settlement. I am of opinion that the Sheriff-Substitute's interlocutor should be recalled.

LORD ORMIDALE—I concur, but with some difficulty. In the case of *Greig* v. *Miles*, I quoted the opinion of Lord Chancellor Cranworth in *Adamson* v. *Barbour*, and I quote it again here—"Considering the peculiar nature and object of the Poor Laws—the affording relief to those unable to maintain themselves—it is absolutely necessary we should construe the provisions of the Legislature so as to meet the ordinary social wants of those for whose benefit they were made." In this case, clearly all the pauper's social ties were with the parish of St Fergus, where he had lived so long, where his two families had come into existence, where he still spent his earnings to support his wife and child, and where in all probability he would come to die. A humane and just interpretation of the Poor Law Act will not sever so close a connection as this is. Certainly the mere fact of these termly engagements having been entered into in closely-adjoining parishes will not have that effect.

LORD GIFFORD—I concur, although I think each fresh case under the Poor Law Act is narrower than its predecessors. There was here no true interruption of Webster's residence in St Fergus. During the whole period he paid rent and taxes (if taxes were due) for the same house where his domestic establishment was. He does not settle down for work in one outside parish, but he wanders from one parish tc another, and sometimes back to St Fergus, and accepts work on the usual terms. The fact that he could only get the accommodation of a bothy explains why he never changed his home.

The Court pronounced the following interlocutor:—

"Find that the pauper had resided in the parish of St. Fergus for upwards of twenty-years prior to 1866, and had acquired a residential settlement in that parish: Find that the pauper after that date worked in several adjoining parishes, but retained possession of his house in St. Fergus, to which he returned at intervals of a week or a fortnight, and in which his family resided: Find that these periods of absence on the part of the pauper did not interrupt the continuity of his residence in the parish of St Fergus, or affect the retention of his settlement in that parish: Therefore sustain the appeal; recal the judgment of the Sheriff-Substitute; assoilzie the defender from the conclusions of the summons, and decern; and find the appellant entitled to expenses both in this Court and in the Sheriff-Court, and decern: Remit to the Auditor to tax the expenses now found due, and to report."

Counsel for Pursuer—Pearson—Asher. Agent—Alexander Morison, S.S.C.

Counsel for Defender—Moncrieff—Balfour. Agents—Pearson, Robertson & Finlay, W.S.

Friday, January 11.

SECOND DIVISION.

[Lord Curriehill.

M'DONALD *v.* HIMSELF AND OTHERS.

Succession — Marriage-Contract-- Entail — Reserved Power—Jus Crediti.

By antenuptial marriage-contract a husband disponed certain lands in conjunct fee and liferent to the spouses, but for liferent use allenarly to the wife, and to the heirs-male of the marriage, whom failing to the heirs-male of any subsequent marriage, whom failing to the husband's brothers and their respective heirs-male, whom failing to his nearest heirs whomsoever; and reserved a power to himself to execute an entail of the lands on the condition of calling first the heirs mentioned in the marriage-contract, but with power to add what heirs he pleased. The husband executed an entail which introduced the heirs-female of the marriage and the heirs-male of their bodies, whom failing to the heirs-female of the bodies of the sons of the marriage, whom failing the heirs-female of the bodies of the daughters of the marriage, immediately after the heirs-male of the marriage. On the entailer's death his eldest son took as institute of entail.—*Held* that the *jus crediti* being confined to the heirs-male of the marriage, the institute could not challenge the entail as not being a competent exercise of the reserved power.

This was an action of reduction and declarator, brought by Colonel Alastair M'Iain M'Donald of Dalchosnie and Kinloch Rannoch, eldest son of the late General Sir John M'Donald, against himself and John Alan M'Donald, second and only other surviving son of General M'Donald, and Elizabeth Moore Menzies M'Donald, Adriana M'Donald, and Jemima M'Donald, the only three daughters of General M'Donald, concluding for reduction of the deed of entail after mentioned, and the writs of infeftment and investiture following thereon in favour of the pursuer in fee and his parents in liferent, either totally or in so far as they contained the lands of Dalchosnie. There was also a conclusion for declarator that the whole lands contained in the entail, viz., Dalchosnie, Loch Garry, and Kinloch Rannoch, or at least the lands of Dalchosnie, belonged to the pursuer in fee-simple. The defender lodged preliminary defences, and the facts of the case, so far as material to the judgments pronounced, sufficiently appear from the following interlocutor and note of the Lord Ordinary (CURRIEHILL):—

"10*th March* 1876.—The Lord Ordinary having heard the counsel for the parties, and considered the closed record and whole process, Finds that the pursuer has neither title nor interest to maintain the pleas stated, or to insist in the conclusions of this action: Therefore sustains the preliminary defences of want of title stated by the several defenders: Dismisses the action, and decerns: Finds the pursuer liable in expenses to the said defenders—reserving for consideration the question whether and how far the defenders are entitled to the full expenses of separate appearance after the date of closing the record: appoints

accounts of said expenses to be lodged, and remits the same to the Auditor to tax and to report.

"*Note.*—This is a short and simple question. By the antenuptial marriage-contract, dated 27th September 1826, entered into between Lieutenant-Colonel John M'Donald, afterwards Sir John M'Donald, and Adriana M'Inroy, the said John M'Donald, in contemplation of the marriage, *inter alia*, 'dispones, conveys and makes over to and in favour of himself and the said Adriana M'Inroy, in conjunct fee and liferent, but for her liferent use allenarly during all the days and years of her life from and after the first term of Whitsunday and Martinmas after his death, in case she shall survive him, and to the heirs-male of this present marriage; whom failing to the heirs-male to be procreated of his body in any subsequent marriage; whom failing to William M'Donald, his brother, and his heirs-male; whom failing to Donald M'Donald, his brother, and his heirs-male; whom failing to James M'Donald, his brother, and his heirs-male, whom failing to his the said John M'Donald's nearest heirs whomsoever, heritably and irredeemably, All and whole the town and lands of Dalchosnie,' &c. The deed, however, reserves 'full power to the said John M'Donald to execute an entail of the whole or of any part of the lands before-mentioned, and that containing, if he shall think proper, prohibitory, irritant, and resolutive clauses; providing only that the said John M'Donald shall in such entail first call to the succession the series of heirs above mentioned, in the order above narrated, and thereafter such other heirs as he shall think proper.' The deed contains an obligation to infeft, but no procuratory of resignation or precept of sasine.

"Several children were born of the marriage, the eldest being the pursuer Alastair M'Iain M'Donald. The estates of Loch Garry and Kinloch Rannoch, which adjoin Dalchosnie, were, some time after the marriage, purchased by Colonel M'Donald, who resolved to add them to the Dalchosnie estate; and with that view and in exercise of his reserved power he, on 18th July 1837, executed an entail of Dalchosnie and the other two estates, in which deed the right of himself and his wife in the said estates was restricted to a liferent, and by which he conveyed the fee to the heirs after mentioned, viz., 'Alastair M'Iain M'Donald, my eldest son, and the heirs-male of his body; whom failing John Alan M'Donald, my second son, and the heirs-male of his body; whom failing Donald Charles William M'Donald, my third son, and the heirs-male of his body; whom failing Donald M'Donald, my fourth son, and the heirs-male of his body; whom failing any other son or sons *seriatim* in order, according to their seniority, that may be born of my present marriage with the said Adriana M'Inroy or M'Donald, and the heirs-male in succession of the body of such son or sons.' So far it is not disputed by the pursuer the destination in the entail is in entire conformity with the obligation or conveyance in the marriage-contract, as it is in favour of the sons of the marriage in their order, and the heirs-male of their respective bodies; in other words, in favour of the heirs-male of the marriage. And in particular it must be observed that the institute of entail is the pursuer Alastair M'Iain M'Donald, who is made the first *stirps* in the destination, the estates being conveyed to him and the heirs-male of his body. *Prima facie*, therefore, the pursuer cannot complain of the destination, as he and the heirs-male of his body occupy the precise position in the deed of entail actually executed by Sir John M'Donald which they would have occupied had the deed been expressed precisely in terms of the marriage-contract in all respects.

"The entail, however, instead of calling next in succession after the heirs-male of the marriage the heirs-male of any future marriage of Sir John, and thereafter his brothers and their respective heirs-male, and his own heirs whomsoever, calls first the daughters of his marriage with Miss M'Inroy in their order, and the heirs-male of their bodies respectively; whom failing the heirs-female of the body of the sons of the marriage in their order; whom failing the heirs-female of the body of the daughters of the marriage; whom failing the brothers of Sir John in their order, and the heirs-male of their bodies respectively; whom failing the heirs-female of their bodies respectively. And the pursuer complains that whereas under the destination in the marriage-contract the heirs-female of his body had a protected right of succession, that right has been interfered with or postponed in the destination contained in the deed of entail; and he maintains that although he is unmarried, he is entitled to protect the interests of such possible heirs-female. He seeks to protect these interests by reducing and setting aside the deed of entail *in toto*, or at least in so far as the same deals with the estate of Dalchosnie, and by asking decree of declarator that the said estate belongs to himself in fee-simple. It is difficult to see how the interests of the pursuer's possible daughters, which he says are protected by the marriage-contract, will be in any way secured by a decree in this action finding that he is fee-simple proprietor of Dalchosnie. And this consideration alone is, in my opinion, sufficient to show that the pursuer has no title to insist in the present action. But as the case was not pleaded at the bar on this footing, but was argued on both sides as if the sole question was whether daughters or heirs-female of the pursuer had a protected succession under the marriage-contract, which has been interfered with by the destination in the entail, it is necessary to consider that question.

"It is clear that if the entail, after calling the heirs-male of the marriage in implement of the marriage-contract, had proceeded to call the other heirs, and none but the other heirs who are specified in the marriage-contract, the destination must have been in favour of the heirs-male of any subsequent marriage of Sir John M'Donald, and failing them the three brothers of Sir John, and their respective heirs-male in their order of seniority, whom all failing the heirs whomsoever of Sir John. But it is undoubted that under the marriage-contract neither the heirs of any future marriage of Sir John M'Donald, nor his brother and his heirs-male, nor the heirs whomsoever of Sir John, had any *jus crediti* or any protected right of succession. And there is as little doubt that only under the destination to heirs whomsoever of Sir John could the succession ever open to the heirs-female of the pursuer. In short, none of the heirs specified in the marriage contract, beyond the heirs-male of the marriage between Sir John M'Donald and his wife

Adriana M'Inroy, had any *jus crediti* or protected right of succession; and the rights of all these parties, as has been shown, have been effectually secured by the destination in the deed of entail above recited. This being so, I am unable to see what title or interest the pursuer—to whom, and the heirs-male of his body as heirs-male of the marriage, the succession is secured by the deed of entail—can possibly have to secure to his daughters or heirs-female, who are not creditors under the marriage-contract, any right of succession to the estate of Dalchosnie.

"I am therefore of opinion that the pursuer has failed to show any title to sue this action, and that the action must therefore be dismissed, with expenses."

Against this interlocutor the pursuer reclaimed, and argued—The deed of entail is not in conformity with reserved power; (*Routledge* v. *Carruthers*, 19th May 1812, F.C., continued under name of *Majendie*, 16th December 1819, F.C., affirmed 2 Bligh 692). The entail being *ultra vires*, the pursuer is entitled to Dalchosnie in fee-simple under the marriage-contract. It was the entailer's intention that Loch Garry and Kinloch Rannoch should descend with Dalchosnie.

The defenders argued—The pursuer had no interest or title to ask decree. He was also barred by adoption and homologation of the joint-deed of settlement and of the entail. The entail was *ultra vires* of General M'Donald.

At advising—

Lord Justice-Clerk—(*After stating the nature of the action*)—I am very clearly of opinion that the interlocutor of the Lord Ordinary is right, and ought to be adhered to. I doubted at one time whether the judgment would not have been more correctly put on the absence of interest on the part of the pursuer rather than on the want of title; but I have come entirely to concur in the views of the Lord Ordinary, and I am further of opinion that, even if these had been doubtful, the pursuer is not in a position to insist on any such demand at present.

When a father becomes bound in an antenuptial marriage-contract to convey a land estate to the heir of the marriage, with a substituted destination to others, there are two general rules which have been very clearly fixed by decision. The first of these is, that such a destination creates no *jus crediti* whatever in any member of the destination other than the descendants of the marriage, and that as regards other members of such a destination the father retains the absolute power of alteration and disposal. The second of these is, that if the father during his lifetime propel or convey the estate so destined to the apparent heir of the marriage, and he accepts of the conveyance, the obligation under the marriage-contract and the *jus crediti* created by it are satisfied; and even although the conveyance contain an alteration of the destination, no right remains in the substitutes to challenge it or set it aside, even in the case of the apparent heir predeceasing the granter.

In this case the complaint by Colonel M'Donald the eldest son of the marriage, is, not that he has failed to receive any patrimonial benefit which the marriage-contract secured to him, but that the granter of the deed of 1837 has altered the position of certain of the members of the destination, on whom no *jus crediti* whatever was conferred, and has given a priority to heirs-female of the marriage over the possible heirs-male of any subsequent marriage which he might contract, and over his collateral relations. It is perfectly evident that the heirs-male of any subsequent marriage, had any such existed, would have had no right to challenge this exercise of the granter's undoubted power. He might have omitted them entirely from the destination. It is equally clear that even in his own view the heir of the marriage can suffer nothing by the change.

The pursuer founds on the clause in the marriage-contract reserving power to General M'Donald to execute an entail of the whole or any part of the lands, providing "only that he should call to the succession the series of heirs above mentioned in the order above narrated, and thereafter such other heirs as he should think proper." He maintains that no entail could be conform to the provisions of the marriage-contract in which that order was not strictly observed, because this was a reserved power and required to be executed precisely as it was reserved. To the extent of his own interest under the contract this may be true. General M'Donald could not have interposed between the eldest son of the marriage and the heirs-male of his body any of the other members called to the succession. To that extent the order set down in the marriage-contract might be held to be a condition of the power to entail. But beyond that, as the heir of the marriage had no interest in the subsequent order of succession, that order was not a condition of his right; and as regards the members of the destination, who could pretend to no *jus crediti* under the marriage-contract, the terms of the power in no respect limited the power of General M'Donald, and the alteration was quite consistent with the good faith of the marriage-settlement, which is the real test in all such questions. The right of Colonel M'Donald was to obtain a conveyance from his father under the fetters of a strict entail, in which he should be the institute and the heirs-male of his body should be next called to the succession. Beyond this he had no interest whatever in the order of the destination, and certainly none in the position which the heirs-male of any subsequent marriage might occupy in it.

An attempt was made in the argument, although not seriously pressed, to maintain that the heir of the marriage had an interest that the members of the destination should not be enlarged so as to interpose additional lives between him and the possible event of the whole destination being exhausted. It is needless, however, to consider this contention, because it is excluded by the words of the contract itself, the power being to call first the series of heirs above mentioned, and thereafter such other heirs as he shall think proper, which left it entirely in the power of General M'Donald to add to the destination as he should think fit. Even without this clause I should have doubted greatly if any such right in the possible exhaustion of the tailzied line could be held to be within the *jus crediti* created by the marriage-contract. But as General M'Donald has not added to the destination, but has only altered the order in which the heirs are to take, this question does not arise.

These views, which I suggest in addition to those very clearly stated by the Lord Ordinary, are sufficient to dispose of the case. But although

the record affords meagre materials for the view, I should be inclined to hold that even if it were not so the case is entirely in the position of the series of cases, including that of *Routledge* v. *Carruthers*, in which it was found that the apparent heir of the marriage by accepting a disposition during the father's lifetime of a land estate destined to the heir of the marriage and other substitutes by antenuptial marriage-contract, extinguished the *jus crediti* thereby created, as far as regards the rest of the destination, and that this is complete fulfilment of the obligation created by the marriage-contract. In this case the entail in question was executed so long ago as 1837. The granter reserved his liferent, and propelled the succession to Dalchosnie and the two other estates of Loch Garry and Kinloch Rannoch (in regard to which he lay under no obligation), to Colonel M'Donald his eldest son, and other substitutes under the fetters of a strict entail. Infeftment passed on the canveyance, and the entail was recorded in 1838. At that time no doubt Colonel M'Donald was under age. But he came of age several years before the death of his father in 1866, and since that date he has taken up all three estates and maintained his right under the conveyance in every possible way. I should have been of opinion, had it been necessary to decide the point, that he has conclusively accepted of the conveyance as it stood, and that the contention maintained in this action is entirely excluded.

Lord Ormidale—I concur with your Lordship in thinking that the Lord Ordinary's interlocutor is right.

It is obvious that, so far as the pursuer is individually concerned, his right and interest in the entailed estates in question have not been affected by the difference on which he founds betwixt the deed of entail as executed and the reserved power in respect of which it bears to have been executed. Neither am I able to understand how it can be maintained that the pursuer is entitled to insist in the present action for behoof and protection of heirs called after him in the destination; and certainly it is, as remarked by the Lord Ordinary, a very anomalous mode, to the say the least of it, of securing and protecting the interests of future heirs of entail for the pursuer to conclude that the lands should be held to belong to him in fee-simple.

The estates in question belonged absolutely to the entailer, and he had right to entail them upon any series of heirs he pleased, provided only that he did not interfere with or prejudice the rights conferred by the contract of marriage between him and his wife upon the children of the marriage. These parties alone had any *jus crediti* or protected right of succession. But it is not and could not be said that the rights of the children of the marriage have been interfered with or prejudiced by the entail as executed. And if this be so, the authorities which were cited in the course of the debate are, I think, conclusive against the pursuer. Thus Mr Erskine (b. iii., t. 8, § 39), while he states, and illustrates his statement by various examples, that settlements in marriage-contracts restrain the father from executing "gratuitous deeds to the prejudice of the heir of the marriage," concludes by saying—"As to the remoter substitutes, if the husband contracted, it was with himself alone, and therefore the substitution must be accounted a simple destination as to them, which may be altered by him at his pleasure." To the same effect is the statement of Mr Bell in section 1970 of his Principles, and the cases to which he there refers. And in accordance with this doctrine one of the questions in the case of *Macleod* v. *Cunninghame* (20th July 1841, 3 D. 1288), cited in the course of the argument, seems to have been decided.

I may add that I concur very strongly with your Lordship in thinking that the pursuer has, by taking up the entailed estates in the way he did, precluded himself from founding on his first objections. But as I cannot help feeling that the materials for determining this point are not before us in proper form, I do not rest my judgment on it.

These are, shortly, the grounds which have influenced me in coming to the conclusion that the judgment of the Lord Ordinary is right.

Lord Gifford [*after stating the conclusions of the summons*]—The ground on which the pursuer makes this demand is that the said deed of entail executed by his father in 1837 was *ultra vires* of his father and in contravention of the provisions contained in his father's antenuptial contract of marriage with Miss M'Inroy, afterwards Lady M'Donald. He pleads, that although the antenuptial contract of marriage reserved power to Sir John M'Donald to make a deed of entail, it was provided that such deed should be in favour of a certain series of heirs named in the marriage-contract, whereas the deed of entail actually executed is not in favour of the prescribed series of heirs but in favour of another and a different order of heirs.

I am of opinion that the contention of the pursuer is not well founded. I think that the deed of entail actually executed by the late Sir John M'Donald was entirely within the powers reserved to him in his antenuptial contract of marriage, and that the same is not challengeable on any of the grounds now insisted in by the pursuer.

At the date of Sir John M'Donald's marriage with Miss M'Inroy, Sir John, then Colonel M'Donald, was proprietor of the lands and estate of Dalchosnie, and by antenuptial marriage-contract between him and his wife, dated 8th September 1826, the said Sir John M'Donald, in consideration of the marriage, made over that estate to himself and his intended wife in conjunct fee and liferent, but for her liferent use allenarly in case she should survive him, and to the heirs-male of the marriage, whom failing, to the heirs-male of the body of the said Sir John M'Donald by any subsequent marriages, whom failing, to Sir John M'Donald's three brothers in succession and their respective heirs-male, whom failing, to the said Sir John M'Donald's nearest heirs whomsoever.

Now, if this provision had stood alone it would have entitled the present pursuer on his father's death to take up the estate of Dalchosnie in fee-simple as heir-male of the marriage, and the pursuer's father could not have defeated his right by any *mortis causa* or gratuitous deed.

But the marriage-contract contains an important reservation in these terms—"Reserving nevertheless full power to the said John M'Donald to execute an entail of the whole or of any part

of the lands before mentioned, and that containing, if he shall think proper, prohibitory, irritant, and resolutive clauses, providing only that the said John M'Donald shall in such entail first call to the succession the series of heirs above mentioned in the order above narrated, and thereafter such other heirs as he shall think proper, and no way defeat or injure the said Adriana M'Inroy's liferent right hereby created in her favour over the said lands of Dalchosnie and others during her lifetime."

Professedly in exercise of this reserved power, and on the further narrative, *inter alia*, that he had purchased two additional estates of Loch Garry and Kinloch Rannoch adjoining to Dalchosnie, and that he and Lady M'Donald wished to settle the whole three estates on themselves and their family, "and failing our heirs-male, so far to alter the destination in the marriage-contract with regard to Dalchosnie as to settle it with the other lands, giving heirs-female of the present marriage a preference and priority to heirs-male of any subsequent marriage," Sir John M'Donald executed the deed of entail of 18th July 1837 of the whole three estates of Dalchosnie, Loch Garry, and Kinloch Rannoch "to and in favour of himself and Lady M'Donald and the survivor of them in liferent, and to the heirs therein mentioned in fee, viz., the pursuer, the eldest son, and the heirs-male of his body, whom failing, John, the second son, and the heirs-male of his body, whom failing, the other sons of the marriage and the heirs-male of their bodies respectively, whom failing, the daughters of the marriage successively and the heirs-male of their bodies respectively, whom failing, the heirs-female of the pursuer and the heirs of her body, whom failing, the heirs-female of the body of the other sons *seriatim*, then the heirs-female of the body of the daughters of the marriage *seriatim*, then the heirs-male or heirs-female of any subsequent marriage of the said Sir John M'Donald, whom failing, to the entailer's brothers then surviving and the heirs-male of their bodies respectively, whom failing, the heirs-male of the entailer, whom failing, his heirs whomsoever."

Now, the main difference between this destination and the destination mentioned in the antenuptial marriage-contract, is that in the entail actually made heirs-female of the marriage and heirs-female of the sons and daughters of the marriage are called to the succession before the entailer's brothers and their heirs, and it is upon this difference that the pursuer founds as rendering the whole entail void as *ultra vires* of the reserved power contained in the marriage-contract.

I am of opinion, however, that the pursuer has no interest and no right to complain of the entail as actually made. In the first place, the pursuer has evidently no right to complain of the destination of the two estates of Loch Garry and Kinloch Rannoch, which were acquired by Sir John M'Donald after the date of the marriage-contract. These two estates were not included in or settled by the marriage-contract at all. No *jus crediti* or right of any kind in favour of the heirs of the marriage was created by the marriage-contract so far as these two estates were concerned. These estates were Sir John's absolute property after he purchased them, and he might settle them in any manner he pleased. The pursuer's complaint must be limited to Dalchosnie alone.

But even as to Dalchosnie, I think the pursuer's challenge of the entail fails. The variation in the destination in no way prejudices the pursuer. The pursuer himself and the heirs-male of his body are first called to the succession, then his brothers and their respective heirs-male, and it is surely not in the pursuer's mouth to object that the destination is then made in favour of the heirs-female of the marriage—including among others the heirs-female of the pursuer's own body—instead of the succession being diverted, failing heirs-male of the marriage, to the brothers and collaterals of the entailer. The reserved power gave the entailer full liberty, after his brothers and their heirs-male were called, to introduce "such other heir as he shall think proper." So that if the heirs-female in question had been called at the end of the destination this would have been strictly under the reserved power. I think it is not in the pursuer's mouth to object that the heirs-female are introduced in the destination before the pursuer's uncles.

It is quite fixed that while the provisions in an antenuptial marriage-contract confer indefeasible rights upon the spouses and upon the issue of the marriage, yet when there are in such a deed ulterior gifts or destinations over in favour of collaterals of the spouses or of third parties, no indefeasible right is conferred upon or created in favour of such third parties, but a mere *spes successionis* entirely dependent on the will and pleasure of the spouses or of the granters of such gift or destination, and revocable by the granter at any time of the granter's life. Accordingly I am clearly of opinion that the brothers of Sir John M'Donald, although specially mentioned in the marriage-contract, had no *jus crediti* under it, and could not have compelled Sir John M'Donald to make the entail in their favour. In like manner, supposing any of these brothers to be still alive, I do not think they could have challenged the existing entail because it interposes the heirs-female of the marriage before calling them (the brothers) and their heirs-male to the succession. I think it is quite clear that Sir John's brothers had under the marriage-contract a mere *spes successionis* which Sir John might defeat at pleasure by any gratuitous deed, either *inter vivos* or *mortis causa*. Now, if Sir John's brothers who have been postponed to the heirs-female of the marriage, and who are thus undoubtedly prejudiced by having their *spes successionis* made very greatly more remote, could not object to the deed of entail on this ground or on any other ground, it is difficult to see how the pursuer, who is no way prejudiced, but on the contrary is benefitted by the variation, can be allowed to plead on behalf of his uncles what his uncles could not have pleaded for themselves even if they were now alive and objecting. In a case like the present the interest to challenge and the right to challenge are the same. If there is no interest to challenge then there is no right to do so.

If, indeed, the pursuer could say that by the entail in question more heirs of entail are created than the entailer had power to introduce or to name, this would be a relevant challenge, for it is plain that the institute of an entail is always entitled to object to the substitutes being multiplied, for this diminishes his chance that by failure of all the substitutes he himself may become fee-simple proprietor. The entailed succession is as

it were a burden on the fee-simple succession, and this burden must not be unwarrantably enlarged. It often happens, or may happen, that even an institute of entail may, by surviving all the substitutes called, and all the special heirs called, become absolute proprietor. But the pursuer cannot say this in the present case, for undoubtedly under the marriage-contract Sir John M'Donald could call by the entail any number of substitutes or any number of heirs he might "think proper" to the succession, and the pursuer has no interest whatever in the order in which they may be placed.

I agree, therefore, in the conclusion at which the Lord Ordinary has arrived, but I doubt how far the form of his judgment is strictly accurate. He simply dismisses the action for want of title. I should have been disposed to have allowed the production to be satisfied and thereafter to have granted decree of absolvitor, and not a mere dismissal of the action. I think the pursuer, the institute of the entail seeking to get quit of its fetters, has sufficient title to insist on its production, and thereafter the defenders are entitled not merely to have the action dismissed, but to decree of absolvitor. Perhaps, however, this is a mere matter of form and may not require amendment.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming note for Colonel Alastair M'Iain M'Donald against Lord Curriehill's interlocutor of 10th March 1876, Refuse said note, and adhere to the interlocutor complained of, with additional expenses, and remit to the Auditor to tax the same and to report, and decern."

Counsel for Pursuer—Lord Advocate (Watson) —M'Laren. Agent—A. P. Purves, W.S.

Counsel for John A. M'Donald — Fraser — Trayner. Agents—Dewar & Deas, W.S.

Friday, January 11.

SECOND DIVISION.

[Lord Shand, Ordinary.

M'DONALD *v.* M'DONALD.

Entail — Entailer's Debt — Confusio — *Forfeiture — Relief.*

Where an institute of entail had acquired by assignation from the marriage-contract trustees of his father and mother a security over the entailed estates in lieu of a sum which had been apportioned to him by his father (the entailer) and mother, under a joint power reserved in their marriage-contract, and had executed assignations of this security — *held* that there had been no *confusio* in the person of the institute, and that the assignations inferred no contravention of the entail, or forfeiture of the institute's rights.

Entail—Entailer's Debt—Clause of Relief—Executor.

In 1837 a proprietor entailed his estates on a certain series of heirs, reserving his own liferent; and infeftment immediately followed in favour of the entailer in liferent and the institute of entail in fee. By the deed of entail the entailer bound and obliged himself and his heirs-at-law, executors, and successors whomsoever, to free and relieve the entailed lands, and the heirs to succeed thereto, "of and from the payment and performance of all the debts and obligements to which I, the said John M'Donald, for myself, or as representing all my ancestors, are or shall be liable, and of and from all claims and demands whatever, whereby the said lands and estate, or any part thereof, may be evicted." The estates entailed were burdened with a debt of £25,000. In 1853 the entailer purchased another estate, which he entailed on the same series of heirs, but expressly reserved power to revoke. On the death of the entailer the institute of entail (who was the entailer's eldest son and his executor) came into possession of the estates under both entails.— *Held* that the institute was not bound to free and relieve the estates entailed in 1837 of the debt upon them, merely in respect of his having succeeded to the estate purchased in 1853 as heir of entail and provision of his father under the deed of entail of the latter estate.

Opinions as to (1) the liability of the estate purchased in 1853 to relieve the estates entailed in 1837 of the burden affecting them; (2) the liability of the institute as the entailer's executor; and (3) the title of a substitute of entail to demand that the relief should be operated.

This was a declarator of irritancy and forfeiture, brought by John Alan M'Donald, residing at Croyde House, Croyde, in the county of Devon, the second son of General Sir John M'Donald, against Colonel Alastair M'Iain M'Donald of Dalchosnie, eldest son of General M'Donald. The action concluded for declarator that the defender had forfeited his right to the whole lands contained in the deed of entail of Dalchosnie, Kinloch Rannoch, and Loch Garry executed in 1837; that the same had devolved to the pursuer; that the defender ought immediately to cede possession of the estates of Dalchosnie, Kinloch Rannoch, and Loch Garry; and that the said lands and the writs ought to be adjudged from the defender to the pursuer as at the next term of Lammas (the summons being signeted on 17th June 1876). There was also an alternative conclusion that the defender, as heir-at-law and executor, or heir-at-law or executor of and as successor to his father General M'Donald, should be ordained to free and relieve the entailed lands of—(1st) a sum of £25,000, contained in a bond and disposition in security over the said estates, granted on 13th October 1828 by General M'Donald, the entailer, in favour of Mrs Elizabeth M'Inroy and others, trustees under the trust-disposition and settlement of the deceased James M'Inroy, recorded in the Books of Council and Session 27th August 1825, and relative instrument of sasine; and (2) the sum of £9000 contained in a bond and disposition in security over the said estates, granted by the defender with the authority of the Court of Session, on 5th July 1867, in favour of the Central Bank of Scotland. By an amendment lodged in