CESSIO—MACKAY *v.* HIS CREDITORS

(*ante*, p. 174).

Cessio bonorum. A person who is in prison for non-performance of a decree *ad factum praestandum* cannot apply for the benefit of *cessio*.

Counsel for Petitioner — Mr Gebbie. Agents—Messrs Macgregor & Barclay, S.S.C.

Counsel for Incarcerating Creditor—Mr Macdonald. Agent—Mr Robert Johnston.

This was a reclaiming note against a judgment of the Sheriff of Caithness finding that an application for the benefit of *cessio* was incompetent on the ground that the applicant was not incarcerated for payment of a civil debt but on a decree *ad factum praestandum*. The decree under which the petitioner had been imprisoned in the jail of Wick since August last was one pronounced by the Sheriff of Sutherlandshire, by which he granted warrant to officers of court to charge the petitioner and his partner, Angus M'Donald, to deliver up to David Levack, a herring fishing-boat and appurtenances and certain herring fishing-nets and buoys. It was not disputed that this was a decree *ad factum praestandum*, nor was it pretended that a person incarcerated on such a decree was in a position to apply for the benefit of *cessio;* but it was argued (1) that the agreement under which Levack claimed the absolute property of the boat, &c., in question was one which only gave him a right to them in security of a debt due to him; and (2) that the petitioner was not capable of implementing the decree against him, because the boat, &c., had been, in his absence in Aberdeenshire, sold under a diligence by a creditor of his partner, Angus M'Donald.

The Court refused the reclaiming-note, holding that as the decree was not brought under suspension it must be assumed to be a good decree; and that being a decree *ad factum praestandum*, it could not be made the foundation of an application for *cessio*.

PATERSON *v.* SOMERS.

Reparation—Slander—Newspaper—Issue. Form of issue in an action against a newspaper publisher for slander. *Question* whether it is actionable falsely and calumniously to represent a person in a public newspaper as the author of an anonymous letter, without farther specification of anything injurious in the statement or the letter.

Counsel for Pursuer—The Solicitor-General and Mr Lorimer. Agents—Messrs Neilson & Cowan, W.S.

Counsel for Defender—Mr Gifford. Agent—Mr Thomas Ranken, S.S.C.

This is an action of damages by Dr James Paterson, Glasgow, against Mr Somers, the printer and publisher of the *Glasgow Morning Journal*. The pursuer complains of the following article which appeared in the defender's paper on 24th March 1865:—"The following communication from one who had had much personal knowledge of Dr Pritchard has been sent us." The communication concludes with the following words:—"The whole matter lies in a nutshell. An anonymous letter is written by some moral coward or other, who either hazarded a stab in the dark, or whose love of justice did not conquer his sense of modesty—a man who, no doubt, does 'good by stealth, and blushes to find it fame,' a blush, doubtless, of deservedly deep scarlet. Well, this anonymous communication is traced to its source, and the writer must, of course, adopt the letter and stand to it. Then the apprehension of the gentleman named or alluded to in it is a natural result, and the *post-mortem* examination, the scrutiny in his household, and all that has since taken place follow in natural sequence, and here the affair rests. But it is not a little strange that a whisper of 'antimony' should have been heard about the County Buildings before even the examination was commenced. Why, what was Dr Paterson about if he knew anything about antimony being administered? Was he not called in his professional capacity, and entitled therefore to speak with a voice of authority as to what should be administered and what withheld; and if administered against his advice, and he saw or suspected anything wrong, why did he not at once deem it his duty to boldly protest, or immediately communicate with the authorities? But we have not yet heard that he has adopted the anonymous letter referred to. It cannot be denied that his position in the case does not, *prima facie*, appear either lucid or pleasant, and this he must feel himself, and acutely too. Dr Paterson should really clear himself as regards this anonymous letter; and the public, seeing that it was the primary cause of the arrest and the subsequent events, should withhold its opinion, give the accused fair-play, and calmly wait for more light."

The pursuer stated, in regard to this article, that it referred to him and was calumnious — that it falsely insinuated and represented that he was the writer of the anonymous letter referred to, in consequence of which suspicion at first attached to Dr Pritchard, and that he was a moral coward, and had not the courage or sense of public duty to state any circumstances of suspicion known to him in reference to the deaths of Mrs Taylor and Mrs Pritchard; that he had thus done Dr Pritchard a grievous injury in a base and underhand way, and as if by a stab in the dark, and that he was guilty of a base action and of gross neglect of public duty, &c., &c.

The issue proposed merely put the question, whether the article complained of was of and concerning the pursuer, and whether the pursuer was thereby falsely and calumniously held out or represented as being the author of the anonymous letter therein referred to. This issue was objected to on the ground that it was not actionable to say of a man that he was the author of an anonymous letter. After discussion, in the course of which opinions were expressed that the proposed issue could not be allowed, the pursuer consented to embody in his issue the statement made by him that he had been represented falsely to be a moral coward; and the issue was to-day adjusted in these terms:—

"It being admitted that the defender is the printer and publisher of the *Morning Journal* newspaper, published daily in Glasgow, with the exception of Sundays, and which had, at the date after referred to, a considerable circulation in Glasgow and elsewhere:

"It being also admitted that in the number of the said newspaper which bore date and was printed and published in Glasgow upon 24th March 1865, there were also printed and published under the heading 'The following communication from one who had had much personal knowledge of Dr Pritchard has been sent us,' the words and sentences set forth in schedule (A), annexed hereto:—

"Whether the said words and sentences are, in whole or in part, of and concerning the pursuer; and falsely and calumniously represent that the pursuer was the author of the anonymous letter referred to in said article, and that he was a moral coward, who hazarded a stab in the dark—to the loss, injury, and damage of the pursuer?

"Damages claimed, £3000."

Friday, March 2.

SECOND DIVISION.

GORDON *v.* GORDON'S TRUSTEES

(*ante*, pp. 69, 110).

Entail—Trust Settlement—Construction. A truster having directed his trustees to invest the residue of his estate in the purchase of lands, and to execute a deed of entail thereof in favour of his

son "*and his heirs whatsoever*"—*held*, by a majority of the whole Court, that as the entail directed to be executed would not, if executed, be a valid and effectual entail, the son was entitled to demand payment from the trustees of the fund forming the residue of the truster's estate.

Counsel for Pursuer—The Solicitor-General, Mr Gifford, and Mr Crawford. Agent—Mr Peacock, S.S.C.

Counsel for Defenders—Mr Patton, Mr Clark, and Mr Lee. Agent—Mr Gentle, W.S.

This case was argued some time ago before the whole Court. The pursuer, Mr Gordon of Cluny, concludes for decree of declarator, to the effect that the trust-disposition and settlement of his father, the late Colonel John Gordon, of 1853, and relative codicil of 1854, "do not contain a valid and effectual direction to the defenders (the trustees acting under the disposition and settlement) to make and execute a valid and effectual deed or deeds of strict entail of the lands directed to be purchased with the residue of the trust estate of the said deceased Colonel John Gordon, now vested in the defenders, the said trustees; and that the said residue is subject to the debts and deeds of the pursuer, and that the pursuer is entitled to the said residue as his own absolute property, free from the conditions and restrictions of entail, and to have the said residue paid over and transferred to him in fee-simple for his own absolute use, *and that according to the true intent and meaning of the deeds of settlement of the said Colonel John Gordon.*" The summons also concludes that it should be declared that the defenders, Colonel Gordon's trustees, are not entitled to purchase lands with the residue of his estate and convey them to the pursuer and the heirs mentioned in the trust-deed, "but are bound to pay over the said residue of the trust-estate to the pursuer as his absolute and unlimited property." Then there is a petitory conclusion that the defender should pay the pursuer the sum of £251,598, 15s. 4d. (under certain deductions) as the free residue of his father's executry estate. The action is directed against Colonel Gordon's trustees and Charles Henry Gordon, described as his nephew and heir whatsoever.

The Lord Ordinary (Jerviswoode), before whom the case depended, gave decree for the pursuer on the authority of the judgment in the Dalswinton case and in Macgregor *v.* Gordon. The trustees having reclaimed, the case was argued before the Second Division at the end of last summer session. The Court at the conclusion of the argument ordered cases. After these were lodged and taken to avizandum, the case was sent for hearing before the whole Court under the following interlocutor:—"29th November 1865.—The Lords of the Second Division having advised with the Lords of the First Division and the permanent Lords Ordinary, appoint counsel to be heard before the whole Court on Tuesday next the 5th of December on the whole conclusions of the summons; but on the assumption that a deed of entail in favour of the pursuer and his heirs whatsoever; whom failing to Charles Gordon and his heirs whatsoever, excluding heirs-portioners; whom failing to the heirs and assignees of the granter, though containing complete prohibitory, irritant, and resolutive clauses, in terms of the statute 1685, would not be an entail effectual under the statute 1685, but would vest a fee-simple estate in the pursuer.

(Signed) "JOHN INGLIS, *I.P.D.*"

The opinions of the consulted Judges were returned in writing.

Five—viz., the Lord President, Lord Deas, Lord Ardmillan, Lord Jerviswoode, and Lord Barcaple—were of opinion that decree should be pronounced for the pursuer in terms of the petitory conclusions of the summons. The remaining four judges—viz., Lord Curriehill, Lord Kinloch, Lord Ormidale, and Lord Mure—arrived at an opposite conclusion.

The following is the opinion of the LORD PRESIDENT, one of the majority of the consulted judges:—

"On the assumption expressed in the interlocutor of 29th November 1865, under which the subsequent very full and able argument from the bar proceeded, and which I hold to be a correct assumption in law, I am of opinion that the pursuer is, in the circumstances of the case, entitled to decree in terms of the petitory conclusions of the summons. The assumption is 'that a deed of entail in favour of the pursuer and his heirs whatsoever; whom failing, to Charles Gordon and his heirs whatsoever, excluding heirs-portioners; whom failing, to the heirs and assignees of the granter, though containing complete prohibitory, irritant, and resolutive clauses in terms of the statute 1685, would not be an entail effectual under the statute 1685, but would vest a fee-simple estate in the pursuer.' 1st, The reason why such a deed would not be an entail effectual under the statute 1685 is not that the fettering clauses would be defective in their structure, but that the destination prescribed is one to which the fetters sanctioned by the statute 1685, however skilfully constructed, could not be applied. According to the law of entail, as interpreted by decisions, a deed or destination in favour of a particular person and 'his heirs whatsoever,' is not a tailzied destination. It does not give to the 'heirs whatsoever' the rights or remedies which belong to heirs of entail under the statute 1685, and consequently it leaves the person last named before them unfettered owner. The instruction given by the late Colonel Gordon to his trustees was to make a deed in favour of the pursuer and 'his heirs whatsoever.' The trustees are not authorised to make a deed in favour of the pursuer and a different class of heirs —*e.g.*, 'the heirs of his body.' If they were to do so, they would be introducing a destination different from that which the truster has prescribed, or, in other words, substituting heirs of their own selecting or choosing, and whereby, in certain events, the estate might be sent in a direction different from that which the truster intended or would have sanctioned. The trust-deed does not empower them to do that. The truster may have expected that a deed such as he directed to be made would be an entail effectual under the statute 1685, and probably he would not have been singular in entertaining such an opinion. But had he been advised that a deed with such a destination would not have that effect, and that, to make an entail effectual under the statute 1685 it would be necessary to make a different destination of the estate, I do not know whether he would have directed any entail to be made, or if he would have directed an entail to be made I do not know what destination he would have prescribed. I can at best only form conjectures on these points; and although it is trite law that in construing instructions to trustees we are to construe them according to the intentions of the truster in so far as he has disclosed his intentions, it is equally trite law that we are not to conjecture or speculate as to what he might or would have done in regard to a matter as to which he does not appear to have had any intention. Still less are we to alter what he has directed to be done, in order that we may give effect to the result of such conjectures or speculations. I am therefore of opinion that in this case the legal obstacle to making an entail that would be effectual under the statute 1685 is one that cannot be removed. 2d, The direction to the trustees being to give to the pursuer and his heirs whatsoever an estate effectually entailed ander the statute 1685, and there being an insuperable obstacle to giving full effect to that direction, the next question is, whether the pursuer can under this trust-deed take benefit to any other effect, or whether the trust-fund does not fall into intestacy, and go to the truster's heir *ab intestato*. I am of opinion that the fund does not fall into intestacy, and that the pursuer can take benefit under the trust-deed, although he does not get that benefit in the same form, or in all respects to the same effect, as the truster may have

contemplated, and presumably would have preferred if law would have permitted. From the terms of the trust-deed itself, as well as from the nature of the reference it makes to other deeds, it is clear that the settled leading purpose of the truster was to make the pursuer his heir or beneficiary in preference to his own heirs at law; and although he may have thought that the further purpose of perpetuity of succession after the pursuer, could through the instrumentality of the statute 1685 be secured by a deed containing such a destination as he directed, the failure of that ulterior object by reason of its impracticability, is not to be held as destructive of the practicable leading object—viz., the making the pursuer the primary beneficiary under the deed. I therefore think that the trust-deed is not inoperative or ineffectual, and that the trustees would fulfil their duty under the sixth purpose of the trust by purchasing lands and making a deed in the form of a deed of entail in favour of the pursuer and his heirs whatsoever, whom failing, &c., as prescribed in the trust, although such a deed would not effectually impose on the pursuer the fetters of the statute 1685, but would place him practically in the position of a proprietor in fee-simple. 3d. The pursuer contends that as he would be the unfettered proprietor to any lands that might be so purchased and settled, and might immediately sell them, and reconvert them into money, he is entitled to demand from the defenders immediate payment of the money, whereby the delay and expense of making purchases and re-sales of land would be avoided. That demand is resisted by the trustees, and there can be no doubt of their title to resist it. They are the proper defenders of the trust, and of any interests under the trust that could be affected by this question. But being of opinion that the pursuer is entitled to have the lands conveyed to him and his heirs whatsoever, in precise conformity with the terms of the destination prescribed by the trust-deed, and that his position and rights in reference to the lands so conveyed would be that just described, I am further of opinion that under the trust he alone has any recognisable interest in the question whether lands shall be purchased and conveyed, or the money be handed over. Further, the truster having contemplated that an entail effectual under the statute 1685 might be made with such a destination as he directed, I regard the direction to purchase lands as a part or concomitant of the direction to make such an entail as a step necessary towards that end. But as such an entail cannot be made, the object for which apparently lands were to be purchased cannot be achieved, and subsequently there is now no good reason for going through the process of making such purchase. On both of these grounds I am of opinion that in the circumstances of this case the pursuer is entitled to have the money paid over to him. Cases may occur in which a direction to trustees to purchase land must be literally followed out. Reasons may appear on the face of the deed or otherwise for not allowing the direction to be departed from. But in the present case it appears to me that there are on the face of the deed reasons why the directions as to the purchase of land should not be literally followed out."

The following is the opinion of Lord KINLOCH, one of the minority of the consulted Judges:—

"I am of opinion that this case must be determined on the assumption that the direction to execute an entail in favour of the pursuer 'and his heirs whatsoever,' is to be carried into effect by the execution of a deed in these precise terms, without any limitation to heirs of the body, or any other qualifications. I conceive the terms of Colonel Gordon's trust-settlement to admit of no other course. There is a fixed and understood distinction between 'heirs whatsoever,' meaning thereby the legal succession, and 'heirs whatsoever of the body:' which the truster must be presumed to have known, and in that knowledge to have chosen the words employed by him. It is true that in some cases heirs, called generally have been held limited to heirs of the body. But in these cases the context of the deed generally supplied the interpretation. There is no such explanation in the present case. There is no reason whatever for qualifying the words, except that thereby an effective entail might be made; and that reason is a bad one. It must further be held, and is assumed in the interlocutor remitting the case for our opinion, that an entail executed in these unqualified terms 'would not be an entail effectual under the statute; but would vest a fee-simple estate in the pursuer.' That this result is neither obviated by the exclusion of heirs-portioners, nor by any other proposed provision, follows on the decision of the Court in the case of Macgregor *v.* Gordon, 1st December 1864 (3 Macq. 148). I am of opinion that notwithstanding this result the pursuer is entitled to have a deed executed in his favour in terms of the direction in the trust-settlement. I conceive this equally to arise from the necessity of implicitly carrying out the truster's directions. It is probable that he did not anticipate that a fee-simple right would arise out of the ostensible entail; though I doubt if I am entitled to assume this being his belief, where the law construes a fee-simple right, and nothing else, out of the expressions employed. The failure of the proposed entail is not from the imperfect expression of a fettering clause; but simply from the entail flying off by the devolution on heirs whatsoever; as it might have done had it contained a previous nomination of several specific substitutes, all of whom predeceased the truster. I am by no means sure that the truster is not in law to be held to have known this legal result. There then arises what is the true practical question in the present case—viz., whether the pursuer is entitled to insist that, in place of the trustees employing the residue of the trust-estate in purchasing lands to be conveyed to him, they shall at once pay him over the money? The direction of the trust-deed is—'After accomplishing all the other purposes of this trust, the said trustees are hereby directed to lay out and invest the whole residue that may remain of my heritable and personal estates in the purchase of lands and heritages, situated as near and convenient as they can reasonably be had to my said estate of Cluny and my other principal estates, and to execute a deed or deeds of strict entail in terms of the foresaid Act of Parliament of Scotland, passed in the year 1685, entituled an Act concerning Tailzies, of the whole lands so to be purchased to and in favour of my said eldest son, John Gordon, now Captain John Gordon, and his heirs whatsoever,' &c. The pursuer contends that he is entitled to obtain a judgment of the Court, by which substantially the trustees shall be ordained to take no proceedings for executing these directions, but at once to pay over to the pursuer the entire residue of the trust-estate. The pursuer rests his right to obtain this judgment on a broad general principle, said to be universally applicable, that wherever the intentions of a truster in directing a specific piece of property to be purchased and conveyed, may be defeated by the party benefited thereafter disposing of the property (which, of course, may happen in any case where there is not an effectual entail), and if no-one else be interested the beneficiary is entitled to demand that the money should at once be paid over to him. That such a principle, or something nearly resembling it, has been adopted in English law, seems to be unquestionably true. A trustworthy authority in that law, as quoted by the pursuer (Jarman on Wills, i. 367, edit. 1861), thus lays it down:—'Where the purpose of the gift is the benefit solely of the donee himself, he can claim the gift without applying it to the purpose; and that, it is conceived, whether the purpose be in terms obligatory or not. Thus, if a sum of money be bequeathed to purchase for any person a ring, or an annuity, or a house, or to set him up in business, or for his maintenance and education, or to bind him

apprentice, or towards the printing of a book, the profits on which are to be for his benefit, the legatee may claim the money without applying it, or binding himself to apply it, to the specified purpose, and even in spite of an express declaration by the testator that he shall not be permitted to receive the money.' The pursuer quotes several cases decided in England on this principle, and indeed where the principle was applied with unflinching logic, as not only an intended annuitant was held entitled to insist on the money being paid over to him, in place of being employed in the purchase of an annuity, but, in another case, the annuitant having died shortly after the testator's death, his executors were found entitled to obtain the money equally. I cannot find that this general principle has ever been adopted in the law of Scotland. The cases referred to by the pursuer are far from inferring such adoption. I think the principle unsound, and one which should not now be introduced. I conceive the leading principle of our law to be that of giving full effect to the directions of a testator or truster. Where the truster has the full disposal of his money, and only bestows it conditionally, or after it is invested in a particular form, I consider the right of the beneficiary to be a conditional right—that is to say, a right to obtain the bequest in that form, and no other. To say that after so obtaining it he can turn it again into money—which can be said in every case where there is not an entail—I conceive to be no good reason why the truster's intention should not in the first instance be carried out. In the many contingencies of human life this disposal by the beneficiary may never be exercised. But however this may be, I conceive that the mere power of after disposal by the beneficiary affords no sound or legitimate reason for giving the bequest in any other form than that prescribed by the testator. To carry out the testator's instructions is, I think, the overruling principle. What may happen afterwards belongs to the contingencies of a world of chance, with which I think that, on sound principle, neither the testator's trustees nor the Court which controls them in their duty have anything whatever to do. It is said that in the present case no one else is interested besides the pursuer; and none, therefore, has a right to prevent his demand being complied with. But I think that in saying this there is an undoubted right overlooked; I mean the right of the testator or truster to have the directions of his settlement implicitly carried into effect. I consider this not only to be a legitimate, but in the strictest sense a legal interest. So much has it been so regarded, that in many cases in which the legal representatives have been entirely excluded from the succession, as where the residue has been bestowed in charity, these representatives have been allowed to appear in Court, to the effect of seeing that the testator's intentions were properly followed out. I conceive that this could only proceed on a recognition of the principle that the instructions of the deceased testator created a legal right to strict fulfilment of his intentions. And this appears to me the grand regulating principle applicable to all wills, and all trust-settlements. It may frequently happen that the testator or truster had especial and favourite views as to the disposal of his money, which, unless his trustees are under an obligation to follow out, no one else may have a legal interest to enforce. What is to be said to the case of his instructing that the lands to be bought should be lands within a particular county, or lands which he specifies by name? He might have very strong and very legitimate views in so instructing. Upon what ground is his will in this respect to be set at nought, and the beneficiary to be entitled to carry off the money? The present case is very nearly that supposed; for the truster specifies the locality within which the lands are to be purchased, though the limits are not so narrow as in the case which I have just figured. The case has also been put of the money being directed to be employed in building a mansion-house on a fee-simple family estate. The illustration may be varied by assuming that the instruction is to lay it out on improvements on the estate—fencing, draining, and the like. In such a case it might with equal soundness be maintained that because the next day after the mansion-house was built, or the improvements completed, the heir could sell the estate, with all the improvements, therefore the instructions of the testator are not to be carried out, but the money to be at once paid over to the heir. Many such illustrations will easily occur. In truth, one great objection to sanctioning the principle contended for by the pursuer is its comprehensiveness of application. No one can at present foresee the variety of cases to which it will become applicable. It simply goes to exclude the fulfilment of a testator's directions as to the disposal of his money, in every case whatever in which the thing purchased is not brought within the fetters of an entail. The principle extends by analogy to many other cases than that of a direction to purchase lands. If the principle be sanctioned, it will be idle for any proprietor to direct his trustees to convey his lands, after the trust purposes have been satisfied, to a series of substitute heirs, by way of simple destination; for, according to the principle legitimately followed out, the first heir called will be entitled, simply because, after the lands are conveyed, he is not tied up from selling them, or from altering the succession, to insist that the trustees shall at once convey them to himself and his heirs whatsoever. It is difficult to see how, on the pursuer's principle, a right of annuity can ever be effectually directed to be purchased by trustees, although in many cases the character and circumstances of the intended annuitant may make this the only kind of right expedient to be bestowed. According to the pursuer, and to the express tenor of the English decisions, the intended annuitant may, immediately on the testator's death, demand the money, and that very night squander it all at the gaming table. Nor, perhaps, may this result be avoided by declaring the annuity alimentary; for the principle still recurs that the annuitant is the only party interested—that his benefit, and his alone, was contemplated—and that not being under any obligation to have this benefit forced on him, he is entitled to elect to have the money. The result holds in England, according to the authority, 'even in spite of an express declaration by the testator that he shall not be permitted to receive the money.' I am of opinion that such a principle is unsupported by sound reason or policy; and I could not sanction its application, unless thereto compelled by an overwhelming weight of authority in our own law, which, and which alone, I am called on to administer. I can find no such authority. I am of opinion that the principle is not such as should now for the first time be introduced; and I am not without considerable anxiety as to the consequences which may follow its introduction. The trustees are in the present case expressly instructed to buy with the residue of the trust-estate 'lands and heritages situated as near and convenient as they can be reasonably had to my said estate of Cluny and my other principal estates.' By an after clause the truster declares 'that the purchases may be made by my said trustees from time to time, as may be judged most eligible, according to the state of the trust-funds, and the opportunities which may offer of making suitable and convenient purchases.' The object of the truster in this direction was clearly not to endow the pursuer with a sum of money. It was to make him a landed proprietor in a particular locality—a most legitimate object, and one which might have connected with it the most important results, both to the pursuer himself and to others. The pursuer now says that he is entitled to have the money, and that it is not to be invested as directed, because he may, and will, sell the estates as soon as they are bought and conveyed. I have no implicit confidence that the pursuer will not change his mind after the estates have become his. The purchase of the lands will occupy some time to effect. The pur-

suer may die before this is accomplished; or in various conceivable ways may be prevented from executing his purpose. Is it on an estimate of such contingencies that the question is to depend, whether the directions of the truster are to be followed out as he has expressly given them? I cannot bring my mind to think so. I am of opinion that such contingencies should be all thrown out of view; and that the only sound and safe principle (as I consider it) should be held by—viz., that the directions of the truster should be implicitly carried into effect, whatever may afterwards occur. Practically this is to hold that, except to the extent of its being found that an effectual entail cannot be made by the trustees, the pursuer is not entitled to prevail in the conclusions of the present summons. I have merely to add, by way of explanation, that I consider the 43d section of the Entail Amendment Act, 11 and 12 Vic., cap. 36, to have no application to the present case."

The case was advised to-day.

Lord Cowan and Lord Benholme expressed their concurrence with the views of the majority, Lord Cowan agreeing particularly with the grounds of judgment set forth in the opinions of the Lord President, and Lord Barcaple. Lord Neaves agreed with the minority that the action should be dismissed. The Lord Justice-Clerk agreed with the majority in the result at which they had arrived, that the pursuer was entitled to decree, but expressed his sense of the difficulties which were felt by the minority of the consulted judges, and he only got over these by resting his judgment on the special ground that, while the trustees of Colonel Gordon are the only parties called, they have made no objection that all parties are not called, and they have not raised a proper process of constitution in order to determine the rights of all that might be interested. He did not think it was the duty of the Court to interpose and take an objection which the trustees had not taken.

The interlocutor of the Lord Ordinary was accordingly adhered to, the Judges being 8 to 5.

Saturday, March 3.

FIRST DIVISION.

LEARMONT'S TRUSTEES *v.* SHEARER.

Arrestment—Forthcoming—Heritable and Moveable. Circumstances in which held that a fund arrested was heritable, and the arrestment of it therefore inept. Decree of forthcoming following thereon suspended.

Counsel for Charger—Mr C. Scott. Agent—Mr James Barton, S.S.C.

Counsel for Suspenders—Mr G. H. Pattison and Mr Alexander Blair. Agent—Mr John M'Cracken, S.S.C.

The question involved in this case was the competency of an arrestment and a forthcoming. The charger, Margaret Shearer, had a claim against the common debtor, John Learmont, which she constituted in 1863 by obtaining decree in absence against him. Having used an arrestment on the dependence in the hands of the trustees named in Learmont's father's settlement (under which he had right to a sixth share of the residue of his father's estate), she thereafter raised an action of forthcoming against the trustees, and obtained decree in absence, upon which they were charged. The trustees then brought a suspension of this decree in absence, which was passed in terms of the Act 1st and 2d Vict., cap. 86, sec. 5, and a record was made up in the suspension. After a proof had been allowed and taken, the Lord Ordinary (Ormidale) found as matter of fact, that at the date when the arrestment was used in the hands of the trustees, they were not indebted and resting-owing to the common debtor in any sum of money, and, for that reason, that in point of law the decree of forthcoming was not well founded and could not be maintained. He therefore suspended the decree and charge thereon, "reserving the effect otherwise of said arrestment, and in particular its effect, if any, in attaching the *jus crediti* pertaining to the common debtor in the trust-estate of his father." The Lord Ordinary referred in support of his judgment to the case of Cunninghame *v.* Cunninghame, 28th February 1837 (15 S. 687).

The charger reclaimed, and moved that the action of forthcoming should be sisted until that portion of the trust-estate which was heritable was sold off and the sum due to the common debtor was ascertained. She had also made this motion before the Lord Ordinary, who refused it. The Court to-day adhered to the Lord Ordinary's interlocutor, holding that the arrestment was inept. The judgment of the Court was delivered by

Lord CURRIEHILL, who after narrating the above circumstances, said—This is a note of suspension, passed in terms of section 5 of 1 and 2 Vict. c. 86. It is proper to keep in view that the effect of passing the note was not to repone the suspenders. It is quite settled by decisions that the passing of such a note has not the effect of extinguishing the decree and charge, but simply of sisting them until the note is refused or decree of suspension is pronounced. It has also been settled that the record should be made up in the suspension process, as was done here. There are various reasons of suspension stated, but it is not necessary to deal with all of them. The only one which requires to be dealt with is, I think, intended to be stated in the 4th plea in law. It was stated to us in argument that as the trustees had not realised the property of the estate, and as they therefore had no money with which to pay the common debtor his share of the residue, the arrestment was therefore an inept diligence. I cannot sustain the plea stated in that broad way. Suppose there had been sufficient moveable estate out of which the share could have been paid, I think the arrestment would have been quite valid. This was settled in the cases of Grierson *v.* Ramsay, 25th February 1780 (M. 159, and Hailes 855), and Douglas *v.* Mason, 1796 (M. 16,213); and these cases have been since acted upon. I therefore think there was a fund attachable by legal diligence although it had not been realised. But that is not conclusive, for the question arises, what kind of diligence was appropriate? That depends on whether the fund was heritable or moveable. If moveable, and so far as moveable, arrestment was the proper diligence. If heritable, it was not attachable by arrestment. That leads me to consider whether the right of the common debtor in his father's estate was heritable or moveable. That depends on the construction of the trust-deed. By it the truster conveyed his whole property, heritable and moveable. The purposes of the trust were the payment of his debts, the delivery of his stock-in-trade to his two sons, William and Thomas, the payment of certain money provisions to his two daughters, and the division of the residue among his six sons and daughters. The only provision in favour of the common debtor was this sixth part of residue. This deed was executed in 1851. In 1852 the truster married again, when he granted a bond of annuity of £50 to his wife. That, of course, created a debt. In 1859 he made it a real burden on his heritage, and at the same time he made over to his wife his household furniture, &c. According to the state of the deceased's affairs at his death, it appears that after payment of the truster's provisions, there was not sufficient moveable estate to pay his debts. It therefore follows that there was nothing but heritage out of which the residue could be paid. That being the state of matters, the fund is heritable, unless the trust-deed contains a direction or power to convert it into money before division. I find in the deed no such power. Whether it may turn out afterwards that it is necessary to convert before