truster may be so worded as that, though the fee has vested, the money which it is directed shall be expended on the purchase of land cannot legally be paid over to the beneficiary under the destination until a time specified by the truster has arrived, or a condition attached has been purified. But this restraint would require to be indicated by some special and peculiar provision in the trust-deed. The whole Court in *Gordon's* case decided that though the intention shown by the truster was that the trustees should hold the fund to be invested in the purchase of land until the investment had been made, yet if the terms in which the directions were given were such as to put it in the power of the beneficiary to take the fund antecedently to the purchase, then the law would permit him to do so.

The question raised here is under the eighth power of the trust-deed, and I apprehend that in this case we find almost all the elements which in *Gordon's* case induced the Court to disregard the indications of intention that the bequest should not be made over until the purchase of land was effected. Under this power the testator wills a gift of the entire residue to the pursuer, and the primary object seems to have been to favour him in preference to the other beneficiaries under the deed. He has a *jus crediti* vested in him to demand a conveyance of heritage in the particular terms of that eighth purpose, and the circumstance that the trustees have a discretion, and that there is an indication of an intention that there is to be no conveyance until the whole fund is invested, is not a condition that is to interrupt the vesting. The time must necessarily come when the fund must be made over to the pursuer. Against this conclusion an argument was offered that this is a continuing trust, with a provision that the trustees are not to be interfered with, but I think it is impossible to read *Gordon's* case without seeing that there was a similar direction there. It is only after the whole money has been invested that the trustees are authorised to denude. All the clauses which seem to imply a continuing trust—for example, those with regard to the management of the estate—may all be accounted for by the fact of the age of the truster's brother, who was to liferent the property.

That being the case, the only question is, whether the intention is of such a character as to make the defence to this action well founded. As I read the opinions in *Gordon*, and especially that of Lord Barcaple, which was concurred in by Lords Cowan and Benholme in the Second Division, in circumstances where it is open to a beneficiary to dispose next day of the estate bequeathed to him, he is entitled to demand an immediate payment of the fund which the testator directs is to be appropriated to the purchase of land. A minority of the Court held adverse views, and in the opinions of Lords Neaves and Kinloch are found the fullest expositions of the grounds on which the truster's apparent intentions were sought to be upheld. I think the interlocutor of the Lord Ordinary should be recalled.

Lord Deas concurred.

Lord President—As I was not present at the discussion of this case, I offer no opinion upon it.

The Court recalled the interlocutor of the Lord Ordinary, and gave decree in terms of the conclusions of the summons.

Counsel for the Pursuer — Solicitor-General (Watson) — Keir. Agents — Dalgeish & Bell, W.S.

Counsel for the Defenders — Lee — Moody Stuart. Agents—Wilson & Dunlop, W.S.

Saturday, October 30.

SECOND DIVISION.

[Sheriff of Edinburgh.

WRIGHT *v.* WIGHTMAN.

Landlord and Tenant—Sheriff—Jurisdiction—Lease.

The Sheriff in a petition at the instance of a landlord ordained a tenant during the currency of a lease of an urban subject to stock and plenish her premises with furniture sufficient in value to afford security for the current rent, otherwise to find caution for payment, and upon failure to implement this order he granted a further warrant summarily to eject her—*Held* that as these proceedings were for the purpose of enforcing, and not of rescinding the lease, they were competent.

This was an appeal in a petition presented in the Sheriff-court of Edinburgh by Mr Charles William Wright against his tenant Mrs Helen Wightman. It appeared that the petitioner had, at the term of Whitsunday 1874 let to the respondent his house in No. 16 Greenside Place, Edinburgh, upon a lease of three years, and at an annual rent of £30. There was in addition payable yearly, along with the rent, a further sum of £2 for the use of certain fixtures and fittings. That at Whitsunday 1875 there was due to the petitioner by the respondent for rent and use of fixtures a sum amounting with interest to £23, 5s. 8d. The petitioner at that time obtained a warrant of sequestration, under which he sold the whole of the respondent's furniture. The proceeds of this sale reduced the debt due to him to £17, 3s. 3d. The petition further stated "that the respondent is still in possession of the said house, and at the present time there is not sufficient household effects and plenishing to pay the current rent, amounting to £32, exclusive of the balance of £17, 3s. 6d. still due to the petitioner."

The petitioner accordingly craved the Sheriff "to ordain the said respondent to plenish the said dwelling-house with furniture and other effects, so as to afford security sufficient in value equal to the sum of £32 sterling, and of the foresaid balance of £17, 3s. 3d., at the sight and to the satisfaction of a licenced appraiser to be named by your Lordship; and failing her doing so, or finding caution for said rent acted in your Lordship's Court, to grant warrant summarily to eject the respondent, her servants and dependants, goods, gear, furniture, and other effects, furth and from said dwelling-house and pertinents, and convey any furniture or other effects belonging to the respondent to a place of safe custody, there to remain subject to the peti-

tioner's claims for rents, when an application for the sale thereof can be applied for, and further to grant warrant to the petitioner to let the said dwelling-house and pertinents at such rent as he can procure therefor, to be applied *pro tanto* of any balance of any rent that may remain over unpaid after a sale of said effects; to grant warrant to open shut and lockfast places, so far as may be necessary for carrying into effect the warrants herein craved, and to find the respondent liable in the expenses for this application, and of all proceedings to follow thereon."

The respondent, in her minute of defence, stated that she was in the course of furnishing her house, and that there would be in a short time sufficient household effects and plenishing to pay the current rent, and she denied liability for the balance of £17, 3s. 3d.

On July 6, 1875, the Sheriff-Substitute (GEBBIE) issued the following interlocutor:—"The Sheriff-Substitute having considered the closed record, ordains the respondent, within ten days from this date, to stock and plenish the premises in question with furniture and effects sufficient to afford security for the current year's rent thereof, amounting to £32 sterling, and for the balance of rent due at Whitsunday last, as set forth in the petition, and to produce a certificate under the hand of any licensed appraiser to that effect; or within said period to find good and sufficient caution acted in the Sheriff Court Books for payment of said current year's rent, and also for said balance due at Whitsunday last, and to produce a certificate, under the hand of the Clerk of Court, to that effect, with certification that if she fail to stock and plenish, or find caution as aforesaid, warrant to eject will be granted, all as craved; meantime reserves further consideration of the cause."

The respondent appealed, but the Sheriff (DAVIDSON), on 24th July 1875, adhered. Upon 31st August a warrant to summarily eject the respondent was granted by the Sheriff-Substitute (HAMILTON).

The respondent appealed to the Court of Session.

Argued for her—If this was virtually an action of removing the proceedings were incompetent, not being in accordance with the Act of Sederunt of 1756. But if not equivalent to an action of removing, the Sheriff had no right to eject the tenant while the lease was still subsisting. The Sheriff was not entitled to ordain the tenant to put into the house sufficient furniture to give security for the arrear of rent. The landlord could only recover this balance of £17, 3s. 3d., as an ordinary debt.

The respondent's (petitioner's) counsel admitted that the security sought must be restricted to the sum of £32, the amount of the rent for current year.

Authorities—*Horn* v. *M'Lean*, Jan. 19, 1830, 8 Shaw 329; *Hall* v. *Grant*, May 19, 1831, 9 Shaw 612; *M'Dougall* v. *Buchanan*, Dec. 11, 1867, 6 Macph. 120; M'Glashan's Sheriff Court Practice, n. e. 41; *Adam* v. *M'Dougall or Fergusson*, June 14, 1828, 6 Shaw 978.

At advising—

LORD JUSTICE-CLERK—We had in this case a full and learned argument as to Sheriff-court procedure. The Sheriff has granted warrant to eject the respondent as craved in the petition. She had been previously ordained either to plenish her house or to find caution. Having failed to do so, a warrant of ejectment followed. Now, the question is, had the Sheriff authority to grant this warrant? It has been maintained that he was terminating a lease, and that he had no power to do so except in cases of removing from agricultural subjects. I think there is nothing in this view, nor anything unusual in what has been done, as far as the practice is concerned.

There is nothing in the prayer of the petition which applies to the question whether the lease is at an end or not. The prayer is for warrant to the petitioner to let the subjects in aid of bygone rent. I am inclined to think that the landlord would have been obliged to receive back the appellant within the currency of the lease upon his claim being satisfied. There must, however, be some alteration in the Sheriff's interlocutor, as it is admitted that the petitioner can only recover the arrear of rent and the £2 for the use of fixtures as an ordinary debt in the ordinary way. The result is, that the respondent should be ordained to plenish the house with furniture up to the value of £30, the amount of actual rent, or to find caution in terms of the prayer of the petition, and failing her so doing that, warrant of ejectment should be granted.

LORD ORMIDALE—I am of the same opinion. There were two grounds upon which this appeal was maintained. It was said that the only remedy open to the petitioner in the Court below was under the Act of Sederunt of 14th December 1756. But that Act is not applicable to urban subjects.

But then it was forcibly and ingeniously argued that what was sought from the Sheriff was practically a reversion of the lease, which was not competent in the Sheriff-court. It would be much to be regretted if that principle was given effect to so as to exclude actions of this sort in the Sheriff-court. I do not think it can be maintained, for this reason, the landlord does not desire to rescind, but rather to enforce, the lease; and it is the tenant who, by her action, cuts it down by refusing to plenish or find caution. Now it appears to me that this proceeding was perfectly competent in the Sheriff-court. There is one circumstance which satisfies me that it was so, and that is, that the objection now taken was never raised there.

LORD GIFFORD—As I read it, this is not a petition to put an end to a lease, but to enforce one. The premises, if not plenished by the present tenant, are liable to be let, but under the existing lease, so that the landlord may have recourse against her in the event of a less rent being obtained.

LORD NEAVES was absent.

The following interlocutor was pronounced:—

"Sustain the appeal; find that the petition in this case is competent before the Sheriff; recall the judgments complained of in so far as the appellant is thereby ordained to plenish the premises in question to the

extent, or to find caution for the sum of £17, 3s. 3d., and the sum of £2, for which reserve the petitioner's claim and the appellants answer thereto, and remit to the Sheriff to proceed in conformity with these findings; find no expenses due to or by either party in this Court, and decern."

Counsel for Appellant—Rhind. Agent—D. Murray, L.A.

Counsel for Respondent—M'Kechnie. Agents—T. & W. A. M'Laren, W.S.

Saturday, Oct. 30.

FIRST DIVISION.

[Lord Curriehill.

LORD CLINTON AND SAYE, PETITIONER.

Tutor and Pupil—Property—Feu.

Circumstances *held* to import necessity sufficient to warrant the Court to grant authority to a tutor and administrator-in-law to feu portions of his ward's estate.

The petitioner, as tutor and administrator-in-law for his son, the Hon. Charles Trefusis, the proprietor of Pitsligo and Fettercairn, applied for authority, *inter alia*, to grant feus of that portion of ground surrounding the village of Sandhaven, which formed a part of the Pitsligo estate. The Lord Ordinary having received reports on remit from Mr William Moncreiff, C.A., and Mr Fletcher N. Menzies, Secretary of the Highland Society, pronounced an interlocutor reporting the petition to the First Division. The circumstances of the case are set forth in the following note, which his Lordship subjoined to his interlocutor:—

"*Note.*—The petitioner, Lord Clinton, as tutor and administrator-in-law for the Hon. J. R. H. Stuart Forbes Trefusis, the proprietor of the estates of Sligo and Fettercairn and others, has presented this petition for authority to accept renunciations of leases, and to grant new leases of certain farms on these different estates, and to expend various sums of money in repairs and improvements on these farms, and to feu certain parts of the estate of Pitsligo. Although the petitioner is not a tutor under the superintendence of the Accountant of Court, or within the operation of the Pupils Protection Act, I considered it expedient to remit the application to Mr William Moncreiff, C.A. (the Accountant of Court), to inquire into the circumstances and to report, empowering him to consult with Mr F. N. Menzies, Secretary of the Highland Society, as to the amount of the proposed feu-duty and as to the leases, &c.

"After considering Mr Moncreiff's report, special powers were granted to the petitioner, by interlocutor of 16th July 1875, in terms of the prayer of the petition, except that part in which he asks authority to feu, as to which I entertained some doubts.

"The village of Sandhaven is situated on the sea-coast of Aberdeenshire, and forms part of the pupil's unentailed estate of Pitsligo; and the petitioner asks authority to grant feus of about 20 acres of land surrounding the village. It appears that herring-fishing is extensively carried on there, but that there is a great scarcity both of harbour and of house accommodation. With a view to enlarge and improve the harbour, the petitioner in 1873 applied to and obtained from Parliament a provisional order authorising his ward to execute various works which are at present being carried on, and by which it is expected that the harbour will be materially improved and enlarged. It also appears that there is a great demand at present for house accommodation in and about the village; that the whole available ground in and around the village belongs to the pupil, and that accommodation cannot be had upon any other ground in the district. Mr Menzies reports that the ground proposed to be feued is conveniently situated and well adapted for the purpose; and that he has no doubt that it will be a great advantage to the property if the feus proposed were to be granted. The present agricultural rental is stated to be £2 per acre, while the minimum rate of feu-duty recommended by Mr Menzies and approved of by Mr Moncreiff is £10 per acre.

"Although it is evident that if the 20 acres in question were to be all feued out at the rate suggested the return would be increased from about £40 to £200 per annum, it does not appear to me that, so far as regards the interests of the pupil and of the property of Pitsligo, there is any case of necessity for feuing made out by the petitioner. The income of his ward appears to be ample, and it would not be increased by the proposed feuing to such an extent as to make the granting the powers sought a matter of necessity, or even of great expediency, so far as regards the ward himself or the estate. The desire of fishermen and others to become householders in Sandhaven can hardly be said to make it a necessity for the ward and his estate that the proposed feus should be granted.

"On the other hand, if feus are not granted, the result may perhaps be—although I do not see this noticed in any of the reports—that fishermen and skippers may fail to resort to the harbour, and that the harbour dues may thus become inadequate as a return for the funds of the ward which have been expended in enlarging and improving the harbour.

"In the general case, the Court will not give powers to the guardian of a pupil or other person under disability to grant feus of his ward's heritage unless in the case of necessity—the avoidance of considerable loss to the ward's estate being generally held to amount to necessity. The general rule applicable to such cases is laid down in the case of *Maconochie*, 3d February 1857, 19 D. 366. As illustrating the class of cases in which such special powers may be granted, reference may be made to the cases noticed by Mr Moncreiff in his report, and to the case of *Alexander*, 26th June 1857, 19 D. 888. But in the latter case, and in the case of *Jamieson* (1868), the special powers were granted because the ward had himself, before becoming incapable, commenced feuing on an extensive scale, the interruption of which would have seriously diminished the value of his estate. And in the case of *Jamieson* (1873), where the Court refused to grant general feuing powers, they authorised the curator to grant three long leases of small specified lots of ground, after in-