pelling that plea. I am clearly of opinion that the statute has no application to the facts averred here. The averment of the pursuer is that he entered into a joint-adventure with the defender on the footing that the joint-adventurers were to have equal shares in the adventure, and that the defender was authorised to make the purchase for behoof of the joint-adventure. In the original condescendence it was not made quite clear that in taking the title in his own name he had gone beyond his mandate. An amendment has been made in the fifth article of the condescendence which makes the statement quite clear that the defender had no authority to take the title in his own name—"on the contrary, the arrangement between the parties and the pursuer's instructions to the defender were, and the defender's duty was, to take the missive in the joint names of himself and the pursuer." Notwithstanding that, the defender took the missive in his own name, and he now says that the pursuer is barred by the Statute of 1696 from proving that the purchase was made for the joint-adventure. The statute only applies when one man trusts another to take a title in his own name. It is indispensable that the one should be acting for the other. Otherwise the statute has no application. I think the Sheriff was right in repelling the defender's plea. In regard to the defender's new plea—[*reads plea*]. I think that neither of these pleas can be sustained. The missive does not require to be taken out of the way. The taking it out of the way would have no effect unless what has followed could also be taken out of the way. But the disposition to a *bona fide* third party which followed the missive cannot be set aside. The missive is therefore binding in a question *inter socios*. As to the necessity for alleging fraud, I do not see that fraud is required. The missive might have been taken carelessly, foolishly, in good faith, and yet there might be a relevant allegation that it was taken in the agent's name instead of in the joint name of the pursuer and defender. Having taken the disposition in his own name, the fraud would consist in the defence of this action. I do not think there is any objection to the pursuer's case, and as the parties are agreed to go to a jury I think we ought to order issues.

Lords Deas, Mure, and Shand concurred, on the ground that the question was one of mandate and not of trust.

The following interlocutor was pronounced:—

"Adhere to the interlocutor of the Sheriff-Substitute, by which he repels the first plea stated for the defender in the Inferior Court: Repel also the first and second pleas for him, added to the record in this Court: Appoint the pursuer to lodge such issues as he proposes for the trial of the cause in six days: Find the pursuer entitled to the expenses of this discussion, which modify to the sum of £12, 12s. sterling, and for which sum decern against the defender for payment to the pursuer."

Counsel for Pursuer—Balfour—Asher. Agents—J. & A. Hastie, S.S.C.

Counsel for Defender—Fraser—Rhind. Agent—William Officer, S.S.C.

Wednesday, June 20.

SECOND DIVISION.

SPECIAL CASE—TRAILL AND OTHERS (CAITHNESS TRUSTEES).

Succession—Trust-Disposition—Husband and Wife—Legal and Conventional Provisions—Election—Powers of Trustees.

A testator by trust-disposition and settlement gave his widow a liferent of his whole estate, and empowered his trustees to make advances out of capital to the beneficiaries to whom the fee of the estate was destined. *Held*, on a construction of the trust-deed, that the truster's widow was not entitled to the liferent and also to her legal rights, but must elect between the two; and (2) that the trustees were entitled without the widow's consent to make advances to the beneficiaries out of capital.

This was a Special Case presented by (1) John Traill, surgeon in Arbroath, and others, trustees under the settlement of the late William Caithness, corn merchant, Arbroath; (2) Mrs Caithness, the widow of the said William Caithness; and (3) her pupil grandchildren, beneficiaries under the settlement.

Mr Caithness died on 11th February 1874, leaving a trust-disposition and settlement, dated 2d May 1872. He was survived by his wife. There was no issue of the marriage. The amount of his estate, after payment of all debts and expenses, was about £1200. Mrs Caithness had a daughter, Mary Ann Gordon, by a previous marriage, who married David Wilson, and had at the date of this case two children, William Caithness Wilson and Margaret Nicoll Wilson.

The settlement of Mr Caithness contained no express declaration that the provisions in favour of the widow should be accepted of by her as in full of her legal claims. By the third purpose of the deed the widow was to have the liferent of the truster's household furniture; and under the fourth purpose she was entitled to the liferent of the residue of the whole means which belonged to him at the time of his death, the trustees being empowered and required to advance from capital, if the income of the residue should not amount to £40 yearly, so as to make up the amount to £40; it being provided, "nevertheless, that in case the said free yearly revenue shall exceed the said sum of £40 sterling, my said wife shall be entitled to receive the whole free revenue, my intention in said restriction being to prevent undue encroachment on the stock." Mrs Caithness did not accept the provision in her favour contained in the settlement. She maintained that she had right to the provisions over and above her legal claims. The trustees maintained that she must elect to take either the provisions in her favour under her husband's settlement or her legal rights. By the fifth, sixth, and seventh heads of the trust-disposition and settlement, discretionary powers were conferred on the trustees to advance or expend part of the capital of the trust-funds for certain purposes, viz., (1) under the fifth, for educating and training in business William Caithness Wilson; (2) under the sixth, for enabling him on attaining

majority to engage in a profession or business; and (3) under the seventh, for rendering pecuniary assistance to Mrs Mary Ann Gordon or Wilson during the lifetime of the widow, but that only if she was in circumstances to require it. The trust-disposition and settlement contained no express stipulation that the provisions thereby conceived in favour of the truster's widow were to be affected in the event of the discretionary powers above mentioned being exercised; and the widow maintained that no payment could be made under any of these purposes without her consent. The eighth purpose directed the liferent of the truster's whole estate to be paid to Mrs Wilson after the death of the widow, and the last purpose provided that the residue of the trust-estate should belong to the lawful child or children of the said Mary Ann Gordon or Wilson alive at the death of the last survivor of the testator and his wife and the said Mary Ann Gordon or Wilson, equally between and among them, share and share alike, if more than one (except William Caithness Wilson, who got a double share); with a declaration that if before vesting any of said children should die leaving lawful issue, such issue should be entitled to their parent's share; and with the further declaration that the share of the beneficiary or beneficiaries should not be payable until they should attain twenty-one years of age, or, being daughters, should be married; but with a power before majority, or in the case of daughters, before marriage, to apply the interest or annual produce of their shares for and towards their maintenance and education.

The following questions were submitted to the Court:—(1) "Is the truster's widow, the second party, entitled to the conventional provisions in her favour under the trust-disposition and settlement of her husband, the said William Caithness, and also to her legal claims of *jus relictæ*, and an allowance for mournings, and aliment to the first term after her husband's death, or is she bound to make her election between the said conventional provisions and legal claims? (2) If the second party be not bound to make her election, and shall take both her conventional provisions and legal claims, will she in that event be entitled to have the income of the residue, to which she is entitled under the trust-disposition and settlement, made up out of capital to £40 per annum? (3) Assuming that the second party is bound to make her election as between said conventional provisions and her legal claims, and accepts the provisions in her favour in the said trust-disposition and settlement, or that she is entitled to both her legal claims and conventional provisions, are the first parties entitled, without her consent, to encroach on the capital of the estate, and give effect to any or all of the fifth, sixth, and seventh purposes of the trust-settlement? Or can she prevent the first parties from encroaching on the capital of the funds except for the purpose of making up therefrom the annuity or sum of £40 payable to her? (4) When will the shares of residue vest?"

Authorities—*Riddell* v. *Dalton*, M. 6457; *Keith's Trustees*, 17th July 1857 19 D. 1040, Erskine's Institute, iii. 3, 30; *Leighton* v. *Russel*, Dec. 1, 1852, 15 D. 126; *Young*, 1664, M. 6447; *Breadalbane's Trustees* v. *Duke of Buckingham*, March 5, 1840, 2 D. 731; *Minto* v. *Kirkpatrick*, May 20, 1842, 4 D. 1224; *Thomson* v. *Smith*, Dec. 12, 1849, 8 D. 282; *Cross* v. *Burn*, Hume 484; *Bell* v. *Laurie*, Hume 486.

At advising—

Lord Ormidale—As to the first question submitted to the Court, I am clear as to the matter upon the authorities quoted to us. The cases of *Minto* and *Breqdalbane* appear to me to settle the point. I think that by his settlement Mr Caithness embraced his whole estate, inclusive of the *jus relictæ* of his widow. We could not have a case where the implication is stronger, and it seems to me to be the inevitable result unless it could be maintained that the *universitas* of an estate cannot be deemed to have been disposed of save by express words. I have, however, no doubts upon the matter, and accordingly the first question will fall to be answered to the effect that the widow is not entitled to her legal as well as her conventional provisions, but that she must elect between them. The second question then is superseded.

As to the third question, I am of opinion that the trustees are entitled to act according to their discretion. They have no interest but that of carrying out the objects and the instructions of the testator. In the circumstances which have actually arisen it seems probable that the trustees may not think themselves entitled to make these advances to the ultimate beneficiaries. I think that it is likely that, looking to the small amount of the capital, they will follow this course, but I express no opinion on the matter. As to the circumstances of these grandchildren, we know nothing. They have at least parents living who may provide for them, but the whole matter is one solely for the discretion of the trustees. The fourth question was virtually abandoned—indeed the testator has himself settled it.

Lord Gifford—I am of the same opinion, and have had no difficulty in the case. The truster here has used very wide terms for conveying his whole estate, but the widow nevertheless claims her legal rights in addition to the provisions made for her by the deed. I am clear that she cannot do this, but must elect. I would answer the questions as your Lordship proposed, both on the ground of the authorities quoted and of the terms of the settlement. If, however, the widow choose her conventional provisions, she approbates the whole will, and in these circumstances the third question arises. I think upon that matter that the widow has no veto on the trustees as to the sixth and seventh purposes of the deed. The question of vesting is determined by the words of the deed itself—"The residue of my estate shall belong to the lawful child or children of the said Mrs Mary Ann Gordon or Wilson alive at the death of the last survivor of me and my said wife and the said Mary Ann Gordon or Wilson."

Lord Curriehill—I entirely concur. I only wish to add, as to the third question, that in my opinion the trustees have the very fullest discretion. The fifth, sixth, seventh, and eighth purposes of the deed were, to my mind, clearly framed so as to prevent any interference by the widow with the trustees in their discretionary management. I am sure they will exercise an independent and a wise discretion whether any, and if

so what, advances out of capital should be made to these parties.

LORD JUSTICE-CLERK—Absent.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the Special Case, are of opinion and find—(1) That the widow is not entitled to the conventional and legal provisions, but is bound to make her election: (2) This query superseded by the answer to the 1st query: (3) That the first parties are entitled, without the widow's consent, if they should see fit in the exercise of a wise and prudent discretion, to encroach on the capital, so as to give effect to any or all of the fifth, sixth, and seventh purposes of the trust-settlement: (4) That the shares of residue vest on the death of the last survivor of the testator and his widow and Mrs Mary Ann Gordon or Wilson; and decern."

Counsel for the First Parties—Darling. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Second Parties — Jameson. Agent—R. Strathern, W.S.

Counsel for the Third Parties—Keir. Agent—Graham Binny, W.S.

Tuesday, June 26.

SECOND DIVISION.

[Sheriff of Forfar.

DONALDSON *v.* EARL OF STRATHMORE.

Property—Servitude—Water Supply—Primary Uses—Riparian Owner.

Feuars in a village had right to "the use and privilege of the water" in a burn. The superior of the feus, who was proprietor of both banks of the burn, wished to divert spring water flowing through an artificial channel into the burn above the village for the primary uses of his house situated below the village. It was proved that a sufficient supply would be left for the villagers. *Held* that, the right of the feuars being one of servitude and not of property, the proprietor was entitled to take as much water as he required for primary uses.

Expenses.

Circumstances in which no expenses were allowed.

This was an appeal in an action for interdict brought in the Sheriff Court of Forfar at the instance of William Donaldson, labourer, Charleston, Glamis, against the Earl of Strathmore, in the following circumstances:—The petitioner was a feuar in the village of Charleston, which was built upon the property of Charles Henderson of Woodbank, and under the original rules and regulations for the village the feuars were to have the use and privilege of the water in a burn which flowed past the village, and of a piece of ground to be laid out as a bleaching green. This ground lay between the burn and the petitioner's feu. Mr Henderson was proprietor of only one bank of this burn, and his property was purchased by Lord Strathmore, who was proprietor of the other bank. Lord Strathmore thus became sole riparian proprietor, and superior of the Charleston feus.

For thirty years Lord Strathmore's factor's house at Glamis had been supplied by water from the burn, conveyed from a point slightly below the village in a 3-inch drain. Lord Strathmore, on account of the drainage of the village having polluted the water, proposed to lay a 3-inch pipe drain to convey the water to Glamis, not from the burn, but from a stone-built drain which was supplied by a spring in a field above the village and upon his Lordship's property. This stone-built drain conveyed the water from the spring into the burn, the junction being near the lower end of the bleaching green. There was no intention of removing the stone drain, which would continue to convey into the burn the spring water in so far as it was not carried off by the 3-inch pipe. There was another strong spring, which the respondent averred amply supplied the bleaching green and the village. This action was for the purpose of interdicting Lord Strathmore from laying the proposed pipe-drain.

The petitioner pleaded — "The petitioner having right to the water in the said burn, the respondent is not entitled to interfere therewith, or to carry it away, or to alter or divert any of the sources thereof."

The respondent pleaded—"(2) The respondent being proprietor of the spring and drain and adjoining lands, is entitled to take water therefrom for his own uses. (3) The petitioner having only a privilege of servitude for using water, and the operations complained of not being such as to deprive him of the requisite supply, the petition ought to be refused."

A proof was taken at Forfar on July 10, 1876, and on 11th December 1876 the Sheriff-Substitute (D. GILLESPIE) pronounced an interlocutor in which he, *inter alia*, found as follows:—"Finds in law that the petitioner has no higher rights than that of servitude in regard to the water of the said burn, and that he is not entitled to object to the operations of the respondent unless these operations are such as to injuriously affect the petitioner's use and privilege of the water of the said burn: Finds, in fact, that the operations complained of will not injuriously affect the petitioner's said use and privilege, inasmuch as even if the respondent abstracts the whole water of the said channel, the natural water of the burn, unaugmented by the water from the channel, will suffice not only for all the purposes of the petitioner but of the whole villagers of Charleston: Therefore sustains the third plea in law for the respondent; recalls the interim interdict formerly granted; refuses the prayer of the petition.

"*Note.*—The petitioner's feu is upwards of a hundred yards from the nearest point either of the burn or of the covered channel. He is not riparian proprietor, and accordingly cases relating to the rights of upper and lower riparian proprietors have no direct application to the present case. The right conveyed by his titles is