question was, whether there was an obligation, under the custom of merchants as modified in Scotland, incurred on this bill by J. M'Kinlay to Mr Walker? Mr Bell in his Commentaries had been in error when he said that such a signature as this might according to English law be evidence of a collateral undertaking. It was not so in England. All the Judges below in this case held that this signature could not operate as an acceptance. Lord Shand showed that the cases quoted in Scotland did not support the view that that was ever the law of Scotland even before 1856. Other four Judges held that before 1856 this might have been a valid acceptance. But the statute of 1878 showed that the Common Pleas wrongly construed the statute of 1856, and that it would have been, and is now, a valid acceptance to sign the name across a bill without any words preceding it. James M'Kinlay, however, never intended to be an acceptor; and even if it was intended, which however was not clearly made out, that James M'Kinlay was to bind himself as a surety for his sons to Walker, and wrote his name on the back of the bill with that intention, he did not carry out his intention. He cannot be treated as a guarantor, because the law of England extends to Scotland, and there must be a writing signed to make a guarantee effectual—and there was no such writing proved.

Lord Hatherley concurred.

Lord Watson said he also was unable to agree with the grounds on which the majority of the Judges in the Court of Session decided this case. The tenor of the bill sufficiently showed that James M'Kinlay was not an acceptor of the bill. But that was not because he did not use words before his signature. On the contrary, the Mercantile Amendment Act of 1878 showed that it was a mistake of the Court of Common Pleas to have supposed that an acceptor would not sufficiently bind himself by merely signing his name without more even while the statute of 1856 stood alone. And after the Act of 1878, which was a declaratory Act, the mere signature would now amount to a valid acceptance. It was plain however from the facts that James M'Kinlay did not sign as a party to the bill, but merely gave his signature without exactly knowing what the effect of that would be. And there was no sufficient evidence that James M'Kinlay had made himself a guarantor of the bill. The judgment of the Court was therefore right.

The Lord Chancellor said that after reading the opinions of Lord Blackburn and Lord Watson he would not have added anything of his own, being satisfied with their reasons. But as the question was one of general importance, and turned on the construction of the two Mercantile Amendment Acts of 1856 and 1878, he was of opinion that the Act of 1878 was a declaratory Act, and showed that the construction of the Act of 1856 had been misapprehended. It was, and now is, quite enough to bind an acceptor that he merely sign his name across the bill without any words preceding the signature. But in this case it was sufficiently apparent that he did not sign his name as an acceptor, and his liability could only be established by evidence in writing signed by him that he was a guarantor, and here there was no such evidence; therefore the decision of the Court below should be affirmed and the appeal be dismissed.

The House affirmed the judgment of the Court of Session, with costs.

Counsel for Appellants — Benjamin, Q.C. — Romer. Agents—Simson & Wakeford and Ronald & Ritchie, S.S.C.

Counsel for Respondent—Pearson, Q.C.—Scott —Roger. Agents—Holmes, Anton, & Greig, and Morton, Neilson, & Smart, W.S.

Thursday, July 8.

(Before Lord Chancellor Selborne, Lord Hatherley, and Lord Blackburn.)

CAMPBELL *v.* CAMPBELL.

(*Ante*, Dec. 11, 1878, vol. xvi., p. 280, 6 R. 310.)

Succession—General Disposition—Special Destination.

Where a person who held certain lands in fee-simple under a special destination executed a general disposition of his estates in favour of a different series of heirs, *held* (*aff.* Court of Session), in accordance with *Thoms* v. *Thoms*, March 30, 1868, 6 Macph. 704, that, in the absence of any indication of a contrary intention, the special destination had been evacuated.

This was an appeal from a decision of the Second Division of the Court of Session, the circumstances of which are reported Dec. 11, 1878, *ante*, vol. xvi., p. 280, and 6 R. 310.

At delivering judgment—

Lord Chancellor—My Lords, the question in this case is, Whether by the law of Scotland general words of disposition in a *mortis causa* deed are, in the absence of any proof of a contrary intention, sufficient to pass heritable property vested at the date of the deed in the disponer with a special destination to heirs-substitute? The interlocutors appealed from, which in effect affirm that general proposition, were founded upon the case of *Thoms*, decided in the Court of Session in 1868, after much consideration, by a large majority of all the Judges, and it was admitted at the bar that if that case was rightly determined the present appeal must fail.

It may be useful, before referring to authorities, to consider how this question would appear to stand upon principle in the absence of authority. It is difficult, on any principle, to understand why words in a testamentary instrument descriptive of a man's whole estate, present and future (the law permitting all the present and future estate, moveable and immoveable, to be so disposed of), should, in the absence of a controlling context, be held to pass less than what they properly describe. There can be no question as to the meaning of such words—no possible extrinsic evidence can make them equivocal. Their use, *prima facie*, excludes the supposition that the disposition was intended to be limited to some particular subjects. No reason can be suggested why a testator should be presumed

generally to have more regard for heirs-substitute under a destination not of his own making than for his own heir-at-law.

By the law of Scotland the institute or the heir in possession under a settlement or entail without fetters is absolute fiar. The property is his; it is liable for the payment of his debts; his disposition operates upon it *per directum*, and not by way of revocation or as in the exercise of a power. The heirs-substitute take only for want of a disposition by him, and they then take as heirs-nominate instead of the heir-at-law. It would seem, therefore, on principle, that there can be nothing in the mere nature of such a special destination to prevent property so settled from passing by a general disposition as part of the *universitas* of the fiar's estate.

The operation of such general words may of course be limited by proof of a contrary intention, and the law of Scotland appears to allow such contrary intention to be proved by evidence of a kind which in England would not be admissible for that purpose. If the testator has himself made a prior settlement, in which after himself there is a special destination to heirs-substitute—whether such settlement is or is not contained in a proper *mortis causa* deed—general words of disposition in a subsequent *mortis causa* deed will not "evacuate"—as the phrase is—the destination to those heirs-substitute; and the special destination will equally prevail if the settlement of the particular property is of later date than the general disposition. This may be explained upon an intelligible principle. In such a case both the instruments express the mind and will of the same person—the one as to a particular part, the other as to the generality of his estate. Every *mortis causa* disposition of heritage in Scotland was, until lately, a deed, and not technically a will; and every disposition *inter vivos*, so far as it appointed heirs-substitute to succeed to the disponer after his death, though it might not be technically a *mortis causa* deed, fulfilled in effect the same office. There was nothing therefore inconsistent or unreasonable in reading and construing two such instruments together, and treating the general as subordinate to and exclusive of the particular intention—the effect of which was to make the general words residuary in their operation, as they would have been if the particular disposition had been found in the same instrument.

There are, it must be admitted, some authorities which go further than this, and in which it has been held that a testator's intention to use general words in a *mortis causa* disposition in a sense exclusive of a particular subject may be manifested by his accession to or concurrence in a settlement of the same subject by a predecessor in title, or by other acts showing that he regarded lands destined to special heirs-substitute by such a settlement as beyond the scope of his testamentary disposition. Such were the cases of *Farquharson* and of *Glendonwyn*, in which judgments to that effect of the Court of Session were affirmed by this House, the one in 1759 and the other in 1873. To attribute a force equivalent to that of testamentary declarations to acts of a different kind is certainly a very considerable extension of the doctrine applicable to a disposition of the particular subject by the testator himself. But the principle of these cases also seems to be that there is a declaration, *rebus et factis*, of the testator's will and intention as to the particular subject—the only question (apart from authority) being as to the *media* of proof by which it may be competent to establish that will and intention as against the generality of the language of the *mortis causa* deed.

It is more difficult to explain the case of *Campbell* v. *Campbell*, decided by this House in 1743, in which it was held that property which had vested in a testator subsequently to a general disposition of all his present and future estate by a *mortis causa* deed under a settlement made by his son of which he remained ignorant till the time of his death, did not pass by the general *mortis causa* disposition, but went to the heirs-substitute under the son's settlement. I am unable to reconcile that case with the later decision of this House in *Leitch* v. *Leitch* in 1829, unless it be upon a distinction between words *de præsenti*, which at the time when they are used may describe—though under a general formula—specific subjects then existing and ascertained, and words *de futuro*, the application of which to any such particular subjects cannot then be in contemplation, but must remain to be determined by future and uncertain events. I cannot say that this distinction is to my mind, satisfactory. If the two cases are not to be so reconciled, I apprehend that the authority which is at once the more recent and the more consistent with general principles ought to prevail.

In *Glendonwyn* v. *Gordon* Lord Colonsay said—"The point now in question was certainly not the main subject of controversy in the case of *Leitch*, and it appears not to have been there pressed in argument. Indeed, Judges of high authority have pointed out that in the case of *Leitch* the circumstances were not such as would have admitted of the application of the principle on which alone such a plea could have been maintained." I myself, on the same occasion, stated that some considerable difficulties which I then felt about the cases of *Campbell* and *Farquharson* might be removed if those decisions could be referred to the doctrine maintained by the minority of the Judges in *Thoms'* case; and I thought *Leitch's* case sufficiently explained by Lord Colonsay's observations. But nothing which was then said as to *Leitch's* case or *Thoms'* case was at all necessary for the decision of the appeal then before the House; and after the fuller and more exhaustive examination which the case of *Leitch* has now received at your Lordships' bar, I no longer think it possible to distinguish it from the case of *Thoms*, on the ground suggested by Lord Colonsay.

In *Leitch's* case heritable property was vested in a deed of settlement in trustees in trust for the settler's wife for life, and after her death for behoof of George Leitch, if then living, and his heirs and assigns whomsoever in fee, or if George Leitch was not then living, for behoof of James Frisby Leitch, if then living, and his heirs and assigns whomsoever in fee; after which the settlement proceeded thus:—"And failing the said James Frisby Leitch by decease before me, or prior to the death or second marriage of the said Elizabeth Ironside" (the widow), "then I appoint the said trustees to hold the foresaid lands and others in trust for behoof of Andrew Leitch, my nephew, son of the said George Leitch, whom failing for behoof of my sisters Christian

and Mary Leitch, and my nieces Agnes and Jean Trokes, equally among them, and their heirs and assignees." The trustees were then ordered and appointed, immediately on the death of the widow, to dispone and convey, in the first case, to George Leitch in fee; in the second case to James Frisby Leitch in fee; and in the third case, "to dispone the said lands to and in favour of Andrew Leitch, my nephew, whom failing to my sisters Christian and Mary Leitch, and my nieces Agnes and Jean Trokes, equally among them, their respective heirs and assignees." The question was, Whether the destination to Andrew Leitch vested and was transmitted by a general disposition of all his estate contained in a *mortis causa* deed afterwards executed by him although he died in the widow's lifetime? or whether a condition that he also should survive the widow was to be implied? It was held in the Court of Session and by this House that the fee vested in Andrew Leitch, and that it was transmitted so as to "evacuate" the ulterior destination to the settler's sisters and nieces by the general words of his *mortis causa* deed. That decision cannot, I think, have been right if there is a presumption in the law of Scotland against the sufficiency of mere general words of disposition in a *mortis causa* deed to pass heritable property vested at the date of the deed in the disponer with a special destination to heirs-substitute.

I have had an opportunity of referring not only to the appeal papers in the case of *Leitch* before this House, but also to the papers in the Court of Session, which are preserved in the library of the Society of Writers to the Signet. I find from those papers that Lord Colonsay was mistaken when he supposed the point in question not to have been pressed in the argument of that case. The following extract is taken from the printed argument of the settler's sisters and nieces before the Second Division:—"A general disposition can have no further operation than a general service. Now, it is clear that a general service could not defeat a substitution, it being plain that to maintain this would just be to say in other words that there could be no such thing as a substitution. The institute may, in the general case, defeat the substitution, but he must do so by express terms. He must indicate his intention of defeating the substitution, which he cannot do by a general deed making no reference to the property. This seems to be the principle upon which both this Court and the House of Lords decided, in the case of *Farquharson* v. *Farquharson*, 2d March 1756, that a deed disponing 'all lands which should pertain to the granter at the time of his death' was not sufficient to defeat a substitution created as to lands to which the granter afterwards succeeded."

This argument was not indeed founded so much upon any alleged presumption by the law of Scotland against an intention to defeat such a substitution by general words as upon technical reasons:—"Where a person" (it was said) "grants a mere general conveyance without applying it to any special property there is no method known in the law of Scotland by which a feudal title can be obtained to this property except through the heirs-at-law of the granter. The general disposition is held to convey only that which would otherwise have been claimed by the heirs-at-law. The general disponees have a mere equitable title, which they can make effectual and convert into a legal title solely by the intervention of the heirs-at-law. But it is perfectly clear that where there is a proper substitution the heirs-at-law of a person deceased can never by means of a service or any other proceedings at their instance defeat the substitution." In the appellant's printed case before this House these technical reasons were in effect repeated. The whole argument founded upon them was rejected by the Court of Session and by this House, and it is hardly conceivable that it would have been put in that form if any such general presumption or rule of construction as that now contended for had been then known to the legal profession in Scotland.

The distinction suggested by the minority of the Judges in *Thoms'* case, to which Lord Colonsay referred with some approval in the case of *Glendonwyn*, and which was again pressed upon your Lordships in the present case by the appellant's counsel, was that the settler's sisters and nieces were not heirs-substitute, but were conditional institutes, who were only to take if the property never vested in Andrew Leitch. It is clear, however, from the papers that *Leitch's* case could not have been decided upon any such ground. The printed case of the respondents (the disponees in trust of Andrew Leitch) both in the Court of Session and in this House contained this passage—"The appellants next demanded whether the heirs of law of Andrew Leitch could have preferred any claim to the lands in the case of his death without leaving a settlement?" The answer to this is obvious. "The heirs of law of Andrew Leitch were disappointed by the substitution in favour of the appellants, which substitution, again, was vacated by the conveyance of the right vested in Andrew Leitch to the respondents, his trustees." The argument at the bar has completely satisfied me that the point would have been untenable if it had been taken. I am unable to discover any means consistent with the ordinary rules of construction and with the decision of this House that Andrew Leitch took a vested and transmissible fee, though he died in the widow's lifetime, by which the conclusion that the sisters and nieces were conditional institutes and not heirs-substitute could have been reached.

The result is, that I think *Thoms'* case was rightly decided, and that the present appeal ought to be dismissed, with costs.

Lord Hatherley—My Lords, I am of the same opinion. This class of cases has been so often before your Lordships' House of late, and it has also been so frequently and fully discussed by the tribunals below, that the question we have before us now appears to me to be of a very condensed character, and not one requiring research into the large number of authorities which in some cases may usefully be referred to.

There appears to have been at first some discussion as to the exact position of a person entitled under a destination in a course of settlements to estates which were not fettered by the settler with those fetters to which recourse is had in Scotland when it is desired by a settler to tie up his estate as we should call it. If there be no such fetters, it is conceded on all hands that the right of alienating the estate is absolutely vested

in the person who comes into it by virtue of a destination in which he has not himself at all concurred, having simply been the recipient of the bounty (it may be) or the disposition of others. He is entitled when in possession as fiar absolutely to dispose of the estate, although it was so destined that that destination if left alone would have carried it on to others. He may disappoint those others, not being fettered or prevented from so doing, and if he disappoints them the fee will be conveyed just as much as if he had conveyed away an estate which had come to him from his ancestors or which he had purchased and acquired by his private means. That has been over and over again stated by different learned judges—judges of eminence—who have heard these cases.

The next point, my Lords, to be considered is, what is the limitation in this particular case now before us? The words are as general as can be conceived, applying not only to all heritable and moveable property which then was vested, but which at the time of his death should be vested, in the person who took under the disposition I have referred to which was made by General Campbell. That being so—having words which are quite sufficient *per se* (subject of course to the main question which arises here) to displace the interest created under the previous settlement and to substitute those interests which were created by the general disposition subsequently made, or, in other words, to evacuate, as it is expressed in Scotland in these cases, the special destination before made—there remains this question, Whether or not, in order to arrive at that result, anything is required in addition to those words, which are in themselves sufficient if they had full operation unfettered by any rule of law or any rule of construction introduced into the consideration of deeds of this character? Whether there is any *onus* imposed upon those who claim under the general words of disposition in defeat of the particular destination, to show such to have been the second settler's intention? Whether it ought not rather to be taken to have been his intention to use the words in the plain meaning in which, according to their ordinary understanding, a man would have used them to effectuate his purpose? or Whether upon evidence which owing to a rule of law is admissible in Scotland they are shown to have been used with a different intent? With regard to showing that intent, the law of Scotland differs considerably from the law of England, which would not have admitted many classes of evidence which have been shown to have been admitted in Scotland in order to prove the intention to have been this or that on the part of the second settler independently of the words he used.

This appears to be the point to which cases of this class have been ultimately brought down. I will quote from one or two cases which were mentioned in the course of the argument, and which are set forth in the respondent's case. With regard to Lord Curriehill's views upon the subject, I will quote a passage from a decision of that learned judge—"The same Judge" (that is, Lord Curriehill) "in a prior case—*Collow's Trustees* v. *Connell and Others*, 23d February 1866, 4 Macph. 465—where the effect of a general disposition to convey a particular estate was argued but not decided, as it was held the estate was effectually entailed, made the further important statement—'The other question, whether or not the trust-deed would have included these estates supposing the power to have existed' (that is, the power of disposal), 'is a question of construction of that deed. It is one on which I have felt great difficulty, and I have changed my opinion on it in the course of the discussion. I think the question was scarcely put to me in the right point of view. It was put as a question whether the truster intended to convey these estates. But the words, taken literally, are quite sufficient to carry everything that belonged to him.'" (It is the same in the present case). "'They *prima facie* included the entailed estates, which confessedly belonged to him if he had power to dispose of them; and therefore I think the proper point of view in which to regard the question (on that assumption) is, whether he intended to exclude these estates from the general conveyance? But such a general disposition, when occurring in gratuitous and in *mortis causa* settlements, has been frequently subject to a different construction. When such words occur in an onerous conveyance *inter vivos*—as, for instance, in a trust-deed for behoof of creditors—there is no doubt that they would carry all that the party had the power to convey.'"

Your Lordships will observe that there is a reference to what Lord Curriehill says in a subsequent case, which entirely leads to the construction which the respondents have maintained at the bar, and which was the last decided by the Court below. It was a case in which there was a considerable difference of opinion, though a very large majority of the Judges were in favour of the view that the *onus* was on those who attempted to prove the exclusion. In that case they say Lord Curriehill expressed a somewhat different view from that which he stated in the passage I have read, and Lord Colonsay in that case, in which it was necessary to discuss all the previous cases, made use of this expression—"With regard to the second class of cases, where the disposition with a special destination had been made by a former proprietor, but was unprotected by any prohibitory or fettering clauses, Lord Colonsay remarked that in these also the question was one of intention or presumed intention; but he added—'There has indeed of late been difference of opinion as to whether the mere existence of the previous destination unaltered does, without aid from other circumstances, raise in this class of cases a presumption that the general words were not intended to apply to the particular estate so previously destined. But there does not appear ever to have been any difference of opinion as to the competency of resorting to external circumstances going to show that the general disposition, notwithstanding the comprehensiveness of the language, was not meant or intended to displace the prior special destination.'" Then Lord Colonsay adds—"Without at present discussing that debateable proposition, I go on to observe that the judgment of the majority in the case of *Thoms* was given subject to the necessary qualification that reference might be made to circumstances outside the deed to rebut the presumption, and that each case is circumstantial, and to be ruled by its own specialities."

I gather from the observations made by the

learned Judges, especially by Lord Colonsay, that it is a "debateable proposition" where the *onus* lies (and a good deal depends upon that in many cases perhaps)—whether it is on those who claim under the general disposition to show that that was the intent of the disponer, or whether it lies on those who claim under the previous destination to show that they were intended to be excluded. It appears to have been considered a dubious proposition, but in each case, as the learned Judges remark, the matter is open for consideration upon the evidence.

Now, my Lords, that evidence certainly goes a great deal further than any evidence of an at all approximate character is permitted to go in this country. In this country there are cases where the judge is entitled, if I may use a familiar expression, to seat himself in the chair of the testator making his will, to know all the facts and circumstances that he knew, and if there arises any doubt *dehors* the instrument—not in interpreting the instrument, but *dehors* the instrument—as to what the particular descriptions of property may be to which the instrument refers, then the judge avails himself of that knowledge, just as the testator could of course have availed himself of that which was within his own cognisance with regard to the disposition of his own property. Not infrequently cases have arisen in England which perhaps would look as if they approached this case more than others do, but they do not really approach near to the same latitude of evidence. I refer to cases of persons having estates belonging to them, some of which are held in fee-simple and others held under a power of appointment, and such a person making as a testator a disposition of his property, and by the words "my estate," or the like, intending to pass his interest. If he uses words of gift, not words of appointment, the question arises whether or not the words of gift apply to the subject-matter which he clearly and plainly describes in the instrument he is executing (the will or the like)—whether he has any estates of the description so described in reality in his own ownership. If he has not—if he gives, in plain and definite terms, "my house" so and so "in which I am living," with a clear and definite description of it, and it is found that that house is not his house in the sense of being his property, but only his house as being subject to a power—then the Court thinks there is nothing to answer the gift at all, because that property did not belong to the testator; and in such cases as those the Court has at times said they will apply to that which he clearly wished to pass, namely, the house in which he was living, those technical words of appointment which he has not himself used. But this, you will observe, is entirely without any evidence *dehors* the instrument, beyond the mere evidence to show what is the character of the property he has referred to in his will, and to ascertain what is the title of the property referred to in his will as to which he has expressed in an informal manner an intention to give that class of property belonging to him. The point upon which evidence is received is—Does the will refer to that class of property over which he has an absolute power of disposition, or does it refer to that class of property over which he has only a power of appointment? There are cases of election which are treated in the same way, where the person gives what really belongs to another. There the same sort of result has been arrived at by extrinsic inquiry *dehors* the will. I hardly know any cases that go further than this in that direction. It is not an inquiry to explain the will, but merely to explain what it is that passes by the will, by ascertaining the only property to which it could possibly have any reference whatever.

My Lords, this case is very different indeed. This person, as is conceded by all the learned Judges, had power to dispose of the property absolutely as his own house from the beginning. He makes a general disposition by which he changes the destination, as he might have done at any time he pleased, and he gives that property with all his other property, heritable and moveable, in a mode which displaces that previous disposition by general words.

My Lords, I need say no more as to the point to which the matter seems to be brought by decision until we get to the case of *Leitch* v. *Leitch's Trustees*. The other cases may have had specialties in them which I need not enter into. My noble and learned friend on the woolsack has fully classified the different conditions under which property thus disposed of generally may be viewed, according to whether it is found in the second disponer as taking under the first disposition, or was acquired by the second disponer by some other means. All these points have been carefully gone into by my noble and learned friend on the woolsack. Then one comes to the case of *Leitch* v. *Leitch's Trustees*, which, contrary to the view which Lord Colonsay entertained of it, has been found, by the research which has been made by my noble and learned friend, to have a clear and distinct bearing upon the question we have before us—a bearing which seems to favour (no contrary case having been cited which contradicts it) the view that when a general disposition is made large enough to carry everything that the disponer, whoever he may be, may have power to dispose of, it is not for those who question the effect of that general disposition to put the persons who claim under it upon proving that it was intended to do that which the words do. The words have that effect, and a person is supposed to have intended that which he has expressed by his words. The peculiarity of the law of Scotland, differing from the law of England, is that under certain circumstances, which I need not enter into in detail, the Court may be led to hold that those words have a different effect from that which they were undoubtedly intended to have, and exclude a particular part of the property which otherwise they would include. That may be so; otherwise the solution would be very simple.

It only remains, then, to consider the question whether or not that second point has been at all established by any evidence brought before us in this cause. The authorities which have preceded this case have led me to the conclusion that there is no *onus* incumbent upon those who claim under the general disposition to show that it was intended to evacuate the previous destination, but that the *onus* is the other way. It is on those who say that it was not evacuated to show the testator's intention in some way to exclude it from those words which otherwise would include it. A few points, but very few, have been raised bearing

that way, and I do not think it is necessary to enter into any detail upon them, because, in the first place, the greater part of them have been touched upon by my noble and learned friend on the woolsack, and, in the second place, I have had an opportunity of seeing the valuable opinion which will be expressed to your Lordships by my noble and learned friend who will succeed me in giving his view upon the case, and therefore I think it is scarcely necessary for me to enter into any detail at all upon the subject. But certainly some of the points seem to me to have very little weight in the consideration of a case of this kind.

One point was, I think, similar in its first aspect, though not in reality, to the cases I referred to upon powers and instruments taking effect under the doctrine of election in the English Courts. One case was cited in which there was the circumstance that the second disponer, as I have called him all through, had no other property than that which was carried by the destination, but I do not think that that had any effect upon the decision of the cause, because it was conceded in deciding the case that it had to be decided upon the question of whether or not it was intended by the testatrix to reverse that disposition of her property which had previously been made by way of a particular destination by her predecessor in title. I do not think that when that case comes to be looked at it will be found that any weight was given to the particular circumstance that she had no other property.

Here it was said, on the contrary, that this Mr Lachlan M'Neill Campbell, the second disponer, had abundance of other property—as much again as the estates which are involved in this suit—belonging to him in his own right independently of the property concerned in the suit now before us. But because he had a great deal more property, it does not follow that he intended to exclude this particular property from the operation of the instrument. If he intended to exclude it, it was very easy for him to do so. The words are very large, taking in everything he had to dispose of, and there is nothing that we ought to look at here as showing that he did not intend a particular portion of that aggregate to go with the rest because it was somewhat differently situated from the remainder of the property that he was dealing with. It comes to this—there is no authority whatever cited to show that you must take that previous destination as in itself standing before the eyes of the second disponer, and read the instrument containing the previous destination as that which would induce him to hold his hand when he was making the general disposition of his property. Surely, if it was so brought before him, and there had been the least intention on his part so to do, he would have expressed it; but nothing of the sort is expressed. This being his property, and capable of passing by the words he has used, he deliberately put down those words. The fact of his having two or three times as much property would make no difference in my view as to his disposing of that which he could dispose of by those words. The case is not, I think, one which would induce me to say that there is anything in the shape of the instruments here which leads to the conclusion that he intended this exclusion, or that he intended to do anything else but what the words have done, namely, to make this destination which was present to his mind.

As regards the circumstances of the case, I really think there is nothing in them which can reasonably be considered to have a legal effect one way or the other. If you ask what a person who was sitting down to dispose of his property unfettered by entail might reasonably be expected to do, probably the first answer given would be that you would reasonably expect to find an alteration of the destination in favour of his near relations instead of his more distant relations. But, for my own part, looking, according to our English view, only to the words which have been used, without making any conjecture upon the subject, I should not be disposed to receive that against those claiming under the second disposition as a proof of his intention in that respect. I think what we have to look at is the wording of the instrument he has executed.

I may make one observation which I alluded to in the argument, namely, if your Lordships' House were to hold that an instrument of this description could not be held applicable to changing a destination without a special mention of it, you would very much fetter the disposing power by will of testators who execute in Scotland testamentary deeds which are in the nature of wills. Many of them are executed in a man's last moments, and sometimes when he is *inops concilii*, and he does it in England, and probably in Scotland also, in a very few words in many cases. If he says "I give the whole of my property"—in England "both real and personal," or in Scotland "both heritable and moveable"—in a particular direction, he believes that he has given it all; he does not go over the parts of his property and think of them one by one unless he is in a very strong state of health. And that is still more likely to be the case when instead of having his own legal adviser he has one who is called in on the spur of the moment and who receives instructions to make a will. If the instructions referred to any definite purpose, you would expect to have that definite purpose stated; and if no definite purpose were stated, but the whole of the property was directed to be given, what would be the natural construction of that but what the very words say, namely, a desire to give everything he possessed in that particular direction. And with regard to carrying that desire into effect it appears to me to be reasonable to say that it is carried into effect, unless you can show, so far as the law of Scotland allows you to do so, that these words were not used in the sense of including a particular estate which was the subject of previous destination.

How this state of things has arisen I am not able distinctly to trace, but there are steps, I think, recognisable in previous cases showing what the law has approximated to, and I think there is nothing contradictory to the decision which your Lordships propose now to arrive at in the present case. Therefore we shall be free from the difficulty which will, I believe, be pointed out by my noble and learned friend who will succeed me, and which I should admit to be a very great one indeed if it existed, namely, the difficulty of disturbing any practice of conveyancers which may have arisen. This House has not been slow to recognise the importance of that consideration in many cases—in one not long ago, and in others

at different times—and many decisions of this House have been founded upon the law and practice of conveyancers.

Lord Eldon said from time to time that he never could think of hastily entering upon a course of decision which would shake perhaps a very large proportion of the titles on which landed property throughout the kingdom was held. The greatest respect is therefore due to the opinion of conveyancers, but I do not think we have had even the usual number of citations from text writers in this case, and I do not think that any authority decided by the Courts has gone counter to the conclusion at which I have myself arrived, namely, that it is not proved in this case that the general disposition did evacuate the previous destination contained in the first instrument. Therefore, my Lords, I entirely concur in the motion which my noble and learned friend has made.

Lord Blackburn—My Lords, in this case two questions are raised as to the effect of the testamentary disposition and settlement of Lachlan M'Neill on the succession to a considerable landed estate in Scotland.

It appears that by the settlement of General Campbell this estate was destined to Lachlan M'Neill and the lawful heirs-male of his body, whom failing to Dugald M'Neill (Lachlan's brother) and the lawful heirs-male of his body, whom failing to cousins in succession; and it is not disputed in this case that if that destination still regulates the succession to the lands, the pursuer Isabella, who is the sister of Lachlan and Dugald, and their heir-at-law, does not take as an heir of provision under the General's settlement. There were no prohibitory clauses in the General's settlement. General Campbell died in 1837, and it is not disputed that Lachlan from the time of the General's death was fiar in the estate, and had as complete power to dispose of it by a testamentary disposition to the disinherison of his heirs of provision as he had to dispose of lands which he held as fiar which would have gone to his heir-at-law to the disinherison of that heir-at-law.

Lachlan executed the settlement in question after he had succeeded to the destined lands. It is not necessary to read it. It is not disputed that this settlement was duly executed, and that the general words may be sufficient to pass the destined lands as well as those not destined. The appellant's contention is well expressed in his case —"The subjects disposed of are described in language entirely general and enumerative of the several categories of property known in Scotch law. The first and most generally important question which the deed gives rise to is, whether its general terms can be held to be directed to include Kintarbet and Crossaig, landed estates already settled upon a destination of heirs. The appellant submits that they cannot. It is decided in Scotch law that such a general disposition does not comprehend estates which have been already settled on a line of heirs by a previous deed of the same proprietor. The appellant maintains that the like rule applies when the existing destination is settled, not in a deed of the same granter, but in the deed under which he has himself taken the estate. Without entering in this supplementary statement into any examination of the authorities, it may be sufficient at present for the appellant to state that the judgment against which he appeals was rested by the learned Judges in the Court of Session entirely upon a decision of that Court in 1868, viz., *Thoms* v. *Thoms*, 30th March 1868, 6 Macph. 704. That decision was not submitted to the review of your Lordships' House. In the most recent case in which the general question now raised was under the consideration of your Lordships' House, the rule laid down in *Thoms'* case was doubted by both the noble and learned Lords who gave detailed opinions. The appellant is to maintain to your Lordships that mere general words purporting to dispose of a man's whole property in a will or *mortis causa* deed must, 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 prior instrument, either made by the settler himself or under which he holds."

My Lords, the case of *Glendonwyn* v. *Gordon*, 2 L.R., Scot. App. 317, has been so recently and so fully brought before your Lordships' notice that I think it not necessary to read the judgments, which must be fresh in your recollection. Lord Colonsay, as I understand him, gives a decided opinion, based on decisions in Scotland, and in this House in appeals from Scotland, that general words such as those in this disposition may or may not carry an estate which is subject to a simple destination, and that whether they do so or not was to be determined not merely by construing the words of every part of the will and receiving all such evidence of surrounding circumstances as tends to show what the words were used about, and as aids in their interpretation (evidence of that class which Sir James Wigram in his Treatise on Extrinsic Evidence calls (pp. 9–10) "explanatory evidence"), which would be received in an English case and according to English law, but also by evidence of subsequent deeds and dealings in respect to the property, showing what the disponer's intention really was—whether the words expressed it or not—(being evidence of that class which Sir James Wigram calls "evidence to prove intention")—which latter class of evidence, unless in the exceptional case of a latent ambiguity, is not admissible in an English case and according to English law. In the course of his argument Lord Colonsay (2 L.R., Scot. App. 823) cites and relies on *Thoms* v. *Thoms*, stating that the Judges in the majority in that case recognised as a general principle that each case was ruled by its own specialties, and whose opinions therefore support the general position which he had before laid down, in these terms:—"There has indeed of late been difference of opinion as to whether the mere existence of the previous destination unaltered does, without and from other circumstances, raise in this class of cases a presumption that the general words were not intended to apply to the particular estate so previously destined. But there does not appear ever to have been any difference of opinion as to the competency of resorting to external circumstances going to show that the general disposition, notwithstanding the comprehensiveness of the language, was not meant or intended to displace the prior special destination," He then intimates pretty clearly that he was not at present inclined to agree in the conclusion come to by the majority in *Thoms* v. *Thoms*;

and his opinion, though not the ground of his decision, is a weighty authority. But he declines to enter on what he calls "that debateable proposition," and finally gives as his *ratio decidendi* —"Therefore, even if it should be thought that in this class of cases the presumption is in favour of the general disponee, I think that the circumstances I have referred to are quite sufficient in this particular case to rebut that proposition."

My Lords, before proceeding further I may say that (perhaps in consequence of the prejudice naturally instilled into me by my education now for more than forty years as an English lawyer) I cannot but think that the English rule is both more convenient and logically more consistent with the principle on which the previous communings between the parties are not received to construe a written contract. This was decided in your Lordships' House in *Inglis* v. *Buttery* (3 L.R., App. Ca. 552) to be the law of Scotland. It was not then new law in Scotland, and is indeed very clearly enunciated by Lord Gifford in the passage cited by me in *Inglis* v. *Buttery*, at page 577. I therefore sympathise completely with the wish expressed by the Lord Chancellor (Selborne) in *Glendonwyn* v. *Gordon*, that your Lordships could have based your judgment in that case on some ground which would have prevented such "evidence to prove intention" from being admissible in Scotland even in such a case as this. But, my Lords, I think that could not be done if the Scotch authorities were such as Lord Colonsay thought them. The law of conveyancing in every country—in none more than in England—is a system of artificial law. It is of immense consequence that that law should be settled, so that those who have to advise intending purchasers or lenders as to the sufficiency of titles should, if possible, know what the law is. And it is hardly possible to exaggerate the confusion and the mischief which would ensue if no point of conveyancing law, either in England or Scotland, which has not been finally decided in this House, were considered settled, however long it had prevailed, if it appeared not to have been originally based on a sound principle. But besides this I think that Lord Colonsay was justified in saying that the reception of this class of evidence in this class of cases was sanctioned by this House in *Farquharson* v. *Farquharson*. I say nothing as to *Campbell* v. *Campbell*, for I have proved quite unable to understand what was the *ratio decidendi* in that last case.

The Lord Chancellor after expressing this wish proceeded to point out that the appellant was in a dilemma. Either this House in *Farquharson* v. *Farquharson* acted on the evidence which it unquestionably received, or it acted upon the ground that an heir of provision under a destination was not disinherited by general words, such as would have disinherited an heir-at-law. In either case the appeal failed, and it was unnecessary to decide on which horn of the dilemma the appellant was to be fixed. I think this was a true dilemma, but I think that it is now necessary to decide the point there left undecided—that is, in effect, whether *Thoms* v. *Thoms* was rightly decided or not.

It is not, I think, disputed that unless the decision in *Thoms* v. *Thoms* is overruled by your Lordships, it governs this case. Thirteen judges were concerned in that case. Of those, three—the Lord President Inglis, Lord Benholme, and Lord Neaves—rested their judgment on a very able exposition by those two latter judges of what they thought the principles of Scotch law; and Lords Jerviswoode, Ormidale, and Ardmillan, in separate judgments, did the same. None of those six Judges relied on the decision of this House in *Leitch* v. *Leitch's Trustees*, but none of them said anything indicating that they did not think that that decision involved the point. Three Lords—Kinloch, Barcaple, and Mure—relied on *Leitch's* case as a decision of this House on the very point, and if so, settling the question. Lord Deas agreed in the result with the majority, but thought that *Leitch's* case was not a decision upon the point. Three judges—Lord Justice-Clerk Patton, Lord Cowan, and Lord Curriehill—formed the minority.

That decision carries with it the weight of a very great majority of the Judges; and if it had not been questioned soon after, I should have been unwilling to shake such a decision on a point of conveyancing. For, as I said before, it is of great consequence to the interests of the commerce of land that those who are asked to advise the purchasers or lenders of money on land as to the sufficiency of a title should not be left in doubt as to what the law is. Even thirteen years would be enough to make one very unwilling to decide that a judgment on the faith of which lands might in the interval have been bought and money lent was wrong. But enough, I think, took place in the subsequent case of *Glendonwyn* v. *Gordon* to prevent the lapse of time having this effect. I think, therefore, that your Lordships should treat this as in effect an appeal from *Thoms* v. *Thoms*.

My Lords, I have come to the conclusion that *Thoms* v. *Thoms* was rightly decided. I form this opinion partly on the ground that I agree in the very able reasons of Lords Benholme and Neaves, and partly because I think that *Leitch* v. *Leitch's Trustees* did involve the point, and was ill decided, unless the law was as the majority then decided and the respondents now contend.

It is no doubt true that it was not the point mainly argued, and that if all that was said about it by Lord Lyndhurst was what appears in the report in 3 Shaw and Wilson, viz., that "it was too clear for argument," the very great difference of opinion in *Thoms* v. *Thoms* is a curious comment on his judgment; but in justice to Lord Lyndhurst it should be observed that we have not all he said. He had at the end of the argument expressed his views, and unfortunately we have no report of what he then said. He postponed judgment to examine the papers more thoroughly, and what we have in the report is merely what he said on the second occasion, to the effect that he had not changed his formerly expressed opinion.

Taking this view of the matter, I think it unnecessary to examine any of the authorities prior to *Leitch* v. *Leitch*, nor to examine any of the cases subsequent to *Thoms* v. *Thoms*. I cannot state the case of *Leitch* v. *Leitch's Trustees* better than is done in the respondent's case:—"In that case the estate of Kilmardinny was conveyed by a *mortis causa* disposition of its proprietor John Leitch to trustees in trust for Elizabeth Ironside, my wife, in case of her surviving me, in liferent for her liferent alimentary use allenarly during

the time of her life and of her continuing my widow; and after her death, or in case of her entering into another marriage after my death, then for behoof of the said George Leitch, my brother, and his heirs and assignees whomsoever, in fee, in case he shall survive me and shall be in life at the time of my death or second marriage of the said Elizabeth Ironside; and failing the said George Leitch by decease before me or prior to the death or second marriage of the said Elizabeth Ironside, then I appoint the said trustees to hold the foresaid lands and others in trust for behoof of the said James Frisby Leitch, my nephew, and his heirs and assignees whomsoever, in fee, in case he shall be in life at the time of the death or second marriage of the said Elizabeth Ironside; and failing the said James Frisby Leitch by decease before me or prior to the death or second marriage of the said Elizabeth Ironside, then I appoint the said trustees to hold the foresaid lands and others in trust for behoof of Andrew Leitch, my nephew, son of the said George Leitch, whom failing for behoof of my sisters Christian and Mary Leitch, and my nieces Agnes and Jean Trokes, equally among them, and their heirs and assignees." There was also an express direction applicable to the event which, as will be presently noticed, occurred—that in case of the death of the two first heirs, called George and James Frisby Leitch "before me, or before the death or second marriage of the said Elizabeth Ironside, then I appoint the said trustees to dispone the said lands to and in favour of Andrew Leitch, my nephew, whom failing to my sisters Christian and Mary Leitch, and my nieces Agnes and Jean Trokes, equally among them, and their respective heirs and assignees." George Leitch, the brother, and James Frisby Leitch, the nephew of the trustee, predeceased his widow, and therefore by the terms of the deed took no right under it. His nephew Andrew Leitch survived James Frisby Leitch, but died in February 1821 survived by the truster's widow, who died in November 1823 without entering into a second marriage. Andrew Leitch executed a general *mortis causa* disposition in October 1820 of all his estates and effects, which did not specify the estate of Kilmardinny. On the death of John Leitch's widow that estate was claimed by the trustees of Andrew Leitch as carried by his general disposition, and by the sisters and nieces of John Leitch as heirs-substitute under the special destination in John Leitch's trust-disposition. The Lord Ordinary preferred the heirs in the special destination. The Inner House recalled his judgment, and preferred the trustees of Andrew Leitch as the disponees under his general disposition. The House of Lords on appeal affirmed this decision. In the argument of the appellant it was expressly pleaded—"Andrew's general conveyance not referring specifically to the lands of Kilmardinny, cannot exclude the subsequent substitutes in John's disposition of that estate;" to which the respondents replied—"The disposition executed by him was sufficient to transfer his right to the respondents, and excludes the sisters and nieces as substitutes."

The question mainly argued was no doubt this—Whether Andrew took a vested interest of any kind during the life of the widow? The decision was that he took a vested interest of inheritance of some sort, and that his interest, whatever it was, was transferred by the general words of his disposition. If what Andrew took was a fee as institute, subject to a destination to the ladies as substitutes, the very point was decided. It could hardly have been overlooked, for the Lord Ordinary, though he based his judgment mainly on the ground that in his opinion the trust for Andrew was in effect governed by the previous words "in case he shall be in life at the death or second marriage," though they were expressed as relating only to the previous gifts, yet he did state, as a second ground, that the general words were not sufficient to evacuate the destination to the ladies as heirs-substitute. Very little was said as to this last point in the Court below. The three Judges who formed the minority in *Thoms* v. *Thoms*, and Lord Deas, who on this point agreed with them, thought that the true construction of John Leitch's settlement was that the trust was in favour of Andrew and his heirs-at-law, and that the ladies were never to take anything at all under the disposition unless Andrew predeceased the truster; for if Andrew had died an hour after the truster his vested fee would have gone to his heir-at-law, and as he had uncles, the ladies, who were his aunts, could not take in that capacity. This could hardly be John Leitch's wish. I cannot find either in the report of the case of *Leitch* v. *Leitch*, or in the papers laid before this House, any trace of this construction of the disposition having been suggested. I cannot, in the absence of anything to show it, presume that the Court below or the House of Lords put such a construction on the trust-disposition which, as it seems to me, would have frustrated the truster's intentions.

There remains a second question, namely, Whether there is in this case any such evidence as would be admissible to prove, and of sufficient weight to prove, that the testator Lachlan did not intend to give the destined estates by those general words?

This I may treat very shortly, I think, therein agreeing with all the Judges below, and I believe with all your Lordships, that none of the matters relied on in the Court below was of sufficient weight. One point not made below, because not then noticed, was made at your bar, arising on the mode in which Lachlan M'Neill made up his titles without noticing the new testamentary disposition which still remained in his own hands, and was revocable at his pleasure. I apprehend that his agent, even if he knew of this disposition and had it in his hands, ought in the absence of express directions to keep it secret; and if he had noticed it in making up the titles would have done wrong, and probably if Lachlan afterwards revoked his disposition would have caused some trouble. I do not, therefore, see how this mode of making up the titles can afford any inference that he did not intend to affect these lands by his disposition.

I therefore come to the conclusion that the appeal should be dismissed with costs.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Counsel for Appellant—Davey, Q.C.—Darling.

Counsel for Respondent — Lord Advocate (M'Laren, Q.C.)—Kay, Q.C.