as oversman, and refer the two points on which they differ to his determination, with all the powers competent to the office of oversman. The moment that instrument is executed, I take it that the oversman is in exactly the same position as if there were no other matters in difference but those which were referred to him, as if he had been originally appointed solely to carry out the terms of the reference contained in the submission. What he did was this: He executed a valid instrument of prorogation, in which, after reciting his appointment, he prorogated and adjourned the said submission, (that is, as far as he was concerned, for with regard to no other part of the submission had he any authority,) and the period for deciding the matters referred to him, to the day of . Therefore the state of the case is this: The submission is to be read as if it was a submission of the two matters in dispute only to Andrew Lindsay, with power to him to prorogate. He accepts the reference, and does prorogate. That gives him full power to make his determination within the time to which his prorogation extends. But how does it affect any other matters? Evidently not at all. It would be out of the four corners of the instrument of submission, and beyond what is there included or intended to be included. The right of prorogation is a discretionary right, to be exercised as the interests of the parties may require, and it is a right to be exercised with reference to those matters that are before the party by whom that discretion is to be exercised.

My Lords, I come therefore to the opinion, that in this case there was no power whatever in the oversman to prorogate, and that, in point of fact, he never did prorogate. I come to that conclusion, which is decisive of the case; and even if there could be a valid devolution to the oversman, yet while the matter is not so devolved, he is not finally to decide it. There appears to me to be great weight in what is said by Lords Fullerton and Ivory on the subject, that the functions of the arbiters cannot be in operation as to part of the matters in dispute, while those of the oversman are in operation as to the rest. I give no decided opinion as to that. I do not say that there cannot be such a state of things, but that there cannot be such a state of things without an express contract that such a state of things should exist. It is clear that there is nothing of the sort in the present case.

My opinion, therefore, is—1*st*, That until the final decree of the arbiters, in May 1847, the matters then adjudicated upon had not been so decided as to preclude them from altering their decree if they thought fit; and that therefore the notes of November 1846 were not a valid decree. And, 2*dly*, That the oversman had not, by the submission or the devolution, the power of prorogation, save as to the matters referred to him; so that there was no prorogation of the decree of the arbiters after November 1846, and therefore the decree of May 1847 could not be valid. I come to this conclusion upon purely technical grounds. We are deciding the case on a mere matter of form; but after the observations I took the liberty of addressing to your Lordships at the commencement, I trust your Lordships will have no hesitation in adopting the conclusion at which I have arrived, that this interlocutor appealed from must be reversed.

Interlocutor reversed.

Appellants' Agents, J. and H. G. Gibson, W.S.—*Respondents' Agents*, Murray and Beith, W.S.

MAY 10, 1855.

HERCULES SCOTT and Others, *Appellants*, *v.* GEORGE SCOTT and LORD BENHOLME and Others, *Respondents*.

Legacy—Disposition and Settlement—Trust Deed—Construction—Nearest Relations—Full and half blood—*A testator, after conveying his property, heritable and moveable, to trustees, directed the residue, after fulfilment of the trust purposes, to be paid to his nearest relations then alive. He left no issue, and no relations, but children of two full brothers, and children of a sister uterine. Throughout his settlement his sister uterine was spoken of simply as his sister, and her children as his nephews and nieces.*

HELD (affirming judgment), *That the nephews and nieces by the half blood were entitled to participate in the residue equally with the nephews and nieces of the full blood.*[1]

The pursuers appealed against the judgment—1. Because the appellants and James Robert Scott, as the children of the testator's brothers german, or such of them as shall be alive at the

[1] See previous report 14 D. 1057; 24 Sc. Jur. 649. S. C. 2 Macq. Ap. 281: 27 Sc. Jur. 372.

period when the residue of his means and estate becomes divisible, will be the only parties called by the testator in his settlement to succeed to the said residue under the description of his "nearest relations then alive:" and in that character the appellants and the said James Robert Scott, surviving at the said period, or those in their right, will be entitled to the whole of the residue, to the exclusion of the respondents, the children of the testator's sister uterine, or such of them as may also happen to be then alive. 2. Because, according to the law of Scotland, the appellants and James Robert Scott, or those of them who are alive at the period when the residue becomes divisible, will be the testator's whole "nearest relations then alive;" and there is nothing in the tenor or terms of the testator's settlements to indicate that he attached to the words above quoted any signification different from that assigned to them by law, but, on the contrary, these settlements demonstrate that the testator considered the appellants and Mr. James Robert Scott to be nearer relations to him than the respondents. 3. Because, even if the terms of the settlement should be considered doubtful or ambiguous, the appellants and the said James Robert Scott, or such of them as shall be alive when the residue becomes divisible, will be the sole next of kin and legal heirs in moveables of the late James Scott, and entitled as such, by themselves or their assignees, to succeed to the whole of the said residue. Grotius Inleydinge Tot de Hollandische Rechts Geleertheyt; 2 Burge, 857; Voet, xxviii. 5, 17; Scots Acts, 1681, cap. 79; *Brown*, M. 16,679; *Laing*, 16th Nov. 1814, F.C.; Stair, iii. 4, 6; Ersk. iii. 8, 2; *Wharrie* v. *Wharrie*, M. 6599; *Pope* v. *Whitcomb*, 3 Mer. 689; *Smith* v. *Campbell*, 19 Ves. 400; S. C. Coop. Chan. Cases, 275; *Brown's Trustees*, M. 2318; *Mahon* v. *Savage*, 1 Sch. & Lefroy, 111; *Norris* v. *Norris*, 2 D. 220; Bell's Prin. § 1861; Ersk. iii. 8, 8.

The respondents answered, that,—According to the sound construction of the deed, the respondents, or such of them as may be alive at the time of Mr. David Scott's death, will be entitled, under the provisions of the deeds, to share the residue of the trust estate equally with the appellants. *Grieve* v. *Rawley*, 10 Hare, 63.

Solicitor-General (Bethell), and *Anderson* Q.C., for the appellants.—It is settled in the law of almost all nations, that a gift to one's nearest relations means a gift to those who would take in the event of the testator's intestacy.—2 Burge's Com. 857; 4 *ibid.* 590-2; Voet, xxviii. 5, 17. As, therefore, by the law of Scotland in moveable succession, the full blood excludes the half blood, the appellants are alone entitled to the gift of the residue. This doctrine is assumed in *Wharrie* v. *Wharrie*, M. 6599. The case of *Norris* v. *Norris*, 2 D. 220, is not against this, for there the gift was to the whole of the nephews and nieces, and thus the rule was excluded. But here there is no indication in the will that the testator meant by the words anything else than what the law attributed to them. On the contrary, he seemed by the other gifts to give a clear preference to the children of the brother by the full blood.

Lord Advocate (Moncreiff), and *Rolt* Q.C., for the respondents, were not called upon.

LORD CHANCELLOR CRANWORTH.—My Lords, I think the case now before your Lordships is one that is clear beyond the possibility of a doubt. When I say that, I do not mean to express a doubt that, if the words in the will had been merely that the testator gave the residue to his nearest relations, it would, according to the law of Scotland, mean those persons who would have taken the estate in case of his intestacy. But here the question is not who would take in the case of intestacy, because the testator has been his own interpreter of what he intended.

It is quite plain, that whatever the meaning of the term "nearest relations" may be in the abstract, it is here clearly and expressly to be understood, that the children of the half sister should be included, so as to give to the children of the brother as children of the full blood, and to the children of the half sister as children of the half blood, equal shares. It is perfectly clear that whatever may be the meaning to be attached to the term "nearest relations" in the abstract, wherever the testator gives to any of his nephews and nieces, he designates them as his nephews and nieces. The words that he makes use of are these:—"To Hercules Scott, his only son, £3000; and to each of his seven daughters, the sum of £1500; to Mrs. Isabella Robertson Scott, my sister, £500; to each of my nieces Jane and Helen Robertson, her daughters, £300." He calls them both his nieces. He says—"To Mrs. Scott, my sister, £500,"—plainly intimating, that he considered her as being in the same category with his brothers:—"and in the event of the death of either of my said nieces, both of these legacies to go to the survivor; to my nephew Captain George Robertson Scott, £500; to my nephew Hercules James Robertson, £300;" and to the other three nephews, naming them, £300 each. And so he goes on, calling them all nephews and nieces, as well those who were the children by the half blood as those who were the children by the whole blood.

Without, therefore, going further into the case, it seems evident that the testator has been his own interpreter of what he meant to do, and has shewn clearly that by nearest relations he means those whom he has here designated as being his nearest relations, and whom he describes as being the children of his brother of the full blood, and the children of his sister by the half blood. I therefore move your Lordships that this interlocutor be affirmed, with costs.

LORD ST. LEONARDS.—My Lords, as my noble and learned friend has told your Lordships, this is a simple case, turning entirely upon the words of this will. The testator has here told us,

that he considers his relations of the half blood equally with those of the full blood as his relations. Indeed the expression he uses is rather more marked perhaps in the one case than in the other; for in speaking of the children of the brother, he speaks of them as the children of his brother so and so, while in speaking of the children of the sister he speaks of his nephews and nieces. The simple question in this case is, whether your Lordships can possibly exclude those whom he has described, in the plainest terms, as relations of an equal degree with the others. I think the question is one that admits of so little doubt, that it really involves nothing in the shape of argument; and therefore I agree with my noble and learned friend that the decision of the Court below should be affirmed, with costs.

Interlocutor affirmed, with costs.

Appellants' Agent, James Burness, S.S.C.—*Respondents' Agents*, Hope, Oliphant, and Mackay, W.S.

MAY 22, 1855.

THE Hon. MARY ELLEN NORTON, *Appellant, v.* SIR SAMUEL HOME STIRLING and Others, *Respondents.*

Entail, Recording—Misdescription of Deed—Clerical Error—Diligence—*A deed of strict entail, perfect in all its clauses, was recorded in the Register of Tailzies on a petition and warrant describing it as an entail in favour of the entailer and his heirs, whereas the institute in the destination was not the entailer himself, but his eldest son.*

HELD (affirming judgment), *That this misdescription did not void the recording of the entail, so as to leave the estate open to the diligence of creditors,—the entail challenged being actually recorded entire in its whole clauses.*

Entail, Recording—Clerical Error—Fetters—Entail Amendment Act, § 43—*The resolutive clause of a deed of entail bore, "in case the said J. S. or any of the heirs of tailzie shall contravene the order herein before written, or the conditions, provisions, restrictions, or limitations contained in this deed of tailzie, or any of them—that is, shall fail or neglect to obey or perform the said conditions," &c. In the register this clause was transcribed thus:—"that is, shall fail to neglect, obey, or perform the said conditions," &c.*

HELD (affirming judgment)—1. *That the discrepancy did not void the recording of the entail, so as to leave the estate open to the diligence of creditors.* 2. *That the 43d section of the Entail Amendment Act of 1848 did not apply.*

Entail, Recording—Alteration, Deed of—*The destination of an entail was in favour of A and his heirs; whom failing, B and his heirs; whom failing, M and her heirs. Before recording the deed the entailer executed a deed of alteration, whereby M and her heirs were struck out of the destination. The entail was nevertheless recorded as it stood, and the deed of revocation was not recorded. The estate being in possession of an heir of the first branch of the destination, a creditor raised a process of declarator and adjudication as against an heir possessing under an entail not duly recorded.*

HELD (affirming judgment), *That, in a question between these parties, the omission to record the exclusion of M and her heirs was immaterial.*[1]

On appeal it was maintained that there ought to be a reversal, because,—1. The requirements of the Statute 1685 in reference to the registration of deeds of entail, had not been observed with reference to the deed in virtue of which it is sought to exclude the appellant's diligence. 2. The non-recording of the true heirs of tailzie constitutes a substantive and an insuperable objection to the validity of the entail, in a question with creditors. Sandford on Entails, p. 167; *Logiealmond*, i. e. *E. Mansfield* v. *Stewart*, 5 Bell's Ap. 154, 161. 3. The entail is subject to the additional objection that the combined irritant and resolutive clause, as appearing upon the face of the register, is blundered and incongruous. Mor. 15,539; *Rennie* v. *Horne*, 3 S. & M'L. 173; *Lumsden*, 2 Bell's Ap. 115; *Hoddam*, i. e. *Sharp* v. *Sharp*, 1 S. & M'L. 618. 4. The discrepancy between the entail as recorded and the principal deed, is in itself fatal to the validity of the entail. *Cathcart*, July 1, 1846, 8 D. 970; *Holmes* v. *Cuninghame*, 13 D. 689.

The respondents maintained that there ought to be an affirmance, because—1. The objection

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[1] See previous report 14 D. 944; 24 Sc. Jur. 590. S. C. 2 Macq. Ap. 205: 27 Sc. Jur. 372.