ' JA. ROSS.'

CUNNINGHAME *v.* Mc LEOD.—13th August, 1846.

" The following may be given as another example of the " same kind:—

" ' 31*st March*, 1741.—Received out of the register by me, " ' writer in Edinburgh, discharge and obligation by Sir James " ' Mackenzie, to Sir William Dick of Prestonfield, dated 12th " ' November, 1740 years, registered 12th November, 1740, and " ' is now taken out by me, ingiver thereof, having delivered " ' the extract to be cancelled.

(Signed) " ' RODK. MACKENZIE.'

" Many entries of a similar tenor occur in the minute-books " and *responde* books of the different offices. And in all such " cases, it appears that the deeds had been withdrawn within " the period when they would have fallen to be *booked*, and of " course they are not to be found in the existing registers, at least " as of the date of the original *ingiving*. The same deeds might " of course be afterwards brought back at any time, and again " presented for registration; and of this proceeding the instances " are by no means very uncommon.

" Thus, on March 9, 1819, a discharge of inhibition by the " assignees of Atkins and Sons, &c., to Stenhouse Wood, dated " 28th October and 7th November, 1818, was given in for regis- " tration, and thereafter given up on receipt; but again pre- " sented for registration on the 22nd of March, 1819; and the " deed is accordingly registered of that latter date.

" Again, on the 13th of March, 1819, a power of attorney by " Andrew Douglas M'Culloch, in Edinburgh, to John Graham, " dated 8th March, 1818, was presented for registration, given " up on receipt, and again registered on the 21st of April, " 1819.

" These, and many other cases, apparently of the same kind, " appear to have been conducted in strict conformity with the " intendment of the Act of Parliament; nor has there been " found any instance of a deed withdrawn or given up after it

" had been *booked*, or recorded *ad longum* in the register.
" Instances, indeed, occur, of special warrants by the Court,
" authorizing deeds to be given up or borrowed, for specific
" purposes, even after having been recorded, such as for the
" purpose of being judicially produced in Court, and afterwards
" recorded in the Register of Tailzies; but to cases of that des-
" cription it is unnecessary here to advert more particularly.

" There is, however, another class of cases of by no means
" unfrequent occurrence, where, within six months after the
" date of presentment, deeds are 'borrowed' by the ingivers
" upon receipt, avowedly in the view of being returned to the
" keepers, and entered on the register as of the date of their
" original *ingiving*. Of the receipts taking in such cases, the
" following are examples:—

" '*Edinburgh*, 31*st December*, 1767.—Borrowed up by me,
" 'clerk to Thomas Innes, writer to the signet, principal dis-
" 'charge and renunciation, the Royal Bank of Scotland to Sir
" 'James Innes, of Innes, dated the 18th day of Decr. 1767, and
" 'regd. in the books of Council and Session the 23d day of the
" 'said month and year, to be returned on demand.
" 'Prin. returned.' " 'THOMAS RIDDOCH.'

" '*Edinburgh*, 10*th July*, 1822.—Borrowed by me, W.S.,
" 'submission and decreet-arbitral, Jean and Alison Ponton,
" '&c. and John Dawson, at Dalmeny, registered 9th current,
" 'and in the meantime have deposited the extract.
(Signed) " 'WALTER FERRIER.'

" '*Edinburgh*, 31*st July*, 1822.—Borrowed by me, W.S.,
" 'ratification and bond of corroboration, Chas. Halkett
" 'Craigie, Esq., to Miss Hannah Halkett Craigie, and others,
" 'dated 28th March, and registered 18th June last; and, in
" 'the meantime, I have deposited the extract.
(Signed) " 'ALEX. MONYPENNY.'

CUNNINGHAME *v.* MC LEOD.—13th August, 1846.

" ' *Edinburgh, 20th March*, 1824.—Borrowed by me, Alex-
" ' ander M'Craw, clerk to Alexander Young, W.S. prob. copy
" ' heritable bond by Alexander Murray, Esq. of Broughton,
" ' to the trustees of the Westminster Co., for 34,000*l.*,
" ' dated 26th Jany. 1824, and recorded 1st March following.
(Signed) " ' For ALEXR. YOUNG.
" ' ALEX. M'CRAW.'

" In these, and many similar cases, the receipts have been
" cancelled. The principal writs are preserved among the
" public records, and they are found to have been *booked* in the
" register as of the date of their original presentment. How
" long this practice may have prevailed, I have not ascertained.
" It cannot, perhaps, be condemned as in violation of the Act
" 1685; at the same time, it must be obvious that it derives no
" direct sanction from the provisions and regulations embodied
" in that statute.

" By your interlocutory order above referred to, your lord-
" ships have further directed me to report upon what appears
" in the registers and other books of the office, relative to the
" registration of the disposition by the late Lady Ashburton in
" favour of Lord Cranstoun, dated May 21, 1835, and said to
" be recorded in the books of Council and Session, on the 8th
" day of August, 1835.

" In the minute-book of deeds presented for registration, there
" is the following entry, under the date of August 8, 1835:—

" ' Dispn. by Lady Ashburton to Lord Cranstoun, 21st
" May, 1835.'

" And in the responde book of the office there is an entry
" under the date of August 11, 1835, which shows that an
" extract of the disposition in question was then given out.

" Among the receipts for writs delivered up or borrowed,
" contained in the responde book, there is the following:—

" ' *25th January*, 1836. Borrowed by me, W.S., principal
" ' disposition by the late Right Honourable Anne Selby, Lady

CUNNINGHAME *v.* MC LEOD.—13th August, 1846.

" ' Ashburton, in favour of the Right Honourable James Lord
" ' Cranstoun, dated 21st May, 1835, and recorded 8th August,
" ' 1835. In the meantime I have deposited the Ex. with Mr.
" ' Peat.

(Signed) " ' AW. HOWDEN.'

" To this is annexed the following note :—
" ' *4th February*, 1836. Prinl. returned to the record by
" ' A. H.'

" There is no subsequent entry in the minute-book of " *ingivings*; nor any entry in the responde book, to indicate " that any other, or different, extract had been given out by the " keeper; and the deed is entered on the record, as of the date " of the original presentment, on the 8th of August, 1835."

In consequence of suggestions by the parties, the deputy clerk register, at a subsequent period, made an additional report. To the suggestions of the appellant, he made the following answer :—

" 1. That second extracts are occasionally demanded by the " party ingiver of the original deed, as well as by other parties, " within the period of six months after the presentment of the " deed, and prior to its engrossment in the register; but in " such cases, if the original deed were demanded by the in- " giver, in the view either of being again returned and depo- " sited, or of being entirely withdrawn, the keepers would hold " themselves entitled and bound to withhold the deed until every " extract, whether in the hands of the ingiver or in those of " third parties, had been restored.

" 2. It is not consistent with the knowledge and experience " of the present keepers, nor is there any evidence on the books " of the office, that in any case where the original deed had " been borrowed by the ingiver, and not yet returned, a second " or other extract of that deed had been demanded or furnished " to any third party.

" 3. In any case where an original deed had been borrowed

CUNNINGHAME *v.* MC LEOD.—13th August, 1846.

" by the party ingiver, upon his receipt, and afterwards brought " back in a state varied in any respect from the tenor of the " first extract, the present keepers have no hesitation in stating " it as the rule of their bounden duty, that such altered deed " should be recorded anew, as of the date of this second pre- " sentment; and, independently of the case which has occa- " sioned the present inquiry, they are not aware, nor do the " books of the office afford evidence, of any deviation from the " rule now stated.

" 4, and 5. On the circumstances of the present case, the " present keepers can afford no explanation beyond what ap- " pears on the books of the office, as quoted in my former " report; but, on the facts assumed in these questions, there " has been a manifest violation of the rule by which the present " keepers hold themselves to be bound. Mr. Thomas Peat, " the principal keeper, by whom the extract, dated August " 8, 1835, was given, died in the month of September, " 1836."

And to the suggestion of the respondents, these answers:—

" 1. That agreeably to the uniform course of practice, the " deed in question originally presented for registration on the " 8th day of August, 1835, could not have been booked on the " 25th day of January, 1836, when the principal deed was bor- " rowed up, nor on the 4th day of February, 1836, when the " deed appears to have been returned, nor at any time prior to " the 8th day of that month, when the period of six months " from the date of its presentment terminated.

" 2. In all ordinary cases, even where a deed has been bor- " rowed and returned, it is recorded as of the date of the origi- " nal presentment; but, independently of what appears or is " alleged as to the circumstances of the present case, on which " I have nothing further to report, there is no evidence to be " found, on the books of the office, of any deed, borrowed, " altered, and returned, having been recorded on the date of its

" first presentment, and not on the day of its second present-
" ment, agreeably to the rule already stated.

" 3. I have been informed by the present keepers, that,
" within their knowledge, one or two instances have occurred,
" where a deed has been borrowed for a temporary purpose,
" and retained beyond the period of the six months from the
" date of presentment; and, in such cases, the record has been
" framed from the authenticated official extract left with the
" keepers until the original is returned."

The Court ordered minutes of debate to be laid before the other Judges of the Court for their opinion, which, upon advising these papers, was delivered in these terms:

" We are of opinion that it was competent for the parties who
" first sent the disposition libelled on to the register, to borrow
" or demand back the same within six months.

" It is indisputable in the practice of the register, that the
" enactment of the Act 1685, cap. 38, is still in force, in so
" far as it allows parties who have lodged writs for registration
" to get them back within a specified period. The report of
" the depute clerk register conclusively shows that that privi-
" lege has been acted on in many instances down to the present
" time.

" There is no doubt that this privilege is restrained by
" another special enactment in the statute, which provides, that
" ' no writ given in, shall be taken out, after the same is *booked*;'
" but we conceive that there was no room for the application of
" that prohibition in the present case. It only comprehended
" cases where the writs have been actually entered in the regis-
" ter book before they are demanded back. In such cases, the
" privilege of getting back the writ is taken away, probably to
" prevent any contradiction or discrepancy between the record
" and the principal writ, by alterations or additions which might
" be made, if the latter were lent up, after it had been engrossed
" *ad longum* in the record.

CUNNINGHAME *v.* MC LEOD.—13th August, 1846.

" But we apprehend that the issuing of an *extract*, or certi-
" fied copy of the deed before booking, is not sufficient to bring
" the case within the prohibition of the statute. Some incon-
" venience or hazard may indeed be found to arise from the
" issuing of such extracts, before actual registration; and if any
" evil is experienced, an appropriate remedy will be provided by
" the legislature, or by a general regulation to be made by the
" Court, as possessing a power of superintendence and control
" over the public records, in reference to future cases. In the
" meanwhile it rather appears that the custom of the keepers
" of the register, when a writ is demanded back within six
" months, to call in and get back, before returning the writ, all
" extract-copies which may have been issued since ingiving, is
" a precaution that may be sufficient to prevent any abuse from
" the practice now referred to. The report of the depute clerk
" register shows that the extract-copy first issued, was de-
" manded and given back in the present instance to the keeper,
" before the principal writ was returned. And, therefore, under
" all the circumstances of the case, we think that the inter-
" locutor of the Lord Ordinary on this point is well founded,
" and ought to be adhered to.

" J. CUNINGHAME.
" C. HOPE.
" AD. GILLIES.
" J. H. MACKENZIE.
" JOHN FULLERTON.
" F. JEFFREY.
" H. COCKBURN.
" JOHN A. MURRAY."

" I am of opinion, that it was competent, under the Statute
" 1685, c. 38, for the party ingiver, *to take up* the deed libelled
" from the register, at any time within the space of six months
" after its ingiving. But it appears to me, that this was com-

" petent only in the manner and under the circumstances pointed " out by the statute; and, consequently, that it was essential to " the regularity and validity of the proceeding, that the taking " up should be an absolute and definitive taking up, so as, from " the moment of its occurrence, to '*discharge the clerk of such* " '*writ*, just as if the same had never been registered.'

" I cannot regard the *borrowing* that took place in the pre- " sent case as a *taking up* of the deed in this statutory sense. " Neither the register nor the clerk was '*discharged of the writ*' " by such a borrowing. The receipt granted to the clerk, on " the contrary, implied an obligation to *return* the writ, as one, " which, *constructively* at least, was still *in manibus* of the clerk, " as a registered document. When the deed was returned, it " was accordingly dealt with by the clerk,—not as a deed given " in *of new* to the register,—but as a deed *already registered*, " and after a temporary borrowing, '*returned to the record*;' " the matter remaining upon the footing, and of the date, of the " original registration.

" Having this view of the case, I do not concur in Lord " Cuninghame's opinion, that it was competent for the parties " 'to borrow' the deed, 'and to return it *with the corrected* " '*testing clause* at the period that the disposition in the present " 'instance was returned.' It appears to me, on the contrary, " that any *alteration* upon the tenor of the disposition, while it " remained *borrowed up*, *on receipt*, was just as much a tamper- " ing with the integrity of the record, as if the party had " obtained access to the writ *in publica custodia* within the " register office, and had there effected the alteration. And, " therefore, as there is nothing, in my opinion, of which the " Court ought to entertain a greater jealousy, or which they " ought more readily or more anxiously to extend their arm to " prevent, than an attempt to interfere with the integrity of " written instruments, more especially while lying *in publica* " *custodia*, so I think it would be encouraging a dangerous

" laxity, if, in the present instance, the party altering a deed, " while he holds it *borrowed up on receipt from the clerk register* " *or his deputies*, were to be allowed, directly or indirectly, to " take benefit from an alteration under such circumstances; or " were the Court to recognise or give effect to that alteration, as " if it were an innocent or authorized proceeding.

" Whether the pursuers,—had they, in terms of the statute, " got up the deed from the register, and so brought it once " more as a private document, under their own proper control, " —would have been justified in making the change upon the " testing clause, which they have made;—what ought to be the " legal effect of such change,—or whether the misnomer of the " witness, as originally written, would have been fatal, supposing " no change to have taken place;—are all of them questions " upon which, as I understand, no answer is now desired. But, " be the case in these respects as it may, I am humbly of " opinion, that the pursuers should, as matters now stand, be " kept to the shape of the deed as it existed, when presented for " registration on the 8th August, 1835.

" Besides, the summons libels the deed as 'a disposition " ' dated 21st May, and *recorded in the books of our Council and* " ' *Session, 8th August*, both in the year 1835;' and it is impos- " sible, I think, with reference to a libel so laid, to take into " consideration any other form of the deed, than what existed " at the date of recording thus libelled. The alteration upon " the testing clause which has given rise to the present discus- " sion, was confessedly not made till January 1836. And while " the settled practice, as reported by the depute clerk register, " is, that where a deed is got up from the register, and is after- " wards returned, ' varied in any respect from the tenor of the " ' extract,' the altered deed 'should be *recorded anew*, as of the " ' date of the second presentment,' there was here no registra- " tion of posterior date to 8th August, 1835, so as in this way " to meet the change effected on the tenor of the deed.

CUNNINGHAME *v.* MC LEOD.—13th August, 1846.

"Upon the whole, there having been here—on the one "hand, by the private party, what I must consider an improper "tampering with a document belonging to, though, for the "moment, *borrowed out of the public records*,—and on the "other upon the part of the record keeper, what the deputy "clerk register expressly reports to be 'a manifest violation of "'the rule by which the present keepers hold themselves to be "'bound,'—I am of opinion that, *in the circumstances of this "case*, the deed libelled was not competently taken out of the "register, in the only sense recognised by the statute; that "the alteration made upon it, while *constructione juris* yet in "the register, must be wholly disregarded as an illegal pro-"ceeding; and, finally, that the deed must therefore be dealt "with, in the present discussion, as if no alteration had been "made, and as if it had stood at this moment precisely as it did "when originally given in for registration on 8th August, "1835. J. IVORY."

Upon receiving these opinions, the Court, on the 20th July, 1841, adhered to the interlocutor of the Lord Ordinary.

The appeal was against these interlocutors, and two others not necessary to be noticed.

Sir F. Kelly and *Mr. Anderson* for the Appellant.—The disposition of 1835, as the testing clause stood originally, was altogether void. Archibald *v.* Marshall, *Mor.* 16907. Douglas and Co. *v.* Clerk, *Mor.* 16908. This, indeed, was assumed by the Judges below, who dealt only with the attempt to cure the defect in it. However regular the proceeding of borrowing up the deed from the record might have been, so far as the records were concerned, the alteration of the deed after the death of the granter, was altogether incompetent. In the Bank of Scotland *v.* Telfer's Creditors, *Mor.* 1690, an objection, that the testing clause had been added to, was

repelled no doubt; but there the addition, although made after the bankruptcy of the granter, was at least done in his lifetime; and in Dick *v.* Dick, *Hume's Rep.* 908, an objection to the filling in of a testing clause, after the death of the granter, was repelled; but there the objection was not to any alteration upon the deed, after it had been once completed, but to the insertion of the entire testing clause in a space which had been left for it by the maker of the deed. These cases, therefore, are both distinguishable from the present in their circumstances, and, moreover, in this other respect, that in neither of them had the deed either been recorded or presented for registration.

If the deed was void at the death of the granter, nothing that was done after that event could alter its condition. The lands then vested in the appellant as the heir-at-law of Lady Ashburton, and nothing done afterwards could divest them, still less anything done by the grantee in the deed. For anything known, the granter may intentionally have allowed the deed to remain with the error in the testing clause uncorrected, and any evidence *dehors* the deed itself to prove the contrary, is altogether inadmissible. Cleland *v.* Cleland, 1 *B. & M.* 254.

But if the deed could be altered after the death of the granter, it could not be so after it had been recorded; and it was recorded, so soon as the keeper had issued an extract. Thenceforth, whatever may have been the practice of the office, it was incompetent for the keeper to deliver it out again. Registration is voluntary; and the Statute 1685 allows the party giving in the deed for registration, to alter his mind, and withdraw the deed altogether, at any time, within six months, so long as the deed has not actually entered the record: but it in no way sanctions the notion of the deed being borrowed up in order to its being altered—it may be in order to its being vitiated—and being then returned for recording as was done in this case. If that practice were to be sanctioned, it is difficult to conceive the consequences; in the present case, the extract

upon which the action is founded, bears, that the deed was given in to be recorded on the 8th August, and the extract, with this statement, contains the alteration of the testing clause, which, according to the very case made by the party, had not been effected until the month of January following.

In another view, however competently the alteration might have been made after the death of the granter, or after registration, it amounted to an alteration *in substantialibus*, and so vitiated the deed, *Stair* IV. 42. 19; Walker *v.* Gibson, 2 *Dow.* 270, where the vitiation was the writing of the instrumentary witness's name upon an erasure.

II. The deed of 1826 was, for onerous causes, and in its nature irrevocable. Not only did Macdonald dispense with any tocher, but he renounced his *jus mariti* and right of curtesy; and in consideration of this, it was agreed that the estate should be settled on the issue of the marriage, "and other ways." It is not denied, that if there had been issue of the marriage, the deed would have been irrevocable. It is only because the marriage was dissolved, without issue, that it has been supposed to be revocable, but in its terms it is not confined to the duration of the marriage. It makes provision for the event of the dissolution by the death of either of the parties, by a continuance of its operation in the form of a strict entail upon substitutes beyond the issue of the marriage. The non-existence of issue, and the dissolution of the marriage, cannot alter the nature of the deed from onerous to gratuitous; the only effect is to advance the rights of those ultimately entitled to take. The settlement having been made before marriage, the substitutions are effectual beyond the immediate subjects of the marriage, and cannot be defeated, according to a rule established in England, and recognized in Scotland. Goring *v.* Nash, 3 *Atk.* 188, note to Sanders' edit.

The deed, which is one *inter vivos*, divests the granter of her estate, and while it reserves to her an equivalent to a liferent in

the enjoyment of the rents and profits, puts a restraint even upon that enjoyment, by prohibiting sale, mortgage, or anticipation, and binds the granter in absolute warrandice of the conveyance effected by it; and in that view, though it were held not to be onerous, it would be irrevocable after delivery to the trustees, *Ersk.* III. 3. 91, Grant *v.* Grant, *Mor.* 3596, there, a conveyance, *inter vivos*, in favour of a brother, upon failure of issue, was sustained as irrevocable: and in Warnoch *v.* Murdoch, *Mor.* 7730, an annuity given by a contract of marriage to the stepmother of the husband, was sustained as irrevocable; and Braidwood *v.* Braidwood, 13 *S. & D.* 449, and 14 *S. & D.* 64, is a similar illustration of the irrevocable nature of a deed *inter vivos*, having a clause of absolute warrandice.

Moreover, so soon as the lands purchased under the deed of 1826 were vested in trustees, they were withdrawn from the power of the granter until the purposes of the trust were answered, which they are not, while the remote substitutions, after the issue of the marriage, are unsatisfied, Turnbull *v.* Tawse, 1 *Wil. & Sh.* 80; Spence *v.* Ross, 3 *Wil. & Sh.* 380; and Smitton *v.* Todd, 2 *Bell & Mur.* 225. Not only so, but the trustees were required to entail the lands strictly upon the series of substitutes pointed out. As this ought to have been done by the trustees, it must be held as having been done; and had it been done, it would not have been in the power of the granter to do anything whereby the rights of the substitutes could be injured or defeated. Schaw *v.* Schaw, *Robertson's App.* p. 203; Gordon *v.* Dewar, *Mor.* 15579.

III. Not only was the deed of 1826, from its nature and terms, irrevocable, but no right of property was ever vested in Lady Ashburton, which could entitle her to execute the disposition of 1835. If the lands had been vested in her, a disposition with a final substitution in favour of "her heirs," might have given her the fee absolute on failure of the prior substitutions;

but where the lands had never been vested in her, and she was not one of the members of substitution, the final substitution to "her heirs," and more especially to her "nearest "heirs-at-law," is merely designative of the persons to take, not of the character in which they take, 1 *Fount.* 586, and cannot imply any reverting fee in her. The interposition of the trust under which the fee was to remain in the trustees, they paying her the rents and profits until her death, when the entail was to take effect, more especially precluded any notion of this kind. Even in England, where the law is less favourable than the law of Scotland is, to conditional institution, ultimate limitations by marriage-settlement have been held to give a right which is not defeasible by the settler, Anderson *v.* Dawson, 15 *Ves.* 532; Baines *v.* Ottey, 1 *My.* & *K.* 465. Here, the appellant, under the destination to the "*nearest heirs-at-*"*law*," was entitled, on failure of the prior links in the destination, to take as conditional institute. If Lady Ashburton was not absolute owner of the lands otherwise, she was not the more so, that she had, by the deed of 1826, a power of appointment, even although the possession of the power was accompanied by the enjoyment of a life estate. Mere possession of a power is not equivalent to possession coupled with an exercise of the power. It must be exercised in order to confer any right upon the holder of the power, or those claiming under him. Hepburn *v.* Bruce, 2 *Bro. Supp.* 15; Mc Lean *v.* Mc Lean, 5 *Bro. Supp.* 44; Reid *v.* Shergold, 10 *Vesey*, 369. Moreover, her power in the present case was of a limited nature, to be exercised as a sort of rider upon the entail to be executed by the trustees; and its very existence is opposed to the notion of any absolute right of property resulting to Lady Ashburton, on failure of issue of the marriage, and establishes that a conditional institution of her "nearest heirs-at-law" was intended; for how, on the supposition of her obtaining an absolute right upon such failure, could it have been necessary to confer upon

her any power whatever, which was not implied in such absolute right.

IV. If the deed of 1826 was revocable, it has not in fact been revoked. The deed of 1835 is confessedly, by the terms of the summons, not sufficient *per se* to operate a conveyance of Arisaig, without a conveyance from the trustees; it would be wholly inoperative, in the events that have happened; but such a conveyance was not contemplated or intended by Lady Ashburton. Instead of revoking the deed of 1826, she intended it to remain as the title of a conveyance from the trustees to her, which in its turn should support her deed of 1835, in favour of the respondent, a deed which she had granted as "heritable "proprietrix;" but until she obtained that conveyance from the trustees in her own favour, her conveyance to the respondent, though clearly enough expressed in intention perhaps, was not completed in act.

V. The deed of 1835 was neither in form nor effect an exercise of the power reserved by the deed of 1826. That power was to name or appoint persons or uses under the entail, to be executed by the trustees, and that by deed of settlement or other writing, to be executed during the subsistence of the marriage, or after its dissolution, by the death of Macdonald. The persons or the uses, therefore, were to be subject to the entail; but the deed of 1835 is not a nomination at all, either of persons or uses; it is a conveyance in fee-simple absolute; and it was not executed, either during the subsistence of the marriage, or after its dissolution by the death of Macdonald, but after its dissolution by his divorce. It neither refers to the power, a reference which can be dispensed with only when the form of exercise prescribed has been observed; nor does it observe that form. But in order to make a deed in exercise of a power effectual, it is indispensable that every requisite prescribed by the power be minutely observed. Breadalbane's Trustees *v.* Breadalbane, 2 *D. B.* & *M.* 915: Borthwick *v.* Hos-

pital, *Mor.* 4095; Hawkins *v.* Kemp, 3 *East*, 410. In the absence of either a reference to the power, or observance of the forms prescribed by it, it is impossible to say that Lady Ashburton had the power in her mind, at the time she executed the deed of 1835.

The Lord Advocate, Mr. Turner, and *Mr. G. L. Russell*, for the Respondent.—I. The Statute 1685 requires that a deed given in to be registered shall be booked within a year after, but it allows the party giving it in, the privilege of withdrawing it at any time within six months after "its ingiving," under the limitation that no writ "given in shall be taken out after "the same is booked." It is ascertained by the keepers of the register, that in the present instance the deed was taken out within the six months, and that at the time it was given out, it had not been entered in the books of the register. What was done, therefore, was within the provisions of the statute. With regard to the constructive registration contended for by the appellant, in the fact of an extract having been given out as if the deed had been recorded, there is no authority in the statute for it; and if it were adopted, the effect would be to nullify the registration of all the deeds which have been given out in this way, and which, according to the report of the keeper of the register, are very numerous. Though it be true that the extract, issued after the deed had been returned, should have borne a new date of presentment, that will not vitiate the deed itself, which remains unaffected.

If the proceedings in regard to the taking of the deed out of the record was regular, there was nothing in the error in the instrumentary witness' name to affect the validity of the deed. In Stewart *v.* Stewart, the instrumentary witnesses signed by the names of "Moir" and "Garrock," but in the testing clause their names were filled in as "Moor" and "Garvock," *o* being substituted in the one case for *i*, and in the other *v* for *r*; dis-

crepancies fully as serious as that which occurred here, and yet an objection to the validity of the deed was overruled. But even if the objection to the testing clause, as it stood originally, were well founded, nothing is better established in the law and practice of Scotland than that the testing clause of a deed may be filled in at any time before the deed is produced in judgment. It was as competent, therefore, to make the addition to the testing clause, as it was to fill in the clause itself.

II. The deed of 1826 was no further onerous than as regarded the issue of the marriage between Lady Ashburton and Macdonald. The interests of the contracting parties and of their issue by the marriage, were the only objects contemplated by it, and so soon as the marriage was dissolved by the divorce of Macdonald without issue of the marriage having been born, the objects of the settlement were at an end. Anderson *v.* Buchanan, 15 *S. & D.* 1073. Craigie *v.* Gordon, 15 *S. & D.* 1157. This being the case, Lady Ashburton by the divorce was restored to all the rights of an unmarried woman, and had full power to re-settle the lands in any way she might feel disposed.

III. But even if this were doubtful, the deed of 1826 gave her ladyship express power, failing issue of the marriage—an event which happened—to appoint the lands to such persons and upon such uses as she might select. The disposition of 1835, though not in form or by reference, an execution of that power, is nevertheless effectual for that purpose, if allowed its own natural operation; and that, by the law of Scotland, is all that is required in order to the execution of a power. It is not necessary, in order to the effectual execution of a power, either that the deed should refer to the power, or that it should be shown that the maker had the power in view;—it is sufficient if the deed giving it its ordinary legal effect, will work an execution. Cameron *v.* Mackie, 7 *Wil. & Sh.* 106.

CUNNINGHAME *v.* MC LEOD.—13th August, 1846.

Even adopting the stricter principles of the law of England upon this subject, there is sufficient upon the face of the disposition of 1835, to make it an execution of the power in the deed of 1826, for it conveys by name the lands which are the subject of the power and cannot take effect without executing the power.

LORD BROUGHAM.—My Lords, this case gave rise to several questions, one of which, originally, occupied a good deal of your lordships' attention at the hearing of the argument at the bar; the other two points were more argued by the respondent than by the appellant, the respondent having been told to confine himself mainly to those other two points. The first of those points, but that which ultimately gave rise to more difficulty in the minds of your lordships who heard the cause, and gave rise also to some communication, through me, with the learned Judges below, as to the practice, was touching the regularity of the testing clause, in which a material alteration had been made for the purpose of curing an otherwise fatal defect in the name of one of the witnesses, an "r" being substituted instead of an "n," *Crammord* instead of *Crammond*, which is most material in writs, which prove themselves according to the Scotch law, being probative writs, in which everything depends upon the perfect accuracy of the testing clause. This correction of an otherwise fatal error, had been made subsequently to the deposit of the deed in the register office, but within six months. It was then got out, and much question arose as to the practice there; and the Court of Session very properly, and very judiciously, in my humble opinion, took the course of remitting to Mr. Thomson, the experienced and learned deputy clerk register, who made a full and ample report upon the subject, containing a variety of precedents and cases, and containing also, his opinion of the practice.

Upon this statement, upon the communication which we

have had with the learned Judges, we have the opinion of those learned Judges, all of whom, with one exception, I think, (a most respectable exception, no doubt,) Lord Ivory; all the others, including the Lord President, the late Lord Justice Clerk, the now Lord President, and Lord Jeffrey, gave a very clear opinion, that this is by no means inconsistent with the practice of the Scottish register office; that the error is, therefore, by no means a fatal one, and, consequently, the argument on this ground on the part of the appellant entirely fails.

It would have required a very much stronger exception than that respectable authority of Lord Ivory furnishes. It would have required a much stronger view of the case than we have been able to take. It would have required a much greater weight of argument, as well as of authority, upon a question which is one fully as much of practice as of principle, to have entitled your lordships, in the face of the all but unanimous opinion of those learned persons presiding in that Court, including in the majority one of the most eminent conveyancers on that bench. It would have required, I say, a much greater weight of authority, and stronger force of argument, than has been urged against this decision, to have entitled your lordships, in the face of that weight of authority, upon a point of practice as much as of principle of the law of conveyancing in Scotland, to have decided in favour of the appellant and against the respondent.

Then, my Lords, the other points which have not occupied so much of our attention, were argued chiefly by the respondent at the bar, whom we had absolved from the argument of the other point. The other points related to two matters. The first was, whether there was a power in the deed of 1826, under which Lady Ashburton could make the settlement on behalf of the present Lord Cranstoun; and, secondly, whether that power had been executed by her.

With respect to the first of those, I am clearly of the

opinion at which Lord Jeffrey arrived, the Lord Ordinary in the cause, and which he has very fully explained, and I think very successfully defended, both by argument and also by authority, in reasoning upon the case, and setting forth his view of its peculiar circumstances. With that opinion, and upon those grounds, I am entirely disposed to concur.

There was a case referred to by Lord Jeffrey, (Turnbull *v.* Tawse,) and which I recollect very well in this House. It was decided by Lord Gifford, (sitting here in 1823 with Lord Eldon,) the then Master of the Rolls and Speaker of this House for the time being, reversing the decision of the Court of Session. My Lords, I do not go along—and it is principally for that reason I mention that I cannot go along—with an observation of Lord Jeffrey; and it is the only part of the learned and able note, (as everything that comes from him is sure to be learned and able,) that I do not go along with. It is an observation in which he objects to, or casts some doubt upon, the justice of that decision in this House. His lordship is pleased to say, that he cannot help entertaining doubts of the soundness of the views on which that reversal seems to have proceeded. Now that is very possible—my Lord Jeffrey may entertain, if he chooses, those doubts—but he goes on to say, that he is far from feeling any assurance that the Court, (that is, the Court of Session,) would hold themselves bound by its authority in any similar case.

Now a Judge in the Court below may well entertain doubts of the soundness of a judgment in the Court above, reversing his decision. We allow him the full benefit of those doubts, but he must not act upon those doubts. He may say that it is only *simile* not *idem;* but he says he is far from feeling any assurance that the Court of Session would hold themselves bound by the authority of the House of Lords in any similar case. My Lords, I feel a very confident assurance on the part of the Court of Session, as well as of this House, that they

would feel themselves bound entirely, and that that decision would be found to be a governing principle with them in a similar case, unless there were circumstances so different as to make it have no application—then, of course, it would not be a similar case.

But although I differ in that respect from Lord Jeffrey, I entirely agree with him when he goes on to say that there is no similarity or application whatever of the case of Turnbull *v.* Tawse, to the present case; and if I were to choose words in which to state my opinion of the dissimilarity of the two cases, and therefore of the non-application of that case of Turnbull *v.* Tawse, which I hold to be law and without doubt, (there alone differing from Lord Jeffrey,) if I were required to find words to express that difference, I should take Lord Jeffrey's own most clear, and lucid, and accurate statement of the difference. "In that situation," he says, "and in implement of this natural "and legal obligation, the mother conveys the fee of certain "properties to trustees for them, (then all existing and severally "named in the settlement,) under the single burden of certain "specific and limited debts, and upon this conveyance the "trustees are infeft, for behoof (in so far as concerned the fee) "of the said children, exclusively and without any reservation "on her part of power, either to revoke or alter generally or to "interpose other 'persons or purposes' between them and the "fee so ultimately destined. In the present case, on the other "hand, the destination on which the defender," (that is, Lord Cranstoun,) "relies, is, neither to a child or descendant of the "granter, nor to any one having any natural or legal claim upon "her; nor, finally, to any one definite person known or con-"templated at the time as an existing individual, but merely "in the most general terms, and *ultimo loco* in the event of "no special disposition being made, to whomever might happen "in that event to hold the character of her nearest heir-at-law." And then observe what follows, and then there is besides,

which as my Lord Jeffrey most justly observes, "is *per se* "decisive, the most distinct reservation of power," (which there was not in that case of Turnbull *v.* Tawse at all,) "on the failure "of issue of the marriage," (which here must fail, because the marriage has been dissolved by Act of Parliament or by sentence of divorce,) "to destine the property to any persons or purposes "she might choose to specify by any writing under her hand." I therefore wholly agree in the conclusion, which immediately follows, of my Lord Jeffrey, that "it is impossible, therefore, to "conceive a case in all its essential particulars, more unlike to "that of Turnbull *v.* Tawse."

My Lords, the next point, and the only one that remains to deal with is, whether or not there has been an execution of the power. Now it is not necessary by the law of Scotland in executing a power or a reserved faculty, (what we call a power here,) that reference should be made in the instrument purporting to execute that power, to the instrument creating the power. It is not even necessary in the law of England that there should be in the instrument executing the power a direct and specific reference to the power, or a statement by the donee of the power, armed with it and assuming to execute it, that he does this act in execution of the power. But the law of Scotland materially differs from the law of England in this respect. It is rather contrary in its principle, than similar to the law of England. In the law of England, I, who set up an execution of a power by a certain act done, am bound to show that the act was done in execution of the power, though I am not bound to show it in that particular way of proving it by a direct reference to the instrument creating the power in the act executing the power. But in the law of Scotland it is rather the reverse; the proof is thrown upon the other side. It shall be held to be an execution of the power, unless it appears not to be an execution of the power. So entirely different are the principles in this respect upon which the two systems of juris-

prudence proceed. But in the law of England, as I said before, it is not necessary by any means, that A. B., the donee of the power, in doing any act upon which the question arises,—is or is not this act an execution of a given power of which A. B. was the donee?—it is not necessary that the party setting up the act as an execution of the power, shall show that A. B., the donee, referred to the power and said, I do this in execution of the power in me vested by such and such a deed, settlement, or will. No such thing; it must be clear, and he is bound to show it, that it is in execution of the power; but he is not bound to show it by a reference from the instrument executing the power to the instrument creating it. I laid that down very clearly, in the case of Cameron *v.* Mackie, in the year 1833, 7 *Wil. & Sh.* 106, in which this question arose. I referred to the case of Andrews *v.* Emmot, which is a leading case in 2nd *Brown's Chancery Cases*, in Lord Thurlow's time, and to the case of Hales *v.* Margerum, which is in 3rd *Vesey*, junior; that was a decision of Lord Alvanley; and it is there held that if a man disposes of that over which he has a power in such a manner (though without referring to it,) that it is impossible to impute to him any other intention but that of executing the power, the act done shall be an execution of the power. And that is common sense. The internal evidence of the case may show that though no reference whatever is in terms made to the power, yet that it is an execution of the power. Lord Alvanley, in Hales *v.* Margerum, comments upon the decision in Andrews *v.* Emmot, and he says "there must be either a direct "reference to it or a clear reference to the subject of it, or some-"thing upon the face of the will, or independently of it, some cir-"cumstances," (by which I must understand his lordship to mean not some fact out of the instrument, which is a different case,) "some circumstances which show that the testator could not "have made that disposition without having intended to com-"prehend the subject of his power." That is the law here.

Now, even according to this principle of the law of England, if you apply even this principle, which is, as I said before, totally different in this respect from the law of Scotland, which throws the proof upon the party denying, whereas here it is thrown upon the party affirming and setting up the execution, you will find that there is in this case, as has been most justly argued on behalf of the respondent, quite sufficient to have brought the case within the principle even of the English law, with respect to the execution of the power. My Lords, in this case it is quite clear, from the nature of the instrument itself, that this was and could not be other than an execution of the power.

My Lords, upon these grounds, therefore, I entirely go along with the decision of the Court below. It was very fit that time should be taken to consider, especially the first matter respecting the testing clause. I am clearly of opinion, that that decision is well founded; and that with this single exception of the doubts cast upon the judgment of this House in 1823, in Turnbull *v.* Tawse—with which doubts I do not at all concur—with that single exception, the case has been most fully and satisfactorily argued in the judgment of Lord Jeffrey, to which the Court of Session entirely adhered. The only point which seems to have been referred to the consulted Judges, was that with respect to the testing clause. The other points appear never to have raised any doubt whatever in their lordships' mind; for all the Judges, except Lord Ivory, agreed in the judgment.

LORD CHANCELLOR.—My Lords, the only doubt which I entertained at the time this case was argued, was as to the effect of the manner in which the deed of 21st May, 1835, had been dealt with, after it had been presented for registration, on the 8th August, 1835. But upon consideration of the provisions of the Act of 1685, and the practice which has prevailed under it, I concur in the judgment of the Court of Session, that

the deed cannot be impeached upon any of the grounds suggested. The rights of the parties are therefore to be considered upon this deed as it now stands, together with the trust-disposition of 29th June, 1826.

The title against which the appellant contends, is founded upon a disposition by Lady Ashburton, dated 21st May, 1835, by which, describing herself as heritable proprietrix of the lands after mentioned, (being the estate of Arisaig in question in this cause,) she gave, granted, alienated, and disponed, conveyed and made over from her, and her heirs-at-law, and her successors whatsoever, to and in favour of Lord Cranstoun, his heirs and assigns whomsoever, heritably and irredeemably, the lands in question, by name, together with all right, title, interest, claim of right, property and possession, petitory or possessory, which she had, or could pretend thereto. The only question which could arise upon this instrument would be, first:—Had Lady Ashburton the power of disposition over the lands in question? and secondly:—Was the instrument in question capable of passing to Lord Cranstoun the interest in the property which it was Lady Ashburton's wish to bestow upon him. This must depend upon the provisions of the marriage-settlement of Lady Ashburton, dated 29th June, 1826, by which the trustees were authorized and directed to purchase with certain trust-funds the lands in question, and to procure themselves to be feudally invested in such lands, and thereupon, after providing for the payment of the income to her for life, to execute a deed or deeds of strict entail, disponing and conveying the same after her decease, but always under and subject to all clauses, prohibitory, irritant and resolutive, necessary and accustomed by the law of Scotland, for constituting a perfect entail, to and in favour of the children of the marriage, male and female, and failing such issue, "to "such person or persons, or to such uses and purposes as shall "be named and appointed by me, in any deed of settlement or "other writing, to be executed by me, either during the sub-

" sistence of my intended marriage, or after its dissolution by " the decease of my intended husband, whom all failing to my " own nearest heirs-at-law."

The appellant is the heir-at-law, who contends that such estate and interest as by this deed was reserved to the disposal of Lady Ashburton in the event of there being no children of the marriage, was not effectually given to Lord Cranstoun by the disposition of 21st May, 1835. The ingenuity which has been exercised in support of this proposition has totally failed in raising any doubt in my mind. The entail to be created was, I think, confined to the issue of the marriage, upon failure of which the dominion over the property as to *persons, uses and purposes*, was to belong without restriction to Lady Ashburton, and upon failure of all persons so to be named by her, the property was to go to her own nearest heirs-at-law. There being a failure of issue of the marriage, Lady Ashburton by the deed of 21st May, 1835, has given this property to Lord Cranstoun, his heirs and assigns whomsoever. The property was in trustees, but the beneficial interest was in Lady Ashburton; and why is not her disposition competent to pass it to Lord Cranstoun? She had reserved to herself a power of appointment to the property, but in default of appointment it was to go to her heir-at-law. The deed of 21st May, 1835, was quite sufficient to execute the power, because in Scotland it is not necessary that the power should be referred to, and the property is named. If she had no estate or interest, but only a power, then clearly the power was well executed, and if she had a disposable estate and interest, then the deed was sufficient to pass it; and because the deed might operate either way, an argument was raised that it did not operate in any way.

There does not appear to be any ground for the argument, that by the law of Scotland, such an ultimate destination as this to the heir-at-law of the truster, gives an interest to whomsoever may answer that description, which the truster cannot defeat

chievous consequences. Upon such a point, I think that usage, even in the very teeth of the Act of Parliament, must be considered as entirely decisive.

Now, not only from the inquiries that were made during the argument, but by inquiries instituted very properly by my noble and learned friend who sits by me, after the argument closed, it appears that this has been the invariable, constant, and unquestioned usage in Scotland.

I am, therefore, clearly of opinion that validity cannot be given to this objection. That is the only point which I ever entertained any doubt upon, and I, therefore, entirely concur in the opinion that this interlocutor should be affirmed.

It is ordered and adjudged, That the said petition and appeal be, and is hereby, dismissed this House, and that the said interlocutors therein complained of be, and the same are, hereby affirmed. And it is further ordered, That the appellant do pay, or cause to be paid, to the said respondent the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant. And it is also further ordered, That unless the costs certified as aforesaid shall be paid to the party entitled to the same, within one calendar month from the date of the certificate thereof, the cause shall be, and is hereby, remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs, as shall be lawful and necessary.

G. and T. W. WEBSTER—WARRY, Agents.