case, although not reconcilable with the opinion delivered by a large majority of the Judges of the Court of Session, was maintained by a very weighty minority. The doctrine, that mere general words purporting to dispose of a man's whole property in a will or *mortis causâ* deed, shall (unless there be something in the instrument itself to control that presumption) be understood of property, the succession to which, after the death of the testator, is not already regulated by a special destination to a particular class of heirs in a prior instrument, either made by the settler himself or under which he holds, and that the settler is not merely, by the use of such general words, presumed to intend to innovate upon any such special course of succession, seems to be neither unreasonable nor inconvenient.

The word "revocation" or "evacuation" may not be apt to describe the effect produced by an instrument devising lands held under such a title to other persons, because (as was justly said at the bar) such an instrument should operate upon the absolute fee legally in the person executing it, not by altering the special destination, but by withdrawing from it altogether the subject matter of the settlement. If, however, substance rather than technicality is to be regarded, the analogy of revocation properly so called is not without a legitimate bearing on this class of cases. It is admitted that if a special destination were contained in a prior deed (even though not strictly a *mortis causâ* disposition) executed by the settler himself, it would prevail against a subsequent disposition, by general words, of all the settler's property in a testamentary instrument, and it further seems to be the law of Scotland, (on the ground that an intention to innovate on a special course of succession is not readily presumed,) that when a reference to "heirs is found in the dispositive words of an instrument executed by a settler holding a particular estate although without fetters under a prior deed of entail, (whether executed by himself or by any other person,) it must, *primâ facie*, be taken, that the heirs intended by the later instrument are those to whom the estate would go by virtue of the destination in the earlier deed.

The doctrine mentioned by the minority of the Judges in *Thoms' case* seems to me to depend on the same principle, and I find it easier to suppose that this doctrine was the real foundation of the decision of your Lordships' House (under the advice of so great a Judge as Lord Hardwicke) in the two cases of *Campbell* and *Farquharson*, than to refer these decisions entirely to the weight of the extrinsic evidence which was undoubtedly received in them; but whatever may be their true ground I do not think it would be possible to reconcile those decisions of your Lordships' House with a judgment of reversal in the present case; and I concur in the propriety of the motion which has been made to your Lordships by my noble and learned friend.

LORD CHELMSFORD.—My Lords, I am of opinion that these interlocutors ought to be affirmed.

Interlocutors affirmed, and appeal dismissed with costs.

Appellant's Agents, Mackenzie and Kermack, W.S.; Loch and Maclaurin, Westminster.—*Respondent's Agents*, H. & H. Tod, W.S.; Valpy and Chaplin, London.

JUNE 16, 1873.

SIR WILLIAM STUART FORBES, Baronet, *Appellant*, *v.* The Hon. C. J. R. TREFUSIS and Others, *Respondents*.

Succession—Entail—Heirs Male—Heirs whatsoever of the Body—*A destination in an entail was to F. and the heirs male of his marriage with S., and the heirs male of their bodies respectively, whom failing, to the heirs whatsoever of the bodies of such heirs male respectively, whom failing, to the heirs female of the marriage of F. and S., etc.*

HELD (affirming judgment), *That the only daughter of the eldest heir male of F. was entitled to succeed before the second son and heir male of F.*

Appeal—Limitation of Time—Absence of Appellant abroad—*A pursuer and mandatory having lost their action, a petition of appeal was presented to the House of Lords three years after final judgment, the pursuer having been abroad at the commencement of the action and ever after:*

HELD, *The appeal was in time within the meaning of* 6 *Geo.* IV. *c.* 120, § 25. [1]

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[1] See previous reports 6 Macph. 900; 40 Sc. Jur. 514. S. C. L. R. 2 Sc. Ap. 328: 11 Macph. H. L. 44; 45 Sc. Jur. 388.

This was an appeal from the decision of the First Division as to the construction of a deed of entail.

In 1811 Sir John Stuart made an entail, by which he destined his estate, failing himself and heirs male of his body, to Sir William Forbes of Pitsligo, and the heirs male of the marriage between him and Dame Williamina Stuart, and the heirs male of their bodies respectively, whom failing, to the heirs whatsoever of the bodies of such heirs male respectively, whom failing, to the heirs female procreated of the said marriage, and the heirs whatsoever of their bodies respectively, whom failing, to other parties.

Sir John Stuart died in 1821. Sir William Forbes then succeeded to the estate, and possessed it till 1828. He had three sons and two daughters. The eldest son was Sir John Hepburn Stuart Forbes, who died in 1866, leaving an only daughter, Lady Clinton. The question was, whether Lady Clinton was next entitled or the next brother of her father, namely, the father of the appellant, Sir William Stuart Forbes. The present action was raised in 1866 by the appellant to reduce the titles under which Lady Clinton claimed to hold the estate, and Lady Clinton having afterwards died, the respondent, her eldest son, was made a party in her stead. The Lord Ordinary (Jerviswoode) decided in favour of the appellant. When the case was advocated to the First Division the Judges were equally divided; but three Judges of the Second Division being called in to assist, the Court, consisting of seven Judges, then became unanimous, and reversed the Lord Ordinary's judgment. The present appeal was then brought.

The *Dean of Faculty* (Gordon), and *Anderson* Q.C., for the appellant.—A preliminary objection to this appeal had been made, on account of more than two years having elapsed after the date of the interlocutor before the petition of appeal had been presented. A mandatory had been sisted along with the pursuer, who had been all the time living abroad, and it was urged before the Appeal Committee, that such mandatory was a party, and that the interlocutor had become final against him, and so the petition of appeal was too late. And the Appeal Committee allowed the question to be raised at the bar along with the argument on the merits. The respondent, however, does not now wish to urge the objection, and it need not be noticed.

As to the merits, the correct construction of the destination is, that, next after Sir William Forbes, the heirs male of his body by his marriage with the entailer's daughter were to succeed, and on their entire failure, but only in that event, the heirs female or heirs whatsoever of the bodies of these heirs male were to succeed. The Court below proceeded on the fallacy of assuming, that the entailer meant each of the sons of Sir William Forbes to be instituted as the root of an independent *stirps*, and that the limitation should have the same effect as if each son had been called by his name with limitation to the heirs male and female of his body. But the words are not apt to express this intention, whereas it would have been easy to express such an intention if that intention had existed. The Court below has ignored the word "male" in the words of inheritance following the limitation to the first and other sons, namely, "the heirs male of their bodies respectively." They read the words "heirs male" as if they were "heirs general." No reliance can be placed on the use of the word "respectively," for that word is a mere expletive. If the intention had been as the Court below held, it would have been easy to express it in a clear and apt manner, as is seen in the cases of *Anstruther* v. *Anstruther*, 2 Bell's Ap. 242; *Howden* v. *Rocheid*, L. R. 1 Sc. Ap. 550; *ante*, p. 1711; The words "whom failing" were also erroneously construed by the Court below, and in a way which is contrary to *Lockhart* v. *Macdonald*, (*Largie case*,) 1 Bell's Ap. C. 202. The proper antecedent to the words "whom failing" is the class of heirs male of the body called in the preceding substitution. There is no presumption in favour of the heir entitled by legal descent from the last heir in possession; and if the whole of the deed be looked at, there was a clear preference shewn for heirs male. There are instances of destinations like what the appellant contends is the true meaning of the present destination, in Dallas's Styles, 623; *Gordon*, M. 15,386; *Creditors of Carleton*, 5 Br. Sup. 252; *Lockhart* v. *Gilmour*, M. 15,404; *Farquhar* v. *Farquhar*, 1 D. 121; *Earl of Kintore* v. *Lord Inverury*, 4 Macq. 520; *ante*, p. 1179. The judgment of the Court below was therefore wrong, and ought to be reversed.

The *Lord Advocate* (Young), the *Solicitor General* (Jessell), and *R. Lee*, for the respondents.—The construction adopted in the Court below is the only one consistent with the language used in the destination. The destination divides the family into (1.) the heirs male procreated of the marriage and the heirs male of their bodies respectively, whom failing, the heirs whatsoever of their bodies respectively; and (2.) the heirs female procreated of the marriage, and the heirs whatsoever of their bodies respectively. The Lord Ordinary had by some mistake assumed, that Lady Clinton claimed under the destination "to the heirs female procreated of the marriage and the heirs whatsoever of their bodies;" whereas she claimed under the prior destination "to the heirs whatsoever of the bodies of such heirs male respectively." The construction of the respondent is the only one which gives effect to all the words of the destination.

LORD CHANCELLOR SELBORNE.—My Lords, in this case your Lordships have the benefit of a very careful and well considered judgment not only of the Judges of the First Division, but also of the consulted Judges who were called in to assist them, and the result of whose united

deliberations was to produce unanimity. The Judges of the First Division having been originally divided in their opinions, I need not say, that it would be only on very clear and strong grounds, that your Lordships would be disposed to decide against that weight and authority, and against so well considered a judgment of the Court below. Further, I may observe, that the learned Lord Ordinary, who came to a different conclusion, founded it not wholly, but certainly in a considerable degree, on a view of the construction of a part of this deed which was no longer insisted upon at the bar, and therefore it may be doubted whether, if the Lord Ordinary had had the same benefit of further consideration which the Judges of the First Division had, his Lordship might not have concurred in their opinion. When we come to examine the deed, the first thing which I think is clear in fact—it was hardly resisted by the Dean of Faculty in his reply—is this, that although "the heirs male procreated of the marriage," and in a latter place "the heirs female procreated of the marriage" between Sir William Forbes, Bart., and Dame Wilhelmina Stuart, the settler's daughter, are words which might have extended to all the male line descending from that marriage, and all the female line also descending from that marriage, yet it appears from the context of this particular deed, that that is not truly their meaning, because having spoken of "the heirs male procreated of the marriage" between Sir William Forbes and the settler's daughter, the deed goes on with the words "and the heirs male of their bodies respectively"—plainly, therefore, speaking of the first heirs male procreated as the authors of a stirps or line from whom other heirs male were to descend and to take by inheritance. That by itself, I think, unless there were other difficulties in the context which do not occur here, would be a sufficient reason for taking "heirs male" to signify sons, and to be a word descriptive of the persons who are to be the heads of several stirps, and the heirs female in like manner to be daughters. And I would observe, that although the words "procreated of the marriage" between two persons named are words that would not necessarily exclude the ulterior descent of a remoter issue from them, yet in their strict and accurate signification they are certainly more appropriate to issue of the first generation than to any afterwards who are truly and literally procreated of other persons, though their immediate parents may be traced back to the persons named.

Having arrived at that construction of those words, one material step has been made towards the rest of the construction, because we have thereby ascertained, that this testator intended several of the stirps to take one after another in the order of primogeniture, and not a single stirps to take according to the ordinary rules of simple descent.

I cannot help observing, that that construction is further illustrated by a comparison of this portion of the deed with those parts which follow it, because, when the testator intended a simple destination to the heirs male of the body of a particular person, he knew how to express it, for he goes on to say, "whom failing, to John Hepburn Belsches, Esq., Invermay, and the heirs male of the body of the said Sir William Forbes, Bart., in any subsequent marriage, whom failing, to Sir George Abercromby, and the heirs male of his body, whom failing, to the heirs whatsoever of the body of the said John Hepburn Belsches," in every case expressing himself in the manner in which, if the argument for the appellant were sound, he might have been expected to express himself in the first part of the deed, for in truth the argument of the appellant is, that all this amounts in the result to neither more nor less than what would have been the effect of the deed if the testator had simply said, failing the heirs male of his own body, to Sir William Forbes, Bart., of Pitsligo, and the heirs male of his body by his marriage with my daughter, whom failing, to the heirs female of the said Sir William Forbes by the same marriage. For that, of course, it would have been quite unnecessary to have used the very special language which this testator has used, dividing the stirps instead of vesting them in one, using the word "respectively," and contrasting the language of this part of the deed, in the manner in which he has contrasted it, with the parts which follow.

Now it is certainly a sound principle, that when you find words used, you should suppose them to be used for a purpose rather than without a purpose, and I think, therefore, that if we can place a reasonable construction upon the words which occur here, and which are rendered superfluous by the appellant's argument, we ought to do so. The appellant's argument turned very much upon what was said to be the proper or technical force of the words "whom failing," which it was said were words intended, after the exhaustion of one limitation or a series of limitations, to introduce another. To that proposition I see no reason whatever for taking the slightest exception, but it is in truth a mistake to suppose, that it is a proposition in any way inconsistent with the judgment of the Court below. The same effect, neither more nor less, is given by the argument on both sides to these words "whom failing." Both agree that on the failure of the one line they are meant to be introductory of another. The question is not as to the effect of the word "failing," but as to the effect of the word "whom." What is the antecedent to which the word whom is relative. The *Largie case* has no tendency whatever to throw the least light upon that which is the only question in this case, because it is admitted by the respondents in this case, that the destination "to the heirs whatsoever of the bodies of such heirs male respectively" is not to take effect until the failure of the heirs male of the bodies previously

mentioned. The question is, what is the true antecedent of the relative word "whom"? Now I cannot help thinking, that the Court below had sound reason for answering that question as they have answered it in this way: that "the heirs male of their bodies respectively" is the antecedent, not "the heirs male procreated of the marriage between" the settler's daughter and Sir William Forbes and their descendants, but those persons "respectively."

Having arrived at that, I cannot but think, that the effect of the word "respectively" introducing the gift over, which commences with the words "whom failing," and recurring at the end of that gift over to the "heirs whatsoever of the bodies of such heirs male respectively," such heirs male being there clearly such sons, is to import the force of that word "respectively" into the entire sentence, and that is not really distinguishable in sense from what it would have been if, as it was put to the counsel in the course of the argument, it had been "whom respectively failing," or "whom failing respectively," the effect of it being, that the heirs of the bodies of each stirps are to succeed in this manner—the heirs male of that stirps first, the heirs female of that stirps afterwards, but both the heirs male and the heirs female of that stirps succeeding next respectively to the parent towards whom they stand in relation of heir, and are meant to stand in the relation of successor. That word "respectively" is, in its natural and proper sense, and with the force which it constantly has in these legal instruments, a word at once of distribution and connexion. It distributes when a series of persons are intended to take, or to take in a certain order or manner, and it is a word of connexion, because it brings together by reference the heir to the ancestor, the issue or the child to the parent. So understood here, it seems to be only a short term for expressing a series of limitations, in each of which, as I understand it, and as the Court below has understood it, the whole issue of each stirps is to be exhausted before you go on to the subsequent limitations in this deed, the male issue, however, being always preferred to the female.

Now I do not know that we really need more to support this construction than the reasons which I have offered to your Lordships, and which in truth are more fully and more ably expressed in the judgments in the Court below, particularly the judgments of Lord Curriehill and Lord Benholme. But I cannot help saying, that although I think it was quite right of the learned counsel for the respondents not to lay their main stress upon subordinate clauses in the deed, which after all assist rather by way of illustration than by direct construction, yet I cannot but think, that the subsequent clause as to the rule which is to apply upon the succession of daughters is very much more consistent with the construction placed upon this instrument by the Court below, than with that contended for by the appellant. Your Lordships will observe, that the effect of the appellant's construction is to reduce this to the simple elements which I mentioned at the outset, the single stirps of Sir William Forbes, or rather the testator's daughter as the wife of Sir William Forbes, there being a preference of the male issue descending from that stirps over the female, but subject to that preference, a simple gift first to the male issue of that stirps and then to the female. On the other hand, the construction which the Court below has adopted, and which I think is hardly now contested as far as the division of the stirps is concerned, (I mean as far as the construction of the words "heirs male procreated" and "heirs female procreated" are concerned,) makes several stirps each to take successively the one after the other.

Now, with which of these two schemes of the will is this declaratory clause more consistent? Your Lordships will see, that the declaratory clause contemplates the rule to be followed for female succession, the succession of daughters, always so often as the succession through the whole course thereof shall devolve upon daughters, that rule being, that the daughters shall take with reference to the latest taker, I mean with reference to the last state of possession by the heir from whom that daughter takes—that, for instance, if there should be a daughter of the last taker in the male line, that daughter should succeed before the daughter of any former taker in the male line. I think that that rule, fairly understood, will also give a clue to the mode of succession if that daughter's line were exhausted, or if the last taker in the male line died without any issue at all. Then you are still to look to the last previous possessor, and the female taker is to take in order of possession reversed, that is, that the heir representative of the family in the preferred male line transmits to his own daughter as his successor, and if that line fails, you then go back to the next preceding male heir in the preferred male line, and his daughter will take in preference to any former ones. That is a mode of succession at least more consistent with the division of the whole into stirps, and the succession of the females of each stirps after the failure of the males of that stirps, than the notion, that all the males of a single stirps are to be completely exhausted, and then all the females are to come in.

However, I agree entirely with what was said, that after all, from these subsidiary clauses, illustration rather than proof is to be derived. All that I venture to say is, that, taken in the manner in which they have been taken by the Court below, the result is something consistent with the ordinary scheme of a family settlement in strict entail, where you have a division like this into a certain number of stirps, and being so, I think that the opposite view is very much less consistent with the ordinary scheme of will. Therefore I think the antecedent probability concurs with the conclusion at which I arrived from the words themselves, and particularly

from the governing word "respectively" as found in the earlier part of the instrument. On the whole, I advise and move your Lordships to affirm these interlocutors, and to dismiss this appeal, with costs.

LORD CHELMSFORD.—My Lords, I must confess that I have felt considerable doubt in the course of the argument as to the proper construction of this deed of entail of 1811, nor can I say that that doubt has been entirely removed; but considering, that we have here the unanimous judgment of seven learned Judges in the Court of Session, which judgment is concurred in by the opinion of my two noble and learned friends, I feel that my doubt is unfounded, or at all events, that it ought to yield to such high authority. I therefore agree that these interlocutors should be affirmed.

LORD COLONSAY.—My Lords, I concur entirely in the opinion which has been expressed by my noble and learned friend on the woolsack. The case is a very simple one, and cannot be illustrated by more statement than has been given by him, and by two at least of the learned Judges in the Court below. It appears to me, that the clause of the deed of entail makes each of the sons of the marriage a stirps, and that it says with regard to those sons respectively, that is, as to such stirps, that the descent shall be to the heir male of his body, whom failing, to the heirs whatsoever of the body of such sons. That seems to me to decide the whole case. I think that is the natural reading of the words. I think it is consistent with the ordinary course of descent in such cases, and on the whole reconciles the subsequent clause better than if we took the opposite construction. I have nothing more to add.

Dean of Faculty.—My Lords, perhaps you will allow me to make an observation with reference to the costs. I shall not say anything of course as to the costs of the principal appeal; but there was an objection taken to the competency of the petition of appeal presented by my clients, on the ground that their application was too late. The same proceeding took place in this House in the case of *Kerr* v. *Keith* on the 10th of June 1842, 1 Bell's Ap. 425; and there the same adjournment of the objection from the Appeal Committee to the House took place as in this case. The point was argued out on either side, and the result was, that, while the judgment was affirmed with costs, your Lordships' House made the following order with regard to the objection to the competency of the appeal, and the costs of it: "And it is also further ordered, that the said petition to dismiss the original appeal as incompetent be, and is hereby refused." That, I presume, unless your Lordships hold, that the objection was withdrawn at the bar in this case, would require to be repeated here, "and that the said respondent William Keith" (that was the party who took the objections to the competency of the appeal) "do pay or cause to be paid to the said appellant in the said original appeal, the cost incurred in respect of the case and proceedings in this House arising out of the said petition, the amount thereof to be certified by the Clerk assistant." Now the only difference between that case and the present is this, that in that case the validity of the objection was argued at the bar of the House, whereas, in the present case, it was not argued. I do not know that that makes much difference.

LORD CHELMSFORD.—It rather makes it stronger in your favour.

Dean of Faculty.—Yes; I think so, because it implies that it was scarcely an arguable point. We have been put to some expense in consequence of this objection being taken, and the precedent in the case of *Kerr* v. *Keith* shews the way in which your Lordships' House has disposed of a similar objection before.

LORD CHELMSFORD.—I think, my Lords, that the appellant ought to have the costs of the opposition to his appeal on the point of competency. Your Lordships may recollect, that the Lord Advocate, being pressed by my noble and learned friend on the woolsack, said that he did not mean to insist upon the objection. This is a stronger case, as it appears to me, than that cited by the Dean of Faculty.

Lord Advocate.—Perhaps I might be permitted to say, as we are the respondents upon this application, that I should not, after the motion which has just been made, or the opinion which has just been expressed by the noble and learned Lord, say a word upon the substance of the question of our being subjected to these costs, but I presume the costs will only be the costs of the answer to the petition. The circumstances in this case were these. I can state them in a sentence of six words.

LORD CHELMSFORD.—Your objection before the Appeal Committee was that the appeal was not in time.

Lord Advocate.—Yes, the appeal was not in time.

LORD CHELMSFORD.—I think the appellant ought to have all the costs occasioned by your opposition on that point.

Lord Advocate.—That would be merely the attendance of the agent. The appeal was presented after a lapse of close upon five years, and it was presented by a party who is in precisely the same position now as he was throughout in the Court of Session. A petition against the competency of the appeal was presented, and an agent appeared before the Appeal Committee to whom it was remitted, and the Appeal Committee reserved the question for the consideration of this House.

LORD CHELMSFORD.—The costs will be taxed by the taxing officer of this House; therefore we need not enter into any discussion upon that point. The appellant will get the proper costs, that is to say, the costs arising from the opposition to the competency of the appeal whatever they may be. We cannot decide what they ought to be.

Lord Advocate.—Of course not. I only wanted to direct your Lordships' attention to the fact, that it was merely the costs occasioned to the appellant by this objection to the competency of the appeal.

LORD CHELMSFORD.—I think the House ought not to hear any discussion about what the costs should be.

LORD CHANCELLOR.—I think it would be best to put it in this general way: The costs which arose out of the petition presented to the Appeal Committee against the competency of this appeal.

Dean of Faculty.—The question was reserved to be argued at the bar of your Lordships' House; and you will find statements relating to it in the cases submitted to your Lordships; so that the preparation of the cases involved dealing with the question of the competency of the appeal.

LORD CHANCELLOR.—I think, my Lords, it would be much better to use words which do not anticipate the function of the taxation of costs, but which express the principle upon which the House proceeds, and with that view I propose to your Lordships these words:—"The costs occasioned by the presentation of a petition against the competency of the appeal."

Interlocutors affirmed, and appeal dismissed with costs—the respondents to pay the costs occasioned by the presentation of the petition against the competency of the appeal.

Appellant's Agents, Adam and Sang, W.S.; William Robertson, Westminster.—*Respondents' Agents*, Mackenzie and Kermack, W.S.; Loch and Maclaurin, Westminster.

JULY 10, 1873.

MRS. CAMPBELL PATERSON, *Appellant*, *v.* REV. JOHN MACLEOD, D.D., of Morvern, *Respondent.*

Teinds—Valuation—Presumption—Identity of Lands—Prescription—*The plea of positive prescription is inapplicable to a claim to the benefit of a valuation of teind, this being neither the kind of title nor the kind of possession which the Statute requires.*

A defence of alleged valuation of teind having failed for want of identifying the lands in respect of which the teind was valued:

HELD (affirming judgment), *That no plea of negative prescription is admissible.*[1]

This was an appeal from a decision of the Teind Court, involving the question, whether teinds of the lands of Knock and others in the parish of Morvern, belonging to the appellant, Mrs. Campbell Paterson, were or were not valued. The respondent, Dr. Macleod, the parish minister, had raised an action of augmentation of stipend. The Court of Teinds modified a stipend, but remitted to the Lord Ordinary to inquire, whether there existed a fund for the purpose of augmentation. Thereafter the Lord Ordinary allowed the minister to lodge a condescendence as to the teinds of the parish, and the heritors to lodge answers. The minister alleged, that the teinds of the lands of Knock were unvalued. In answer, Mrs. Paterson, the proprietrix, set forth, that her lands of Knock were valued, and produced a decree of approbation and valuation obtained in 1786 in the Court of Teinds. This decree ratified a valuation of the sub-commissioners of the Presbytery of Argyle in 1629, an old copy of which was also produced. In the valuation of 1629 no mention occurred of the lands of Knock, but the appellant contended, that they were included under other names, and the name of Knock occurred in the decree of 1786 as the modern name of certain lands mentioned in the older valuation. The appellant contended, that the decree of 1786 was now conclusive, and was fortified by prescription, both positive and negative, and that the sub-valuation included the whole lands of the parish, and had been so treated in a process of augmentation in 1804. It was contended, that the minister of the parish at the date last mentioned had an interest to shew in that process, that the teinds of Knock were unvalued, and that, as he did not do so, the negative prescription was running against him since that date.

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[1] See previous reports 7 Macph. 614: 41 Sc. Jur. 325, 435, 618; 42 Sc. Jur. 245. S. C. 11 Macph. H. L. 62: 45 Sc. Jur. 461.