were not entitled to the statutory protection unless they proved that the collision was due to the fault or incapacity of the pilot. This is only true in a limited sense. The defenders were not bound to negative every kind of objection which the pursuers might take to the fittings or trim of the vessel. They sufficiently discharged any burden that was upon them by showing that the vessel was in charge of a compulsory pilot, that all his orders were obeyed, and that if there was fault in the navigation of the vessel they were not responsible for it. The onus was thus shifted to the pursuers. In the end, apart from the objection to navigation, which was clearly met by the defence that the vessel was under the control of a compulsory pilot, the only charge that was pressed against the defenders was that they were responsible for the trim of the vessel, and that the collision was due, or partly due, to that cause. It lay upon the pursuers to prove this, and in my opinion they have failed to do so.

In the result I am for affirming the judgment of the Sheriff, with perhaps one or two immaterial alterations in the findings.

LORD YOUNG was absent.

The Court pronounced this interlocutor:—

"Having heard counsel for parties in the appeal and considered the cause, with the assistance of Captain Hoare, one of the brethren of Trinity House, as nautical assessor, dismiss the appeal: Find in fact and in law in terms of the findings in fact and in law of the interlocutor appealed against: Of new assoilzie the defenders, and decern."

Counsel for the Pursuers and Appellants —Ure, K.C.—Younger. Agents—J. & J. Ross, W.S.

Counsel for the Defenders and Respondents—Clyde, K.C.—Hunter. Agents—Webster, Will, & Co., S.S.C.

Tuesday, July 7.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

JOHNSTON *v.* JOHNSTON'S TRUSTEES.

Succession—Restrictions Imposed on Disponee—Restrictions Ineffectual to Bind Disponee—Docquet to Trust-Deed Signed by Disponee—Personal Bar.

The proprietor of certain estates by trust-disposition and settlement *inter vivos* conveyed his estates to trustees, among whom were his nephews A, B, and C, directing them on his death to convey the estates to A and his heirs-male, whom failing to B and his heirs-male, whom failing to C and his heirs-male, whom failing to their other brothers, under the reservation and condition that in the dispositions to be executed by the trustees a clause should be inserted prohibiting the disponee from selling or burdening the estates with debt except with the consent in writing of his two immediate younger brothers. After the execution and delivery of the trust-deed, A, B, and C signed a docquet to the trust-disposition whereby they accepted the office of trustees, and "individually" concurred in and agreed to "the terms and conditions of said deed." After the death of the truster three dispositions were executed by the trustees conveying the estates to A, each disposition bearing that it was granted in terms of the trust-settlement, and "under the prohibition that the disponee for the time being under the destination therein contained shall not sell or burden with debt the subjects disponed except with the consent in writing of his two immediate younger brothers."

Held, in an action of declarator brought by A, the disponee, against the trustees (in which his younger brothers B and C were compearing defenders) that under the dispositions A was absolute fiar of the estates conveyed to him, and had full power to sell or burden the estate with debt and alter the order of succession thereto and execute any deeds necessary for these purposes; that he was not barred from maintaining his rights under the disposition by having signed the docquet to the trust-deed; and that an averment to the effect that the trust-deed was granted as the result of a family arrangement, and in reliance upon the pursuer agreeing to be bound by its terms, which he had approved, was not relevant to be admitted to probation.

Archibald Francis Campbell Johnston of Carnsalloch, Dumfriesshire, brought an action against Augustine Campbell Johnston, Conway Campbell Johnston, and others, to have it declared that three dispositions dated December 28, 1896, and January 31, 1897, set forth in the summons granted by the pursuer and Augustine Campbell Johnston and Conway Campbell Johnston, two of the defenders, as trustees under the trust-disposition and settlement of the deceased General Thomas Henry Johnston of Carnsalloch to and in favour of the pursuer as an individual and his heirs-male, whom failing to certain other persons, should be deemed and taken to be invalid and ineffectual in so far as, but only in so far as, the dispositions were granted subject to certain declarations and prohibitions (quoted *infra*), and that notwithstanding these declarations and prohibitions in the foresaid three dispositions the pursuer "holds and is entitled to hold" the lands and properties conveyed by the foresaid three dispositions "as unlimited fiar and fee-simple proprietor thereof, and that he has full power to sell, alienate, or dispone the said lands and others in whole or in part in any way he may think proper, and to contract debt thereon, and to dis-

pone or burden the same, alter the order and course of succession thereto at pleasure, and to grant and execute all deeds necessary for these purposes, and further to deal with the same as unlimited fiar and fee-simple proprietor thereof."

Augustine Campbell Johnston and Conway Campbell Johnston were the only compearing defenders.

The lands and properties conveyed by the three dispositions recited in the summons formerly belonged to General Thomas Henry Johnston of Carnsalloch.

By trust-disposition and settlement dated September 28th 1891 General Johnston, with a view to the management of his estates, and also of settling them in the manner thereinafter directed, with consent and concurrence of his brother Patrick for his rights and interests, conveyed his whole lands and estates to his brother Patrick and to the pursuer and the compearing defenders, being sons of his deceased brother Robert, as trustees, for the purposes, with the powers, and subject to the declarations therein written. The trust-disposition provided, *inter alia*, that the trustees, not later than the first term of Whitsunday or Martinmas which should happen three years after the death of the longest liver of the truster and his brother Patrick, should convey and make over to the pursuer and his heirs-male, whom failing to the defender Augustine Campbell Johnston and his heirs-male, whom failing to the defender Conway Campbell Johnston and his heirs-male, whom failing to the other sons of his deceased brother Robert, the lands of Carnsalloch and other properties specified, always under the exceptions, reservations, and conditions thereafter mentioned.

The truster further directed his trustees, in the event of there being no heritable debts affecting the said estates at the date of the disposition or other deed to be executed by them as thereinbefore directed, to insert a clause or clauses in said disposition or other deed prohibiting the disponee from selling or burdening said estate with debt except with the consent in writing of his two immediate younger brothers, and in the event of there being heritable debts affecting the said estate at the said date, he directed his trustees to set forth the amount of the same in the said disposition or other deed, and to insert a clause or clauses prohibiting the disponee from selling or burdening said estates with debt in excess of the said amount except with the consent in writing of his two immediate younger brothers: "Providing always and declaring that the person succeeding to said estate by virtue of the said trust-disposition and settlement should be entitled to make reasonable provision for his widow from the annual income of the estates, but which should in no case exceed one-third of the proceeds of the same."

General Johnston died on December 29th 1891, and his brother Patrick died on March 14th 1892. The pursuer, and the defenders Augustine Campbell Johnston and Conway Campbell Johnston, accepted the office of trustees under the foresaid trust-disposition and settlement, entered into possession of the estates, and completed a title thereto.

The pursuer in the year 1894 called upon the trustees of General Johnston to convey to him the said estate of Carnsalloch and others subject to the burdens affecting the same, but Augustine Campbell Johnston and Conway Campbell Johnston as trustees foresaid declined to accede to this request. Accordingly the pursuer on June 18th 1894 raised an action in the Court of Session against the trustees of General Johnston to have it found and declared that he as an individual had a vested right in the subjects destined to him by General Johnston in his trust-disposition and settlement. In the course of the procedure in the said action a minute of agreement was entered into between the pursuer and the said Augustine Campbell Johnston and Conway Campbell Johnston, dated October 16th 1895, whereby the said action was settled. By this agreement the parties bound and obliged themselves as trustees foresaid and as individuals, *inter alia*, that a conveyance should at once be granted by the trustees in favour of the pursuer of the lands and properties therein specified, "in the terms and under the conditions contained in the general settlement, but declaring that the insertion of said conditions in the conveyance is in no way to prejudice or bar Captain Johnston from maintaining that notwithstanding them he is fee-simple proprietor of the subjects. This declaration to rest on this agreement or any other collateral writing or agreement demanded by Captain Johnston, and not to be inserted in the conveyance."

In accordance with the said minute of agreement draft dispositions of the lands referred to were prepared and revised, but the defenders the said Augustine and Conway Campbell Johnston refused or delayed to execute the dispositions in terms of the drafts, and the pursuer on September 18th 1896 raised another action in the Court of Session, concluding to have them decerned and ordained to implement and fulfil in all respects their part of the minute of agreement by executing valid dispositions in terms of the drafts produced in the action. On 19th December 1896 Lord Kyllachy ordained the defenders to execute and lodge in process dispositions in terms of the said drafts, and on 18th March 1897 he ordered and directed that the dispositions be delivered to the pursuer. On 16th June 1897 the Lords of the First Division adhered to Lord Kyllachy's interlocutor, and the dispositions (three in number) in favour of the pursuer, referred to in the summons, were delivered to him accordingly.

The disposition of the lands of Carnsalloch contained a declaration in the following terms:—"But declaring that these presents are granted in terms of said trust-disposition and settlement executed by the said General Thomas Henry Johnston, under the prohibition that the disponee for the time being under the destin-

ation herein contained shall not sell or burden the said subjects hereinbefore disponed with debt in excess of the foresaid sum of £46,000, except with the consent in writing of his two immediate younger brothers, providing however always and declaring that the disponee for the time being under the destination herein contained shall be entitled to make a reasonable provision for his widow from the annual income of the said subjects, but which shall in no case exceed one-third of the free proceeds of the same."

The other two dispositions conveying the other lands and properties which had belonged to General Johnston contained declarations in practically similar terms.

The pursuer pleaded, *inter alia*, as follows—"(2) On a sound construction of said three dispositions and relative agreement, and in respect of the facts set forth, the pursuer is entitled to decree of declarator in terms of the conclusions of the summons. (3) No relevant defence."

The defenders pleaded, *inter alia*, as follows—"(4) In any event, upon a sound construction of the terms of said trust-disposition and settlement, the clauses against selling or burdening the said estates are valid restrictions upon pursuer's right in said estates, and decree of absolvitor should be pronounced. (5) *Separatim*, upon a sound construction of the terms of said trust-disposition and settlement, the restrictions on the pursuer's right of voluntary alienation of said estates by selling or burdening, are conditions under which he took the said estates, and binding on him, and effectual in a question with the defenders or substitute heirs."

On December 3, 1902, Lord Kyllachy pronounced an interlocutor finding, declaring, and decerning in terms of the conclusions of the summons, and finding the compearing defenders liable in expenses.

The compearing defenders reclaimed.

After the reclaiming-note was presented, the compearing defenders lodged a minute craving leave to make certain amendments upon the record, which were allowed, and to which answers were lodged by the pursuer. In a minute of amendment lodged June 13, 1903, the defenders stated, *inter alia*:—"The trust-deed of General Johnston dated September 28, 1891, embodied an arrangement come to between General Johnston and his brother Patrick, as to which the pursuer and defenders were consulted, and of which, after suggesting many of the provisions, they approved. The purpose of this arrangement was to keep the estates therein specified in the family, with a view to which it was stipulated that whoever should become the disponee should not alienate or burden with debt the estate without the written consent of his two immediate younger brothers. The deed was an *inter vivos* deed, and at once delivered on its execution. The deed was executed by General Johnston and his brother Patrick in reliance upon pursuer and defenders, who had approved its terms, agreeing so far as they were individually concerned to be bound by its conditions, in token of which they were required to sign, and did sign, the pursuer's signature being dated October 20, 1891, a docquet thereto in these terms:—"We, Archibald Francis Campbell Johnston, Augustine Campbell Johnston, and Conway Campbell Johnston, designed in the foregoing deed, hereby accept of the office of trustees conferred on us, and we individually concur in and agree to the terms and conditions of said deed." Said docquet merely embodied in writing the agreement already come to between General Johnston and his brother Patrick on the one side, and their nephews the pursuer and said defenders on the other, and on the faith of which said trust-disposition was granted."

The defenders also stated that the declarations (quoted *supra*) in the three dispositions referred to in the summons were "binding on the pursuer in a question with the defenders, and any transaction by him in contravention of them, if feudally possible, would be in fraud of the agreement under which the said trust-disposition was executed and accepted."

By the said minute the defenders added the following plea:—"2. (*a*) The object of the present action being to facilitate the pursuer committing a breach of contract, and pursuer having no other interest, the action should be dismissed. 2. (*b*) In respect that the Court ought not to interfere to facilitate the pursuer's breach of the agreement on the faith of which he has obtained the estate, the action should be dismissed."

The pursuer, in answer, explained that he signed the docquet as an acceptance of the office of trustee, and that he never was asked to contract, and never did contract, to carry into effect the conditions set forth in the trust-deed of General Johnston, dated September 28, 1891.

Argued for the defenders and reclaimers—The declarations and prohibitions in General Johnston's trust and in the three dispositions to the pursuer, although they might be ineffectual feudally as real burdens on the pursuer's title, were binding on him personally, and he was not entitled to any declarator by the Court to enable him to break them—*M'Cormick* v. *Grogan*, 1869, 4 E. & I., App. 82, *per* Lord Chancellor; *Jones* v. *Bradley*, 1868, 3 Ch. App. 362. The declarations were effectual conditions of the gift to the pursuer—*Falconar Stewart* v. *Wilkie*, March 15, 1892, 19 R. 630, 29 S.L.R. 534; *Murray* v. *Macfarlane's Trustees*, July 17, 1895, 22 R. 927. The docquet, which was signed in the lifetime of the truster by the pursuer, and by which he agreed to the conditions of the trust-deed, constituted a contract binding on the pursuer, or at least personally barring him from bringing this action. The conditions imposed by the deed were by this docquet accepted by the pursuer in terms, as well as being impliedly accepted by him by his acceptance of the benefits which the deed conferred. The defenders were entitled to a proof of their averments as to the trust-deed of General Johnston being the embodiment of a family arrangement, and having been granted, being an *inter vivos* deed, in reliance upon

the pursuer agreeing—as he had in fact agreed by signing the docquet—to be bound by the terms and conditions of the trust-deed. The contract on the part of the pursuer took the case out of the region of cases such as *Stewart* v. *Fullarton*, 1830, 4 W. & S. 196, as to entails. Further, the case did not come under the principle of *Miller's Trustees* v. *Miller*, December 19, 1890, 18 R. 301, 28 S.L.R. 236, as there was here no repugnancy between the gift and the declaration qualifying the gift, and as the pursuer here had contractually barred himself from contravening the declaration. It was not *pars judicis* to facilitate the pursuer committing a breach of the contract on the faith of which he had obtained the estates.

Argued for the pursuer and respondent—Under the dispositions the pursuer was absolute fiar of the lands therein conveyed. The declarations were not fenced by irritant and resolutive clauses, and accordingly at law had no effect. A person who was vested with an absolute fee could not be restricted in his dealing with the lands—*Miller's Trustees* v. *Miller* (*supra*). Even though the intention of the truster was clear—and it was by no means clear in this case—he had not provided the machinery requisite for carrying out that intention. By the minute of agreement of 16th October 1895 it was agreed that the insertion of the prohibitory conditions in the three dispositions to be granted to the pursuer should not bar him from maintaining that he was absolute fiar. The docquet relied on by the other side was signed by the pursuer simply as an acceptance of the office of trustee, and could not be construed as an acceptance by the pursuer of restrictions as legal and binding which were not legal and binding. There was in the documents no trace whatever of any contract by the pursuer binding himself to carry out the conditions contained in the trust-deed. The effect of the defenders' averments as to the trust-deed being a family agreement to which the pursuer was a party was to set up a trust outside of and controlling the written instruments, and these averments were accordingly irrelevant, as a trust or arrangement controlling written instruments could be proved only by writ or oath. The defenders were attempting to set up an entail of these estates without any of the requisites of an entail being present—*Stewart* v. *Fullarton*, 1830, 4 W. & S. 196. The pursuer simply asked for a declarator of his legal position, and in Scotland anyone was entitled at any time to have such a declarator. The matter must be determined by the Court on a construction of the deeds. The question whether the pursuer was personally barred by contract or otherwise from selling or bonding the estates just came back to the question, what was the legal effect of the deeds granted to and accepted by the pursuer.

LORD PRESIDENT—The question in this case is whether the pursuer is, under three dispositions of lands and other properties granted in his favour by the testamentary trustees of his uncle the late General Johnston, the proprietor in fee simple and the full and unfettered owner of the properties conveyed to him by these dispositions, or whether he is effectually restrained from alienating or burdening these properties very much as if they were held under a deed of strict entail.

[*The Lord President here narrated the facts as to the trust-settlement of General Johnston and the dispositions granted to the pursuer by General Johnston's trustees.*]

The pursuer maintains that he is sole fiar of the lands and others held under the three dispositions just mentioned, and that he is entitled to dispone, sell, and burden them in the same manner and to the same effect as if he had been the sole disponee named in the conveyances, and he alleges that he is hampered in the administration of his estates by the declarations just mentioned, and in particular by the clauses prohibiting him from selling the estates or borrowing upon the security of them, and that he has raised the present action with the view of having it declared that he is the unfettered proprietor of the estates. The defenders maintain that the clauses in the dispositions above mentioned effectually prevent the pursuer from disposing of or borrowing upon the estates, or doing anything which may involve voluntary alienation in whole or in part without their consent.

After hearing parties the Lord Ordinary on 3rd December 1902 found, declared, and decerned in terms of the conclusions of the summons and found the compearing defenders liable in expenses.

Since the reclaiming-note against that judgment was presented to this Division, the defenders lodged a minute craving leave to make certain amendments upon the record, which were allowed, and to which answers were lodged by the pursuer. In this minute of amendment the defenders state that a docquet to the said deed was signed by the pursuer and them which bears that they "hereby accept of the office of trustees conferred on us, and we individually concur in and agree to the terms and conditions of said deed."

Upon a careful consideration of the arguments submitted to us, I am of opinion that the judgment of the Lord Ordinary of 2nd December 1902 is right. The dispositions in favour of the pursuer are out-and-out conveyances not containing any fettering clauses or any other effectual qualifications or reservations in favour of the defenders or anyone else, and without the creation of any trust. It was declared by the minute of agreement of 16th October 1895, that the insertion of the conditions in the conveyance should in no way prejudice or bar the pursuer fom maintaining that he, notwithstanding them, is fee-simple proprietor of the subjects, and it was expressly stipulated in the agreement that the declaration should rest on the agreement or any other collateral writing or agreement demanded by the pursuer and should not be inserted in the conveyance.

The first question is, whether the stipula-

tions in the minute of agreement affect the right of the pursuer to plead that he is fee-simple proprietor of the subjects, and I am of opinion that they do not. It was part of the agreement that the conveyances should not be affected by such collateral and separate deeds, and I consider that they are not affected by them.

The next question is, whether the right of the pursuer is affected by the prohibitions contained in the disposition against selling or burdening the subject conveyed with debt in excess of £46,000 without the consent of his two immediate younger brothers, and I am of opinion that a prohibition of this kind, not fenced with irritant and resolutive clauses, is altogether unavailing to affect the right of the disponee.

It was, however, further maintained by the defenders that the docquet signed by the pursuer and his brothers bears that they "concur and agree to the conditions of the said deed," and that he is effectually restrained by this as a pactional agreement. The docquet was signed by the pursuer and the defender Conway Campbell Johnston during the lifetime of General Johnston, and by the defender Augustine Campbell Johnston on his return from California on 26th February 1892, after the death of General Johnston. The parties had skilled conveyancers as their advisers, and when they did not adopt the method of making either a strict entail or an effective trust, it must, in my judgment, be held that they took their chance of whatever they might obtain under titles which did not effectually restrain the pursuer from dealing with or disposing of the properties as he pleased.

The defenders on 13th June 1903 (more than six months subsequent to the date of the interlocutor under review) lodged in process a minute in which they craved and obtained leave to make certain amendments upon the record, and in these they alleged, *inter alia*, that the trust deed of 28th September 1891 was adjusted for the purpose of keeping the estates therein mentioned in the family, and that it was executed by General Johnston and his brother Patrick in reliance upon the pursuer and the defenders, who had approved of its terms, agreeing, so far as they were individually concerned, to be bound by its conditions, in token of which they were required to sign, and did sign, a docquet thereto in the following terms—"We, Archibald Campbell Johnston, Augustine Campbell Johnston, and Conway Campbell Johnston, designed in the foregoing deed, hereby accept of the office of trustees conferred on us, and we individually concur in and agree to the terms and conditions of the said deed." Upon this the defenders plead that any transaction by the pursuer in derogation of the agreement under which the trust-disposition was executed and accepted would, if feudally possible, be *in fraudem* of the agreement under which the trust-disposition was executed and accepted.

The pursuer in his answers to this minute explains that he signed the docquet as an acceptance of the office of trustee, and that he never was asked to contract and never did contract to carry into effect the conditions set forth in the trust deed of 1891.

I do not think that the defenders have made any averments relevant to be remitted to probation, and, *separatim*, I consider that if the averments were relevant they are of such a character, especially as being at variance with the terms of written instruments executed by the parties, that they could only be proved by writ or oath.

If a proof is not allowed, the question on this part of the case comes to be what is the effect of the docquet by which the pursuer and the defenders "individually concur in and agree to the terms and conditions of the said deed?"

I am unable to see that these words constitute a contract not to plead what they maintain to be the true legal construction and effect of the written instruments, and I think that upon a just construction of these instruments they do not preclude the pursuer from maintaining that he is not subject to any effectual restraint against disposing of the properties as he pleases.

The defenders further argued that the case resolves into one of trust, and that upon a due execution of the trust the pursuer would not be entitled to maintain the position which he has taken up in this action. I am, however, unable to accept this argument.

It appears to me that the defenders cannot in any view put their case higher than one of an unfenced prohibition against alienation—a kind of prohibition which is ineffectual in law.

There appears to be no prohibition against altering the order of succession, and it is to be borne in mind that whereas prior to the passing of the Entail Act of 1848 it was necessary to a successful challenge of an entail that a particular blot should be hit (as it was termed) now under section 43 of the Act, if the entail is defective in any particular it is bad *in toto*.

For these reasons I am of opinion that the interlocutor of the Lord Ordinary should be adhered to.

LORD ADAM—I do not think there is any real doubt on the face of the three dispositions which are founded on in this case that the pursuer is the absolute fiar in the lands in question and that he can give a valid disposition of these lands to any third party. I do not think that Mr Johnston really disputed that. But then he said there were clauses prohibiting the pursuer from selling the lands and contracting debts upon them above a certain amount, which I think was £46,000, without the consent of his immediate younger brothers. That is so, but then the fact that these clauses are not fenced by irritant and resolutive clauses shows, I think, that it is perfectly clear that they have no operation against the fiar in these lands. But even if they had been fenced with irritant and resolutive clauses the defenders would have been in no better condition, because it happens that there is no prohibition against altering the order of succession in this disposition, and that being so of course these clauses are really

of no force or effect. There are no clauses such as are to be found in a strict entail containing prohibitions properly fenced; and I do not think that anybody can doubt that unless such prohibitions are fenced with irritant and resolutive clauses they are of no avail. I certainly do not appreciate the argument which was maintained that because the prohibitions were not fenced they did not enter into the same category and come under the same principle of law as a strict entail. In truth the real defence stated in this case depends on the effect to be given to the docquet signed by the pursuer to his uncle's settlement; and as I understood the argument it was contended that this should give effect to the prohibitions. Now all that he does in that docquet is to accept the office of trustee individually concurring in and agreeing to the terms and conditions of the said deed. Now what are the terms and conditions of the deed? The terms and conditions are that these clauses be inserted in the conveyances; and they have been so inserted. Then the question is, what is the effect if these prohibitions are inserted. I think it just comes to the old question. I do not think we are bound to treat this deed as a strict entail. We have only to accept it as a disposition with this clause. I concur with your Lordship.

Lord M'Laren—I concur in the opinion of the Lord President and have very little to add. I think that this is a case in which the settler intended that whatever effect was due or was to be given to his wishes should receive effect through the medium of a conveyance of the lands under conditions, and not through any independent consent or guarantee or obligation imposed upon the legatee. Now, the nature of the conveyance which he desired to be executed is that in the event of there being no debt affecting his estate the trustees were to convey the estates to the heir or heirs in the order specified in the destination, with clauses prohibiting the disponee from selling or burdening the said estates with debt; but in the event of there being debt charged upon the estates the clause was to prohibit the disponee from selling or burdening the estates with debt in excess of the amount prescribed. There is no prohibition that I can discover against altering the order of succession, and that of itself would at common law be fatal to the efficacy of the deed as a deed of entail. But the most peculiar feature of this new form of settlement is that no one is to be bound directly except the first taker. We know that at one time in the history of the law of entail it was doubted whether it was necessary to bind the institute, but from the time of Lord Mansfield's decision in the Duntreath case (2 Pat. 255, at 257) it was established that unless the institute was brought under the entail the deed could have no prohibitory effect against anyone. The principle is that the Act of 1685 directed the prohibitions and restrictions to be laid not only on the heirs of entail, but they were to be laid upon the grantee and the heirs of entail, and if they did not bind the grantee or disponee, then there was not an entail in terms of the Act of 1685. In this case—apparently unique in the annals of entails—the attempt is made to bind no one but the institute. I need hardly say that such an attempt is open to precisely the same objection as the Duntreath entail, because the statute directs two things to be done under each prohibition, and the trustees have only done one of them, and therefore they have not complied with the statute in regard to any of the prohibitions. That being so, I am unable to see how the acceptance of a title under a deed of this kind should in any way fetter or interfere with the action of the disponee in the administration of what is a fee-simple estate. At most the directions of the will under which he takes could only be regarded as matter of advice which it lay with the conscience and judgment of the disponee to give such effect to as he might think proper. But then I think the weight of the argument in favour of the prohibition was founded upon the action of the granter in desiring that his immediate disponee should agree to accept under the conditions of the entail. He has accepted, but I think that his acceptance is affected by the same incurable fallacy that affects the deed itself, and that is the supposition that when an estate is given over to a disponee under what the law accounts a destination in fee-simple you can control his powers as a proprietor by conditions. That is known by all lawyers to be absolutely impossible. Nor can I read the docquet of acceptance as importing an independent obligation—a personal obligation on the maker and his heirs to give effect to the intentions of the deed. I think it meant nothing more than the acceptance of the deed with its conditions as expressed in the deed. His position is therefore the same in all respects as if he had done nothing but wait until the conveyance was executed in his favour and had then accepted it by taking infeftment.

Lord Kinnear—I am entirely of the same opinion. I think in the first place that it is really not open to question—hardly open to argument—that the conveyance in question imposes no effectual restriction on the absolute right of the disponee as fiar. And therefore the question comes to be whether he has subjected himself to any restriction by the agreement which is said to be expressed in the docquet appended to the trust-deed. Now that is an agreement to accept the terms and conditions of the trust-deed. I do not see how an agreement to accept it can by any possibility operate as an agreement to submit to more stringent or more effective conditions than are contained in the deed itself. I have no doubt that the pursuer has accepted the conveyance in the terms directed by the truster, but then the deed he has accepted is exactly in the terms directed by the trust, and the agreement to accept these terms can put him in no worse position than if he had accepted them without any agreement whatever. The question comes back to what is the effect of the conveyance granted in accordance with the truster's directions.

The Court adhered.

Counsel for the Pursuer and Respondent—Dundas, K.C.—Craigie. Agents—Mackenzie & Black, W.S.

Counsel for the Defenders and Reclaimers—Johnston, K.C.—M'Clure. Agents—Cowan & Dalmahoy, W.S.

Friday, July 10.

SECOND DIVISION.

[Sheriff Court at Edinburgh.

BRASH *v.* J. K. MUNRO & HALL.

Lease—Removing—Ejection—Ejection without Warrant—Tenant with ex facie Valid Title—Lease Obtained by Fraud and Misrepresentation—Reparation.

By missive of lease a firm of house factors let a house for half-a-year to a woman who paid a quarter's rent in advance, and to whom they handed the keys. The house factors having been informed that the woman lived with a man who had been tried for an offence under the Immoral Traffic Act (which had been found not proven), and that the woman was a prostitute, three days after the tenants had entered on possession of the house requested them to leave, and upon their refusing to do so removed the door of the house, and so compelled the tenants to quit possession.

In an action of damages against the house factors, they stated in defence that the house had been got from them by misrepresentations and for immoral purposes. *Held* that even if this were so, the defenders were not entitled at their own hand to make the house uninhabitable and thus compel tenants, who were in possession upon an *ex facie* valid title, to leave it, and that they were liable in damages for doing so.

Gabriel Brash, commission agent, Edinburgh, raised an action in the Sheriff Court at Edinburgh against J. K. Munro & Hall, house factors, Edinburgh. The conclusions of the action were (1) for payment of £3, 10s. with interest at 5 per cent. from 18th October 1902, being a quarter's rent paid in advance for the lease of a house 16 Beaumont Place, which the defenders had let to the pursuer for half-a-year from Martinmas 1902, and (2) payment of £100 as damages for forcing the pursuer to leave the house by removing the outside door a few days after the pursuer had entered it.

The defenders averred that the lease of the house had been got from them by false and fraudulent misrepresentations and for immoral purposes, and that they were entitled in the circumstances to act as they did.

A proof was led before the Sheriff-Substitute (HENDERSON). The facts of the case are fully stated in his interlocutors.

On 1st June 1903 the Sheriff-Substitute pronounced the following interlocutor:—"Finds in fact; (1) that on 18th October a woman, who calls herself Margaret Reid or Brash, and says she is the wife of the pursuer, called at the defenders' office and inquired as to houses to let; (2) that she was given the address of some houses and went away to inspect them; (3) that on the following day she returned to the defenders' office and stated that she was prepared to take the house No. 16 Beaumont Place; (4) that in reply to questions she said that her husband's name was James Reid, and that he was a commercial traveller from Leeds, and that their furniture was at the railway station; (5) that she was unable to find security but would pay a quarter's rent in advance; (6) that thereupon the missive No. 21 of process was made out whereby the house 16 Beaumont Place was let to 'James Reid' for the half-year from Martinmas 1902 to Whitsunday 1903, at the yearly rent of £14, and the woman paid £3, 10s. as a quarter's rent in advance and was given the keys of the house with leave to take immediate possession; (7) that the woman signed 'James Reid' to this missive, and at the defenders' request also signed what she said was her own name 'Margaret Reid'; (8) that on 21st October the woman who had taken the house from the defenders, along with the pursuer and the witness Schuleman, who lodged with them, took possession of the house No. 16 Beaumont Place, and placed their furniture, which they removed from a house in Panmure Place, in which they had been living for some time, in it; (9) that the defenders having heard that the real name of the man was not 'James Reid' but 'Gabriel Brash,' a man who had in September been tried in the Police Court for an offence under the 'Immoral Traffic Act,' sent a clerk on the same forenoon to 16 Beaumont Place with a message ordering the occupants of the house at once to leave it; (10) that these persons refused to do so, contending that as they had paid the quarter's rent in advance and had signed a missive of let and received the keys they were entitled to remain in the house; (11) that after the defenders had made other attempts to induce the occupants of the house to remove from it, they eventually on the next day, 22nd October, sent an assistant with a joiner and two policemen to the house, when the joiner proceeded to take off the outer door of the house and so left the house open to the common stair; (12) that the occupants remained in the house suffering considerable inconvenience for that night and the following day and night, but eventually, as the woman was in a delicate state of health, and by the advice of her doctor, they left the house on the night of 24th October and have not since returned to it; (13) that the woman was confined on 8th November; (14) that although the pursuer was tried for the offence under the 'Immoral Traffic Act' of living upon the proceeds of the prostitution of the woman who called herself his wife, the charge was found not proven; (15) that there can be little doubt that the woman