the contrary in the titles, I am of opinion that the roof above the petitioners' property must be considered their several property, and not the joint property of themselves and the respondents.

It appears from the titles that the respondent Geddes, who is proprietor of one-half of the upper storey, is bound in all time coming to maintain and uphold one-half of the roof of the tenement, that the appellants are bound to uphold and keep in repair a proportional part of the roof of the tenement of which their property is a part, and that the respondent Yule is also bound to support and uphold the roof of the tenement proportionally with the other proprietors.

It is clear that as regards the matter of upkeep and maintenance the roof is treated in the titles as a *unum quid*, and it is made matter of admission that the expense of keeping the roof in repair has been borne by the proprietors of the tenement generally.

This obligation to keep up and maintain the roof does not seem to me to imply that the roof is treated in the titles as common property, because in that case it would have been unnecessary to insert this obligation, that being the legal result; but if each of the proprietors had a several right of property in the roof, then it was necessary, because each in that case would only have been bound to keep up his own part of the roof. But it does not appear to me to follow, because the proprietors have agreed for their mutual convenience that the roof should be kept up and repaired at their joint expense, that each proprietor should be held to have given up in other respects his individual right of property in the part of the roof which otherwise would have belonged to him. I think, therefore, that there is nothing in the titles inconsistent with the petitioners being the proprietors of that part of the roof covering their property.

But the respondents say that they are entitled to oppose the proposed alterations on the roof because the effect would be to increase the burden imposed upon them of maintaining the roof. I am not satisfied that that is so either in law or in fact. The Dean of Guild has reported generally that the burden would be increased, but he has not told us how or to what extent it would be so. Had it been necessary to consider this objection on the merits I should not have been prepared to act on the Dean of Guild's report without farther information, because the question is one of degree. A slight or unsubstantial increase of the burden might not have availed the objectors, and I cannot help thinking that the increased burden, if any, in this case would have been of a shadowy description, but however that may be, I think the objection is not relevant.

If the effect of the petitioners' alterations be to increase the cost of maintaining the roof, it does not follow that such increased cost will fall upon the objectors. It may very well be that it will fall on the petitioners themselves. But the operations are entirely *in suo*, and I do not think they can be prevented from improving their property merely because of the obligation of joint maintenance of the roof.

LORD M'LAREN concurred.

LORD KINNEAR was absent.

The Court pronounced this interlocutor—

"Recal the interlocutor of the Dean of Guild: Find that the petitioners are entitled to a warrant to construct a storm window as craved, provided it can be constructed so as not to encroach on any part of the roof which does not cover their own garret: Find no expenses due to or by either party in the Dean of Guild Court: Find the appellants entitled to expenses in this Court, and remit," &c.

Counsel for the Petitioners—Guthrie—Chree. Agents—John C. Brodie & Sons, W.S.

Counsel for the Respondents—W. Campbell — Clyde. Agents — J. & A. Hastie, Solicitors.

Wednesday, December 1.

SECOND DIVISION.

[Lord Pearson, Ordinary.

DALGLEISH *v.* RUDD.

Entail—Direction to Entail—Evacuation by Conveyance in Fee-Simple—Whether Contingent Burden on Heirs-Substitute Effectual against Institute to whom Estate has been Conveyed in Fee-Simple.

A testator by his trust-disposition and settlement directed his trustees to execute a strict entail of certain lands in favour of J, his oldest son, and the heirs of his body, whom failing to L, his second son, and the heirs of his body, whom failing to M, his only daughter, and the heirs of her body, whom failing to certain other persons. He further directed that the deed of entail should contain a provision in the form of a real burden that in the event of the failure of M and the heirs of her body, "the heirs succeeding to them or called after them, and the said lands and others, shall be burdened with the payment of £5000" to Mrs R., his sister, and failing her to her children and their descendants equally *per stirpes*.

The institute called in the proposed entail having obtained a decree in terms of the Entail Acts authorising the trustees to convey the said lands to him in fee-simple, and the disposition having been executed in terms of the decree, *held* (*rev.* judgment of Lord Pearson, Ordinary) that the above-mentioned provision had lapsed and was no longer prestable.

By trust-disposition and settlement dated 29th March 1862, and codicil dated 16th

March 1870, James Dalgleish directed his trustees to settle and secure his lands of Ardnamurchan and certain other lands "according to the strictest form of a disposition and deed of entail permitted and authorised by law at the time . . . upon and expede titles thereon in the person of the said John James Dalgleish, my eldest son, and the heirs of his body, whom failing the said Laurence Dalgleish, my second son, and the heirs of his body, whom failing any other son or sons to be procreated of my body, and the heirs of their body, whom failing to Mary Wellwood Dalgleish, my only daughter, and the heirs of her body, whom failing to any other daughter or daughters to be procreated of my body, and the heirs of their body, . . . whom failing to such other person or persons as I may name and appoint by any writing under my hand, whom failing to my own nearest heirs and assignees whomsoever, the eldest heir-female and the descendants of her body excluding heirs-portioners, and succeeding always without division, which deed of settlement or disposition and deed of entail shall be granted under the real burden of any annuities hereby granted existing at the time, and shall farther contain a provision in the form of a real burden that in the event of the failure of the said Mary Wellwood Dalgleish and the heirs of her body, the heirs succeeding to them or called after them and the said lands and others shall be burdened with the payment of £5000 sterling to Mrs Christian Dalgleish or Rymer, my sister, and failing her to her children and their descendants equally *per stirpes* and not *per capita*, with interest thereon from the first term of Whitsunday or Martinmas after the succession shall open to such heirs." The truster further directed that the entail should be executed not later than Martinmas 1880, and that three-fourth parts of his debts and provisions as might then be prestable should be created real burdens on the lands entailed.

On 30th September 1870 the truster died leaving no other sons or daughters besides those named in the trust-deed, and without having exercised the reserved power of naming other heirs.

The trustees entered on the management of the trust-estate. With the consent of the institute and the substitute heirs called in the proposed entail the trustees delayed the execution of the deed of entail after Martinmas 1880.

On 20th July 1883 John James Dalgleish, the institute called in the proposed entail, applied to the Lord Ordinary on the Bills in terms of the Entail Acts for authority to the trustees to convey the lands of Ardnamurchan to him in fee-simple. By decree dated 21st April 1884 the trustees were authorised by the Court to do so under the real burden of the provisions specified in the schedule of debts lodged in the petition. The schedule contained amongst others the provision of £5000 in favour of Mrs Rymer and her descendants, which was described therein and in the decree of Court substantially in the terms of the truster's settlement. Thereafter by disposition dated 11th and 12th and recorded 23rd February 1885 the trustees conveyed the lands of Ardnamurchan to the pursuer and his heirs and assignees. The disposition contained no reference to the provision of £5000.

The lands mentioned in the trust-deed other than Ardnamurchan were not included in the petition for disentail. They were entailed by the trustees under burden of, *inter alia*, the provision for £5000 above mentioned, but they were not of sufficient value to secure that amount.

In 1892 Mary Dalgleish died without issue.

In 1896 John James Dalgleish sold the estate of Ardnamurchan to Charles Dunnell Rudd. The purchaser's agents took exception to the seller's infeftment as not being in conformity with the decree in the petition for disentail, which was his only warrant for holding the land in fee-simple. Accordingly the surviving trustee of the testator executed a supplementary disposition dated 11th and recorded 14th May 1896 of the lands of Ardnamurchan in favour of John James Dalgleish and his heirs and assignees whomsoever, which disposition contained a declaration as to the £5000 provision in terms of the decree in the petition for disentail.

In these circumstances John James Dalgleish raised an action of declarator that whereas by his trust-disposition the testator had directed his trustees to execute an entail of his lands of Ardnamurchan and others in the terms above set forth: "And whereas by decree of our said Lords, of date 21st April 1884, in an application by the said John James Dalgleish, our said Lords granted warrant and authority to, and decerned and ordained, the trustees acting under the said trust-disposition and settlement and codicil of the said deceased James Dalgleish to convey and make over to the said John James Dalgleish, his heirs and assignees in fee-simple, the said lands and estate of Ardnamurchan under burden as mentioned in the said decree, and whereas the said trustees have conveyed and made over the said lands and estate to the said John James Dalgleish, his heirs and assignees in fee-simple, under burden as aforesaid, and the said John James Dalgleish has sold and conveyed and made over the said lands and estate to the defender Charles Dunnell Rudd, and now seeing that the said disposition and deed of entail of the said lands and estate of Ardnamurchan . . . has not been executed, and cannot now be executed, and that the destination of the said lands and estate of Ardnamurchan in favour of certain heirs of entail directed by the said trust-disposition and settlement and codicil to be therein inserted, has been abrogated and cannot now take effect, and that the condition under which the heirs succeeding to the said lands and estate and the said lands and estate were to be burdened with the payment of the said sum of £5000 to Mrs Christian Dalgleish or Rymer, and failing her to her children and descend-

ants *per stirpes*, can never be purified, Therefore the said provision out of the said lands and estate of Ardnamurchan has lapsed and is no longer prestable, and is not exigible from and cannot become a charge or burden upon the said lands and estate, but the said lands and estate are effectually disburdened thereof for ever, and the defender, the said Charles Dunnell Rudd, as the purchaser of the said lands and estate from the pursuer, and proprietor thereof, and his heirs and successors in the same, are free of all liability in respect of the said provision, or in respect of the procedure which has led to the release of the said lands and estate from any burden, immediate or contingent, in respect of the same."

The only heirs of entail at the date of raising the action were the pursuer, his son James Patrick Dalgleish, a minor, and Laurence Dalgleish, the pursuer's brother. The defenders called were Mr Rudd, the descendants of Mrs Rymer, who was dead, James Patrick Dalgleish, Laurence Dalgleish, and the surviving trustee.

The defences in the action were lodged by (1) Mr Rudd, and (2) the descendants of Mrs Rymer. In the course of the proceedings a *curator ad litem* was appointed to James Patrick Dalgleish.

On 10th June 1897 the Lord Ordinary (PEARSON) pronounced the following interlocutor:—"Assoilzies the defenders from the conclusions of the summons, and decerns," &c.

Note.—[*After a statement of the facts*]—"No question is raised here—and I offer no opinion—as to whether from a conveyancing point of view the real burden has been effectually imposed on the lands by this series of deeds. All parties have assumed that it has, and the question now raised is, whether for other reasons the provision 'has lapsed and is no longer prestable, and is not exigible from, and cannot become a charge or burden upon the said lands.'

"It is the disentail proceedings (as they virtually were) which furnished the pursuer with his argument in support of this proposition. The steps of the argument, as disclosed in the conclusions of the summons, are these—(1) the entail cannot be executed, (2) the tailzied destination has been abrogated and cannot now take effect, and (3) the condition under which the heirs succeeding to the lands, and the lands themselves, were to be burdened with payment of the provision, can never be purified.

"Now, the event on which the real burden is expressly conditioned is 'the event of the failure of the said Mary Wellwood Dalgleish and the heirs of her body.' But this event has already happened, for Mary died in 1892 without heirs of her body. Accordingly, it was maintained for the pursuer, in the first place, that the expression 'the failure of Mary and the heirs of her body' does not mean their failure at any time, but their failure after succeeding to the estate, and this cannot now happen seeing they have failed before succeeding. This argument arises quite apart from the disentail. If valid at all it would have been valid under the entail, in the event of the *stirps* of Mary Wellwood Dalgleish becoming extinct during the lifetime of a prior heir, and it would have operated to relieve the estate of the provision in that event, even if the succession had subsequently opened to a second daughter of the entailer. As thus stated, the argument seems to me plainly untenable. I see no ground for attributing so non-natural a meaning to plain words.

"I therefore take it that the pursuer's true ground is, that by reason of the disentail proceedings and what has followed thereon, the class of heirs which was to be burdened with the provision, and during whose occupancy the lands were to be burdened, can no longer come into existence. In other words (as it is put in the pursuer's third plea), the pursuer having evacuated the tailzied destination, the real burden, which was conditional on the succession opening to certain substitutes in the destination so evacuated, has become void and incapable of ever receiving effect.

"It is said that this follows from the terms in which the provision itself is conceived, and in which the debtors are described. The debtors are to be 'the heirs succeeding to them (*i.e.*, to Mary and the heirs of her body) or called after them, and the said lands and others,' and interest is to run on the provision from the first term 'after the succession shall open to such heirs.' Thus the debtors are described in terms which assume the subsistence of the tailzied destination. And the *terminus a quo* for the running of interest on the provision is to depend on an event which cannot now happen, namely, the opening of the succession 'to such heirs.'

"So far as regards the personal obligation for payment under which the entailer sought to lay his remoter heirs of entail this argument may be well founded. It may be that those persons are not to be liable to make good the capital of the provision, or keep down the interest, otherwise than as being heirs of entail in possession for the time. But the lands themselves are to be burdened with the provision. It may be open to question, owing to the terms used as to the running of interest, whether anything but the capital of the provision will be exigible under the real right. But I regard the real burden on the lands as being the substance of the provision, and it is not, in my opinion, so linked with the personal liability that they must stand or fall together. The creditors were to have the security of a certain series of heirs, and of the lands themselves; they may lose the one without losing the other.

"It may be objected that this virtually results in the institute having to make good the provision, notwithstanding the intention of the entailer that it should not be prestable until a later stage of the destination. But this is not so. If the estate is sold subject to the real burden, he will have to allow from the price only the present value of the postponed and contingent debt. Or if the matter is worked out (as it has been provisionally) by invest-

ing the full sum of £5000, that is really a surrogatum for an equivalent part of the lands sold, and the pursuer's rights in it and in the income accruing from it are precisely of the same extent and quality as his rights in the land. All he is asked to do is to provide for a contingent debt created by the entailer in favour of persons who are strangers to the entail, and whose position (so far as I can see) is indistinguishable from that of outside creditors. This duty was imposed upon the trustees by the Court as a condition of their obtaining power to convey the estate in fee-simple to the pursuer, and the present difficulty has arisen through disregard of that condition.

"The defenders plead that the action ought to be dismissed (1) as being premature, and (2) as being an incompetent mode of getting behind and reforming the decree of Court pronounced in the petition. On the whole, I think that all interests are sufficiently represented to warrant a decision on the merits, while as to the decree, it will be observed upon an examination of its terms that the condition as to the real burden of £5000 is inserted in the very words used by the entailer, and in this view what I am now asked to do is rather to construe the decree than to reform it. It is further contended that the pursuer is barred from founding on his own act of altering the destination, as relieving the estate of a burden to which it would otherwise be subject. It appears to me, however, that this depends upon the same considerations as the merits of the action. The pursuer has availed himself of his statutory privilege, and he is entitled to the benefit of all the legal consequences which flow from the exercise of that privilege."

The pursuer reclaimed, and argued —He had executed his statutory rights to prevent the entail being constituted as far as the estate of Ardnamurchan was concerned. There being now no possibility of these lands being entailed, it followed that the class of heirs which was to be burdened with the provision, and during whose occupancy the lands were to be burdened could never come into existence. The provision inserted in the decree following upon the disentail petition must be taken *quantum valeat*, in the same way as the provision in the trust-deed. It was for the Court to determine *quantum valeat*. The real burden was contingent on the personal obligation, and there could now be no personal obligation. If it was decided that the real burden subsisted, it might not become exigible for an indefinite time, and the law would not favour such a proposal. The provision of £5000 was a condition of the entail, and had fallen when the entail was evacuated — *Schank* v. *Schank*, July 2, 1895, 22 R. 845.

Argued for the defenders, the descendants of Mrs Rymer—The act of disentail had not discharged the real burden. It had taken away the possibility of any person succeeding to the lands who was liable personally. But the real burden still remained on the lands, and the disentail had been granted on condition of this burden being provided for. The only competent mode of settling the matter was for the pursuer to invest £5000 in trust until it could be definitely settled that the contingency contemplated by the trust-deed would not arise. — *Baroness Gray*, July 14, 1870, 8 Macph. 990.

Lord Young — This case relates to a provision in the trust-disposition and settlement of the late Mr Dalgleish, who purchased the estate of Ardnamurchan, and died a good many years ago. By that trust-disposition he directed his testamentary trustees to settle and secure the lands and estate of Ardnamurchan and others according to the strictest form of a disposition and deed of entail permitted or authorised by the law at the time—"which deed of settlement or disposition and deed of entail shall be granted under the real burden of any annuities hereby granted existing at the time." I pause here to remark that by this same deed he provided that three-fourths of his debts so far as unpaid, and the family provisions so far as unsatisfied at the time when the entail was executed, should be made real burdens upon the lands. I refer to that only to observe that an entail is executed of lands burdened with debts, but that debts and burdens upon lands are not provisions of an entail.

The deed, after specifying the heirs in whose favour the strict entail is to be executed—(1) his eldest son and his heirs, (2) his second son and his heirs, (3) any other sons that he might have (he had only two at the date of the deed, and never had any more), (4) his only daughter Mary and her heirs, (5) any other daughters which he might have (he never had any other)—contains this direction, "that in the event of the failure of the said Mary Wellwood Dalgleish" (*i.e.*, his daughter), "and the heirs of her body, the heirs succeeding to them or called after them, and the said lands and others, shall be burdened with the payment of £5000 sterling to Mrs Christian Dalgleish or Rymer, my sister, and failing her to her children and descendants equally *per stirpes*." That is the provision in the deed to which the conclusion of this action relates.

I may say at once that I regard it as a provision and condition of the entail. This was not a deed of entail, but it is a direction to execute one, and this is a provision or condition of the entail which he directed his trustees to execute. I point that out to distinguish it from the debts with which the estate was burdened—the annuities and three-fourths of the unpaid debts and family provisions which he declared should burden the lands. This provision, which has reference to a succession referred to possibly to take place under the entail, is a provision and condition of the entail. It is simply this, that if under the provisions and conditions of the entail the estate goes to an heir who is

called upon the failure of his daughter Mary and her heirs, that that heir so succeeding shall not take the estate, like his predecessors, unburdened, but shall take it subject to a burden upon himself and the lands in favour of the party named. Well, after the death of Mr Dalgleish a statute was passed enabling an heir-of-entail in possession, or a party who under the provisions of any settlement is entitled to have lands entailed upon him, to apply to have them disentailed if an entail has been executed, or to have a direction to execute it annulled and the estate conveyed to him in fee-simple. And the eldest son, the person directed to be made institute in the entail ordered by the truster to be executed, made application under that statute and got authority from the Court by decree that the trustees should not execute the entail, but should convey the estate to him in fee-simple, and that was done.

I only notice here an incident, that after they had done it, and after he had as proprietor in fee-simple sold the estate, it occurred to somebody—I think the agent for the purchaser—that the lands should be put under the burden of this £5000 provision, and another disposition was executed by the only survivor at that time of the trustees, making a new conveyance to him under the burden of this provision. And the purpose of the present action—that part of it which is the operative conclusion—is to have it found and declared that—[*His Lordship read the conclusion*].

Now, I pause here to notice that in the application to the Lord Ordinary on the Bills to order the trustees to convey the lands in fee-simple there was nothing considered or determined as to whether this burden now in question remained in operation or not. If there had been anything determined between contesting parties, then it would, of course, be binding until it was removed in regular form, but there was nothing of that kind determined. I think it clear that the question is now perfectly open to us, notwithstanding the form of these proceedings in course of which this provision was entered in a schedule along with the real burdens of the family provisions and annuities so far as not paid.

I have here, therefore, to consider, as the Lord Ordinary considered, whether the condition and burden upon the lands should remain such until it can be ascertained who is the person who would succeed or would have succeeded under the entail if it had subsisted after the failure of all the heirs up to Mary, the daughter, and the heirs of her body — whether it is to subsist until it is ascertained who that person would be, and who would therefore, had the entail subsisted and continued, have taken it, and taken it under this burden of £5000. Now, my opinion upon this question is so simple as this, that I think when an entail is set aside, every provision and condition of the entail is set aside with it, and falls with it, and this as a provision and condition of the entail cannot survive the entail. I do not know that one can put by way of illustration a clearer case than this is; but just let me suppose, if it be possible, that a party entails his lands with a great number of heirs called, intending to exhaust all those who exist, or may come into existence of his own race and lineage—his own blood—and then makes a provision that after they are exhausted—whenever they have all failed (and it may be centuries before they all fail) then the estate shall pass to another family—the family of the Scotts of Buccleuch, or the Sutherland family, or the Argyll family, or any you like—under this condition, that the heir who succeeds immediately upon the failure of all those of his own race and lineage shall not take the estate unburdened as those of his own race had done, but shall take it subject to a burden upon himself and upon the lands of paying over £100,000 to the University of Edinburgh or Aberdeen, or Dundee, or St Andrews. Could that provision survive the destruction of the entail so that the estate must remain under that burden? I think this is exactly the same case in principle, and just about as clear.

I am therefore of opinion that when this estate was conveyed to the eldest son in fee-simple, the entail being terminated, this, like any other condition or provision of the entail, terminated with the entail, and that it cannot possibly survive at all. That really disposes of the case, and therefore, in my opinion, the pursuer is entitled to decree in terms of the conclusions of the summons.

Lord Trayner—The late Mr Dalgleish directed his trustees to execute a deed of entail of his lands of Ardnamurchan and others in favour of a certain series of heirs, which deed he directed should contain a provision in the form of a real burden that in the event of the failure of his daughter Mary (who was the third heir *nominatim* called) and the heirs of her body, "the heirs succeeding to them or called after them, and the said lands and others," should be burdened with the payment of £5000 to his sister Mrs Rymer, and failing her to her children. No deed of entail of the lands of Ardnamurchan was ever executed, because the pursuer (who would have been the institute) took advantage of the provisions of the Entail Acts to call upon the trustees to dispone these lands to him in fee-simple, and this, under the authority of the Court, has been done. The question before us is, whether the lands of Ardnamurchan are or should be made subject to the real burden of payment to Mrs Rymer (or rather her children, for Mrs Rymer is now dead) of the foresaid provision of £5000.

It may be noted that it is not averred on the record that the event on which alone this provision was to come into existence has occurred. It is not averred that Mary Dalgleish and the children of her body have failed. The Lord Ordinary, however, mentions in his opinion that Mary died in 1892 without issue, and I take that to be the

fact, as the argument before us proceeded on the assumption that it was so. The Lord Ordinary has decided that on the failure of Mary and her issue the real burden fell to be imposed on the lands of Ardnamurchan, although payment of it could not be enforced until some heir called to the succession after Mary Dalgleish had succeeded to the lands. I cannot take that view. According to what I think to be the fair construction of Mr Dalgleish's settlement, the provision in question was only to come into existence, not on the failure of Mary and her children merely, but on the failure of all those who had been called to the succession before them. The purpose of the testator was to leave his lands to his sons and to his daughter Mary and their heirs respectively without any burden. As Mary could only succeed to the lands after the failure of her brothers and their heirs, the failure of Mary referred to as the event in which the real burden was to be imposed, involves the idea of the previous failure of the heirs called before her. It is said that the words "the heirs succeeding to them (*i.e.*, to Mary and her children) *or called after them*" show that the burden was to be imposed whether Mary ever succeeded or not. Probably that is so; but it does not follow that the burden was to be imposed on the lands while in the possession of some heir called before Mary. On the contrary, I think these words were intended to cover the case of Mary's failure resulting directly in the succession opening up to some remoter heir. In short, the testator seems to have contemplated making this provision for his sister and her children in the event of the lands passing away from his own children. Now, the action of the pursuer in the exercise of his statutory right has excluded the possibility of Mary ever succeeding (had she survived), and indeed excluded the possibility of heirs succeeding who were called to the succession before her. Accordingly, it appears to me that the event in which the burden was to be imposed cannot now occur. To give effect to the defender's contention would, in my opinion, be to impose on the pursuer the burden which was only to be imposed after his failure. The Lord Ordinary thinks this would not be so, because by investment of £5000, which would be held as a surrogatum for part of the lands, the heir's rights in such investment and in the income accruing from it, would be of the same quality and extent as his right in the land. But the pursuer's legal right under the statute was to have the lands as his own—in fee-simple—and if he gets only the income accruing from a part of the lands, or the surrogatum for that part, then he does not get the right either in quality or extent to which he is entitled.

I do not think that the interlocutors pronounced in his application to have the trustees authorised to convey the lands to him in fee-simple form any bar in the pursuer's way of suing this action. The question here raised was not raised, considered, or decided there.

I think, therefore, that the interlocutor of the Lord Ordinary should be recalled, and the pursuer found entitled to decree.

Lord Moncreiff—The defenders' pleas that the action is (1) incompetent, and (2) premature, are not in my opinion well founded. On the merits, having regard to the scheme of the eighth purpose of Mr James Dalgleish's settlement, I am of opinion that the personal obligation and the real burden of £5000, which it was his wish to create in favour of his sister Mrs Rymer and her children, must stand or fall together. Mr Dalgleish intended that a deed of strict entail should be executed by his trustees upon the series of heirs mentioned, and no doubt he contemplated that it would or might subsist until the heirs of the body of his daughter Mary were exhausted. In that event (which might not occur for a century, if then), and in that event alone, he intended that the burden of £5000 should become exigible from the lands and enforceable against subsequent heirs of entail. The burden therefore was contingent on the entail subsisting, and the estate devolving on the heirs called after Mary Dalgleish and the heirs of her body.

That event has not occurred, and cannot now occur, as the entail is at an end and the destination has been evacuated. The Lord Ordinary, however, has held that the lands may be affected, although the personal obligation has flown off. I do not think that this is sound. The truster did not contemplate that the entail would become ineffectual; but exercising his statutory rights the institute has acquired the estate in fee-simple. Thus the intention of the truster, and the hopes of subsequent heirs have been defeated; and in precisely the same way the bequest in favour of Mrs Rymer has became imprestable. If the truster had foreseen that the heirs called immediately after the institute would be deprived of their succession, we cannot tell whether he would have made the bequest in favour of his sister. I think the pursuer is entitled to the decree asked.

Lord Justice-Clerk—I am of opinion with all your Lordships, and agree with all that has been said. I have had an opportunity of reading the opinion which was prepared by Lord Trayner, which has my entire concurrence.

The Court pronounced the following interlocutor:—

> "Recal the interlocutor reclaimed against: Find, decern, and declare in terms of the conclusions of the action."

Counsel for Pursuer—H. Johnston, Q.C.—C. N. Johnston. Agents—Dalgleish & Bell, W.S.

Counsel for Defender, C. D. Rudd—Abel. Agents—J. L. Hill & Company, Solicitors.

Counsel for Defenders, Mrs Rymer's Descendants—Balfour, Q.C.—Kennedy. Agent—Lindsay Mackersy, W.S.

Counsel for Defender, James Patrick Dalgleish's *curator ad litem*—Pitman.