Friday, June 11.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

SIR MAURICE DUFF GORDON *v.* CHALMERS AND OTHERS.

Entail — Disentail — Trust — Jus quæsitum — *Lapsed Trust—Re-Entail.*

G, an heir of entail in possession of lands held under an entail dated in 1811, entered into an agreement with the three next heirs, whereby he obtained their consent to disentail the lands of M, which were discontiguous to the main estate of F. The lands of M after being disentailed were conveyed to trustees with power *inter alia* to sell them, and with the price pay debt affecting the estate of F, if any such debt there were, and purchase lands contiguous to F for the purpose of adding them to that estate. M remained unsold, but a succeeding heir, who was also G's heir-at-law, disentailed F. *Held* that the contract being onerous there was a *jus quæsitum* conferred by it on every heir called by the entail, and that therefore the heir who disentailed and acquired the estate of F in fee-simple was not entitled as heir-at-law to declarator that the trust had lapsed and that the lands of M had fallen to him, but, on the contrary, that the trustees were still bound to acquire suitable lands with the price of M, and entail them on the heirs called by the entail of 1811.

This was an action by Sir Maurice Duff Gordon of Fyvie, Aberdeenshire, against the trustees of the deceased Charles Gordon of Fyvie, in which the pursuer sought to have it found and declared that a trust created by Charles Gordon had lapsed, and that the trustees were bound to make over to him the entire trust-estate as heir-at-law.

In 1849 Charles Gordon of Fyvie was heir of entail in possession of the entailed estates of Fyvie in Aberdeenshire, and Maryculter in Kincardineshire, under an entail executed in 1811 by the Honourable General William Gordon of Fyvie.

In that year, 1849, Charles Gordon desired under the powers of the Entail Amendment Act 1848 (11 and 12 Vict. cap. 36), to disentail Maryculter. He, as heir in possession, entered into a contract in October 1849 with his three sons, the three next heirs then entitled to succeed, and whose consents were necessary to the disentail, on the narrative that he had applied, with their consents, for authority to disentail Maryculter, whereby he agreed that on the proposed disentail of Maryculter being carried through he or the heir who might be in possession of the entailed estate at the time of the completing of the disentail should immediately convey the said lands and estate to trustees with certain powers as to management, and particularly with power to sell, and for the purposes of (1) payment of the expenses of the trust; (2) that the capital of the price obtained from the sale of the disentailed lands should be laid out in paying the capital of the debts affecting the entailed estate, if any there might be, but not in payment of provisions to wives, etc., these being payable out of the rents; "(*Third*) The said price or prices shall be applied in the purchase of land lying as nearly contiguous as can be got to the lands and estate of Fyvie, and judged to be a valuable addition to the entailed estate, and the said lands, when purchased, shall be conveyed by the said trustees to the heir of entail in possession of the estate of Fyvie at the time, and to the heirs succeeding to the said entailed estate, with and under the whole provisions and conditions of the foresaid deed of entail by the said Honourable General William Gordon of Fyvie, and which lands so to be acquired by the said trustees shall be purchased by them at the sight and with the approbation of the heir of entail in possession of the entailed estate of Fyvie for the time, or of the factor or manager appointed by him; (*Fourth*) Until a proper opportunity for investing the said price or prices in the purchase of land as aforesaid, the said trustees shall invest the same, or such part thereof as may not at the time be laid out in the purchase of land, upon such security as may appear to them to be adequate and sufficient at the time, and which investment shall be made in their own names, and they shall be entitled to uplift the sums so invested, and to re-invest the same as they may think proper." . . .

In fulfilment of this arrangement a trust-disposition was executed in January 1850 by Charles Gordon, proceeding on the narrative that he had entered into the contract of 1849 with his three sons, that the disentail had been executed, that the approval of the Court to the procedure was forthwith expected, and that the steps necessary for completing the disentail would forthwith be carried through, so as to vest the lands of Maryculter in his person in fee-simple. He accordingly conveyed and made over to trustees, for the purposes of the contract of 1849, the lands and estate of Maryculter.

The trustees accepted office and completed their title to the disentailed lands of Maryculter. No suitable lands contiguous to the estate of Fyvie having been secured by the trustees, Maryculter remained unsold, and the income was paid by the trustees to the heir in possession of Fyvie. At the date of this case the trustees were P. H. Chalmers and Sir Maurice Duff Gordon (the pursuer himself).

In 1884 the pursuer of the present action, who was a grandson of a younger brother of the said Charles Gordon, succeeded, as heir of entail, to the estate of Fyvie. In April of the same year he executed an instrument of disentail of the lands of Fyvie, which was recorded in the Register of Entails under the authority of the Court on 8th May 1884.

In October 1884 the present action was raised by Sir Maurice Duff Gordon against the surviving assumed trustees under the trust-disposition of Charles Gordon, and also against the three heirs called to succeed under the aforementioned entail of 1811, in their order next after himself.

The pursuer sought by the conclusions of his summons to have it found and declared that the trust created by Charles Gordon's trust-deed of 1850, had, as regarded the 2d and 3d purposes, lapsed and become inoperative, and that the defenders, the trustees thereunder, were bound to denude thereof in his favour, and make over the trust-estate to him. Alternatively he sought declarator — "(*First*), that the trust-estate conveyed by and held under the said trust-disposition and relative deeds of assumption is held by the said Patrick Henderson Chambers and Sir Maurice Duff Gordon, as

trustees foresaid, in trust for the purpose of selling the same, or so much thereof as may be necessary, and out of the capital of the price or prices obtained therefrom, of paying off the capital of the debts which affected the lands and estate of Fyvie and others in the county of Aberdeen, at the date of the disentail thereof on the 8th day of May 1884, other than the provisions to wives and children, which in terms of the entail of the said lands and estate of Fyvie and others must be paid out of the rents or other annual income; and the said Patrick Henderson Chalmers and Sir Maurice Duff Gordon, as trustees foresaid, ought and should be decerned and ordained, by decree foresaid, forthwith, or in due course of realisation, to sell the said trust-estate, or so much thereof as may be necessary for that purpose, and either to pay off the capital of the said debts or to make payment to the pursuer of the sum of £23,000 sterling, or such other sum, less or more, as shall be ascertained in the course of the process to follow hereon to be the amount of the debts affecting the said lands and estate of Fyvie and others falling within the second purpose of the said trust; and (*Secondly*), It ought and should be found and declared that *quoad ultra* the said trust-estate is held by the said Patrick Henderson Chalmers and Sir Maurice Duff Gordon, as trustees foresaid, in trust for the pursuer and his heirs and assignees, or otherwise, in trust for the pursuer and the series of heirs who would have succeeded after him to the said lands and estate of Fyvie, under the disposition and deed of entail thereof granted by the deceased Honourable General William Gordon of Fyvie, dated 30th April, and recorded in the Register of Tailzies 12th June, and in the Books of Council and Session 12th September, all in the year 1811."

He maintained that the trust erected by Charles Gordon had come to an end, and alternatively, if it should be held that it still continued, that the trustees held in trust for him, and at all events did so to the extent necessary to pay off the debt secured on Fyvie at the date when it was disentailed.

He averred that the debt affecting Fyvie at the time it was disentailed amounted to £19,088, 9s. 2d., also that Fyvie was the leading family estate, the rental being £8000, while that of Maryculter was £1200.

He pleaded—"(1) The second and third purposes of the said trust having become inoperative through the disentail of Fyvie, and none of the defenders having any right or interest to insist on the exact fulfilment of the trust, the pursuer, as heir-at-law of the truster, and also as the person who would have been heir in possession of Fyvie under the entail thereof, is entitled to have decree of declarator and denuding in terms of the first alternative conclusions. (2) Alternatively, if the trust falls to be carried out according to its terms, the pursuer, as proprietor of the formerly entailed estate of Fyvie, and creditor in the obligation incumbent on the trustees under the second purpose, is entitled to have the Fyvie debt paid off or provided for in terms of the conclusions thereanent, and on a sound construction of the trust-deed he is, in the event which has happened, entitled to decree in terms of one or other of the remaining conclusions."

The trustees lodged defences stating that they occupied a neutral position, and would execute the trust of 1850 as the Court might ordain.

They pleaded that all parties were not called, in respect that though the pursuer had called the three heirs next after him in the entail he had not called the other substitutes, and a supplementary summons calling them was raised.

The three next heirs (to two of whom, as being in minority, Mr J. P. Bannerman, W.S., was appointed *curator ad litem*) stated—"The second purpose of the trust to which the payment of the price of Maryculter is to be applied has failed by reason of the disentail of Fyvie on 19th April 1884. The third purpose of the said trust has now come into operation, and the trustees now hold Maryculter in trust to sell the same and purchase lands to be entailed on the heirs called in the destination of the Fyvie and Maryculter entail of 1811. The trustees are bound to proceed in the execution of the said trust, using their discretion in carrying out the sale of Maryculter and the purchase and entail of other lands, unless the pursuer shall now proceed with an application to the Court to acquire the lands in fee-simple under the Rutherfurd and subsequent Entail Statutes.

They pleaded—"(1) The estate of Fyvie having been disentailed, the second purpose of the trust-deed of 1850 has failed, and the trustees are not entitled to apply any part of the price of Maryculter, when sold, in disburdening the fee-simple estate of Fyvie. (2) The third purpose of the trust-deed of 1850 having come into operation, the trustees are bound to apply the price of Maryculter, when sold, in the purchase of lands to be entailed on the heirs called in the destination of the Fyvie and Maryculter Entail of 1811, and meantime to hold the Maryculter estate for these heirs."

On 21st November 1885 the Lord Ordinary repelled the pleas-in-law for the pursuer, and assoilzied the defenders.

"*Note.*—The pursuer brings this action in two characters, that of heir-at-law of Charles Gordon, the granter of the trust-disposition, and that of proprietor in fee-simple of the disentailed estate of Fyvie. The first conclusion of the summons is maintainable solely in the character of heir-at-law. For under this conclusion the pursuer seeks to have it declared that the trust created by Charles Gordon's trust-disposition of 1850 has become inoperative in all its purposes except the first (which relates to the payment of expenses), and has lapsed, and that the trustees are bound to make over the entire trust-estate to him as heir-at-law. The pursuer's contention on this head appears to me to be quite untenable.

"The second purpose has failed by reason of the disentail of Fyvie, but the third is in my opinion still subsisting and effective. If the trust-disposition had been purely gratuitous I should still have thought that it subsisted, notwithstanding the disentail of Fyvie, for the benefit of the persons who would have been entitled to succeed to that estate under the destination of 1811. For although this specific purpose of the trust cannot now be achieved in the precise form and manner prescribed, there remains the general purpose which is still perfectly attainable and effectual, viz.—the settlement of the estate of Maryculter, or its proceeds, for the benefit of the heirs of entail of Fyvie. But the trust-disposition was not gratuitous, but was made in performance of an agreement

between Charles Gordon, the granter of the deed, who was then heir in possession under William Gordon's entail of 1811, and his three sons, who were the heirs next entitled to succeed in their order to the entailed estate. By this agreement the estate of Maryculter, which till then had been held along with Fyvie under the entail 1811, was disentailed and conveyed to trustees for the purpose of clearing off debt affecting the entailed estate, and secondly for the purpose of selling Maryculter and buying lands in the neighbourhood of Fyvie, to be added to that estate, and held along with it under the conditions of the entail. There can be no question as to the position of Charles Gordon under this trust-deed. As the Lord President explains in the case of *L. Fincastle* v. *Dunmore*, 3 R. 345, 'he was no longer fee-simple proprietor. He had divested himself of that character, and he was beneficiary under this trust, and institute in the deed of entail to be executed by the trustees when they had sold' Maryculter and acquired other lands. He was thus in the position, as the pursuer is now in the position, contemplated by the 27th section of the Entail Amendment Act. The pursuer is entitled to demand a conveyance of the trust-estate, provided he complies with the conditions of the Entail Amendment Act; but he cannot obtain such a conveyance upon any other terms. For the heirs under the entail of Fyvie have a *jus quæsitum* under the trust-deed, and there can be no question as to the nature of their right. It is just the right of a series of heirs entitled to succeed in their order under a tailzied destination. For the trust-estate is, by virtue of the 27th section of the Rutherfurd Act, to all intents and purposes an entailed estate, subject to disentail, upon the same conditions as if a formal deed of entail had been executed of the date it bears. The interests of the heirs who are entitled to succeed to the pursuer may therefore be determined by a disentail in a proper application to the Court for that purpose, but in no other way. The notion that by disentailing Fyvie, the pursuer has extinguished the right of the heirs of entail in Maryculter, which he has not disentailed, appears to me to be extravagant. The same considerations are sufficient for the disposal of the alternative conclusions. The pursuer cannot, in my opinion, have the trust-estate applied in paying debts affecting his estate of Fyvie, because Fyvie has been disentailed, and in that condition of matters to pay off the debts on Fyvie would not be to execute but to defeat the trust by giving to the pursuer for his own exclusive benefit an estate in which he was intended to have only the interest of an heir of entail. The decree which is asked would simply give the pursuer the benefit of a disentail without his being required to satisfy the conditions upon which a disentail may be obtained. It is said that if the action fails the result will be to give the heirs an interest in the trust-estate which was not contemplated by the trust-deed, or by the agreement on which it followed, since it was not intended that they should have any higher right in Maryculter than the existing entail gave them in Fyvie. But their interest in each estate is precisely the same so long as both entails subsist. If the conditions upon which the two estates are disentailable by an heir in the position of the pursuer are different, that arises from the operation of the Entail Amendment Act.

"It was impossible to make a trust for entailing land in 1850 which should not be subject as regards disentailing to the conditions applicable to entails dated after 1848.

"The second alternative of the last conclusion of the summons expresses accurately the general purpose for which the trustees now hold the estate; but as this part of the conclusion is dependent upon the first part, it is unnecessary to qualify the absolvitor."

The pursuer reclaimed, and argued that he was entitled to succeed under the first conclusion of the summons, and to have the debts of Fyvie cleared off. It was clear that the second and third purposes of the trust-disposition had failed, and it was no objection to what the pursuer was here asking that he himself had disentailed the lands which he wished to clear from debt. The trust had lapsed—*Love's Trustees* v. *Love*, Dec. 19, 1879, 7 R. 410, 24 D. 1191. Having failed in its second purpose, there was clearly no existing trust, and the estate of Maryculter resulted to the pursuer as heir-at-law of the truster. The truster's purpose was to benefit the estate of Fyvie by payment of debts, and by adding to the estate. It was not to confer a benefit on any specific legatee. All through the trust-deed this could be seen to be its essential purpose. But the truster overlooked the fact that Fyvie could be disentailed, though the trust-deed in 1850 made a new entail as regards Maryculter, which could not be disentailed as Fyvie could be. If, however, the trust-deed and the agreement on which it proceeded failed, then the pursuer must be heir of entail under the old (1811) entail of Maryculter. But again, if it were considered that the trust-disposition alone failed, while the agreement embodied in the contract of 1849 remained in force, then the pursuer was fee-simple proprietor of Maryculter, subject only to the agreement. That agreement was satisfied by the trust-deed. The parties took the risk of the trust-deed failing to defend the agreement. If it had failed to do so nothing more could be enforced under the agreement. Either you cut down the trust-deed and then the pursuer succeeded as heir-at-law of the truster Charles Gordon, or you put all parties into the position that existed before 1849 by cutting down both the agreement and trust-deed of 1849, and then the pursuer succeeded as heir of entail of Maryculter under the old entail of 1811. Even assuming that the general scheme of the trust had failed, still if the Court were of opinion that so far as possible the purposes of the trust-deed ought to be carried out, then the debt on Fyvie must be paid. If it were decided that Maryculter must be re-entailed on the heirs named in the Fyvie entail, then by the same reasoning debt on Fyvie must be paid. The estate of Fyvie had a *jus crediti* over the trust estate of Maryculter. The arguments against this purpose (*i.e.*, the payment of Fyvie debts) still subsisting all told against any of the purposes of the trust subsisting. According to the Lord Ordinary, the pursuer the day before the disentail of Fyvie in 1884 could have had the debts on that estate paid and then disentailed it, but now after the disentail he could not ask the trustees to pay those debts. Was he to forfeit

£23,000 merely owing to the procedure he had adopted?—(4th section of Rutherfurd Act.) If it were argued that the only debts to be paid by the trustees were those due in 1850, the answer was that this would not be in accord with the main purpose of the trust-deed, which is the benefit of Fyvie. The trust-deed met the events which happened and satisfied the principle of Lord Stair's case—(Lord Stair's case, 5 Shaw 449, and 2 W. & S. 414, 614) *Gordon* v. *Gordon's Trustees*, March 2, 1866, 4 Macph. 501.

Replied for respondents—In interpreting the clause containing the third purpose of the trust-deed the Court must look at the contract contained in the trust-disposition and agreement. When there was no specific time fixed for the implement of the trust, then the result was that the Court must consider a year to be the time within which the trust must be implemented. Hence the Court must suppose Maryculter sold in 1851, and a new estate then re-entailed on the same series of heirs as those named in the 1811 entail. The above referred to case of Stair, and such cases, went upon the intention of the truster. In the case of *Dickson's Tutors* v. *Scott*, November 2, 1853, 16 D. 1, accumulation was ordered by a deed, and the Court decided that such accumulation should go on for one year. In 1851, one year after the trust-deed, and for nine years later, there were no debts upon Fyvie, and therefore the second purpose of the trust-deed failed, and the third purpose came into force. The 3d purpose was in force, though some of its clauses could not be fulfilled. These clauses were not essential, and the third purpose must stand—*Lord Lonsdale* v. *Countess of Berchtoldt*, 3 Kay and Johnstone 185; and *Gordon* v. *Gordon's Trustees*, above referred to. In 1850 a new entail of Maryculter was directed, and the date of the trust-deed must be considered as the date of new entail—*Graham* v. *Stewart*, March 15, 1852, 15 D. 558, and 5 M'Queen 295—*Balgowan* case. Further, *Lord Fincastle* v. *Lord Dunmore*, January 14, 1876, 3 R. 345. The main object of the trust-deed was to strengthen the estate of Fyvie for the benefit of a certain series of heirs. The pursuer could not take the advantage of the second purpose of the trust-deed, *i.e.*, the payment of debts upon Fyvie, for that would be for his benefit alone as an individual, since Fyvie had been disentailed, and this would defeat the true purpose of the trust-deed, which was not to benefit one individual but a series of heirs.

At advising—

Lord President—The deed of entail of Fyvie was made in the year 1811, and it comprehended not only the estate of Fyvie in the county of Aberdeen, but also the estate of Maryculter in the adjoining county of Kincardine, but which last estate was not contiguous to the main estate of Fyvie. That entail subsisted and was carried into effect throughout the succession of a series of heirs, until in the year 1849 the estate came to be vested in Charles Gordon as the heir in possession. The Entail Amendment Act of 1848 had just been passed, and it would appear that Mr Charles Gordon directed his attention to the provisions of that statute for the purpose of seeing whether he could take any advantage from it. He found that he could if he pleased disentail the whole estate with the consent of the three next heirs of entail. But that was not at all his object. On the contrary, his view seems to have been rather to do everything he could for the maintenance of the entail and for the advancement of the interests of the heirs of entail. And accordingly he obtained the consent of the three next heirs (who were his own sons) to disentail, not the entire estate, but only the lands of Maryculter, which as I have said were not contiguous to the main estate of Fyvie. But instead of purchasing the consent of the next heirs in the ordinary way, by the payment of a sum of money in lieu of their expectancy of succession, he made a contract with them, and in pursuance of that contract he executed a trust-deed conveying the estate of Maryculter to certain trustees for purposes which must be particularly examined. The object he had in view was mainly to get quit of the lands of Maryculter and to substitute in their place other lands lying more contiguous to the main estate of Fyvie, and so to consolidate the entailed estate Now, this contract, in pursuance of which the trust was afterwards executed, contains within itself the whole provisions of that trust, and it is only necessary to examine one of these deeds, because the trust is just an echo of the contract. The contract provides that the said Charles Gordon, and failing him his son who may be at the time in possession of the estate, and shall obtain right to the disentailed lands, shall immediately upon the said disentail being completed execute a trust-disposition conveying the said lands of Maryculter and others to certain persons therein named as trustees, with power to them to enter into possession and management, and with power to sell and dispose of the said trust estate either by public roup or private bargain, and that either in whole or in lots as they may deem most expedient with the view of obtaining the highest price for the same, and to grant all necessary conveyances. And then follow the purposes which are to be inserted in the trust-deed. The first purpose is the payment of the expenses of the trust and of disentailing the said lands and others. That is to be paid out of the proceeds of the sale of the lands conveyed, and not out of the annual income arising from the trust estate, the said Charles Gordon or the heir succeeding in the event of his death being entitled to the whole annual income arising from the said trust estate. The second purpose is that the capital of the price or prices obtained from the said disentailed lands and others shall be laid out in the payment of the capital of debts affecting the entailed estate, if any there be, but not in payment of the provisions to wives or children, which in terms of the entail must be paid out of the rents. And the third purpose is—"The said price or prices shall be applied in the purchase of lands lying as nearly contiguous as can be got to the lands and estate of Fyvie, and judged to be a valuable addition to the entailed estate, and the said lands when purchased shall be conveyed by the said trustees to the heir of entail in possession of the estate of Fyvie at the time, and to the heirs succeeding to the entailed estate under the destination, and with and under the whole provisions and conditions of the foresaid deed of entail"—that is, the deed of 1811. And then it is provided farther, that until a proper opportunity for in-

vesting the money shall be got, it may be invested otherwise. Now, that is the substance of the contract made between Charles Gordon and his three sons, and I need hardly say that it was not only an onerous contract, but it was also a contract entered into between the three next heirs of entail as representing not themselves merely but the whole series of heirs of tailzie. There was undoubtedly a *jus quæsitum* under this contract to every heir of entail in the destination of the original entail of Fyvie.

Well, the trust was executed precisely in terms of this contract, and the trustees entered into possession, and nothing was done under the trust except I presume paying the income of the trust estate to the heir in possession of Fyvie for the time, till the present pursuer succeeded to Fyvie as heir of entail in 1884; and he took a somewhat different view from his predecessor Mr Charles Gordon, for instead of trying to consolidate and improve the entailed estate he disentailed Fyvie itself, and the consequence is that he is now fee-simple proprietor of the estate of Fyvie. He brings this action in two characters—in the first place as heir-at-law of Charles Gordon, the maker of the trust-deed, and in the second place as proprietor of the estate of Fyvie —not as heir of entail in possession of Fyvie, for of that character he has dispossessed himself. As heir-at-law he asks to have it declared that the trust has lapsed and come to an end altogether, and that in consequence of the disentail of Fyvie by himself no one has any right now under the trust-deed, and the trust estate belongs to the heir-at-law of the maker of the trust. Now, it seems to me that the assumption of that character by the pursuer is quite out of the question. No doubt he may be *de facto* heir-at-law of Charles Gordon, but that in that character he can interfere with this trust or the estate held by the trustees is I think entirely out of the question. It is enough to say that this trust was onerous, and that the trustees hold for certain definite objects and purposes which can perfectly well be carried into execution. But in point of fact, although the trust had been gratuitous, it does not appear to me, as the Lord Ordinary has observed, that that would make the position of the pursuer any better, because Mr Charles Gordon's position after he had executed the trust-deed of 1849 was certainly not that he was fee-simple proprietor of the estate of Maryculter. He had effectually put off that character by the execution of the trust, and reduced himself to the position of a beneficiary under that trust as regarded the trust-estate. He could have made himself fee-simple proprietor of the estate of Maryculter no doubt, but he did not do it, and what is more, he could not do it, for he was bound by contract not to do so. He was bound by contract to constitute himself a beneficiary under that trust, and nothing else. Now, the present pursuer may if he pleases deal with this trust-estate. He may be entitled as heir of Charles Gordon, and he is entitled as heir of entail, to take benefit under that trust, because he is one of the heirs of entail of Fyvie, and as such he is an heir under the trust-deed. But he cannot use his character as heir-at-law of Charles Gordon for the purpose of defeating or setting aside that trust-deed, or preventing its operation and effect. All that is perfectly clear I think, and therefore the first conclusion of the summons may be put out of view altogether, for it is only in the character of heir-at-law that he seeks to maintain that conclusion. But then he contends further under his alternative conclusion, in the first place, that he is entitled to have the estate of Maryculter sold, and the price applied to what may be called the primary purpose of the trust —that is to say, to paying off the debt on the estate of Fyvie. Now, there also I think his contention cannot be sustained. The plain object of that provision of the trust-deed is to benefit the whole heirs in the destination of the tailzie of 1811, and not to benefit anyone of them as an individual, or anyone of them to the exclusion of the other heirs of tailzie. If there had been no other purpose of the trust-deed except to pay off the debts on Fyvie, there might have been some ground for saying that the object of the trust had been frustrated, and therefore it could not be carried into execution. But that is not the only purpose, nor is it the main purpose. The truster does not contemplate as a certainty that there will be any debt on Fyvie to pay off, and accordingly that purpose of the trust is qualified by the words "if any debt there be," and if there is no debt on Fyvie, or if it becomes unnecessary to pay off the debt on Fyvie, then the next purpose of the trust comes into operation, and the whole price of Maryculter is to be applied to the purchase of lands to be entailed on the series of heirs called in the deed of 1811. But the pursuer contends that the words of the third purpose, which is really the primary purpose of the deed, are such that the first end of the money to be realised by the sale of Maryculter must be applied to pay off the debt on Fyvie, if there any be, and he shows, or at least he attempts to show, that there is somewhere about £20,000 of debt burdening Fyvie.

Now, the effect of that of course would be to benefit the pursuer alone, and I agree with the Lord Ordinary in thinking that that, instead of carrying out the directions of the trust-deed, would be to defeat the provisions of the trust-deed. It would be in direct contravention of the declared purpose and intention of the truster, and in direct contravention of the contract upon which that trust-deed proceeds, because both the contract and the trust-deed destine this money to pay off debts which affect the whole series of heirs called under the entail of 1811, and to apply that to pay off debt upon an estate which belongs to the pursuer in fee-simple is just to do a thing entirely different from that which was in the contemplation of all the parties. I am therefore of opinion that that purpose of the trust-deed cannot be carried into effect consistently with the plain intention and object of the deed itself. But then there is nothing to prevent the other purpose being carried out, and which in one sense is the main purpose of the trust. The great object of the truster would have been to invest the whole price of Maryculter, if possible, in the purchase of other lands to be settled upon the heirs called by the deed of 1811. He intended that to be the case if there was no debt on Fyvie. If the debt on Fyvie had been otherwise provided for that would have been the effect of it, and now that the debt on Fyvie cannot be paid off to the effect to which alone it was intended to be paid off, there results just the

same conclusion that the whole of the price of Maryculter is to be applied in the purchase of lands to be entailed. There is no difficulty about doing that. There may be difficulty in finding a proper subject, but in the circumstances in which the trust is now placed, and in which the heirs of entail are placed, by reason of the disentail of Fyvie, probably the main intention and purpose of the truster might be quite well carried into execution by re-entailing Maryculter if no more suitable lands can be had. But whichever way that purpose of the trust-deed may be carried into execution, it must be done to the effect of settling lands in strict tailzie upon the heirs called in the destination of the deed of 1811. And therefore I agree with the Lord Ordinary in the conclusion at which he has arrived, assoilzieing the defender.

Lord Shand—I entirely concur in the opinion which your Lordship has expressed. The first conclusion of this action demands total denuding of the trust estate by the trustees in favour of the pursuer, and is rested, as your Lordship has observed, on his alleged character of heir-at-law of the truster. The ground upon which that claim is made is that the trust purposes have failed, and that as it is assumed the truster would have been entitled to a fee-simple conveyance of these lands, so the pursuer as his heir-at-law is entitled to such a conveyance. Now, in the first place, I think with the Lord Ordinary and with your Lordship that even if the trust-deed had been gratuitous on the part of the granter, yet he could not have succeeded in his present demand. It is quite true that as there is no longer an entailed estate of Fyvie to which the heirs nominated by the entail have right to succeed, there is no longer any purpose to be served by buying lands in the neighbourhood of that estate, such as the trust-deed contemplated; and that for the same reason the direction to relieve the estate of Fyvie of its encumbrances has failed. But looking beyond the special directions of the deed it is plain that the purpose of the trust which the deed sufficiently expresses is to benefit the heirs who would take under the entail of Fyvie by securing to them other lands which should be entailed in their favour; and as such heirs still exist, and the deed was delivered to trustees for the purpose of executing that purpose, I see no reason to doubt that the general trust purpose admits of being carried out either by a re-entail of the lands which the trustees now hold, or by the substitution of other lands to be purchased and entailed. By the execution and delivery of the deed to the trustees, and its being recorded in the register of sasines, the heirs designated acquired a *jus quæsitum* to have the general purpose of the trust carried out by entailing an estate in their favour, and the inability of the trustees to fulfil this purpose in the particular way directed will not destroy the trust. I take it that even if the truster had been the absolute proprietor of the estate of Maryculter which he conveyed, and it had been held by him without any condition as to how he should use it, even in that case, in the circumstances which have occurred, the defenders would be entitled to resist the pursuer's demand.

But this part of the case becomes absolutely plain when we consider the conditious under which the truster held the estate which he conveyed. The case is not one of a truster holding lands of his own in fee-simple and which he can therefore dispose of as he pleases. That was not the testator's position. The estate was not his to deal with as he pleased. He acquired it in fee-simple subject to conditions. Four different parties contributed to put the estate under the trust—the heir in possession and the three heirs whose consents were required to the disentail. Each of these parties had a right more or less valuable in this estate. It was therefore not the right only of the heir in possession, but the joint rights of the four parties taken together, in the estate which became vested in the truster subject to the condition of his executing the trust-deed. Although he was in form the truster to convey the property to the trustees with the power of dealing with it, in substance he was only one of the four parties who created the trust, which was in truth created by the heirs of entail for their own behoof. In that aspect of the case it results that if for any reason the trust should fail in its more immediate object there can be no possible ground on which the truster as one of these parties or his heir-at-law should take the benefit of the lapsing of the trust by appropriating to himself an estate which never belonged to him, but which he acquired under conditions from others who had important and valuable rights over it. Looking at this conclusion of the summons in that view of the rights of parties the Court is bound to see if it be not possible to carry out the general intention of this trust-deed, which is to benefit the heirs who would succeed to Fyvie. I think, as your Lordship does, that there is no difficulty in carrying out that purpose. The truster and the three persons who consented to the estate being disentailed and put under trust conveyed it for the purpose of benefiting the heirs of entail who were entitled to succeed to Fyvie, and although Fyvie itself has been disentailed, the heirs who would have succeeded to it have obtained a valuable right under an onerous deed, and I see no difficulty in making that right available either by the execution of an entail of Maryculter or by the purchase of other lands to be entailed. And so I think the action on the first branch of it, rested on the pursuer's character as heir-at-law, entirely fails. I observe that the first plea-in-law which deals with this conclusion sets out that the pursuer not only in his character as heir-at-law, but "also as the person who would have been heir in possession of Fyvie under the entail thereof, is entitled to have decree of declarator and denuding in terms of the first alternative conclusions." But there can be no possible ground on which the pursuer, who would have been heir in possession of Fyvie, shall have a denuding of this estate so as to acquire it in fee-simple on the ground that he has already become fee-simple proprietor of Fyvie. Because of his being the person who would have been heir in possession of Fyvie he can have no right to acquire additional estate in fee-simple, for the direction in the trust-deed in his favour is to entail estate. Accordingly, as it appears to me, the result on this part of the case is really to give effect to the few words with which the conclusion of the summons ends under branch second, after the words "*quoad ultra*" [*vide supra*, p. 674]. My opinion is that the said estate "is held by Patrick Henderson

Chalmers and Sir Maurice Duff Gordon as trustees foresaid in trust" (striking out "for the pursuer and his heirs and assignees") "for the pursuer and the series of heirs who would have succeeded after him to the lands and estate of Fyvie under the disposition and deed of entail thereof granted by the deceased General William Gordon of Fyvie in 1811."

The other question that remains is, whether the claim on the part of the pursuer, who has disentailed Fyvie and acquired it in fee-simple, to have the debts or burdens upon that estate paid out of the trust estate, can be maintained? The trust-deed which empowered the trustees to sell the lands of Maryculter for the purpose of paying debts and for the purchase of lands to be entailed is dated in 1850, and it might have been carried out to the effect of the trustees selling these lands and purchasing other lands and entailing them before the debts now proposed to be charged had been constituted. But the existing state of matters is explained by the pursuer himself in condescendence 6, where he states that "no suitable opportunity of acquiring land contiguous to the estate of Fyvie having occurred, the said lands of Maryculter and others were not sold, and they are now vested in the defenders Patrick Henderson Chalmers and Sir Maurice Duff Gordon as sole surviving assumed trustees." There is no charge against the trustees that there has been any failure in the due administration. On the contrary, it is explained by the pursuer himself that the delay is to be accounted for by the fact that no suitable opportunity for acquiring lands had occurred, and so the trustees had not thought it expedient to sell Maryculter. Now, the purpose of the truster was to disburden Fyvie for the benefit of the heirs of entail entitled to succeed to Fyvie. But the proposal now is that the estate of Fyvie shall be disburdened of its debt, not to the benefit of the heirs of entail, but to their detriment, and entirely to the benefit of the pursuer himself—that is, that the pursuer shall put the money into his own pocket as an individual. It may be quite true—I think there is a good deal to be said for it—that if the pursuer before disentailing the estate of Fyvie had called upon the trustees to realise Maryculter and to proceed to fulfil the purpose of the trust by disburdening Fyvie, he might have succeeded in an action to that effect, and Maryculter having been sold, he might have had the estate of Fyvie disburdened and then have been able, after a disentail under the authority of the Court, to sell it—if he desired to sell it—free of the debt which is now an encumbrance upon it. But that course was not followed, and it is not necessary, and perhaps we have not before us the elements to enable us to decide what would have been the result in the case of that course having been followed. That course not having been taken, and the pursuer now being in possession of Fyvie, not as an entailed estate, but as an estate entirely his own, it appears to me that all title on his part to make a claim of this kind is gone. His title must arise from the provisions of the trust-deed embodying the contract between the parties. The trust-deed, no doubt, provided for the payment of the debts, if any, affecting the entailed estate of Fyvie—but the purpose in view was to disburden Fyvie only for the benefit of the heirs of entail, who were, indeed, as I have explained, the granters of the trust. It is of the essence of the direction that the estate was entailed, and that consequently the debts should be paid off to the benefit of the heirs of entail, and the claim for payment of debts must be made by an heir of entail. That can no longer be done. The payment cannot be made for the benefit of the heirs of entail, and it appears to me, therefore, that the right and title of the pursuer to ask that these debts shall now be provided for in the way proposed is entirely gone. Upon that ground I agree with your Lordship in thinking that we should grant absolvitor to the defenders from the second conclusion of the summons, and on the whole matter I think we should adhere to the judgment of the Lord Ordinary.

Lord Adam—I am of opinion that under the agreement of 1849 and the relative trust-deed the heirs of entail of Fyvie acquired a *jus quæsitum* that these trusts should be carried out. If that be so, it appears to me, as your Lordship stated in the case of *Dunmore*, that even the contracting parties could not afterwards defeat that *jus quæsitum*, and that seems to me to go a long way to solve this case. The third purpose directs that the estate of Maryculter should be sold, and after paying the debts affecting the entailed estate of Fyvie what remained over should be expended in the purchase of another estate near Fyvie, to be entailed on the same heirs of entail. Now, it appears to me that it was out of the power of the heir of entail of Fyvie, the present petitioner, to defeat the *jus quæsitum* which the other heirs of entail had acquired by disentailing the estate of Fyvie. If that be so, it follows that the third purpose of the trust has not failed, and that therefore he must fail in the first conclusion of this action. I agree with your Lordship that in the altered circumstances of this case it may not be necessary to carry out that third purpose in its terms. It may be that none of the heirs of entail have any interest in insisting on the sale of Maryculter and other lands being bought; and it may be that the general intention and purpose of the truster will be carried out if the estate of Maryculter is now re-entailed. I think that may very well be done in the circumstances. The only other question is, whether the trustees, upon the demand of the present pursuer, are now bound to sell Maryculter, and to apply part of the price in paying off the debts which affected the estate of Fyvie before it was disentailed? The trust-deed is dated in 1850, and the first of the debts affecting Fyvie was incurred I believe in 1860, and they went on from 1860 to 1883. Now, if the demand had been made by the heir of entail in possession of Fyvie in 1860, or at any time after that—after the Maryculter trust had existed for upwards of ten years—I should have doubted very much whether there would have been any good defence to an action or demand upon the trustees to sell the estate and pay off the debt on Fyvie, the result of which would have been to have put that amount into the pocket of the present pursuer. I do not think it would have been a good answer to that demand to say, "We have not been able to find a suitable estate near Fyvie to invest the money in, and therefore it has not been sold." It appears to me that the necessity of selling Maryculter is not contingent on being able to find a suitable estate to pur-

chase. I agree with your Lordship that the only person entitled to insist on making this demand is an heir of entail, and the present pursuer not now possessing that character, but coming in a totally different character and demanding this money to put in his own pocket, I do not think he is entitled to succeed.

Lord Mure, who was absent when the case was heard, gave no opinion.

The Court adhered.

Counsel for Pursuers—D.-F. Mackintosh, Q.C. —Pearson — Ferguson. Agents—Auld & Macdonald, W.S.

Counsel for Trustees and Defenders—Comrie Thomson—Lorimer—Moody Stuart. Agents—S. Greig, W.S., and J. P. Bannerman, W.S.

Friday, June 11.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

DONALDSON *v.* TAINSH'S TRUSTEES.

Succession—Husband and Wife—Jus relictæ—*Election of Testamentary Provisions.*

After the death of a testator his widow attended a meeting of the trustees to which she had been called, and signed a minute of the meeting bearing that after the whole circumstances had been explained to her she "expressed herself as desirous of carrying out the wishes of her late husband as expressed in his settlement," and in token of her approval she signed the minute. She had at the time no separate legal advice. Thereafter for four years she continued to receive the testamentary provisions without objection, and at the end of that time raised an action of count and reckoning with the object of taking her *jus relictæ*. *Held* (*rev.* judgment Lord Kinnear, *dub.* Lord Rutherfurd Clark) that she was not barred from claiming an accounting in virtue of and in accordance with her legal rights.

William Tainsh, grocer, Greenock, died on the 11th December 1881. He left a widow and four children, one of whom died shortly after him. He left a holograph trust-disposition and settlement dated 31st January 1880, by which he appointed the Rev. A. Davidson, E.U. minister, Greenock, and his brother John Tainsh, grocer, to be his trustees and executors. By this settlement he bequeathed to his wife for her own behalf and that of the children "the entire sum of money at credit of my private account in the firm of Robert Lusk & Co., wholesale grocers, Greenock," directing the trustees to invest it as they should see fit, the interest of such investment to be paid over to his widow at such time as she might require it, but no part of the capital was to be paid unless under such circumstances that the trustees considered it absolutely necessary. In the event of his widow's death or marriage the interest was to go in equal proportions to each of his surviving children, so long as they remained unmarried, when in such case they were each to receive £50 as a gift. His wife was also to receive a gift of £10. After mentioning one or two other small legacies, he directed that the residue was to be equally divided among the various schemes and funds of the Evangelical Union. Besides the estate dealt with in this trust settlement, Mr Tainsh left a small amount of other moveable property, of which his executor came into possession. The whole estate was moveable property.

On 28th March 1882 a meeting of the trustees was held at Greenock in the office of Mr Dunlop, the law-agent of the trust, at which Mrs Tainsh was present. She had been by letter invited to attend a meeting of the trust to be held for the purpose of assuming an additional trustee, "thereafter a statement of how matters stand with the trust will be laid before you." She signed a minute, of which the following is the part material to this case:—[*After narrating the assumption of the new trustee*]—"The factor [John Tainsh] reported that he had received payment of the deceased's interest in the firm of R. Lusk & Co. and the other assets of the estate, and had deposited in name of himself and Mr Davidson as trustees the sum of £1147, 18s. 7d., in the Royal Bank's branch, West Blackhall Street. In the Provident Bank there is in name of the trustees the sum of £7, 9s. 11d. He stated that he had in hand the £21, 9s. paid today by the Prudential Assurance Company. The factor submitted a statement showing the above balances in cash and on hand. Mrs Tainsh, who was in attendance, having been called in, the position of the estate was shown to her, and the law-agents read over the settlement and explained the rights of Mrs Tainsh and the children under it, and also their rights at common law. Mrs Tainsh expressed herself as desirous of carrying out the wishes of her late husband as expressed in his settlement, and in token of her approval and concurrence she subscribes this minute." Thereafter the interest of the estate was paid to her for the support of herself and her three children, until the beginning of 1883, when she married John Donaldson, clothier, Glasgow. The interest of the invested sums of money continued to be paid to her, but for the use of her children, by a weekly allowance, the receipts for which were signed by Mrs Donaldson. The form of receipt was as follows:—"Received . . . the sum of sixteen shillings and sixpence sterling, being weekly proportion of interest which said estate yields, and paid to me for behoof of said William Tainsh's children.—Mrs John Donaldson."

Both before and after the second marriage the widow made various requests to the trustees for assistance. One of these applications, which was made through a solicitor in 1882, she, in applying for it, referred to the power of the trustees under the will to draw on the principal if they should think it indispensable, and representing that it was necessary to do so.

The trustees also, in January 1884, advanced £12 to her on account of the children's interest in the estate for the purpose of paying a half-year's rent and taxes on the house in which she lived.

In May 1885 Mrs Donaldson intimated that she claimed her legal rights, and on 28th September 1885 raised an action of count, reckoning, and payment against Tainsh's trustees, concluding for an accounting for her *jus relictæ* and payment of