It was quite true, as stated by Mr Gordon, that in every case the pursuer must prove his issue; but this is a rule which has various meanings and many qualifications, according to the nature of the case. In this case the pursuer must prove that the money was uplifted, and that he has done by the defender himself. He farther undertakes to prove that the money has not been paid. Now, that is a negative; and no one is bound to prove a negative in the same sense in which he is bound to prove an affirmative. Still, undoubtedly, the burden of proof is, in the first instance, on the pursuer. This old lady dies, and when her representatives look into her affairs they find that although she had been possessed of a considerable sum of money six months before, there is no trace of it. They find next that this £320 had been uplifted by the defender; and on 7th November 1859 they direct their agent Mr Wilson to address the following letter to the defender:—

"Macduff, 7th Nov. 1859.

"Sir,—I have, on behalf of John and Elizabeth Byres, executors-dative of the deceased Ann Murray, Portsoy, who died at Reidstack, to apply to you for the key of the room in Portsoy occupied by her, and in which are her articles of furniture—which key you have. To save you trouble, I have instructed your police constable, John Grant, to receive the key from you.

"I understand that, at your desire, Mr William Thomson took an inventory of the articles in the house. I shall be obliged by your sending me it, or a copy certified by Mr Thomson.

"I have also to request you to let me know what became of the £320 which belonged to Ann Murray, and which you on 14th January last drew from the Union Bank, Banff, with £6, 1s. 2d. of interest, and where it is now.

"I shall be glad to hear from you satisfactorily on these points.—I am, Sir, your obt. servt.,

"GEO. WILSON.

"Mr James Forbes, innkeeper, Portsoy."

That letter contained a very reasonable request; and if the defender had then come forward and said, "I handed over the money to Miss Murray, and I don't know what has now become of it," that might have been very satisfactory. But he does not answer the letter at all; and on 19th November he directs his agent to write to Mr Wilson the following letter:—

"Banff, 19th Nov. 1859.

"My Dear Sir,—Mr James Forbes, innkeeper, Portsoy, has handed me for recovery the enclosed account against Ann Murray's executors, consisting of articles supplied to the deceased, and of the expenses of the funeral, amounting to £15, 9s. 5d., subject to the deduction of 20s. received by Mr Forbes in July 1859. The vouchers of the account are in my hands, and you may see them whenever you desire.

"At the end of this account has been added a claim of Mr Peter Forbes, at Reidstack, for board, &c., to the deceased, running from 1st May last up to the time of her decease, and amounting to £6, 6s.

"J. CHRISTIE."

The pursuers farther find that on 19th January 1859 the defender made the deposit in his own name of exactly the same sum as he had uplifted. Suppose that were the case presented, and nothing else, the jury would be very much inclined to infer that the defender had appropriated the money. His Lordship did not say that such was the state of the case, but he stated the circumstances, for the purpose of telling the jury that they had the effect in this case of shifting the burden of proof. Accordingly, the pursuer commenced his case by putting the defender into the box and asking him to explain himself. His explanation is a very curious one. He says he was very intimate with Ann Murray, and she placed great confidence in him; that she asked him one morning to do some bank business for her at Banff, and that he refused to go, because, as he said, he did not think it was quite proper for him to mix himself up with the money matters of another; that she kept at him for about a week, when he consented to go, and got the deposit-receipt from her endorsed blank. It also occurred to him to get a separate writing from her in the following terms:—

"Portsoy, 14th January 1859.

"Mr Rust.—Sir,—Please give the bearer, James Forbes, the whole of my money lying in your bank.—I am, Sir, yours truly,

(Signed) "ANN MURRAY."

This mandate was written by the defender, and signed by the deceased. It is contended that the terms of this mandate negative one of the pursuer's theories—namely, that the object of the deceased sending the defender to the bank was to get up the interest only, as had been Miss Murray's practice. There is a great deal of force in that observation, for the mandate was to get up the whole money. But, on the other hand, if the money was to be redeposited after the interest was paid on a new receipt, it would require for this purpose also to be all first uplifted. The defender says he gave the money to Miss Murray, and took no acknowledgment from her. It was said that it was not usual to do so in such circumstances; but the transaction was a most unusual one, and his Lordship thought that it was very rash in the circumstances not to take an acknowledgment. The defender's sister, Maria, says she saw her brother hand over the money; but it is very singular that while she recollects perfectly well all that was said and done, and describes the appearance of the notes, she is undoubtedly in error as to the silver. The sum was £326, 1s. 2d., and there was and could be but one shilling. Yet she says she is certain there were at least more than two. There is another part of the case which the defender has undertaken, as he was bound to do, to explain—that is, the striking identity of the sum he uplifted and the sum he lodged in his own name. His statement on the subject is very singular. He has not explained why he fixed upon lodging the sum of £320. That was not the amount of the contributions of his friends added together, which was only £298. The pursuers say this explanation given by the defender is all plainly false, and the defender says there is nothing false about it. The defender is corroborated by his brother, and, what is of more importance for him, by Alexander Watson, who had no interest in the parties, and whose evidence there was no reason to doubt. The Solicitor-General said that it was improbable that Watson, who at the time drove a beer-cart for Messrs Younger for £20 a year, besides his board and expenses, should have so large a sum as £58 lying by him, which he could have lent to the defender. But supposing Watson's evidence to be true, it was quite possible that he might have lent and been repaid the money without any other part of the defender's story being true. His Lordship concluded by saying that the duty of the jury was by no means an easy one; that the question depended entirely on the credit to be attached to the defender and his witnesses; and that it was no part of his function to guide them farther.

The jury unanimously returned a verdict for the pursuers.

Saturday, Dec. 23.

OUTER HOUSE.

(Before Lord Kinloch.)

CONNELL *v.* GRIERSON.

Entail—Clause—Destination. Held (per Lord Kinloch)—(1) That a destination in a deed of entail to heirs-female was to be read as meaning heirs-female of the body; and (2) That a destination to "my own nearest of kindred" was

not to be read as meaning the entailer's heir-at-law in heritage.

Counsel for the Pursuer—Mr Millar and Mr Marshall. Agents—Messrs A. & A. Campbell, W.S.

Counsel for the Defender—Mr Patton and Mr Lee. Agents—Messrs Mackenzie & Kermack, W.S.

This is an action of reduction of a title to the lands of Overkirkcudbright, which were entailed in the year 1779. The Lord Ordinary (Kinloch) has dismissed the action, in respect the pursuer has no title to sue. The grounds of judgment appear in the interlocutor, which is in the following terms:—"The Lord Ordinary, having heard parties' procurators, and made avizandum, and considered the process—Finds that according to the sound construction of the deed of entail of the lands of Overkirkcudbright and others libelled, the destination to the heirs-female of John Collow, the grandson of the entailer, imports a destination to the heirs-female of the body of the said John Collow, and not to his heirs-female general; and that the pupil, James Walter Ferrier Connell, is not an heir-female of the body of the said John Collow: Finds, further, that the said pupil is not the nearest of kindred, nor one of the nearest of kindred, of the entailer: Sustains the objection to the title to pursue, dismisses the action, and decerns."

"*Note.*—The question in the present case relates to the succession under a deed of entail of the lands of Overkirkcudbright and others, executed by William Collow in the year 1779. The defender, Mrs Grierson, has made up her title as heir of entail under this deed. The pursuer, Mr Connell, as administrator-in-law to his pupil son, James Walter Ferrier Connell, brings under challenge Mrs Grierson's right, on the ground of the pupil being a nearer heir. Mrs Grierson states an objection to the title to pursue, on the ground that she herself is the true heir. This simply raises, in the form of a preliminary defence, the question, which, under the entail, is the nearest heir.

"The destination of the entail is 'to my grandson John Collow, and the heirs-male descending of his body; whom failing, to Gilbert Collow, my grandson, and the heirs-male descending of his body; whom failing, to any other heir-male which shall be procreate between my son Thomas Collow and Helen Grierson, his spouse; and in default of all these, to the heirs-female of the said John Collow, my said grandson; and failing of his heirs-female, to the heirs-female of the said Gilbert Collow; and in default of such, to the heirs-female of the male heirs to be procreated hereafter betwixt my son Thomas Collow and his said spouse; and failing of all such heirs male and female, to and in favour of William Collow, my grandson, and the heirs whomsoever, male or female, descending of his body; and in default of all such issue, to and in favour of William Collow, eldest son of the deceased Mr John Collow, late minister of the gospel at Penpont, my brother-german, and the heirs-male descending of his body; whom failing, to Thomas Collow, second son of the said Mr John Collow, and the heirs-male descending of his body; whom failing, to John Collow, third son of my said brother, and the heirs-male descending of his body; whom failing, to James Collow, youngest son of my said brother-german, and the heirs descending of his body; whom failing, to Mr William Grierson, present minister of the gospel in Glencairn, and the heirs-male descending of his body (he is the lawful son of Jean Collow, my sister, deceased, and James Grierson, her husband, also deceased); whom all failing, to any person or persons as shall be called and nominated to the succession of the lands and others after mentioned by a writing under my hand at any time hereafter; and in case of no such nomination, to my own nearest of kindred, and their heirs and assignees and disponees whomsoever, absolutely and irredeemably.'"

It is contended by the pursuer that the pupil, James Walter Ferrier Connell, is now entitled to succeed to the entailed estate, as "heir-female of John Collow," the grandson of the entailer. His right of succession is admitted, provided this destination is to be read as to heirs-female general. But the defender contends that the destination, rightly construed, is to "the heirs-female of the body of John Collow." If this construction be correct, the claim of the pursuer falls, as John Collow died without leaving any issue. This constitutes the first point of inquiry in the case.

I. The Lord Ordinary is of opinion that the destination to the heirs-female of John Collow must be held to be limited to the heirs-female of the body.

The Lord Ordinary considers it to be settled that a destination to heirs-male or heirs-female, expressed indefinitely, is to be limited to heirs male or female of the body, if it appears from the context of the deed that no other than this limited destination was intended by the granter. This was one of the points authoritatively fixed in the well-known Roxburgh case, Ker *v.* Innes, House of Lords, 20th June 1810, "Paton's Appeals," 5, 320. In that case it was found that a destination "to the eldest daughter of umquhile Harry, Lord Ker, without division, and their heirs-male," carried the estate to the daughters of Lord Ker successively, and the heirs-male of their body, not their heirs-male general.

It appears to the Lord Ordinary that the terms of the entail in the present case afford conclusive evidence that by the term "heirs-female of John Collow," heirs-female of the body were alone intended.

The first circumstance to be attended to is, that the granter of the deed was intending to make a proper entail in favour of a series of heirs specifically called. Whatever may be said as to the last devolution on "my own nearest of kindred and their heirs and assignees and disponees whomsoever," as to which also the present case raises a question, it is undoubted that down to this devolution a proper entail was intended in favour of the parties specifically set forth. There would otherwise be little or no meaning in the series of specific substitutions. It would be running contrary to this general intendment to hold an intermediate destination to devolve the estate on heirs-female general, for this would be to introduce a destination of wholly indefinite comprehensiveness, carrying the estate to a variety of possible individuals, unnamed and unknown, and making the after *nominatim* substitutions of scarcely appreciable value. If the heirs-female general required to be exhausted before the succession came to the next substitute, it would be somewhat difficult to predict when that event would happen.

In its usual application a destination to heirs-female general is, in substance and effect, a destination to heirs whatsoever. If, as commonly happens, there is a prior destination to heirs-male, these must, of course, be exhausted before the destination to heirs-female takes effect. But so soon as it takes effect by that exhaustion, the destination is simply one to heirs whatsoever, whether male or female. All heirs, taking through a female, whether themselves male or female, are heirs-female in the eye of law. That a destination to heirs-female is simply a destination to heirs whatsoever, failing heirs-male, was decided in the well-known case of Bargany, in which, on that ground, the daughter of an eldest son (who was heir whatsoever) was found entitled to exclude the entailer's own daughter and her issue. Dalrymple *v.* Dalrymple (House of Lords, 27th March 1739; Paton's Appeals, 1, 237). The legal rule is well and briefly expressed by Mr Bell (Principles, section 1699)—"Heir-female applies to the heirs-at-law, male or female, failing heirs-male."

Starting with a presumption in the present case against a destination so comprehensive as that of heirs-female general of John Collow, it is found that the entailer frames his deed on the specific plan of calling a certain series of substitutes, with the heirs of their bodies respectively called in their place; in other words, a series of substitutes, followed each by his issue or descendants. [Here his Lordship comments on some of the clauses of the destination.]

The whole framework of the deed thus implies a succession of specific substitutes, and the heirs of their bodies—in other words, their issue or descendants.

This being so, it seems to the Lord Ordinary a conclusive consideration that, except on the supposition of the heirs-female of John Collow being limited to heirs-female of the body, not only would the entailer's presumable intention be frustrated, but the whole of his destination of the estate be made a mass of inconsistencies and self-contradictions.

On these considerations the Lord Ordinary has arrived at the conclusion that the destination to heirs-female of John Collow must be taken as importing a destination to heirs-female of the body, and none other. The deed is in this way made clear and consistent, and accordant with the entailer's presumable intentions, but not otherwise. If the deed is so read, all claim by the pupil under this destination fails. There is no one possessed of the character of heir-female of the body of John Collow, for John Collow died without issue.

II. A second question, however, is raised between the parties. Assuming the destination to the heirs-female of John Collow to be read as the Lord Ordinary reads it, the estate has now, by the admission of the parties, devolved on the persons last called—viz., "my own nearest of kindred, and their heirs and assignees and disponees whatsoever, absolutely and irredeemably." For the pursuer it is contended that this is simply a destination to the entailer's heir-at-law in heritage, which character, it is said, belongs to the pupil James Walter Ferrier Connell. For the defender it is contended that the destination in question carries the estate to those who, at the time of the succession opening, are the entailer's nearest in blood, be they more or fewer, and as such the defender says she is entitled to the estate, and has accordingly served heir on that footing.

The pursuer's theory that the destination in question carries the estate to the entailer's heir-at-law recommends itself at first by its simplicity, and by a not unnatural impression that this is by no means unlikely to have been the intention of the entailer. But, on full consideration, the Lord Ordinary has come to the opinion that this theory could not be sanctioned consistently with giving effect to the words of the deed, and involves the substitution of a mere guess or surmise for the language actually employed. The words "nearest of kin" have a defined and well-known meaning in Scottish law, signifying simply the nearest in blood, or those standing in the nearest degree of relationship.

In giving to the words this construction the Lord Ordinary considers them as meaning the next of kin to the entailer at the time the succession opens by this devolution taking effect. Any other meaning—as, for instance, to hold them to signify the next of kin at the time of the entailer's death, and their heirs in heritage — would involve difficulties and absurdities inextricable. The case, it must be remembered, is not one of intestacy. In a case of intestacy, whether originally so left, or supervening by after contingencies, it is the time of the predecessor's death which must be looked to from the very nature of the case. But it is altogether different when it is not a case of intestacy, but of express destination. When this is to a person or persons called designatively, it is the natural as well as legal inference that the destination is to the person or persons who answer the description at the time of the destination taking effect. The "nearest of kindred" is just a designative destination calling those who at the time can show themselves to be comprehended under that designation.

It was remarked that the "nearest of kindred," considered as meaning the same with the "next of kin," is a phrase which, in common use, indicates successors in moveables, not heritage. But there was nothing to prevent the entailer, if he so pleased, from calling to his succession, *eo nomine*, those who at the time might be entitled to succeed to his moveable estate. What effect this might have on the entail is not now the question. The question regards the destination, which was entirely in the entailer's power. There was nothing to prevent a devolution on a plurality of persons, all taking at once. Such plurality of disponees or substitutes is not uncommon in the case of settlements of landed estates. A familiar illustration arises in the destination to "children" in a marriage-contract, as contrasted with that to "heirs," or "heirs and children," the children in the former case being held all equally heirs of provision. On this point the only question is what the entailer intended, taking, as a Court must always do, the words employed by him as the evidence of his intention. The Lord Ordinary cannot answer this question, except by giving the words employed what he thinks the only admissible signification.

It was pertinently asked by the defender, Why, if the entailer merely meant his heir-at-law in heritage, he did not plainly say so? Why did he not simply say—"to my own heirs and assignees whomsoever?" He has not said so, but said something very different; and something which no stretch of construction can make harmonise with the assumed interpretation. If "nearest of kindred," simply means "heirs whatsoever," the devolution then runs," to my own heirs whatsoever, and their heirs and assignees and disponees whatsoever; certainly a very awkward form of destination. But the Lord Ordinary does not proceed on any mere awkwardness of expression. His ground of judgment is, that the entailer has not said what he ought to have said had he intended the devolution to be on his lawful heir in heritage: on the contrary, has said something which cannot fairly or legitimately be construed to mean only this.

It was argued for the pursuer that the phrase "nearest of kindred," construed without reference to the laws of succession in heritage, would embrace relations by the mother's as well as father's side—the half-blood as well as the full blood, and the like—contrary to all that is presumable regarding the entailer's intentions. And reference was made to a class of cases in regard to legacies, of which Scott *v.* Scott (House of Lords, 10th May 1855—2 M'Queen, 281), was presented as an example. But it appeared to the Lord Ordinary that these cases were inapplicable to the present. They were cases of intention as to a legacy, gathered not merely from the legal meaning of the words, but from all the evidence supplied by the rest of the deed and the surrounding circumstances. The question was, In what sense, popular or legal, did the the testator use the expression?

An alternative view was presented by the pursuer. It was admitted that the defender, Mrs Grierson, was nearer in degree to the entailer than the pupil pursuer. She is the entailer's grand-niece, whilst the pupil is his great-great-grand-nephew. But it was contended that if Mrs Grierson took as nearest of kin, the pupil was entitled to share with her, by virtue of the representation introduced by the Moveable Succession Act, 18 Vict., cap. 23. The Lord Ordinary could give no weight to this argument. The Moveable Succession Act makes no alteration in the meaning of the legal phrase "next-of-kin." On the contrary, it maintains that meaning; and preserves to the next-of-kin, legally so called, the office of executor. Undoubtedly it gives a right of representation to those who are not in law the next-of-kin, but successors of some who were But this right of succession is made applicable by the express terms of the Act, only "in cases of intestate moveable succession." There is none such involved here. The case is a case of heritage, and of heritage ruled by a deed. If the pupil pursuer cannot succeed as being legally "next-of-kin," he can as little do so, through any representation introduced by the Moveable Succession Act.

The Lord Ordinary cannot fail to perceive that to sustain, as he does, the contention of the de-

fender, Mrs Grierson, will leave behind a number of questions arising out of this entail. It has been questioned, for instance, whether the clause, excluding heirs-portioners and preferring the eldest heir-female, applies in the case of the devolution on the "nearest of kindred." Another question has been started, whether the "nearest of kindred" are heirs of entail, in such a sense as to apply the fetters of the entail to the heir immediately prior, or whether such heir did not stand towards them in the position of a fee-simple proprietor, equally as in the case of a destination to heirs and assignees whatsoever. But these, and other questions which may be figured, are apart from the present discussion. However these questions may affect Mrs Grierson, the pursuer has no concern with them, unless he establish that he is now the true heir to the estate. The only question now raised is, whether the pupil pursuer has a title to challenge Mrs Grierson's service, either as being heir-female general of John Collow, or as being nearest of kindred to the entailer. The Lord Ordinary has come to the conclusion that this question must be decided unfavourably for the pursuer. W.P.

COURT OF JUSTICIARY.

December 26 to 28.

GLASGOW WINTER CIRCUIT.

(Before Lord Cowan).

H.M. ADVOCATE *v* J. CULLEN AND T. BROTHERS.

Falsehood, Fraud, and Wilful Imposition—Relevancy. Obtaining goods without paying, or intending to pay, therefor, amounts to the crime of falsehood, fraud, and wilful imposition.

Counsel for the Crown—Mr Thoms, A.D., and Mr MacLean.

Counsel for the Panels—Mr Brand and Mr Spens.

James Cullen and Thomas Brothers were charged with the crime of falsehood, fraud, and wilful imposition—in so far as they, acting in concert, having devised together a fraudulent scheme for obtaining possession of certain goods, the property of Messrs Paul & Co., on the false pretence of purchasing the same and paying therefor on delivery, and for appropriating and applying the same to their own uses and purposes without paying, and intending not to pay therefor, entered into an agreement with Messrs Paul & Co. for sale of certain goods, on the condition that payment was to be made therefor on delivery, and, in pursuance of their fraudulent scheme, falsely represented to the manager of Messrs Paul & Co. that they were prepared to pay the price of the said goods on obtaining delivery thereof, and so induced the said manager to deliver the said goods which they then appropriated to their own uses, without having since paid, or having ever intended to pay, for the same.

No objection was stated to the relevancy of the libel. Cullen pleaded guilty, and Brothers not guilty. Cullen's plea was recorded, but the case proceeded as against both panels. They were found guilty, and each sentenced to seven years' penal servitude.

H.M. ADVOCATE *v.* G. W. PEARCE.

Bigamy—English Marriage—Proof. Is an "official sealed copy" from the register of marriages evidence in Scotland of an English marriage?

Counsel for the Crown—Mr Thoms, A.D., and Mr MacLean.

Counsel for the Panel—Mr R. V. Campbell.

The crime charged in this case was bigamy. The first marriage was an English one, and took place in 1844. The clergyman who performed the ceremony was unable to attend the trial, on account of bad health. One witness to the ceremony gave evidence as to the fact of the marriage and the identity of the parties. This witness had signed the entry in the register, and identified the subscription. The other evidence of identity consisted of a letter written by the pursuer to his first wife, in which he assigned her that character, and which was recovered from her. The present custodier of the registers of the church produced the register of marriages, and proved the handwriting of the clergymen in his subscription to the entry, and to a certified copy recovered from the wife. Copies of these registers are from time to time transmitted to Somerset House. They are then bound up and filed, and an extract from these, called "An Official Sealed Copy," is issued upon application, and is evidence of marriage according to the law of England (6 and 7 Will. IV., c. 86, sec. 38). An official sealed copy of the register applicable to this case had been obtained, and Mr James Paterson, barrister-at-law, gave evidence as to the law of England. He stated that, with evidence as to the identity, the official sealed copy was evidence of marriage, and what the English Courts proceeded upon in cases of bigamy. He referred to the statute above noted as to the authority of the official sealed copy. The original register itself was the evidence required by the common law of England, in addition to proof of identity.

The Advocate-Depute did not address the jury. The counsel for the prisoner objected to the official sealed copy being regarded as evidence of marriage. As the witness had only proved that it could be so used in England, it was not the best evidence. The book itself from which it was taken should have been got from Somerset House.

Lord COWAN held that it was unnecessary now to determine the effect to be given to the sealed copy, in respect that the best evidence, both according to the law of Scotland and the common law of England, had been actually adduced by the production of the original register, proof of the clergyman's signature, and the testimony of the only witness alive, who had been present at the marriage, and had subscribed the register, coupled with proof of identity—of which there was sufficient. The first marriage was undoubtedly established; and the second marriage was not only proved, but admitted.

The jury unanimously found the prisoner guilty, and he was sentenced to 12 months' imprisonment.

H.M. ADVOCATE *v.* J. M'CUE.

Lewd and Libidinous Practices—Aggravation—Relevancy. Is it a relevant aggravation of a charge of using lewd and libidinous practices towards girls under puberty, that the practices were used in presence of other girls under puberty?

Counsel for the Crown—Mr Thoms, A.D., and Mr MacLean.

Counsel for the Panel—Mr Mackintosh.

John M'Cue was indicted for using lewd and libidinous practices towards girls under the age of puberty, aggravated by the offence being committed in the presence of other girls under the age of puberty.

It was objected for the panel, that the aggravation libelled was irrelevant, and a novelty in the law of Scotland, aud that it was not sanctioned either by principle or authority. In support of this objection the case of Alexander Low, Oct. 11, 1858, 3 Irv., 185, was referred to, where the same aggravation was objected to and withdrawn. Lord Jerviswoode having been called in, it was, after discussion, proposed to certify the case to the High Court. Whereupon the Advocate-Depute withdrew the aggravation.