

factory to know that the two Courts came to the same conclusion.

Upon the question of competency, I think that this action is perfectly competent, and I cannot say that I participate in the Lord Ordinary's doubt upon that question. If the Magistrates were desirous of preventing the company from overstepping the provisions of the Act, the circumstance that certain private parties who were injured by the delay in the operations had a title to complain, and succeeded in recovering penalties, would not prevent the Magistrates from raising an action to have it found that the railway company were bound to complete their operations within the specified time. If the Magistrates were entitled by means of an action of declarator to have it found that the company were not entitled to use the public street for a longer period than three months at a time, and to have them interdicted from so doing, it seems to follow, on the other hand, that the company should be entitled by the present action to have it determined whether or not they have power which they here claim, and also that owners of shops and dwelling-houses have also the right to prevent the company from overstepping the provisions of the Act, and, if they can, of recovering damages from the company for injury suffered by these operations, quite apart from the penalties which the Act provides may be recovered under criminal proceedings. I see nothing in the fact that such penalties may be recovered to prevent a civil action of damages for injury caused by the company exceeding its statutory powers. While, therefore, I am against the pursuers on the merits, I am with them upon the question of competency.

LORD MURE and LORD SHAND concurred.

The Court adhered.

Counsel for Pursuers—Trayner—R. V. Campbell. Agents—Millar, Robson, & Innes, S.S.C.

Counsel for Magistrates of Glasgow—J. P. B. Robertson—Pearson. Agents—Campbell & Smith, S.S.C.

Counsel for Hutcheson's Trustees—Mackintosh—Goudy. Agents—J. & J. Ross, W.S.

Counsel for Mrs Watson and Others—Mackintosh—Dundas. Agents—Macandrew, Wright, Ellis, & Blyth, W.S.

Friday, July 18.

FIRST DIVISION.

[Sheriff of Chancery.

LORD LOVAT v. FRASER.

Succession—Entail—Destination—Falsa Demonstratio—Falsa Causa—Construction—Description of Grantee—"Namely."

By the dispositive clause of a deed of entail the entailer disposed the lands "to and in favour of the nearest legitimate male issue of my ancestor Hugh Lord Fraser of Lovat, namely, Thomas Alexander Fraser of Strichen, being the nearest lawful heir-male of the deceased Alexander Fraser of Strichen, and his heirs-male," and then failing certain

other destinations, to and in favour of the person who should then be able to prove himself to be the chief of the Clan Fraser by legitimate descent. A claimant to the lands maintained that Thomas Alexander Fraser was not "nearest legitimate male issue of Hugh Lord Fraser of Lovat," and that it was a condition of the destination that the person called should truly answer that description. Held that the destination imported that the entailer intended to give the lands to Thomas Alexander Fraser, whom he had satisfied himself to answer the description; that it was not a condition of his taking them that he should be truly entitled to the description, and that, assuming him to be not, the case was one of *falsa demonstratio* or of *falsa causa*, neither of which would affect his title to the lands.

The late Archibald Thomas Frederick Fraser, Esquire, of Abertarff, in the county of Inverness, died on 2d March 1884 last vest and seised in various portions of the lands of Abertarff, as well the *dominium utile* or property as the *dominium directum* or superiority of the same which stood in the person of the late Honourable Archibald Fraser of Lovat in fee-simple through the failure of heirs of his body. Competing petitions for service were presented to the Sheriff of Chancery by (1) The Right Honourable Simon Baron Lovat; and (2) John Fraser of Mount Pleasance Villa, Carnarvon, each of whom claimed to be served nearest and lawful heir of tailzie and provision in special of the said Archibald Thomas Frederick Fraser of Abertarff.

Alexander the sixth Lord Lovat, who died in 1557, had two sons, of whom the elder was Hugh the seventh Lord, and the younger was Thomas Fraser, called Fraser of Strichen, and the first of the younger branch of the family, who were known as the Frasers of Strichen. Hugh the ninth Lord Lovat had several sons, of whom one, Hugh, died before his father, but his son Hugh became the tenth Lord, and left a son Hugh who became the eleventh Lord, and died without male issue. Hugh the ninth Lord, however, had left other sons, of whom one was known as Thomas of Beaufort. It was one of the sons of this Thomas of Beaufort, namely, Simon, that became twelfth Lord. He was beheaded in 1747.

In this competition it was averred by John Fraser, the competing petitioner, and assumed to be true for the purpose of the case, that Thomas of Beaufort had an older son than Simon, namely, Alexander, who was alive when Simon succeeded, and who would have been twelfth Lord in preference to Simon, but who was obliged to fly from Scotland in or about the close of the seventeenth century, and went to Wales, where he married and left issue, John Fraser, from whom this petitioner claimed to be directly descended.

Simon, known as the twelfth Lord, left issue, one of whom the Hon. Archibald Fraser of Lovat, who was born in 1736 and died in 1815, executed the deeds of entail under which Abertarff was entailed. The first of these deeds of entail was executed by him in 1808. He entailed the lands of Abertarff upon the following order of heirs, viz., "to and in favour of the nearest legitimate male issue of my ancestor Hugh Lord Fraser of Lovat, namely, Thomas Alexander Fraser of Strichen, being the nearest

lawful heir-male of the deceased Alexander Fraser of Strichen and his heirs-male; whom failing, to and in favour of the late Hugh Fraser (now) of Struie, and the heirs-male of his body; whom failing, to and in favour of the nearest lawful heir-male of the late William Fraser of Kilbockie, and his heirs-male; whom failing, to and in favour of Simon Fraser, Esquire, of Faraline, and his heirs-male; whom failing, to and in favour of the person who shall be then able to prove himself to be the chief of the Clan Fraser by legitimate descent from Hugh first Lord Lovat, and his heirs-male; whom all failing, to and in favour of my own nearest lawful heirs and assignees whatsoever, heritably and irredeemably." By the clause of obligation to infest the entailor bound himself "to infest and seize the said Thomas Alexander Fraser, being the nearest heir-male of the said deceased Alexander Fraser of Strichen, and his heirs-male whom failing the other heirs and substitutes above mentioned;" and by the clause resigning the lands for new infestment, he resigned them for new infestment to be made, given, and granted to and in favour of the said Thomas Alexander Fraser of Strichen, being the nearest "lawful heir-male of the said deceased Alexander Fraser of Strichen, and his heirs-male; whom failing, to and in favour of the late Hugh Fraser of Struie, and the heirs-male of his body; whom failing, to and in favour of the nearest lawful heir-male of the said William Fraser of Kilbockie and his heirs-male; whom failing, to and in favour of the said Simon Fraser, Esquire of Faraline, and his heirs-male; whom failing, to and in favour of the person who shall be then able to prove himself the chief of the Clan Fraser by legitimate descent from Hugh first Lord Lovat and his heirs-male; whom all failing, to and in favour of my own nearest heirs and assignees whatsoever;" while the precept of sasine directed sasine to be given "to the said Thomas Alexander Fraser, the nearest heir-male of the said deceased Alexander Fraser of Strichen, and his foresaids," whom failing, the other heirs of tailzie therein mentioned.

The entailor reserved power to revoke or innovate this deed, and in 1812, on the narrative of the reserved power, he nominated and appointed Thomas Frederick Fraser, afterwards known as Fraser of Abertarff, the illegitimate son of one of his sons, to succeed immediately after himself and the heirs of his body. Failing this Thomas Frederick Fraser and the heirs-male of his body, he called the heirs and substitutes in the deed of entail of 1808.

The entailor's last surviving son had died before the deed of 1808 was executed, and none of his sons left legitimate issue. With the entailor, therefore, the main line of the family (apart from the existence, as alleged by the petitioner John Fraser, of direct descendants of Alexander, the son of Thomas of Beaufort) became extinct, and the next in the legitimate order of succession was Thomas Alexander Fraser of Strichen, who became Lord Lovat.

After the succession of Thomas Frederick Fraser (who, as required by the deed of nomination of 1812, took in addition the name of Archibald Fraser of Abertarff) a protracted litigation took place in consequence of a demand by Thomas Alexander Fraser of Strichen, who had become Lord Lovat, that he—Fraser of Abertarff—should

take up the estate under the fetters of a strict entail under a destination which need not here be referred to further than to state that in 1851, on the narrative of the litigation and of a decree of the Court in 1850 approving of a draft deed of entail and ordaining the same to be executed, Archibald Thomas Frederick Fraser of Abertarff disposed, assigned, and conveyed to and in favour of "myself and the heirs-male of my body; whom failing, to the other heirs and substitutes appointed or named by the said deed of entail by the said Archibald Fraser, bearing date the 15th day of August 1808; viz., the nearest legitimate male issue of Hugh Lord Fraser of Lovat, namely, the said Thomas Alexander Fraser, now Lord Lovat of Lovat, therein designed of Strichen, being the nearest lawful heir-male of the deceased Alexander Fraser of Strichen, and to the heirs-male of the said Thomas Alexander Fraser, Lord Lovat; whom failing, to and in favour of the heirs-male of the body of the late Hugh Fraser of Struie; whom failing, to and in favour of the nearest lawful heir-male of the late William Fraser of Kilbockie and his heirs-male; whom failing, to and in favour of the heirs-male of the deceased Simon Fraser, Esquire of Faraline; whom failing, to and in favour of the person who shall be then able to prove himself to be the chief of the Clan Fraser by legitimate descent from Hugh first Lord Lovat and his heirs-male; whom all failing, to and in favour of the nearest lawful heirs and assignees whatsoever of the said Archibald Fraser of Lovat, heritably and irredeemably, All and Whole," &c. The obligation to infest was in favour of the entailor and the heirs-male of his body, whom failing the said Thomas Alexander Fraser, Lord Lovat, and his heirs-male, whom failing the other heirs, &c., and the clause of resignation for new infestment was in like terms:—"To and in favour of me the said Archibald Thomas Frederick Fraser and the heirs-male of my body; whom failing, to the said Thomas Alexander Fraser, now Lord Lovat (being the nearest lawful heir-male of the said deceased Alexander Fraser of Strichen), and his heirs-male; whom failing, to and in favour of the heirs-male of the body of the late Hugh Fraser of Struie; whom failing, to and in favour of the nearest lawful heir-male of the said William Fraser of Kilbockie, and his heirs-male; whom failing, to and in favour of the heirs-male of the said deceased Simon Fraser, Esquire of Faraline; whom failing, to and in favour of the person who shall be then able to prove himself the chief of the Clan Fraser by legitimate descent from Hugh first Lord Lovat and his heirs-male; whom all failing, to and in favour of the nearest heirs and assignees whatsoever of the said Archibald Fraser of Lovat."

After the death of this Archibald Thomas Frederick Fraser of Abertarff without heirs-male of his body, on 2d March 1884, the present question arose by the competing petitions of the present Lord Lovat, claiming through Thomas Alexander Fraser, and John Fraser, and their respective objections as above stated.

John Fraser pleaded—"(1) On the death of the late Archibald Thomas Frederick Fraser without heirs-male of his body, the succession to the lands and estate of Abertarff devolved, in terms of the destinations in the deeds of entail mentioned in the objector's petition, to the nearest

legitimate male issue of Hugh Lord Fraser of Lovat, ancestor of the late Honourable Archibald Fraser. (2) The objector being the nearest legitimate male issue of the body of the said Hugh Lord Fraser of Lovat, is the nearest and lawful heir of tailzie and provision under the said deeds of entail called to the succession after the said Archibald Thomas Frederick Fraser and his heirs-male. (3) The said Simon Fraser, otherwise Lord Lovat, not being a descendant or issue of the said Hugh Lord Fraser of Lovat, is not entitled, or at least not entitled in competition with Mr Fraser, to be served heir of tailzie and provision under the said deeds of entail."

Lord Lovat, in his objections to John Fraser's petition, pleaded that John Fraser had no title to sue, and that his averments were irrelevant "(3) On a sound construction of the deeds of entail founded on, and in particular of the deeds of entail of 1808 and 1851, the petitioner [John Fraser] is not entitled to service as craved, and the petition should be refused, with expenses."

The Sheriff of Chancery (Muirhead), after considering the competing petitions and the respective objections, conjoined the petitions, and before ordering proof appointed the parties to be heard on their pleas-in-law so far as preliminary or as relating to the construction in law of the destination in the entail on which both parties relied.

Lord Lovat appealed to the First Division.

The parties gave in genealogical trees showing their alleged pedigrees. The argument was however taken on the footing that each party could prove his pedigree as alleged as to the construction of the destination in deed of entail of 1808, being the clause above quoted from that deed.

Argued for Lord Lovat—The averments of John Fraser were irrelevant to support the prayer of his petition. Even if proved, they would not avail him in the present competition. The entail showed that the entailer had satisfied himself that Thomas Alexander Fraser of Strichen was the "nearest legitimate male issue of my ancestor Hugh Lord Fraser of Lovat," and even if it should be proved by John Fraser that he was not, it was a case of *falsa causa*. It was either in this view *falsa demonstratio* or *falsa causa*, and *falsa demonstratio non nocet*. If not a case of misnomer, it was one of *falsa causa*. In cases where an error or some inaccuracy occurred in a name, but when the description of the party was quite clear, the latter would prevail. False character only defeated a legacy when the legacy is made conditional on the possession of it. By the designation in the dispositive clause of the deed there could be no possible mistake as to who was meant to be instituted, viz., Thomas Alexander Fraser of Strichen.

Authorities—Justinian (Saunders') i. 20, 29, 31, p. 241; Ulpian, ii. 24, 19; Digest, 35, 1, 17; Charter, 1874 L.R. 7 H. of L. 364; *Drylie's Factor v. Robertson*, July 20, 1882, 9 R. 1178; *Fraser v. Fraser*, 1 Sydney Bell's Appeals, p. 105; *Scottish Missionary Society v. Home Mission of Church of Scotland*, Feb. 19 1858, 20 D. 634; *Farrar v. St Katherine's College*, 1873, L.R. 1699, p. 19; *Bernasconi v. Atkinson*, 10 Hare 345, 1853; *Gillet v. Gane*, 1870, L.R. 10 Ex. 29.

Argued for John Fraser—The entailer clearly wished to call a representative of his race—a

stirps. The motive of the deed was to benefit a person having a certain designation and standing in a certain relation to Hugh first Lord Lovat. Thomas Alexander Fraser could only take in so far as he corresponded with the description. It was truly a condition attaching to the gift that he should answer the description. If the person had been the object of favour, the name would have stood first in the clause, but here the description ("nearest legitimate male issue of my ancestor Hugh") took precedence. The claimant was entitled to be served, because he fulfilled the description of the deed. There was no presumption in favour of the name over the description in a deed like the present.

Authorities—*Bradshaw*, 2 Young and C. Exch. 86; *Doe v. Huthwaite*, 8 Taunton, 306; *Garland* (1878), 9 Ch. Div. 213; Bell's Prin. (Latent Ambiguities) 1871; *Scot v. Clark*, Dec. 9, 1826, 5 Sh. 109; *Davidson v. Magistrates of Anstruther*, Jan. 28 1845, 7 D. 342; *Logan v. Wright*, 5 Will. & Sh. 242.

At advising—

LORD PRESIDENT—Each of the competing petitioners who are parties before us claims to be served as nearest lawful heir of tailzie and provision in special to Archibald Thomas Frederick Fraser of Abertarf, now deceased, in the lands of Abertarf and others. These petitions arose in the Court of the Sheriff of Chancery, and have been transferred here by appeal under the provisions of the Act of Parliament. The parties agree in asking us to determine a question upon the construction of the destination in the deed of entail, without inquiring into the pedigree of either of the parties before us. Now, as regards the pedigree of Baron Lord Lovat no question was raised. He claims here as the representative of Fraser of Strichen. The other party, Mr John Fraser, claims to be descended from a certain Alexander Fraser, who was undoubtedly lineal heir and representative of Alexander sixth Lord Lovat, who died in the year 1557. That Alexander Lord Lovat had two sons; one was Hugh, who became seventh Lord Lovat; and the other was Thomas Fraser, the younger son, who was called of Strichen, and who is the first of the line of what may be called the Strichen branch; and the respondent, if he makes out his pedigree, in point of fact is undoubtedly the representative of what may be called the main line, or descendants of the eldest son of Alexander the sixth Lord. On the other and, the present Lord Lovat is a lineal descendant of the first Fraser of Strichen, who was the younger son of that Alexander, sixth Lord.

Now, in deciding the present question we of course assume that the pedigree of both parties is capable of being well established, and the whole case comes to depend upon the construction of the clause of destination in the deed of entail. The entails here, however, are of a somewhat conflicting kind, and it is necessary that we should have some explanation as to which of them is the regulating deed.

The entailer, who was a descendant of the male line, and was known as the Honourable Archibald Fraser of Lovat, died in the year 1815, and he made a deed of entail of the lands in question in the year 1808, in which was inserted the destination which we are now about to consider. But he made a second deed in 1812, the effect of which was to place the late Mr Fraser of Abertarf,

who was his illegitimate grandson, in the position of institute of tailzie before all the others who had been called in the deed of 1808. A great controversy arose after his death as to whether this deed of 1812 could receive effect because it referred back to the deed of 1808 for the destination, and had newly put the late Mr Fraser of Abertarff into the position of institute, so that the only express conveyance or destination in favour of Mr Fraser was in that deed. That case depended in Court for a considerable number of years, and was only brought to a termination in the year 1851, when the late Mr Fraser of Abertarff was appointed to execute a deed of entail so as to give effect to the two deeds of 1808 and 1812 taken together, and that deed of 1851 is now therefore, properly speaking, the regulating deed of entail of this estate. But it is not of much consequence whether we direct our attention to that deed or to the original deed of 1808, because I think it cannot be disputed that the same construction must apply to both, and therefore it rather appears to me that for the sake of clearness it would be better that I should confine my observations to the original deed of 1808.

The maker of that deed, as I said before, was the Honourable Archibald Fraser of Lovat, and he says in it, that "being desirous of settling the destination of my lands and estate after mentioned in my own lifetime, so as to prevent all disputes after my death, and also for the favour and affection which I have to the person after named, and for other good causes and considerations me moving, have given, granted, and disposed, as I do hereby give, grant, and dispone, from me, my heirs and successors, to and in favour of the nearest legitimate male issue of my ancestor Hugh Lord Fraser of Lovat, namely, Thomas Alexander Fraser of Strichen, being the nearest lawful heir-male of the deceased Alexander Fraser of Strichen and his heirs-male;" then failing of that branch, which may be called the Strichen branch, he gives his estate to "Hugh Fraser, now of Struie, and his heirs-male," and failing them to certain other branches of the Fraser family, and failing all of them, "to and in favour of the person who shall then be able to prove himself to be the chief of the Clan Fraser by legitimate descent from Hugh first Lord Lovat and his heirs-male."

Now, the respondent John Fraser contends that the object of this destination being to call, in the first place, the nearest legitimate male issue of Hugh Lord Fraser of Lovat, meaning thereby the first Lord Lovat, he, as being descended from the older branch of that family, is entitled to prevail in preference to Lord Lovat, who is descended from the younger branch, viz., the Strichen branch of that family. This contention depends entirely upon the effect that is to be given to the words "to and in favour of the nearest legitimate male issue of my ancestor Hugh Lord Fraser of Lovat." If there were nothing else in the deed, the contention of the respondent would be good, assuming always that he is able to make out his pedigree, and show that he is, as he alleges, the nearest legitimate male issue of the first Lord Fraser of Lovat. But then these words do not stand alone, because they are immediately followed by those—"namely, Thomas Alexander Fraser of Strichen, being the nearest lawful heir-male of the deceased Alexander Fraser of Strichen, and his heirs-male." The entailor therefore

asserts, whether it be true or not, that Thomas Alexander Fraser of Strichen is the nearest legitimate male issue of Hugh first Lord Fraser of Lovat, and the question to be determined is what is to be the effect of that assertion of the entailor standing alongside the expression "to and in favour of the nearest legitimate male issue of my ancestor Hugh Lord Fraser of Lovat." Now, it appears to me that the structure of this sentence is perhaps not a very common one in cases where it requires to be determined whether the name of the party called to the succession is to prevail over the description, or the description over the name. I do not think it is a very usual structure of sentence, because the description comes first and the name comes afterwards. The intention is stated to call the nearest male heir of the first Lord Lovat, and the person called is Thomas Alexander Fraser of Strichen, and the respondent says these are two different persons.

But it is further to be observed that the entailor professes his desire to call a particular person, the nearest male descendant of the first Lord Lovat, for he goes on to use the term "namely" in introducing the name of the person who he says answers that description. Now, what is the meaning of the word "namely" in such a deed. The only natural meaning to give to it is that the description that he has already made answers to the person that he is about to name. That is to say, having professed his desire to call the nearest male descendants of the first Lord Lovat, he then asserts that that person's name is Thomas Alexander Fraser of Strichen.

Now, it appears to me that the structure of the sentence does not raise a question in any degree different from that which would have arisen if he had expressed himself in a different way by reversing these two different parts of the sentence, and had said "to and in favour of Thomas Alexander Fraser of Strichen, the nearest legitimate male issue of the first Lord Lovat." I think the words as they stand just mean the same thing as if he had expressed himself in the way I have now suggested, and therefore you have clearly the case of a person called by name, and about whose identity there is not the smallest possibility of a mistake. Nobody says that there is anybody but one who can answer to that name of "Thomas Alexander Fraser of Strichen, the nearest lawful heir-male of the deceased Alexander Fraser of Strichen." That is a person perfectly well known and identified. And what is to be the effect therefore of his being described by the entailor as being the nearest legitimate male issue of the first Lord Lovat? Why did the entailor so describe him? I can suppose more reasons than one for that. In the first place, he may have believed, or thought he knew with certainty, that he did answer that description. And considering that the ancestor of the respondent left this country a very long time ago—somewhere about the year 1690—and neither he nor any of his descendants were since that heard of, it was not at all wonderful that the entailor in the year 1808 should thoroughly believe that Thomas Alexander Fraser of Strichen was the nearest legitimate male descendant of the first Lord Lovat, because it is quite ascertained that there is no remaining representative of the elder or main line except the present

respondent, claiming through that person who went away at a very early period. We have thus a very clear reason for the statement made by the entailor that Thomas Alexander Fraser of Strichen was the nearest male descendant of the first Lord Lovat.

Would it make any difference, then, that he was wrong in point of fact—that it turns out to the contrary of what everybody believed at the time, that there is a nearer descendant because there is a representative of the main or elder line? I apprehend that taking the case in that way the rule *falsa demonstratio non nocet* applies. It is quite clear who is the person intended to be called to the succession. The description of that person turns out to be inaccurate, but that does not detract from the force of the conveyance or destination in favour of a person perfectly well known and identified. The case may be viewed, perhaps, in three aspects. It may be taken that that is a false description, and in that case I think a false description has no effect upon a destination. But it may be suggested also that the reason why the entailor called Thomas Alexander Fraser of Strichen was because he believed him to be the nearest male descendant of the first Lord Lovat. And in the third place, it may be said that the inductive clause was a mistake. Now, there again I apprehend it is settled that that does not affect a destination or a conveyance to a person named, there being no doubt about the identity of the person. *Falsa causa* has just as little effect in a case of this kind as *falsa demonstratio*.

But it is contended by the respondent, in the third place, that this is not a case of *falsa demonstratio* nor of *falsa causa*, and he maintained that it is a condition of the destination that the person called shall in point of fact answer the description of being the nearest male descendant of the first Lord Lovat. Now, if the respondent could establish that proposition, that would be a very different matter indeed, and I should think in that case he would be entitled to prevail. But is there upon the face of this deed anything to shew that the entailor meant to make it a condition of Thomas Alexander Fraser taking the estate, that he should be proved to be the nearest male descendant of the first Lord Lovat? There are no words in the deed of entail that can be held in any way to be an expression of such an intention, and there is nothing importing a condition in this clause of destination at all. So far as I can see, the individual selected by the entailor is a perfectly well-known individual, and although he might think, and had very good reason for thinking, that he was the nearest male descendant of the first Lord Lovat, that does not affect the purpose of the entailor, that that man shall be his institute of tailzie.

A good deal of corroboration may be found of this construction of this clause of destination in other parts of the deed. But it really does not appear to me to be almost necessary to have recourse to that mode of construing this destination clause, because I think it very clear in itself. But in the executory clauses of the deed, in the obligation to infest, in the precept of sasine, and in the procuratory of resignation, there is nothing said about the nearest male descendant of the first Lord Lovat; the obligation is to infest the said Thomas Alexander Fraser of Strichen,

without any further description; and the warrant to the officer to infest is to infest the said Thomas Alexander Fraser of Strichen; and the procurator is desired to resign in favour of Thomas Alexander Fraser of Strichen, but without any such description as we find in the destination clause. And all that shows us more or less, without reference to the clause of destination itself, the settled purpose of the entailor to make Thomas Alexander Fraser of Strichen the institute of tailzie in these lands.

On these grounds I am for preferring Baron Lord Lovat, and for remitting to the Sheriff of Chancery to serve him accordingly, and of course that involves the refusal of the other claim.

LORD MURE—I am of the same opinion.

The provision in these deeds of entail is to Thomas Alexander Fraser of Strichen, who is by name expressly called to succeed as heir of entail under the entail of 1808, in the leading clause of destination, who has been identified, and as to whom there is no dispute, as your Lordship has remarked. He was a person in existence in the year 1808, when this entail was made. Then when one looks at the executory clauses of the deed, he is to be found specially named in every one of them. Therefore there is no difficulty whatever in coming to the conclusion that he is the individual that the maker of the entail had expressly in view as the person in whose favour it was to be made. The confidence of the entailor as to this is so clear that he designs him as the "nearest legitimate male issue of my ancestor Hugh Lord Fraser of Lovat."

And in regard to the form of the clause I agree with the opinion expressed by your Lordship. I do not think there is any difference in result arising from the manner in which the destination clause is constructed. I think the effect of it is just the same as if the name Thomas Alexander Fraser of Strichen had preceded the words "nearest legitimate male issue of my ancestor Hugh Lord Fraser of Lovat." It appears to me that the parties intended to be benefited, and the line of heirs intended to succeed to the estate, are quite well described and identified.

But assuming that this designation of Thomas Alexander Fraser as "nearest legitimate male issue of my ancestor Hugh Lord Fraser of Lovat" is a mistake or a false description, I do not think that can now be held to have the effect of depriving his descendants of their right to take these entailed estates. And I come to that conclusion on the sole ground that no mistake in the description of the institutes and line of heirs, and whose names are distinctly set out in the destination, and who were clearly in the view of the maker of the entail at the time, can prevent them from taking what was given to them by name. I think the words of the destination are simply descriptive, and if that be so a mere mistake in the description is not sufficient to deprive a party of what was given to him by the clear destining words of the entail.

Upon these and the other grounds stated by your Lordship I am of opinion that the Sheriff's interlocutor should be recalled, and that we should, as your Lordship proposes, remit to the Sheriff to refuse Mr John Fraser's petition, and to grant the prayer of that of Lord Lovat.

LORD SHAND—I am of the same opinion.

It is obvious that this is not a case in which it can be said that an error has occurred in the name of the person who is said to be the institute under this deed, the person therein named being Thomas Alexander Fraser of Strichen the nearest lawful heir-male of the deceased Alexander Fraser of Strichen, and therefore that there is no doubt about who is the person meant, and that he and his heirs-male are certainly called to succeed to this estate.

The contention of the petitioner John Fraser I understand is this—that although there be a name given as that of the institute, the name is not enough; that the destination, on the contrary, is not to him of the name, but to the person, whoever he may be, and whatever may be his name, who holds the peculiar character of being the nearest legitimate male issue of the entailor's ancestor Hugh Lord Fraser of Lovat. Now, that is a question of construction of the deed. I think the petitioner John Fraser must have succeeded in his contention that he has right to this estate, on the assumption that he can prove his pedigree, if on the one hand the destination had simply been to the "nearest legitimate male issue of my ancestor Hugh Lord Fraser of Lovat," without going on to designate the particular person whom the entailor had in view, or if, assuming that instead of the name being used as it is used, it had been used subject to the explanation that the succession was made conditional, if the same had been followed up by some such words as these, "provided the said Thomas Alexander Fraser of Strichen be the nearest legitimate male issue of my ancestor," or "if the said Thomas Alexander Fraser be the nearest legitimate male issue," and so on. But I confess I can see nothing unusual or uncommon in the way in which this deed has been expressed.

The decision of the case appears to me to be practically settled by the application of the rule *neque ex falsa demonstratione neque ex falsa causa legatum infirmatur*—neither by false demonstration nor by false cause can a legacy or benefit lose its effect.

It may be a question, whether taking the words of this deed it ought properly to fall under the category of being a case of false description or false cause of granting. It rather seems to me to be only a question as to the line of the ancestor. The destination is to "the nearest legitimate male issue of my ancestor Hugh Lord Fraser of Lovat, namely, Thomas Alexander Fraser of Strichen." The word "namely" may be read, and must be read I think, as equivalent to "that is to say, Thomas Alexander Fraser." The entailor pointed to him as the person he meant to benefit. It may be that there is *falsa demonstratio* there in respect that he was in error in believing that Thomas Alexander Fraser held that character, but even if that was so the benefit will still result, because *falsa demonstratio non nocet*,—the name was there.

If, on the other hand, we are to regard these words "nearest legitimate male issue of my ancestor Hugh Lord Fraser of Lovat" as the reason for which the benefit was conferred, as if the deed had been thus expressed, "I do hereby give, grant, and dispose, from me, my heirs and successors, to and in favour of Thomas Alexander Fraser of Strichen, because he is the nearest legitimate male issue of my ancestor Hugh Lord Fraser of Lovat," the result would still be the same. We

often have a false reason assigned for giving a benefit, but still the benefit must result to the person, because he is named.

Now, as between these two constructions it rather appears to me that the case is one of *falsa demonstratio* rather than of *falsa causa*. But whichever of these be taken, the result must still be the same. It is not incumbent on Lord Lovat to show that Thomas Alexander Fraser of Strichen held the character of nearest legitimate male issue of the entailor's ancestor Hugh Lord Lovat, and therefore I agree in the conclusion at which your Lordship has arrived, and have nothing further to add on the subject.

I agree also with the observations of your Lordship on the executory clauses in this deed. I think a great deal of light is got from these operative or executory clauses—the clause giving power to infest and to resign, and other clauses—all of which plainly show that what the entailor had in his mind was the individual whom he rightly or wrongly believed to be the nearest legitimate male issue of his ancestor Hugh Lord Fraser of Lovat.

LORD DEAS was absent.

The Court recalled the interlocutor of the Sheriff of Chancery, and remitted to him to refuse the petition of John Fraser and to grant the petition of Lord Lovat.

Counsel for Lord Lovat—Mackintosh—Pearson. Agent—John C. Brodie & Sons, W.S.

Counsel for John Fraser—Campbell Smith—J. P. B. Robertson. Agent—P. H. Cameron, S.S.C.

Friday, July 18.

FIRST DIVISION.

STEPHEN, PETITIONER.

Public Company—Winding-up—Companies Act 1862, sec. 79, sub-secs 4 and 5—Inability to Pay Debts.

Circumstances in which the Court made a winding-up order in the case of a banking company which had failed to pay a sum lodged with them on deposit when sued for the same, and was unable to state a good defence to the action.

The Scottish Banking Company, Limited, was incorporated as a limited company under the Companies Acts 1862 to 1880, the certificate of incorporation of the company being dated 12th January 1881. The registered office of the company was in Dundee. The objects for which the company was established were, *inter alia*, "(a) the transaction, both as principal and as agent, of every description of banking and mercantile business and financial operations; (b) the establishment and conducting of agencies or branches in any part of the United Kingdom of Great Britain and Ireland and elsewhere for the above-mentioned purposes." By the memorandum of association it was provided that "the capital of the company is ten million pounds stg., divided