[HEARD *4th March*, JUDGMENT *9th March*, 1847.]

LADY SOPHIA FREDERICA CHRISTINA HASTINGS, MARCHIONESS OF BUTE, LADY EDITH RAWDON HASTINGS, LORD HENRY WEYSFORD CHARLES PLANTAGENET HASTINGS, *Appellants.*

The MOST NOBLE PAULYN REGINALD SERLO, MARQUIS OF HASTINGS and EARL OF LOUDON, by Guardian and Factive *loco tutoris, Respondent.*

Deeds, Construction given to.—Shifting Clause.—Clause of Devolution. —A clause in a marriage contract and entail of the lands of *Whiteacre*, the property of the wife, declared, that in case an heir of the marriage should "succeed to the honours and estate of *Blackacre*," to which the husband was expectant heir, then that heir's second son, and failing a second son, then his eldest daughter should "succeed" to the lands of *Whiteacre*, the property of the wife. A female heir of entail succeeded to the honours and estate of *Blackacre*, and married a husband who was possessor of lands in England, settled upon him for life, with remainder to his sons in tail male. By Act of Parliament the lands of *Blackacre* were exchanged for those English lands, and settled in the same way—the effect being, to set the English estates free and enable the husband to sell them for payment of his debts, and to substitute the lands of *Blackacre* in the uses of the English settlement, and give them to the children of the marriage in tail male. *Held*, that an heir under the entail of *Whiteacre* taking the lands of *Blackacre* under this arrangement, did not "succeed" to these lands in the meaning in which that term was used in the entail of *Whiteacre*, and that the shifting clause in that entail did not thereby come into operation.

IN the year 1720 the Countess of Glasgow was heiress in possession in her own right of the lands of Rowallan, the estate of the ancient family of Mure. In contemplation of the marriage of her daughter, Lady Jean Boyle, with James Campbell,

brother of the then Earl of Loudon, an antenuptial contract, bearing date 29th March, 1720, was entered into, to which the Countess of Glasgow became a party.

By this contract, James Campbell bound himself to invest 3500*l.* of his own money, and 1500*l.* which he was to receive from the Earl of Glasgow, upon real securities, in favour of himself and the heirs male and female of the intended marriage. "And in case there shall be one heir-male existing of this pre-" sent marriage at the time of the said Master James Campbell " his decease, and not succeeding to the estate of Rowallan, " through the existence of one heir-male betwixt the said David " Earl of Glasgow and the said Jean Countess of Glasgow, his " lady, he binds and obliges him and his foresaids to provide and " secure the said heir-male in the sum of other 5000*l.* sterling " out of the first and readiest of any estate, heritable or move-" able, that shall belong to him at the time, at least that the said " heir-male shall succeed to an estate answerable to the said other " 5000*l.* sterling: but if the said heir-male of this marriage " shall succeed to the said estate of Rowallan, then this oblige-" ment for payment of the said other 5000*l.* sterling, or giving " lands or other effects for the samen, shall be void and null." And on the other part, the Earl of Glasgow bound himself to pay to Campbell 1500*l.*, in full of everything his daughter could claim through his decease. The contract then continued thus: "And moreover, in regard the said Jean Countess of " Glasgow, heretable proprietrix of the lands and barony of " Rowallan after disponed, is resolved to settle the succession of " the said estate, with consent of the said David Earl of Glas-" gow, her husband, in favours of the heirs-male procreate or to " be procreate betwixt her and the said Earl; which failzieing, " to the said Lady Jean Boyle, and the heirs-male of her body " to be lawfully procreate betwixt her and the said Mr. James " Campbell, her promised husband; which failzieing, to the " other heirs of tailzie after mentioned (with and under the ex-

HASTINGS *v.* HASTINGS.—9th March, 1847.

"press reservations, conditions, burdens, provisions, and others "after mentioned)" therefore the Countess granted procuratory of resignation for new infeftment in favour of herself and her husband, and the longest liver of them, in life-rent, "and the heirs-male lawfully to be procreate betwixt them "in fee; which failzieing, to the heirs-female of the body of the "said heir-male, the eldest always secluding the rest and succeeding without division; which also failzieing, to the said "Lady Jean Boyle, and the heirs-male to be lawfully procreate "of her body of this present marriage, and the heirs-male of "their bodys; which failzieing, to the heirs-female to be procreate of the body of the heir-male of this marriage, the "eldest always secluding the rest and succeeding without division, as said is; which failzieing, to the heirs-female to be "lawfully procreate of the said Lady Jean Boyle her body of "this present marriage, and the heirs male or female of their "bodys, the eldest heir-female always secluding the rest and "succeeding without division, as said is; which failzieing, to "the heirs-male of the said Lady Jean Boyle her body of any "lawfull subsequent marriage, and the heirs-male of their "bodys; which failzieing, to the heirs-female of the said heir-"male; which failzieing, to the heirs-female of the said Lady "Jean Boyle her body of any lawfull subsequent marriage, and "the heirs male or female of their bodys, the eldest female "always secluding the rest and succeeding without division, as "said is; which failzieing, to Lady Ann Boyle, second lawfull "daughter procreate betwixt the said David Earl of Glasgow "and the said Jean Countess of Glasgow, his lady, and the "heirs-male of the said Lady Ann Boyle her body, and the "heirs-male of their bodies:" and a series of other substitutes.

A clause provided that the heirs of entail should bear the arms of Mure of Rowallan, in these terms: "And sicklike, it's "hereby specially provided and declared, and appointed to be

"contained in the infeftments to follow hereupon, that the "whole heirs-male who shall succeed to the said estate of Rowallan (conform to the clause of succession above mentioned) "shall be holden and obliged to assume and continue the sirname of Mure, and to carry and retain the proper arms of the "family of Rowallan in all time coming; and also declaring, "that if the saids lands and barony of Rowallan, teinds and "others foresaids, with the pertinents (by the deficiency of "heirs-male), shall fall to the heirs-female, and that they shall "succeed to the samen in the event foresaid, by vertue of "the substitution and tailzie @mentioned, then and in that case "the eldest heir-female shall exclude all other heirs-portioners "and succeed without division, and be bound and obliged to "marry a gentleman of the sirname of Mure, or at least whose "children to be procreate of the saids rex'ive marriages, and "succeeding as said is, shall be bound and obliged to carry and "retain the said sirname and arms of the family of Mure of "Rowallan."

A subsequent clause, upon which the principal question in the appeal was raised, was thus framed, "And in like manner, "it's hereby expressly provided and declared, and appointed to "be contained in the infeftments to follow hereupon, that in "case it should fall out that there be only one son of this present marriage procreate betwixt the saids Master James "Campbell and Lady Jean Boyle, who shall succeed to the "honours and estate of Loudoun, tho' there be daughters, then "and in that case it's hereby declared, that the second son of "this only son of this marriage shall succeed to the said estate "of Rowallan; and failzieing a second son, then the eldest "daughter of this only son is to succeed to the said estate, and "who shall be obliged to marrie and carrie the arms of Rowallan, in the terms and under the irritancies of the tailzie "@mentioned; but if there be two sons of this present marriage, then the second son is to succeed to the estate of

HASTINGS *v.* HASTINGS.—9th March, 1847.

" Rowallan, in case the eldest son shall succeed to the estate of " Loudon; and that the succession to the said estate of " Rowallan, in case any of the heirs of this marriage shall suc- " ceed to the estate of Loudon, shall take place according as is " @mentioned, in all time coming; and so soon as the son " of this marriage, or others aforesaid, shall accept of the " honours and estate of Loudon, then the rents of the said " estate of Rowallan are to be managed and improven for the " use and behoof of the next heir of tailzie, who shall succeed " to the said estate of Rowallan in manner foresaid, and that at " the sight and by the advice of Alexander Earl of Eglintoun," and several other persons named.

At the date of this contract, the family honours and estates of Loudon were enjoyed by Hugh the third Earl, and brother-german of James Campbell, the destination of the estates by the titles being "in favour of Hugh Earl of Loudoun, and the " heirs-male lawfully procreated or to be procreated between " him and Margaret Countess of Loudoun, his spouse; whom " failing, to the heirs-male to be lawfully procreated of the body " of the said Hugh Earl of Loudoun in any subsequent mar- " riage; whom failing, to any descendant of the body of the " now deceased John Earl of Loudoun," (*i. e.* the 1*st* Earl, Chancellor,) " grandfather of the said Hugh Earl of Loudoun, " whom the said Hugh Earl of Loudoun shall name by a " writing under his hand at any time of his life, and even on " deathbed, with and under such conditions, provisions, restric- " tions, limitations, qualifications, reservations, clauses irritant " and resolutive, or otherwise, as should seem fit to him to insert " therein; and failing such destination being made by the said " Hugh Earl of Loudoun, or the person or persons so to be " named, to the heirs-male descending of the body of the " said deceased John Earl of Loudoun; whom failing, to the " heirs whatsoever descending of the body of the said deceased " John Earl of Loudoun; whom failing, to the heirs whatsoever

"of the said John Earl of Loudoun; whom failing, to the heirs "and assignees whomsoever of the said Earl Hugh."

The Countess of Glasgow never had any sons; and of the marriage of Lady Jean Boyle with Campbell only one son and two daughters were born; both of the daughters died without issue.

In 1773, the son, James M. Campbell, upon the death of his mother, Lady Jean, was served heir to her, and made up a title to the lands of Rowallan under the procuratory in the contract of marriage.

In the year 1782, James M. Campbell became Earl of Loudon, and entitled to the inheritance of the family estates of Loudon, which after the death of Earl Hugh had descended upon his son John, the fourth Earl, by whom they had been conveyed to trustees for payment of his debts. Accordingly, he was served heir-male and of line in general to his predecessor.

In the year 1786, James M. Campbell Earl of Loudon died, leaving an only child, Flora, who, under the destination of the honours and estate of Loudon, became entitled to them in her own right; and, under the contract of marriage of her grandmother, became also entitled to the estate of Rowallan.

In 1787, Flora made up her title to the lands of Rowallan, by service and infeftment, as heir-female of tailzie, and provision under the contract. And in 1790, the surviving trustee of the Loudon estates for payment of debts, conveyed to her such of these estates as remained unsold, which thereby became vested in her in fee-simple. The two family estates were thus united in the person of Flora Countess of Loudon.

In the year 1804, Flora Countess of Loudon married the Earl of Moira. Of this marriage there were born the following children: Lady Flora Hastings, in 1806; Francis George Lord Mauchline, in 1807, who died in the year in which he was born; George Augustus Francis, afterwards Marquis of Hastings, in 1808; Lady Sophia, in 1809; and two other daughters.

HASTINGS *v.* HASTINGS.—9th March, 1847.

At the period of his marriage the Earl of Moira was possessed of considerable estates situated in England, which were settled upon the Earl for life, with ultimate remainders to the use of his first, second, and other sons successively in tail male, remainder to the Earl, his heirs and assigns. By the settlement made in 1804, upon the marriage of the Earl and the Countess, these English estates were limited to trustees for a term of 100 years, for securing a yearly rent-charge of 1500*l.* for the Countess, and for another term of 3000 years for raising 10,000*l.* for portions for the children of the marriage, other than an eldest son.

In the year 1808, an Act of Parliament was passed, which after reciting the marriage between the Earl of Moira and the Countess of Hastings, and the settlements under which the Earl held these English estates, and that the Earl had charged the lands, under powers in that behalf given by the settlements, with a mortgage-debt of 10,000*l.*, continued thus: "And whereas the "said settled estates comprised in the first schedule," (being the English estates,) "are inconvenient as a family or settled estate, "by reason that they consist for the most part of small and "detached farms and tenements, inconvenient for management "and superintendence, and let at small rents, rendering the "collection of them very expensive, and the said rents are sub- "ject to considerable deductions for repairs of the buildings on "the premises: and whereas the said Flora Mure Countess of "Loudoun is the absolute proprietor in her own right, and by "way of separate estate, of the castle of Loudoun, in the county "of Ayr in Scotland, the ancient seat and residence of her "family, and of divers lands, farms, and hereditaments belong- "ing to the same castle, and forming a very desirable demesne "thereto; but the said lands, farms, and hereditaments are now "subject to or may be affected with or for the whole debts or "engagements of the said Flora Countess of Loudoun and her "predecessors in the said estate, and such castle is a principal

"residence of the said Earl of Moira and Flora Mure Countess "of Loudoun; and it will be a great benefit and advantage to "the issue of the said Francis Earl of Moira and Flora Mure "Countess of Loudoun, and an encouragement to the preserva-"tion of the said castle and the demesnes to be annexed thereto,' "that the said castle and certain of the lands, farms, and here-"ditaments, of the said Flora Mure Countess of Loudoun, in "the said county of Ayr, of greater value than the said settled "estates comprised in the said first schedule to this Act "annexed, after allowing for the said mortgage debt of 10,000*l.* "thereon, shall be settled or exchanged for or in lieu of the "same settled estates, and that the said Flora Mure Countess "of Loudoun may take the same settled estate, subject to the "said mortgage debt of 10,000*l.*, as a continuing charge thereon: "but as such exchange or settlement cannot be accomplished "without the aid and authority of Parliament." Upon this recital the Statute enacted, that from and immediately "after "the passing of this Act, so many and such of the manors or "lordships, messuages, farms, lands, tenements, and heredita-"ments, mentioned and comprised in the said recited indentures "of lease and release or settlement, of the twenty-sixth and "twenty-seventh days of May, 1788," being the English settlements, "as are mentioned or enumerated in the said first sche-"dule to this Act annexed, with their and every of their rights, "royalties, easements, members, and appurtenances, and the "reversion and reversions, remainder and remainders, rents, "issues, and profits of all and singular the same premises, shall "be vested in and settled upon the Right Honourable Charles "Lord Kinnaird, and the Right Honourable Charles George "Lord Arden, their heirs and assigns, to the use of the said "Lord Kinnaird and Lord Arden, their heirs and assigns for "ever, discharged of and from all the uses, estates, trusts, "powers, provisoes, and limitations, remainders, charges, decla-"rations, and agreements, by the same indentures of lease and

Hastings v. Hastings.—9th March, 1847.

" release or settlement, and the said indenture of the twelfth day " of July, 1804, limited, expressed, and declared, of and con- " cerning the same manors and other hereditaments, other than " and except the said sum of 10,000*l.* secured to the said " Thomas Coutts, and now due to the said William Collins " Jackson on mortgage, as aforesaid, and the said term of 1000 " years for securing the same; and which sum, together with " the interest thereof, shall from henceforth be and be deemed " a charge on the manors and other hereditaments comprised in " the said first schedule to this Act annexed, as the fund pri- " marily liable to the payment thereof, and such manors and " hereditaments shall be in lieu of and in exchange for the " castle, farms, lands, and hereditaments mentioned in the " second schedule to this Act, and hereby vested in the said " Charles Hope and William Adam, their heirs and assigns, " upon trust, as hereinafter expressed.

" And be it further enacted, that the manors and other " hereditaments comprised in the said first schedule to this Act " annexed, and hereby vested in the said Lord Kinnaird and " Lord Arden, their heirs and assigns, as aforesaid, shall be held " by them, but subject to the said mortgage for 10,000*l.* and " interest, in trust, for such person or persons, and for such " ends, intents, and purposes, and under and subject to such " powers, provisoes, declarations, and agreements, as the said " Flora Countess of Loudoun, at any times or time hereafter, " and from time to time, as well when covert as sole, and not- " withstanding her coverture by her present or any future " husband, by any deed or deeds, or instrument or instruments, " in writing, to be sealed and delivered by her in the presence " of two or more credible witnesses, and attested by the same " witnesses, or by her last will and testament in writing, or any " writing in the nature of or purporting to be her last will and " testament, or any codicil or codicils thereto, to be signed, " published, and declared by her in the presence of three or

" more credible witnesses, and attested by the same witnesses,
" shall, either before or after the time at which the exchange
" hereby made shall become absolute (but subject nevertheless
" and without prejudice to the provision hereinafter contained),
" direct, limit, or appoint, and in default of such direction,
" limitation, or appointment, and in the mean time, and until
" the same shall be made and take effect, and from time to time,
" subject to such estates, trusts, charges, or interests, as shall
" have been made or created by the said Flora Mure Countess
" of Loudoun, then in trust for the said Flora Countess of Lou-
" doun, her heirs and assigns, as and for the separate estate of
" the said Flora Mure Countess of Loudoun, apart from her
" present or any future husband, and free from his contracts,
" intermeddling or engagements.

" And be it further enacted, that from and immediately after
" the passing of this Act, all and singular the castle, farms,
" lands, and hereditaments, mentioned and enumerated in the
" said second schedule to this Act annexed, being Loudoun
" Castle and part of the estates, together with their rights,
" royalties, members, easements and appurtenances, and the
" reversion and reversions, remainder and remainders, rents,
" issues, and profits of all and singular the same premises, shall
" be absolutely freed and discharged of and from all the present
" estate, right, title, interest, claim, and demand of her the said
" Flora Mure Countess of Loudoun, and her heirs, and be
" vested in and settled upon the said Charles Hope and William
" Adam, their heirs and assigns, upon trust, to convey, settle,
" and assure the same, to and for such uses and estates, and
" under and subject to such charges (other than and except the
" said mortgage debt of 10,000*l.*, and the interest thereof, and
" the said term of 1000 years for securing the same,) as would
" at the time of such settlement, by virtue of the several herein-
" before recited indentures or any of them, have been subsisting
" of and concerning the said manors, farms, lands, and heredita-

" ments comprised in the said first schedule to this Act annexed, " in case this Act had not passed, or as near thereto as the laws " of Scotland and the deaths of parties and other circumstances " will admit.

" Saving always to the King's Most Excellent Majesty, his " heirs and successors, and to all and every other person and " persons, bodies politic and corporate, his, her, or their heirs, " successors, executors, administrators, and assigns (other than " and except the said Francis Earl of Moira and Flora Mure " Countess of Loudoun, his wife, respectively, and their respec- " tive heirs and assigns, and the first and other sons of the " said Francis Earl of Moira, and the heirs-male of the respec- " tive bodies of the same sons and the daughters and younger " sons, for whose portions the sum of 10,000*l.* hath been " appointed as aforesaid, and the said Charles Hope and Wil- " liam Adam, and Sir Thomas Hutton and Joseph Hill, as " trustees of the said several terms of one hundred years and " three thousand years, appointed to them respectively as " aforesaid, and their respective executors, administrators, and " assigns, and the said William Adam, his heirs and assigns, as " trustee of the inheritance conveyed to him and them by the " said Elizabeth Countess Dowager of Moira, in remainder or " reversion as aforesaid), all such estate, right, title, interest, " claim and demand of, in, to, or out of, the hereditaments men- " tioned in the said several schedules to this Act annexed, or " any of the same hereditaments, or any part thereof, as they, " every or any of them, had before the passing of this Act, or " could or might have had, held, or enjoyed, in case this Act " had not been made."

While this statute was being passed, the Earl of Moira granted the following obligation as explanatory of the intentions of himself and the Countess:—" I, Francis Earl of Moira, Lord " Rawdon, considering that, in case the Bill now depending in " Parliament, for exchanging part of my settled estates in

" England for part of the estates of Flora Mure Countess of
" Loudoun, my spouse, in Scotland, shall pass into a law, the
" said estates now of the said Countess will be settled to the
" like uses as my said estate now stands settled; and consider-
" ing that, as I am entitled to the reversion in fee of the said
" last-mentioned estate upon the failure of issue-male of my
" body, and will, of consequence, have the same right and
" interest in the estate of the said Countess which is to be given
" in exchange; and it's my will and intention that, in case of
" the failure of issue-male of my body, the said estate should go
" and descend to the said Countess and her right heirs succeed-
" ing to her title and dignity, and not to my own right heirs if
" they should be different; I do, therefore, hereby bind and
" oblige myself, as soon as the said estate now belonging to the
" said Countess, and proposed to be exchanged as aforesaid, is
" settled in pursuance of the Act so expected to pass, to make,
" execute, and deliver such deed or deeds, as by the Right
" Honourable Charles Hope and William Adam, Esq., the
" trustees named in the said Bill, or either of them, shall be
" judged necessary and proper for carrying my said purpose and
" intention into effect: And I consent that the said estate now
" of my said wife shall, if that is practicable and judged proper,
" be immediately and directly settled, failing me and the heirs-
" male of my body, upon her and her right heirs succeeding to
" her dignity, in and by the deeds which, by the said proposed
" Act, are directed to be framed and executed at the sight or by
" the direction of the Court of Session, provided, nevertheless,
" that in any conveyance or settlement of the said estate to
" effectuate my said intention, the same shall be declared subject
" to and charged with all and every sum and sums of money,
" being the proper debts of the said Flora Mure Countess of
" Loudoun, which shall be discharged out of the proceeds of
" my said estate proposed to be settled on her by the said Bill
" or otherwise by me out of my separate estate and effects, in

" such way that the amount of the said debts, in the case of the " right heir of the said Countess being different from my right " heirs, and becoming entitled to the estate which was hers, " shall be payable to my said heirs by hers; and I hereby " empower the said Charles Hope and William Adam, or either " of them, and the survivor of them, and the heirs of the sur- " vivor, to sue, if necessary, for implement of this obligation, " and to exhibit the same to the Court of Session, and otherwise " to do as to them shall seem proper, so as that my declared " purpose may be carried into execution."

Proceedings were afterwards adopted for completing an entail of the estates of Loudon, in terms of this Act of Parliament, and in June, 1809, the Countess, with consent of the statutory trustees and of the Earl, executed a deed, which after reciting the Acts of Parliament, continued thus: " Now seeing " that the lands and estates comprised in the said second " schedule to the said Act, and hereinafter particularly con- " veyed, are now exonerated of all the debts and engagements " of me the said Flora Countess of Loudoun, and my prede- " cessors, affecting the same at the time of passing the said " Act, or made to affect the same within the time thereby " limited and now elapsed, and in order to charge and burden " the same agreeable to the law and forms of Scotland, as " effectually as the estates in England intended to be exchanged " stood charged at the time of passing the said Act, (excepting " the said mortgage debt of 10,000*l.*, which is, in terms and by " the provisions of the said Act, to remain a charge upon the " said English estates), I am now, in manner after mentioned, " to convey the said lands and estate in said second schedule, " burdened with the payment of 1500*l.* sterling yearly of join- " ture to me, to take place in the event of the decease of said " Earl of Moira, and my surviving him during my life, and in " bar of terce or dower, and also charged with the payment of " 10,000*l.* sterling, as a provision for the younger children of

" the marriage between my said husband and me, in terms of " said marriage-settlement, and to come in place of the charge " for the same sum thereby created upon the English estate; " and I the said Francis Earl of Moira, being desirous and " consenting, as is testified by my subscribing these presents, " that the share, right, and interest which I had in the English " estate, termed the reversion in fee, and which, according to " the terms of the said Act of Parliament, I am entitled to have " and hold in the Scotch estate, should nevertheless go to and " be invested in the said Flora Mure Countess of Loudoun, and " her heirs hereinafter mentioned, in as far as the said purpose can " be effectuated according to the law of Scotland; and I the said " Countess being willing and desirous to comply with the obli- " gation I am under by the said Act, with regard to conveying " the said lands and estates comprised in the second schedule " to the said Act, and hereinafter mentioned, to the same uses " and estates, and under and subject to such charges (other " than and except the said mortgage debt of 10,000*l.*, and " interest thereof,) as, by virtue of the several indentures in the " said Act, and herein recited, would have been subsisting of " and concerning the said manors, farms, lands, and heredita- " ments comprised in the first schedule annexed to the said " Act, in case the said Act had not passed, or as near thereto " as the laws of Scotland, and the deaths of parties and other " circumstances, and the change of intention with regard to the " said reversion, will permit." The Countess then disponed the castle and part of the Loudon estates, " to and in favour " of the said Francis Earl of Moira, and failing him by decease, " to and in favour of George Augustus Rawdon, commonly " called Lord Mauchline, eldest, and at present the only son of " the marriage between the said Francis Earl of Moira and me " the said Countess, and the heirs-male of the body of the said " George Augustus Francis Rawdon, Lord Mauchline; whom " failing, to the second, third, fourth, and every other son, in

HASTINGS *v.* HASTINGS.—9th March, 1847.

" the order of their birth, to be born of the said marriage
" between us the said Earl and Countess, and heirs-male of
" their bodies in their order, respectively and successively;
" whom failing, to the first and other sons of the body of the
" said Francis Earl of Moira, to be born of any other marriage
" he may subsequently lawfully contract and enter into, according
" to the order of the birth of the same sons, and the heirs-male
" of their bodies in their order, respectively and successively;
" whom failing, to me the said Countess, and the heirs succeeding
" to me in the title and dignity of Loudoun; whom failing, to
" the heirs and assigns whatsoever of me the said Countess."
This conveyance was under the burden of the jointure of
1500*l.* provided to her, and of the sum of 10,000*l.* for provisions to the younger children, and under the restrictions and
prohibitions and clauses irritant and resolutive, of a strict entail;
and also " with and under this power and faculty, as it is hereby
" expressly provided and declared, that it shall be competent to
" and in the power of the said Francis Earl of Moira, with the
" consent, concurrence, and approbation of the said George
" Augustus Francis Lord Mauchline, when of the full age of
" twenty-one years, or, in case of his death, with the consent,
" concurrence, and approbation of the next immediate heir of
" tailzie descended of the body of the said Earl, being of the
" age of twenty-one years, and who, in the event of his surviving the said Earl, must succeed to him in the said lands
" and estate, by a proper and formal deed duly executed by the
" parties thereto, according to the forms of the law of Scotland,
" to alter this entail, and to dispone and convey the said entailed
" lands and estate, to the said Francis Earl of Moira, or to any
" other person or persons that may be thought proper, and that
" either in fee-simple, or with such conditions, provisions, limitations, restrictions, and clauses irritant and resolutive, or
" upon trust for such uses and purposes as the parties to such
" deeds may think proper; and, in like manner, after the

" decease of the said Francis Earl of Moira, and in case no
" deed of alteration has been by him executed during his
" life, with the consent and approbation as aforesaid, it shall
" be in the power of the said George Augustus Francis
" Lord Mauchline, and of the other heirs of tailzie aforesaid,
" descendants in the male line of the body of the said Francis
" Earl of Moira, and of each and every one of them, when they
" shall have respectively completed their titles by infeftments
" to the said entailed lands and estate, agreeable to and in
" terms of these presents, and shall have attained the age of
" twenty-one years complete, to alter this entail, and to convey
" the said entailed lands and estate, by proper deeds, in the
" same way and manner, and as fully and freely in all respects,
" as is before provided that the said Francis Earl of Moira, with
" the consent, concurrence, and approbation aforesaid, may do
" in his lifetime; as also, that it shall be competent to the said
" Francis Earl of Moira, with the consent of any of the sub-
" stitute heirs of entail, descendants of his body, when of the
" full age of twenty-one years, to alter this entail, and the order
" of succession with respect to the said substitute consent-
" ing, and with respect to all other substitutes postponed to
" him by this present deed, whether descendants of the said
" consenting substitute or not, and of new to arrange, destine,
" and disbute, or altogether defeat, such contingent succession,
" as to them shall seem meet; but whereas these powers and
" faculties are hereby committed exclusively to the personal
" discretion of the said Francis Earl of Moira, George Augustus
" Francis Lord Mauchline, and the substitute heirs above men-
" tioned respectively, it is hereby provided and declared, that
" the same being of course incapable of transmission by grant,
" purchase, adjudication, or otherwise, must be exercised freely
" and voluntarily, and in a manner suitable to the powers con-
" ferred by the said settlement by indenture of lease and release
" of Francis Earl of Huntingdon; and, therefore, that no deeds

"executed in carrying them into execution shall be effectual, or "in any respect operate an alteration of these presents, until a "decreet is obtained in the Court of Session, in a procees "where the whole heirs and substitutes alive at the time are "called as defenders, declaring the deeds executed for the pur- "poses aforesaid, to be lawful exercise of the powers and faculties "hereby conferred; the meaning and intent of this proviso and "declaration being, that the said Francis Earl of Moira, and "the said George Augustus Francis Lord Mauchline, and the "other issue-male of the said Earl's body, shall, as far as the "forms of the law of Scotland will admit, have the like powers "over the said lands and heritages hereby disponed in their "order, as he or they had or might come to have over the said "lands and estate in England, according to the settlements "thereof recited in the said Act of Parliament, if the said lands "and estate in England had remained under the said settle- "ments, so as to defeat the entail thereof in future, and bar the "remainders or right of substitutes."

By an Act passed in the year 1813, the remainder of the Loudon estates was exchanged for other English estates, held by the Earl under the same settlements as the lands embraced by the Act passed in 1808.

This Act recited that the lands to be affected by it were convenient to be enjoyed along with the other lands affected by the prior Act, and were of greater value than the lands of the Earl for which they were to be exchanged; and enacted, that from the date of its passing, the English estates should be vested in Lords Kinnaird and Arden, "their heirs and assigns "for ever, discharged of and from all the uses, estates, trusts, "powers, provisoes, and limitations, remainders, charges, decla- "rations, and agreements, by the same will of the said Francis "Earl of Huntingdon, limited, expressed, and declared of and "concerning the same hereditaments; and such hereditaments "shall be in lieu of and in exchange for the farms, lands, and

"hereditaments, mentioned in the second schedule to this Act "annexed," being the Loudon estates, "and hereby vested in "the Right Honourable Charles Hope, President of the Court "of Session in Scotland, and William Adam, Esq., their heirs "and assigns, upon trust, as hereafter expressed." It then enacted that the English lands so vested in Lords Kinnaird and Arden should remain, "continue, and be to the use of such "person or persons, and for such ends, intents, and purposes, "and under and subject to such powers, provisoes, declarations, "and agreements, as the said Flora Mure Countess of Loudoun, "at any time since the 5th day of March, in the year 1813, and "before the passing of this Act, and notwithstanding her "coverture by her present husband, hath directed, limited or "appointed, or at any time or times hereafter, and from time to "time, as well when covert as sole, and notwithstanding her "coverture by her present or any future husband, shall direct, "limit, or appoint, by any deed or deeds, or instrument or "instruments in writing, already or hereafter to be sealed and "delivered by her, in the presence of two or more credible "witnesses, and attested by the same witnesses, or by her last "will and testament in writing, or any writing in the nature of "or purporting to be her last will and testament, or any codicil "or codicils thereto, already or hereafter to be signed, published, "and declared by her, in the presence of three or more credibile "witnesses, and attested by the same witnesses (but subject "nevertheless and without prejudice to the provision herein- "after contained); and in default of such direction, limitation, "or appointment, and in the meantime, and until the same "shall be made and take effect, and from time to time subject "to such estates, trusts, charges or interests, as shall have been "made or created by the said Flora Mure Countess of Loudoun, "her heirs and assigns, then to the use of the said Charles Lord "Kinnaird and Charles George Lord Arden, their heirs and "assigns for ever, in trust for the said Flora Mure Countess of

Hastings v. Hastings.—9th March, 1847.

"Loudoun, her heirs and assigns, as and for the separate estate "of the said Flora Mure Countess of Loudoun, apart from her "present or any future husband, and free from his contracts, "intermeddling or engagements, and also discharged from all "right of the said Francis Earl of Moira to be tenant by the "courtesy of England."

It then enacted that the Loudon estates should be "abso- "lutely freed and discharged of and from all the present estate, "right, title, interest, claim, and demand of her the said Flora "Mure Countess of Loudoun, and her heirs, and be vested in "and settled upon the said Charles Hope and William Adam, "their heirs and assigns, upon trust, to convey, settle, and "assure the same to and for such uses and estates, and under "and subject to such charges as would at the time of such "settlement, by virtue of the said will of the said Francis Earl "of Huntingdon, have been subsisting of and concerning the "said farms, lands, and hereditaments comprised in the said "first schedule to this Act annexed, in case this Act had not "passed, or as near thereto as the laws of Scotland, and the "deaths of parties, and other circumstances, will admit," and directed that the proper deeds should be executed for effecting the purposes intended, and contained the same saving clause as was in the Act of 1808.

On the 27th of January, 1815, commissioners of the Earl and Countess of Moira executed an entail having this recital: "Now seeing that the lands and estate comprised in the "said second schedule to the said Act, and hereinafter par- "ticularly conveyed, are now exonerated of all the debts and "engagements of the said Flora Countess of Loudoun and her "predecessors, affecting the same at the time of the passing of "the said Act, or made to affect the same within the time "thereby limited, and now elapsed, and in order to settle the "same agreeable to the laws and forms of Scotland, as effec- "tually as the estates in England intended to be exchanged,

"stood settled at the time of passing the said Act." The entail then conveyed the lands embraced by the second Act "to and in favour of the said Francis Earl of Moira, and fail-"ing him by decease, to and in favour of George Augustus "Francis Rawdon, commonly called Lord Hungerford, at present "the eldest son of the said Francis Earl of Moira, and the "heirs-male of the body of the said George Lord Hunger-"ford; whom failing, to the other heirs-male of the body of "the said Francis Earl of Moira, in the order of their birth, and "the heirs-male of their respective bodies; whom failing, to "such person or persons as the said Francis Earl of Moira has "nominated and appointed, or shall nominate and appoint, by "any deed or deeds under his hand, to succeed on such failure "of the heirs-male of his body, to the said lands and estates "hereinafter disponed, or who shall be so nominated and "appointed by any commissioner or commissioners of the said "Francis Earl of Moira, already empowered, or hereafter to be "empowered, so to do, by a deed or deeds under his hand, and "failing such appointment and nomination, to the person or "persons who, in case the said recited Act of the 53rd of His "present Majesty's reign had not passed, would, on the decease "of the said Francis Earl of Moira, and failure of issue-male of "his body, have been entitled to the English estates mentioned "and comprised in the first schedule to the said last mentioned "Act annexed, under the denomination of the said Francis Earl "of Huntingdon's own right heirs; whom failing, to the heirs "whatsoever of the said Francis Earl of Moira," under the fetters of a strict entail, with the same power of alteration as was given by the prior entail of 1808.

Feudal titles were made up in the person of the Earl of Moira under both of these entails by crown charter and infeftment. And subsequently to the excambion effected under these Acts of Parliament, the English estates were sold, and with the purchase money the debts of the Earl were paid off.

HASTINGS *v.* HASTINGS.—9th March, 1847.

In the year 1826, the Earl of Moira, now become Marquis of Hastings, died, and was succeeded by his son George Augustus Francis, who made up his titles to the Loudon estates as heir of entail and provision under the two entails by service and infeftment.

In the year 1839, Flora, the eldest daughter of the Marchioness of Hastings, died. In 1840 the Marchioness died, leaving of her children surviving her, George Augustus Francis, now Marquis of Hastings, and three daughters, the eldest of whom was the Appellant, Lady Sophia Frederica, Marchioness of Bute. And at the period of her death her son, the Marquis of Hastings, had one son, the Respondent, Paulyn Reginald Serlo, then Earl of Rawdon, and three daughters, of whom the eldest was the Appellant, Lady Edith Rawdon Hastings.

Claims to the Rowallan estates having been asserted on behalf of the Marchioness of Bute and Lady Edith Hastings, on the ground that George Augustus Marquis of Hastings, having succeeded to the Loudon estates, could not likewise take the Rowallan estates, but was debarred therefrom by the terms of the settlement on the marriage of James Campbell and Lady Jean Boyle, it was arranged that the Marquis should make up a title by service as heir of tailzie and provision to his mother the Marchioness of Hastings, and that these claims should be tried by actions of declarator at the instance of the respective parties. Accordingly George Marquis of Hastings made up a title in this form, and then brought an action in 1841, concluding to have it found that he had not *succeeded* to the Loudon estates in the sense in which the term was used in the entail of Rowallan—that he had right to the Loudon estates in satisfaction of his right to the English estates under the settlements thereof, which right he had not by succession, but as a purchaser, and consequently the clause of devolution in the entail of Rowallan had no application, and would not prejudice

his right to enjoy that estate; or at least that that clause did not affect his right to succeed as heir of entail in Rowallan, and did not impose any obligation upon him to denude thereof in favour of any other descendants of the marriage; or otherwise, that the right to succeed under the entail of Rowallan belonged to him, and after his death to his eldest son, or to his second son if he should leave such, and failing a second son, to his eldest daughter, and that such son or daughter was not entitled by virtue of the clause of devolution to question his right of succession, or require him to denude thereof, and that the title made up by him was good and indefeasible.

The Appellant, the Marchioness of Bute, likewise brought an action, setting forth that her brother, George Augustus Marquis of Hastings, having succeeded to the lands and honours of Loudon, the right of succession to the lands of Rowallan under the entail thereof had devolved upon her, and concluding to have that found, and her brother ordained to denude in her favour; or otherwise, that the titles made up by him should be reduced and set aside.

Again, Lady Edith Hastings brought an action, setting forth that as her father, George Augustus Marquis of Hastings, had succeeded to the honours and estates of Loudon without having a second son, she, as his eldest daughter, was entitled to succeed to Rowallan under the entail of that estate, under an obligation to denude in the event of her father afterwards having a second son, and concluding to have it found that her father had no right to succeed to Rowallan—that the Marchioness of Bute had no right to succeed thereto—that her father having only one son, she, as his eldest daughter, was entitled to succeed to these estates, and that they had devolved to her as heir under the contract of marriage, or at least that she would be so entitled in the event of a second son not being born to her father, and that in the meanwhile the rents of the lands should be managed and improved for behoof of

such second son, if such there should be, and failing him, for herself.

After these different actions had been conjoined, and while they were still in dependence, a second son, Lord Henry Hastings, was born to the Marquis. In the year 1842 an action was brought in the name of Lord Henry, setting forth that he, as the second son of his father, was entitled to succeed to Rowallan in consequence of his father having succeeded to the estates and honours of Loudon, and concluding for a declarator of this right, with other consequential conclusions.

This last action was followed by a second action at the instance of Lady Edith, to have it found that her right to succeed to Rowallan vested on the death of Flora Marchioness of Hastings, at which period her father had no second son, and that her right was not affected by the subsequent birth of Lord Henry Hastings.

These two new actions were conjoined with the previously depending ones. Subsequently George Augustus Marquis of Hastings died, and was succeeded in his titles and estates by the Respondent, Paulyn Reginald Marquis of Hastings, who was sisted as a party to all these actions.

The Court ordered cases for the parties to be prepared, and laid before all the Judges for their opinion, and thereafter, on the 16th November, 1844, in conformity with that opinion, pronounced the following interlocutor:—" Find that the deceased " George Marquis of Hastings was entitled to succeed to, and " complete feudal titles to, the estate of Rowallan at the death " of his mother, the late Countess Marchioness, as heir of taillie " under the Rowallan entail, and that his right was not excluded " by the clause of exclusion or devolution in the said entail, in " terms of the first declaratory conclusion of the summons at " the instance of the late Marquis; and, in respect thereof, " Find that the present Marquis of Hastings, the eldest son of " the late Marquis, is now entitled to succeed to, and possess,

HASTINGS *v.* HASTINGS.—9th March, 1847.

"the estate of Rowallan, as nearest and lawful heir of taillie and "provision to his father, and has the sole right and title to the "said estate: And, *separatim*, Find that the clause of exclusion "or devolution, according to its sound construction, did not "apply to, or affect, the late Marquis, and did not exclude him "from the succession to the said estate of Rowallan: There- "fore, in the action originally raised in the name of the late "Marquis, and now insisted in by the present Marquis, decern "and declare to the effect foresaid, in terms of the first and "fourth conclusions of the summons, and repel the whole "defences of all the defenders thereto: And in the counter "actions at the instance of Lady Sophia Hastings, Lord Henry "Hastings, and Lady Edith Hastings, respectively, sustain the "defences of the late Marquis of Hastings, and assoilzie the "present Marquis of Hastings from the conclusions of all these "counter actions."

The appeal was taken against this interlocutor by the Marchioness of Bute, Lady Edith Hastings, and Lord Henry Hastings, who had a common interest in maintaining against the Marquis of Hastings, *first*, that the shifting or devolution clause in the contract of marriage, 1720, was so framed as to be applicable to and take effect against not only the sons of the marriage, but the whole series of heirs called by the contract upon these terms in the later branch of the clause, "and that "the succession to the said estate of Rowallan, in case any of "the heirs of this marriage shall succeed to the estate of Lou- "don, shall take place according as is above mentioned in all "time coming." And *second*, that the clause had come into operation, (by the Marquis of Hastings having come into possession of both Rowallan and the Loudon estates,) under the words in the first branch of the clause, that in case there should be a son of the marriage "who shall succeed to the honours and "estate of Loudon," then it was declared that the second son of that son "shall succeed to the said estate of Rowallan."

But each of the Appellants had a distinct interest in maintaining against the others a *third* question, that if the clause had in the circumstances come into operation, it had done so in favour of the individual Appellant, and not of the others.

In consequence of the conflicting interests of the Appellants under the *third* of these questions, each Appellant was allowed to be heard separately by his counsel, and very elaborate arguments followed upon all the three questions. But the *second* was the only one upon which the House delivered an opinion, and therefore is that to which the subsequent statement will be confined.

Lord Advocate and *Mr. Bethel* for the Marchioness of Bute. —If the shifting or devolving clause by its terms applies to the Marquis of Hastings, the circumstances under which he took the barony and estates of Loudon are not such as to free him from its operation. When the Countess of Glasgow framed that clause in the contract of marriage, she contemplated the possibility of the succession to the estate of Rowallan, and to the honours and estates of Loudon, uniting in the same person. To prevent that union, in whatever way it might be accomplished, and in case any of the heirs of the marriage should become possessed of the Loudon estates, to make Rowallan pass to another and inferior line of heirs, was the object she had in view.

The effect of the arrangement accomplished by the Acts of Parliament, was merely to substitute the Loudon estates under the settlement in tail of the English estates, and to set the English estates free from that settlement for the purposes of sale. But the mode in which that was done by the first Act was to make the lands embraced by it, after serving the uses of the English settlement, descend, not, as the English lands would have done under the settlement in tail, to the heirs of Lord Hastings, but as the Loudon estates would have done under their titles before

HASTINGS *v.* HASTINGS.—9th March, 1847.

being so substituted, viz., to the heirs of the Marchioness. If, then, the present Marquis would have been affected by the shifting clause if he had taken the lands of Loudon after successive descents in fee simple, how can he be less so, because the Marchioness of Hastings did not allow them to descend in fee simple, but sent them down under a special form of entail? With reference to the intention of the settlor, that the two estates—Rowallan and Loudon—should not be united, it is equally violated in the one case as in the other. With respect to the honours of Loudon, the case is quite clear that the settlor intended to prevent them being held by the owner of Rowallan.

[*Lord Campbell.*—If the lands of Loudon had been alienated, and the honours alone had descended upon an heir of the marriage, you do not mean to say that, in that case, Rowallan could not have been taken?]

That case does not arise. Not only is the intention of the settlor violated, but so are the terms used by her to express that intention. In common and ordinary parlance, the Marquis of Hastings *succeeded* to the Loudon estates as first tenant in tail under the Act of Parliament substituted for the English settlements. The term "*succeed*" is not used by the settlor in any other sense than this popular one.

As far as regards *the honours* of Loudon, the case is free from all doubt, as unquestionably the Marquis did *succeed* to them in the strictest sense of the word. But it is said the clause does not apply, because he did not *succeed* to both, to the estate of Loudon as well as the honours, in the meaning in which "succeed" is used in the settlement. But the very clause in question uses that word in reference to the case both of a different transmissibility and a different order of succession.

What the Acts of Parliament effect is to substitute Loudon for the English estates, and make it be taken under the trusts of the English settlement. How can this render inoperative the destination in a given event which is assigned to Rowallan?

Why is anything which the heirs of Loudon might do in regard to Loudon to defeat what the owner of Rowallan had provided in regard to taking Rowallan? But, if this could be said, the saving clause in the statute must enure for the benefit of the owners of Rowallan, and prevent the destination of that estate from being in any respect impaired or qualified by the Act. If the Marchioness of Hastings had herself made a settlement of the Loudon estates, under which the present Marquis took, would he not with propriety, under the terms of the settlement of 1720, be said to succeed to Loudon, although something might have been given to the Marchioness in lieu of the settlement she had made?

[*Lord Chancellor.*—He was tenant in tail of the English estates subject to his father's life interest, and by the Act he gives up these estates for Loudon, so that he purchased the Loudon estates by his own estates. The Loudon estate being at the disposal of the Marchioness, she settled it. She might have sold it in the market for what it would fetch.]

All that was done, was to transfer to Loudon the particular force of limitation of the English estates, or to make an exchange of the one for the other, the effect of which is merely to give the party the same kind of interest in, and benefit from, the estate taken in exchange, as he had in the estate given. The arrangement in fact amounts to a settlement of the Loudon estates by the Marchioness of Hastings, under which the present Marquis may as justly be said to succeed as under the settlement of Rowallan. But after the destination of Rowallan had received a certain character and quality, by the possibility of its ownership being conjoined with that of Loudon, any subsequent alteration in the ownership of Loudon was immaterial to affect the destination of Rowallan.

If the entail of Rowallan had been made in the year 1600, in the year 1700 an Earl of Loudon had sold Loudon, in 1720 another Earl had bought it back, and in 1820 Loudon coming

by descent from the Earl who purchased it back, vested in the same person as the heir of Rowallan, would this person not have *succeeded* to Loudon in the meaning in which the term is used in the entail of Rowallan?

The present Marquis was an infant at the date of the Act of Parliament, and a great many years afterwards he succeeds to Loudon as tenant in tail.

[*Lord Campbell.*—At the date of the Act he had a vested estate tail in the English estates, subject to his father's liabilities, which he gave up upon the Loudon estate being conveyed to his father. The effect of the Act I presume was the same as if the infant, having been of age, had actually been a party to the docking of the entail, and making a new settlement.]

There could not be any distinction, for the legislature in dealing with the rights of the infant acted for him. The Act must be treated for this purpose as a mere conveyance. But how is it to affect Lady Glasgow's entail of Rowallan? To her it was matter of indifference how Loudon was dealt with, or by what means it was carried down; all she had in view was its union in the same person as the possessor of Rowallan.

Fazakerly v. Ford, 1 *Ad. & Ellis*, 897, is supposed to be an authority against the Appellants, but there the clause made express reference to the title under which the estate was "to "devolve,"—it was expressly under a specified will, and as it did not come by the will, to have made the shifting clause take effect, could only have been accomplished by doing violence to its express terms. But that case is an authority for an enlarged meaning of the word "succeed," for there the Vice-Chancellor held "devolve" to mean "a taking in succession by virtue of "the limitation."

Sir F. Kelly and *Mr. D. Mc Neill* were heard to maintain the same arguments upon this branch of the case on behalf of Lord Henry Hastings, and

HASTINGS *v.* HASTINGS.—9th March, 1847.

Mr. Stuart and *Mr. Moir* on behalf of Lady Edith Hastings.

Mr. G. Turner and *Mr. Adam Anderson* were heard in answer for the Marquis of Hastings, and

The Lord Advocate in reply.

LORD CHANCELLOR.—It appears to me to be unnecessary to advert to more than one of the many points which have been raised in this case, and which have been argued with great learning and ability at the bar. If the event has not happened upon which it was provided by the deed of entail, that the Rowallan estate should shift from the proposed successor to some other person, the title of the present Marquis cannot be impeached. This is purely a question of intention, to be collected from the instrument itself. In this, as in all other cases, the words used are to be understood in their natural and usua sense and signification, unless an intention be apparent to give to them an unusual and particular meaning. In either case the intention is the object to be sought, and if it be sufficiently apparent, it will govern. Upon this principle the case of Taylor *v.* Earl of Harewood, in 3 *Hare*, 372, was decided.

On the part of the Appellants much objection was taken to what was said to be an improper use of a technical meaning of the word "purchase" in the English law, in which sense alone it was said that the late Lord Hastings could be treated as a purchaser of the Loudoun estate. But it appears to me that a much more confined and inadmissible use has been made of the technical expression, "succeeding," used in Scotch entails, for it appears to me that the late Lord Hastings was not only a technical but an actual purchaser; but that he was rather a technical, not an actual successor to those estates, in the sense in which that term is used in the entail. But the terms themselves must decide this. The entail provides, if there be only

one son, who shall *succeed* to the *honours* and estate of Loudoun, then the second son of such only son shall *succeed* to Rowallan. If there be two sons, then the second son is to *succeed* to the estate of Rowallan, in case the eldest shall succeed to the estate of Loudoun. And the succession to the estate of Rowallan, in case any of the heirs of the marriage shall succeed to the estate of Loudoun, shall take place according as is above mentioned in all time coming. And as soon as the son of this marriage, or others aforesaid, shall accept of the honours and estate of Loudoun, the rent of Rowallan shall be improved for the use of the next heir of tailzie who shall succeed to Rowallan.

The contract matrimonial was between the heiress of the estate of Rowallan and the heir expectant of the honours and estate of Loudoun. If it had been intended that no heir of Rowallan under the entail should hold the honours and estate of Loudoun, how easy would it have been to have said so; instead of which the shifting is to take place upon certain events only, so little comprehending all possible events, that in two generations both estates have been enjoyed by the same person. There is, therefore, no general intent manifested, to effectuate which violence ought to be done to the expression used. The question is merely what is the natural meaning of the words used, and do they, or do they not, include the particular circumstances which have happened?

To ascertain this, we must place ourselves in the position of the parties at the time the entail was created. They will prove that, as to Rowallan, those who would enjoy Rowallan would be parties entitled under the entail then created; and, as to Loudoun, they must have contemplated that the same persons were likely to become heirs of those honours and estates. When, therefore, the entail speaks of succession, the natural meaning of that expression would be succession under the then existing titles of those estates. But this is not left to depend upon the natural meaning of the terms used—for every

expression used proves that to have been the actual meaning of the parties. The succession is to the honours *and* estate, and the word is used repeatedly as applicable to Rowallan and Loudoun—but as to the honours, and as to Rowallan, the succession intended must have meant succession under the then existing or created estate and limitation. Its meaning as to the Loudoun estate must therefore be the same, there being no words used, or reasons apparent, for giving a different meaning to the word used as applicable to the different subjects to which it refers.

The meaning of the whole, therefore, is, if the existing expectancy of succession to the honours and estate of Loudoun shall be realized in the heir of the marriage, then in certain events Rowallan shall shift to certain other heirs of tailzie. It is not necessary to consider what variations in the course of succession might have come within the provision, as the title of the present Marquis is not in any respect under it. That succession in the person of Flora Marchioness of Hastings, became subject to her control, and she exercised her right by absolutely destroying it. It was through her that the late and present Marquis are connected with the house of Loudoun, and succeeded to its honours. But it is not through her that the late or present Marquis succeeded to the estate of Loudoun, but in the technical meaning of the term "succeed" in the Scotch law, through the first Marquis of Hastings, a stranger, which succession took place in the life-time of the late Marquis's mother.

Now, then, can this be a succession within the meaning of that expression in the entail, which must have meant a succession as heir of the house of Loudoun? Suppose Flora Marchioness of Hastings had, before the marriage with Lord Moira, sold the Loudoun estate, and that Lord Moira had afterwards purchased it, and that it had descended from him to the late Marquis, would that have been the succession contemplated by

the deed of entail? But the present case is stronger, for the purchase was by the late Marquis, and paid for by his property. That estate being the only property applicable to that purpose, has been devoted to meet the debts and engagements of the family. The machinery by which that was effected cannot alter the results. It might have been sold to a stranger, and the proceeds applied, or it might have been sold at public auction, and bought by those interested in the English estate. The same thing was effected by the two Acts of Parliament. In all such cases the succession contemplated by the entail would have been destroyed, and whatever title the late or the present Marquis might have obtained in the land which constituted that property, would have been distinct from, and foreign to, and independent of, any hope of succession which at one time existed in them as descendants of the house of Loudoun.

It appears to me clear upon this point, that the event which has happened is not within the provision of the deed of entail, and that the interlocutor must be affirmed.

LORD BROUGHAM.—This case, my Lords, which is one of very great value, and also of importance as regards the argument which has been maintained on either side respecting the import of the clause in the nature of a shifting or devolving clause in this settlement, has been argued with great ability and learning on both sides of the bar by the various parties before us; and it has been argued at very great, but I will not say needless, length, and is now presented for the decision of your Lordships, with all the benefit and assistance which the Court can derive from this elaborate argument at the bar.

We have considered this case both since the argument at the bar and during the course of that argument, and especially immediately at its close. I mean those of us who heard it, including my noble and learned friend who is accidentally not here present, but who throughout has come to the same view of

the argument, and authorizes my noble and learned friend to state for him that he has come to the same conclusion, as he did indeed during every one of the arguments, in which we also, who are now here present, concur. The result is, that the construction put by the majority of the Judges in the Court below, who were all consulted upon it, is the right one, and that the decree appealed from must be affirmed.

I begin by stating that I rest not my opinion at all upon the view of the case which has been sometimes taken, and was even, to a certain degree, adopted on the part of the Respondent at the bar, at all events, it was dealt with in the argument to rebut that on the part of the Appellant, that we are here in a question of forfeiture, and that we are therefore to apply to the construction of the alleged clause of forfeiture, those very strict rules of interpretation which are applicable to cases of forfeiture. I regard this, no doubt, as a devolution, or shifting clause, as we call it in this part of the island, but I do not regard it in the light of a forfeiture, but rather in the light of a modification impressed upon the destination. I regard it as governing the destination, and not in the light of a forfeiture; at least, it is not at all necessary to my view of the subject, and to support that view, that it should be regarded as a forfeiture, and that the strictness of construction applicable to cases of forfeiture should be adopted in this case. But, regarding it merely in the light of a clause governing the destination, I am to look at the meaning of the words in the early part of the clause, "who shall "succeed to the honours and estate of Loudoun;" and going on in the two subsequent limbs of the clause, "shall succeed to the "estate of Rowallan;" and again, "is to succeed to the said "estate;" that is in the clause ordering the arms and name to be retained; and, ultimately, the more important of the whole, upon which chiefly the argument now turns, that "the succes-"sion to the said estate of Rowallan, in case any of the heirs of "this marriage shall succeed to the estate of Loudoun, shall

"take place according as is above mentioned in all time coming." Therefore the case resolves itself into this question, and the argument, in truth, is confined within these very narrow limits, what construction are we to give to the words "succeed" and "succession?"

Now, I think, first of all, that taking the word in its common use, in common parlance it would be doing no little violence to that ordinary sense and acceptation of the term, if under the words "succession" and "succeed" we were to include (and yet the argument of the Appellant, and of Lord Moncrieff requires it,) every manner of way and any manner of way in which a party or an heir could take or become possessed of an estate. That is not the ordinary meaning of the term; "succeed," in its ordinary sense, unless qualified by the context, or further explained by some antecedent or some subsequent expression, must be taken to convey the idea of one particular mode of succeeding, of taking, of becoming possessed, that is a succession (I fall naturally into the word, for it is the word which naturally occurs to one as expressive of the thing); it means inheriting; it means taking, not as a purchaser at all.

I observe that my Lord Moncrieff, in his argument, is impressed with this idea of it, for in one case he comes to speak of "succeeding in the estate of the family;" but "in the estate "of the family" can only be meant to qualify and explain the expression, for it is to be one particular kind of succession rather than any other, and to the exclusion of any other, namely, taking by descent.

Then just look at the mode in which this word is dealt with in the preceding part of it, in what I call the first limb of the clause, "who shall succeed to the honours and estate of Lou-"doun." Here "succeed" is applied to these two things, "honours" and "estate," to one of which things it can have no application by possibility, except succession by descent, because no persons can take honours by purchase, and yet

"honours" and "estate" are coupled together in the same limb of the sentence, and consequently "*succeed* to the *estate* of Lou-"doun" must there be taken to mean precisely the same thing as when you say "succeed to the *honours* of Loudoun." Then comes the expression in the latter part of all and which follows, the part which I call the ultimate portion of the destination, "and so soon as the son of this marriage, or other aforesaid, "shall accept of the honours and estate of Loudoun." Now, "accept the estate of Loudoun" is intelligible, and might mean shall *take* the estate of Loudoun in any way, because a person who inherits an estate may renounce his succession, and a person may be said to accept an estate when he purchases an estate, or receives it in exchange, as in the case here, which was a purchase, or when he receives it by gift. But "accept the honours" cannot mean that,—"accept the honours" must therefore mean *take* the honours, and honours can only be taken by descent, the honours of Loudoun at least; there could be no new creation, they could only be taken by descent, and therefore "accept the "honours and estate of Loudoun," means "take by descent the "honours and estate of Loudoun," and you must here construe the word "accept," in consequence of the word "estate" coming after it, as well as "honours," in the same manner as regards the honours, that you do as regards the estate, just as in the preceding clause, you must construe in regard to the estate the word "succeed," when it comes to be applied to the words "honours" and "estate" together, in the same manner as you construe "succeed to the honours," because the words "honours" and "estate" are applied precisely in the same manner to, and connected with, the word "succeed."

Now these views, taken from the first and from the last part of this clause, appear very much to bear out the construction which the Court below have put, and which we are inclined and very clearly disposed to put, upon the word "succeed" in this part of the clause, "succeed to the said estate of Rowallan,

HASTINGS *v.* HASTINGS.—9th March, 1847.

"in case any heirs of the marriage shall succeed to the estate of "Loudoun." But I by no means consider that it is necessary, in order to put that construction upon those words, that we should have either the first part, "succeed to the honours and estate," or the last part, "accept the honours and estate," to guide us and to light us upon our way towards that conclusion; for I am perfectly free to confess, that if those words had stood alone "succession" and "succeed to the estate of Rowallan," as they do in the middle, which is the important and governing part of the clause, if they had stood alone, without any light cast upon them by the former or the latter part of the clause, "succeed to "the estate" in the former, "accept the honours and estate" in the latter, I confess that my opinion would still have been strongly in favour of the construction which has been put upon it by the Court below.

My Lords, the case of Taylor *v.* Lord Harewood appears to me a very important decision as regards our views of similar expressions and of similar subjects in an English deed. That case differs from this only in one respect, it is a great deal stronger for the construction which was there put upon it, and for the present construction now in controversy among the parties, than the case at the bar. I do not quite go along with one or two of the reasons upon which that case rested; but independently of those questionable reasons, there remain perfectly sufficient grounds for that decision, and that decision, which I think a perfectly clear and sound one, is, as I said before, considerably stronger than the case which is now before us.

One might suppose, as was ventilated in the course of the argument, cases of a sale to a stranger, or of an exchange with a stranger, and a subsequent repurchase of that estate from that stranger, where there was no privity whatever as regards the family, or any arrangement as to the family, where nothing could turn upon the qualification introduced (under the pressure, I think, of the argument and those considerations,) into Lord

Moncrieff's reasoning, from what is called "succession in the "estate of the family" (a gratuitous introduction by the way), where the introduction of any such circumstance was impossible, where the party took entirely as it were in gross, without any regard to settlement, without any regard to family, but only as a purchaser, where the estate had been sold out and out, and it had been bought by a stranger, and it was afterwards repurchased into the family, at a distant period of time, by one of the heirs of entail; if the argument be good for anything, it is impossible to repudiate its application to that case, and then you would have this result,—that a person in the family having at some future time, by a repurchase of that estate, which had got out of the family by sale or exchange, again acquired it by a totally separate and independent transaction, would then be understood to have accepted the estate, would then be understood to have "succeeded" to the estate, would then be understood to be in such a position that it was a "succession" to the estate of Loudoun, and a forfeiture of the estate of Rowallan.

[*Lord Chancellor.*—A judgment creditor, for instance.]

LORD BROUGHAM.—A judgment creditor is a case which immediately presents itself. A judgment creditor might be in that position; he accepts, he takes, he succeeds, according to the force of the argument, and therefore it is impossible to say that this very judgment creditor might not stand in the same position, yet if he happened to be of the Loudoun succession, he, though a judgment creditor upon Rowallan, would be precluded from benefiting himself by the Loudoun succession.

My Lords, I must say, with the very greatest respect for the learned Judges who have argued the case in the Court below with their usual ability, that they do not appear to me to have shown their accustomed sagacity in forming for themselves, once for all, a clear view of the case. For the best way of deciding or of dealing with any case is to begin by first of all forming to yourself a clear and distinct view of what the ques-

tion is which is before you, and which you are called upon to decide; but if you begin by getting entangled in the mazes of an argument—if you take it up piecemeal, and if you go from one thing to another, and only by degrees get to understand what the real point of the matter which is brought before you for your determination is—the consequence is, that you either never get at that clear view at all, or you get at it entangled by the mazes of the arguments through which you have been proceeding before you arrive at it. If the learned Judges had just at first applied their minds to what it was that was before them, and distinguished it from what it was that they really had not to determine, my opinion is, that they would not have bestowed so very elaborate a train of reasoning upon what does not seem to me to be incumbered with any degree of difficulty, and that we should have had less discrepancy in their judgments, and less argument probably before your Lordships. I am free to confess, with the utmost possible respect for those learned Judges, that I do not feel the pressure of the difficulties under which they seem to have laboured, and against which they seem, with various success, some more successfully and others less successfully, to have struggled. I do not think that the case is one of difficulty, I do not think the case is one of doubt. I do wonder that it is an obscure case, I do wonder that it required very much discussion—and I marvel that there should have been so great a difference of opinion in the Court below. I say this with all possible respect to those learned persons; but it is the opinion which my noble and learned friend and myself have formed from the beginning of the case, which has abided by us through the whole course of the argument, which has not been shaken by any attempts to displace it on the one hand, and which has not been materially confirmed by any attempts which have been made successfully, if it had been required, to strengthen the impression upon the other.

I am exceedingly glad, however, as there was so much dis-

cussion in the Court below, as the case was so elaborately argued there, and as it was the cause of so much difference of opinion there, that it has been so fully and elaborately argued before your Lordships, and I will add, that I feel thankful, therefore, to the learned counsel who have taken the pains so thoroughly to sift and to argue it; and I feel that it was brought before us, as I stated in the outset of my observations, after the most thorough scrutiny in the argument on either side, and after the greatest pains and attention having been bestowed to guide us to our conclusion.

Lord Chancellor.—The noble and learned Lord who attended throughout the whole of the argument, (*Lord Campbell,*) and who is necessarily absent to-day, has requested me to state to your Lordships, that he entirely concurs in the view which has been expressed by my noble and learned friend and myself.

The *Lord Advocate* objected to any finding of costs, because of an agreement which he stated had been made between the parties upon the subject, and which was referred to in the judgment of the Court below. After a discussion between counsel as to the existence and extent of the alleged agreement, the

Lord Chancellor said,—Lord Advocate, I apprehend an order here for costs, if there be a contract to prevent the parties from receiving them, will not give them the right. It is like a judgment at law, which has an equitable contract going with it.

Lord Brougham.—I do not think the parties will be damnified by the usual order at all.

Mr. Turner.—Your Lordship's order applies to all the appeals, of course.

Lord Chancellor.—Yes, certainly.

HASTINGS *v.* HASTINGS.—9th March, 1847.

The following order was made in all the three appeals.

Ordered and adjudged, That the petition and appeal be dismissed this House, and that the interlocutors therein complained of be affirmed with costs.

RICHARDSON, CONNELL, and LOCH—DURANT, STEWART, and MAXWELL—GRAHAM, MONCRIEFF, and WEEMS, Agents.