porter. But the yearly value can be with ease and certainty, and has been, ascertained.

"It appears to be clear, as stated by Mr Brodie, that the power to feu now sought 'would immensely increase the value of the estate.'"

THOMS and BALFOUR for petitioners.

Agents—R. & J. A. Haldane, W.S.

HOUSE OF LORDS.

Wednesday, July 20.

DUNDAS AND OTHERS (STRATHMORE'S TRUSTEES) *v.* STRATHMORE AND OTHERS.

Trust—Policies of Insurance—Entail. A nobleman who had become deeply involved executed a trust-disposition and settlement whereby he conveyed all his property to trustees for certain purposes, viz., (1) in order that they might raise a sum of £250,000 to pay his debts; (2) that of this sum £10,000 was to be applied in insuring against a certain event, the proceeds of the insurance to be applied towards payment of the £250,000; (3) the balance of the £10,000 to be applied towards insurances of the nobleman's life, or, in their discretion, towards reduction of the debt of £250,000; (4) the deed proceeded—"That the residue of the said sum of £250,000, together with such sums received from any insurances on my life, either by the sums assured becoming payable or by the surrender or sale of the policy or policies, shall be applied in payment of my present debts and liabilities." They were further directed to keep up insurances on his life to the extent of £30,000. At the death of the nobleman policies of insurance, which it had been intended that the trustees should have surrendered, fell in to the extent of £130,000. *Held* (altering judgment of the First Division) that the duty of the trustees was to pay all the debts due by the deceased at the date of the trust-deed with the funds in their hands, including, if necessary, the policies which had not been surrendered; and that thereafter the balance of the said policies must be applied towards the reduction of the debt of £250,000 on the entailed estate; and did not belong to the disponee of the deceased or his later creditors.

This was an appeal against a judgment of the Court of Session in an action of multiplepoinding at the instance of the trustees of the late Earl of Strathmore.

The circumstances under which the question arose were shortly these:—The late Earl of Strathmore was heir or institute of entail in possession of the entailed estates of Glamis and others, situated in the counties of Forfar, Perth, Fife, and Kincardine

He was also absolutely seized to him and his heirs in possession in certain copyright tenements at Pauls Walden, in the county of Hertford, as tenant thereof, and was also tenant for life in remainder, immediately expectant on the decease of his mother, the Honourable Charlotte Bowes Lyon, commonly called Lady Glamis, of the manor of Pauls Walden, and other hereditaments in the parish of Pauls Walden and county of Hertford aforesaid, under an indenture of settlement dated 15th July 1847, and he was also tenant for life, in remainder, expectant on the decease of John Bowes, Esq., and default or failure of his issue (he having been at the periods after-mentioned and still being childless), of large estates in the counties of Durham, York, and Middlesex.

The late Earl having contracted large debts on the security of his interest as heir of entail in possession of the Glamis estates, and of policies of insurance on his life, he, by trust-disposition dated 28th October 1854, and three supplementary trust-dispositions, dated respectively the 19th and 20th May 1858, the 10th and 18th January 1860, and 23d and 24th March 1863, conveyed his whole estates, property, and effects, heritable and moveable, and particularly the Glamis estates, to Donald Lindsay and George Auldjo Jamieson, both accountants in Edinburgh, as trustees to act in succession in manner provided in the said trust-disposition and supplementary trust-disposition, for behoof of all his just and lawful creditors, and for the uses, ends, and purposes, with the powers and under the conditions, provisions, and declarations therein written, in virtue of which trust-disposition and supplementary trust-disposition the said Donald Lindsay and George Auldjo Jamieson were infeft in the said Glamis estates, and the said Donald Lindsay was in the year 1864 in possession and management thereof as sole acting trustee for behoof of the Earl's creditors entitled to the benefit of the trust thereby created.

By the year 1864 the debts, liabilities, and incumbrances of the late Earl had increased to such an amount as the agreement after-mentioned bears, "that even if his interests in the Glamis, Bowes, and Pauls Walden estates, and the policies of insurance on his life, and all other his property, heritable and moveable, real and personal, were at once to be disposed of and converted into money, the proceeds would be wholly insufficient for satisfying the claims of the creditors; and not only is he without the means of support and maintenance from the Glamis estates, but the said estates are liable to the diligence of his creditors, who may enter into possession thereof, and waste and dilapidate the same, to the great injury of the succeeding heirs of entail."

With the view of relieving the late Earl from his embarrassments, and preventing the creditors from entering into possession of the Glamis estates, to the injury of the next heirs of entail, who were the present appellants (Lord Strathmore and his two eldest sons, the respondents Lord Glamis and Francis Bowes Lyon), it was arranged that the said estates should be disentailed under the provisions of the Acts 11 and 12 Vict., cap. 36, and 16 and 17 Vict., cap. 94; that, as the agreement after-mentioned bears, "the said Earl shall receive an allowance of £2500 a-year, provided always the said allowance be strictly alimentary, as after-mentioned, out of the rents of the said estates, so long as the free revenue thereof shall be sufficient for payment of the same, after payment of preferable charges thereon, and that such alimentary allowance shall be increased to the extent and in manner after-mentioned, as the debt affecting the estate shall be diminished, and that the fee-simple of the said estates may be charged with a sum not exceeding £250,000, for payment of the said Earl's debts, and for the other purposes after-mentioned, on condition of the said Earl relinquishing all right and title to the estates," and on the other conditions embodied in the said agreement.

The late Earl accordingly presented a petition to the Court of Session for authority, under the provisions of the said Acts, to disentail and acquire in fee-simple the whole of the Glamis estates; and it was arranged that the present appellant, and the respondents, his two eldest sons, being together the three next heirs, should consent to the disentail upon certain conditions, to be afterwards mentioned. With a view to obtain the consent of the present Earl and his sons to the disentail, a deed of agreement was executed, dated 4th July 1864, whereby the late Earl agreed to convey his whole property in trust for certain purposes, and to grant bonds and dispositions in security over the estate of Invereighty for the sums of £26,500, and £7000 respectively, and £31,143 over his other properties, in favour of the present Earl and his sons, the next heirs of entail.

Of the same date with the said deed of agreement, the late Earl, in fulfilment of the stipulations and conditions therein contained, executed a trust-disposition, whereby he "disponed, assigned, conveyed, and made over to and in favour of the appellant and the said John Dundas, and to such other persons as might be named and appointed by them, or the survivor of them, or by the trustees acting for the time under the said trust-deed (therein after referred to under the general designation of the "Glamis Trustees"), and to their assignees, all and whole the entailed estates of Glamis and others, and also all other lands and heritable estate in Scotland belonging to him, and also his whole moveable and personal estate wherever situated, and all debts and sums of money due to him by any person or persons, and securities for the same; and particularly, without prejudice to the said general conveyance, all assurances on his the said Earl's life, and all policies of assurance and other vouchers and securities thereof, whether the same were vested in or held by him, or by any other person or persons for his behoof, or subject to his disposal, with all sums of money which might become due and payable to him in virtue thereof, and all claims competent to him to demand assignments or conveyances of the said assurances from the holders thereof, and all his reversionary interests in any such assurances, as also his reversionary rights and claims under the trust-deeds executed by him in favour of trustees for behoof of his creditors as above mentioned."

It was, however, declared by the said trust-deed that the same was granted in trust for the purposes therein specified, being, first, for conveyance of the estate of Invereighty to the appellant, the present Earl, under the real liens or burdens above mentioned, and that the trustees should grant bonds and dispositions in security for the sum of £21,143, and £10,000 above mentioned, and in the second place, that the trustees should hold the Glamis estates, and whole other estates thereby conveyed during the life of the late Earl, and after his death, in case he should leave issue-male, until the failure of such issue, or until payment of the whole sums to be borrowed by the Glamis trustees on security of the Glamis estates as therein provided, whichever should first happen, in trust to and for the ends, uses, and purposes therein after written, the first of the said purposes being that the trustees should borrow and raise on the Glamis estates a sum not exceeding £250,000, for payment of the late Earl's debts, "and for the other purposes after mentioned."

The first branch of the second purpose of the trust is in these words:—"That they (the trustees) may and shall borrow and raise on the Glamis estates a sum not exceeding £250,000, for payment of my debts, and for the other purposes after mentioned, at such time or times, and in such sums as they shall think proper."

The second branch of the second purpose of the trust, is as follows:—"That of the said sum of £250,000 to be borrowed as aforesaid, they shall apply the sum of £10,000, or any part or parts thereof, in their discretion, in insuring the payment of a sum of money in the event of the said John Bowes leaving issue at his death, which sum so to be insured, if the same shall become payable, shall be applied by the trustees in or towards payment of the said sum of £250,000, and in case the insurances to be effected for that purpose shall not exhaust the whole foresaid sum of £10,000, then the surplus shall be applied in keeping up, in such way as they may think proper, some one or more of the now existing policies of assurance on my life, other than and in addition to the policies amounting to £30,000 (besides bonuses), which are to be kept up from the rents of the said estates as hereinafter provided, or otherwise as they shall think best for the immediate or ultimate reduction of the debt of £250,000 to be contracted as aforesaid, and that the residue of the said sum of £250,000 together with such sum or sums, if any, as may be received from the said Donald Lindsay and George Auldjo Jamieson, or either of them, as the balance of their intromissions as trustees foresaid, or from any assurance or assurances on my life, either by the sums assured becoming payable, or by the surrender or sale of the policy or policies, and any other funds to be received or realized by the Glamis trustees from the trust-estate, other than the rents and profits of the Glamis estates, and of any other lands to be held by them under the trust, accruing from and after the said term of Martinmas 1863, shall be applied in payment of the expenses of the said disentail and of the said deed of agreement, and of the transactions under the same, including the re-settlement of the said estates, the trust-disposition to the Glamis trustees, the disposition of Invereighty, under the real burden as aforesaid, the bonds and dispositions in security for £21,143 and £10,000, and all other proceedings and arrangements that may be necessary for carrying the provisions and arrangements of the said deed of agreement into effect, and in or towards payment or satisfaction of my present debts and liabilities, among which are to be included any outstanding debts and liabilities of the trust under the trust-deeds now held by the said Donald Lindsay and George Auldjo Jamieson, as trustees for behoof of my creditors as before mentioned, according to the rights and preferences of the creditors therein."

The third branch of the said second purpose is in the following terms:—"That in order to meet any excess of my now existing debts beyond what is contemplated by the parties in the said deed of agreement, the said trustees may raise a further sum not exceeding £10,000, over and above the foresaid sum of £250,000, and postponed thereto, on security of the Glamis estates, but for such other sum of £10,000 they shall effect policies of assurance upon my life, or maintain policies of assurance already effected, and they may pay the interest and premiums of insurance out of the income of the Glamis estates, and may grant bonds and dispositions of the said Glamis estates in security of

such interest and premiums, as well as for the principal sums borrowed, and they shall apply the sums so to be borrowed in or towards payment or satisfaction of any of my foresaid debts and liabilities, but the amount of premiums and interest which may be paid by the said trustees in respect of any sums to be so borrowed, shall be held as payments on my account, and shall be deducted and retained by them out of the allowance payable to me as hereinafter provided."

By the fourth branch of the second purpose of the trust the most ample powers of sale of the trust-estate are conferred upon the trustees, it being declared that "they shall apply the prices of the lands or other estate that may be sold by them in or towards payment of the sums to be borrowed on the said estates as aforesaid, or otherwise apply such prices in the purchase of other lands which they may think it desirable to acquire, and which lands shall be held by them for the purpose of the trust."

The fifth branch of the second purpose of the trust is directed to secure that the Earl's plate, pictures, china, books, furniture, and other personal property and effects in Glamis Castle, in so far as not sold, shall descend as heir-looms along with the Glamis estates; and the sixth branch of the said purpose provides, "that during my (the late Earl's) life, and thereafter during the existence of issue-male of my body, the said trustees shall apply the rents and profits of the Glamis estates, and of any other lands to be held by them under this trust, so long as any part of the sums to be borrowed on the estates shall remain unpaid," in paying expenses of management, interest, and similar charges; "(6) the premiums requisite for keeping in force policies of assurance on my life to the amount of £30,000 at least, independently of bonuses that may have accrued or may accrue thereon, or to such further amount as may be thought advisable by the Glamis trustees;" and after all the previously mentioned payments are provided for, for payment of the alimentary allowance of £2500 to the late Earl, "subject to the deduction before mentioned for any interest and premiums to be paid on my account, and subject also to the rent, if any, charged by the trustees at the time for the castle, home farm, and park, if then possessed by me."

The seventh branch of the said purpose provides for the application of the rents of the Pauls Walden estate; and by the eighth branch it is provided, "upon my death, the Glamis trustees shall execute a new entail of the Glamis estates, or of such part or parts thereof as shall then remain unsold, in favour of the heirs-male of my body, whom failing, to the said Claude Bowes Lyon (the appellant), and the heirs-male of his body, whom failing, the other heirs entitled to succeed to the said estates under the now existing investitures thereof, but subject always to the trusts hereby created, so long as any issue-male of my body shall be in existence, or till the whole sums to be borrowed by the Glamis trustees shall have been paid and discharged, if that shall happen while my issue-male are in existence, during which period this trust shall subsist and remain in force, with the full powers of management and sale and other powers hereby conferred on the trustees as a burden upon and title preferable to the title of the institute and heirs of entail, and subject also to the trusts created by the existing trust rights in favour of the said Donald Lindsay and George Auldjo Jamieson, until the same shall be discharged or extinguished, and also under the burden of all debts and securities affecting the estate at the time."

After the execution of the said trust-disposition and of the deed of agreement therein referred to, the application at the instance of the late Earl for the disentail of the lands and estates above mentioned was proceeded with. The authority to disentail was obtained from the Court of Session on 20th July 1864, and the instrument of disentail having previously been executed, was recorded in the Register of Entails on 25th, and in the General Register of Sasines on 31st August 1864. The trust created by the said trust-disposition thereupon came into operation.

After the instrument of disentail was recorded, the appellant and the said John Dundas entered on the administration of the trust created by the said trust-disposition. As directed by the first purpose of the trust, they granted and delivered to the appellant, and his heirs and assignees, a disposition of the estate of Invereighty in Forfarshire, which had formed part of the entailed estates, with right to the rents from and after Martinmas 1863, under the real burden of the sums of £26,500, payable to the respondent Claude George Bowes Lyon, and his heirs and assignees, and £7000 payable to the respondent Francis Bowes Lyon, and his heirs and assignees; and they farther granted in favour of the appellant a bond and disposition in security over the remainder of the Glamis estates for the sum of £21,143, payable at Martinmas 1864, and with interest from Martinmas 1863; and another bond and disposition in security in his favour for the sum of £10,000, payable on the late Earl's death, both of which securities were postponed to the securities granted for the sums amounting to £260,000 borrowed on the security of the estates, as after mentioned. By the execution and delivery of these deeds, the pecuniary compensation stipulated to be paid to the appellant and the respondents, his said sons, in respect of their consents to the disentail, was secured to them.

The trustees farther, in the execution of the purposes of the said trust, obtained on loan from the Royal Exchange Assurance Corporation the sum of £170,000, and from the North British and Mercantile Insurance Company the sum of £90,000, making in all the sum of £260,000, for which sums they granted bonds and dispositions in security over the Glamis estates.

After entering upon the administration of the trust, the trustees paid the whole debts of the late Earl, in so far as known to them to be subsisting. The amount paid by the trustees in respect of debts, expenses, and charges in the trust, prior to the raising of the multiplepoinding in June 1865, was £311,310, 11s. 11d., while the whole sums forming part of the trust-estate then received by them amounted to £279,573, 0s. 2d.; the excess of payments over receipts being £31,737, 11s. 9d. This excess, which arose in greater part from the payments of debts beyond the amount which had been stated by Lord Strathmore, was paid by the trustees at the time in reliance on the personal guarantee of the appellant, contained in a minute of agreement dated 10th August 1864, entered into between the late Earl of the first part, the present appellant of the second part, and Richard James Webb, Esq., of the third part. By the fourth head of the said minute of agreement, the

appellant and the said Richard James Webb, upon the considerations therein specified, "do hereby guarantee the said Glamis trustees from the consequences of their paying the debts of the said Earl in full, and oblige ourselves to keep them skaithless, and to relieve them of all liability in the premises. And we agree to provide them with the means of discharging the said debts in full, so far as the means already provided are insufficient; and that whether the deficiency falls short of or exceeds a sum of £11,102, thereinbefore mentioned." The fifth head was as follows:—"In regard to the policies of insurance on the life of the said Earl, it is declared and hereby provided, that the trustees may keep up, if possible, £40,000, and for that purpose, or for other purposes, *in rem versam* of the trust, they may borrow from the offices the amount they will lend, on the security of the policies, and that the sums payable under the policies, when they emerge, after meeting the advances from the offices, is to be applied as agreed on, towards reduction of the debt of £250,000, by the said deed of agreement authorised to be borrowed, and that if the policies, or any of them, are from time to time surrendered, the value thereof, under abatement of any sum borrowed from the offices on the security thereof, shall be applied towards reduction of the same debts, and shall be then, *pro tanto*, discharged."

When the trust came into operation on 25th August 1864 there were subsisting policies of insurance on the life of the late Earl, to the amount, including bonuses, of £225,156, 17s. These policies were almost entirely held by creditors in security of debts due to them, and under obligations by the late Earl for payment of the premiums as they fell due.

From the time at which the trust came into operation onwards, the premiums upon the said policies of insurance fell due; and certain policies, amounting to £39,000, were surrendered by the trustees in September 1864. But, from information received by the trustees in the latter part of October of that year as to the state of the late Earl's health, the trustees resolved not to surrender, and they did not surrender any more of the policies. They paid the premiums upon those which they did not surrender.

After the trustees had paid the debts above mentioned, it was discovered that other claims existed, of which they had not been made aware. The parties who made these claims used arrestments in the hands of the trustees, and intimated that they claimed payment out of the trust-estate held by them.

These and other circumstances led the trustees to adopt the resolution to raise the action of multiplepoinding with the view of having the rights of parties determined, and they raised the action accordingly on 6th June 1865.

The health of the late Earl continued to fail, and he died, without issue, on 13th September 1865.

Upon his death the contents of the policies upon his life kept up by the trustees became payable. The trustees have received altogether £187,230, 9s. 11d. in respect of the policies.

These policies are divided into three classes, viz.:—"(1) Policies retained by the Glamis trustees, with a view to the proceeds thereof being applied towards reduction of the debt contracted by the trustees on the security of the Glamis estates, the premiums being payable out of the revenue of the trust, in terms of the Glamis trust-deed and minute of agreement between the late Lord Strathmore, the present Earl of Strathmore (then Mr Bowes Lyon), and Mr Richard James Webb, dated 10th August 1864," the total amount of these policies, with bonus additions, being £45,406, 19s. 4d. "(2) Policies retained by the Glamis trustees to meet sum of £10,000 (in addition to the sum of £250,000) borrowed on security of the Glamis estates, on account of Lord Strathmore's debts, the premiums being payable out of his Lordship's allowance in terms of the Glamis trust-deed," the total amount of these policies, with bonus additions, being £10,460, 1s. And (3) "Policies which the Glamis trustees proposed to surrender, but which subsisted at the date of the late Lord Strathmore's death," the total amount of these policies, with bonus additions, being £130,289, 16s. 8d.

After a proof, the Lord Ordinary (BARCAPLE) pronounced the following interlocutor and note:—

"*Edinburgh, 20th July* 1867.—The Lord Ordinary having at avizandum resumed consideration of the former debate upon the closed record in the competition, and having considered the closed record, proof now led, with the debate thereon, and whole process—Finds that the raisers, the Glamis trustees, in the course of their trust-administration, resolved, in regard to the sum of £10,000 appointed by the trust-deed to be wholly or partially applied in their discretion in insuring the payment of a sum of money in the event of John Bowes, there mentioned, leaving issue at his death, to apply to that purpose only the sum of £1650: Finds that the policies on the life of the late Earl of Strathmore contained in branch third of the list of policies referred to in the condescendence of the fund *in medio*, amounting, with bonus additions, to £130,289, 16s. 8d., were kept up by the raisers paying the premiums falling due thereon after the trust came into operation out of the balance of said sum of £10,000: Finds that, on a sound construction of the trust-deed, the proceeds of said policies which accrued on the death of the Earl, in consequence of said premiums having been so paid, under deduction of the surrender value of said policies as at the date when the first premium fell due on each of them respectively after the trust came into operation, must, subject to any security or securities affecting the same, be applied in payment and extinction *pro tanto* of the sum of £250,000, which by the trust-deed the trustees were directed to raise, and have raised on the Glamis estates: Finds that said surrender value of said policies falls, as if said policies had actually been surrendered, to be applied under the direction contained in the second or concluding part of the second purpose of the trust-deed, that the funds there mentioned shall be applied in payment of expenses, and in or towards payment or satisfaction of the truster's then present debts and liabilities: Finds that the unapplied balance of the said sum of £10,000 remaining in the hands of the raisers after payment of the said sum of £1650 and of the premiums for keeping up said policies, must also be applied in payment and extinction *pro tanto* of the said sum of £250,000: Finds that the policies contained in branch first of the list of policies referred to in the condescendence of the fund *in medio*, amounting, with bonus additions, to the sum of £45,406, 19s. 4d., were kept up by the raisers out of the rents of the lands held in trust by them, in terms of the direction in the sixth head of the

sixth purpose of the trust-deed, to apply said rents in paying, *inter alia*, the premiums requisite for keeping in force policies of assurance to the amount of £30,000 at least, independently of bonuses, or to such further amount as might be thought advisable by the trustees: Finds that, on a sound construction of the trust-deed, the proceeds of said last-mentioned policies, subject to any security or securities affecting the same, must be applied in payment and extinction *pro tanto* of the said sum of £250,000: Finds that the proceeds of the policies contained in branch second of the said list, to the extent of £10,000, falls to be applied in terms of the third purpose of the trust, in paying the sum of £10,000, which the trustees were thereby empowered to raise over and above the said sum of £250,000: Finds that the claimant, the Earl of Strathmore, has right only to a proportion of the rents of the Glamis estates for crop and year 1865 corresponding to the period from 13th September 1865, when the late Earl of Strathmore died, to Martinmas 1865: *Quoad ultra* reserves consideration of the claims and pleas of parties: Appoints the cause to be enrolled for further procedure; and reserves all questions of expenses.

"*Note.*—The late Earl of Strathmore having incurred debts to a large amount, entered into an arrangement with the present Earl, then next heir of entail, and his two eldest sons, represented by tutors *ad litem* appointed to them, by which they consented to his disentailing his estates. By that arrangement, which was embodied in a deed of agreement, the present Earl and his sons bound themselves to execute deeds of consent to the disentail: and, on the other hand, the late Earl bound himself, contemporaneously therewith, to convey to English trustees his liferent interest in certain English estates, which was chiefly in expectancy, and also to convey to Scotch trustees his entailed estates of Glamis, his whole other heritable estates in Scotland (of which he does not appear to have possessed any), and also his whole moveable estate, wherever situated, and particularly all policies of insurance on his life, and sums that might become payable under them, and his reversionary interest in any such policies. The disentail was carried through, and the trust-deeds were executed in terms of the agreement. The Scotch trust-deed was executed contemporaneously with the deed of agreement, on 4th July 1864. It came into full operation by the recording of the instrument of disentail on 25th August following.

"The purposes of the Scotch, or as it is styled in the deeds, the Glamis trust, are complicated, and some of them are not of very clear application to the unexpected state of circumstances which has arisen from the premature death of the late Earl, and the course of management adopted by the trustees, which has proved extremely lucrative to the trust. In the first place, the trustees were to convey the estate of Invereighty, part of the Glamis estates, to the present Earl in fee-simple, under the real burden of the sum of £26,500, and £7000 to his sons; and they were to constitute an heritable security on the Glamis estates for £21,143 and £10,000 in favour of the present Earl. These constituted the immediate consideration stipulated for by the three next heirs for giving their consent to the disentail; and they need not be further adverted to.

"The leading objects of the trust were, that, on the one hand, the trustees should borrow on the security of the Glamis estates £250,000, or if necessary £260,000, to be applied, except to the extent of £10,000 (the special appropriation of which will be afterwards noticed), and after defraying all expenses, in payment of the late Earl's then existing debts, and should pay him out of the rents an allowance of £2500, subject to fluctuate in certain circumstances; and that, on the other hand, they should, on the death of the late Earl, execute a new entail in favour of the heirs-male of his body; whom failing, the other heirs entitled to succeed under the former entails, but subject to the trust so long as issue-male of the late Earl should be in existence, or until the whole sums borrowed by the trustees should be paid off.

"After the trust came into operation, it was found that the debts of the late Earl largely exceeded what had been anticipated, and questions arising in consequence as to the duty of the trustees, they brought this process of multiplepoinding in June 1865. The late Earl was then alive, but he died without issue on 13th September 1865. Questions of great importance to the parties have arisen out of that event, in consequence of large sums being realized from policies on his life, which had been kept up by the trustees. The claims to the proceeds of these policies constitute the first and principal branch of this competition. The claimants are,—1st, Lord Glamis and his brother, as representing the interest of the future heirs of entail; 2d, the present Earl, as general disponee and personal representative of the late Earl; and 3d, creditors of the late Earl. The interests of the present Earl and the creditors are to a great extent identical. For, as the Earl claims the proceeds of the policies as representative of the late Earl, and on the ground that they constitute his estate, he can only take them on the footing of his being liable to pay all his debts.

"As already noticed, the trustees were, if necessary, to borrow £10,000 in addition to the £250,000. But for this sum of £10,000 they were to effect or maintain policies on the late Earl's life, and to pay the interest and premiums out of his allowance. This additional sum was borrowed, and policies were kept up as directed, amounting, with bonus additions, to £10,460, 1s. But to the extent of £10,000, required to pay off the sum for which they were kept up, no question arises in regard to them.

"The sixth purpose of the trust, which relates to the application of the rents, after providing for defraying expenses of management, and for paying the interest on all the sums to be borrowed or secured by the trustees on the estate, and immediately before providing for payment to the late Earl of his alimentary allowance, contains a direction to pay out of his rents—'(6) the premiums requisite for keeping in force policies of insurance on my life to the amount of £30,000 at least, independently of bonuses that may have accrued or may accrue thereon, or to such further amount as may be thought advisable by the Glamis trustees.' Under this provision the trustees have kept up policies amounting with bonus additions to £45,406, 19s. 4d. The proper application of this sum is one of the questions in the competition. It will be more conveniently adverted to after considering the larger question in regard to all the other policies subsisting at the late Earl's death. But it is proper to keep in view the existence of those policies, kept up under the special direction in the sixth purpose to keep up policies out of the rents to the extent of £30,000 or up-

wards, as they are expressly referred to, though only parenthetically in the second purpose.

"1. The first branch of the competition, which relates to the other policies subsisting at the Earl's death, amounting with bonus additions to £130,289, 16s. 8d., depends mainly upon the construction to be given to the provisions of the second trust-purpose. This clause of the deed relates chiefly to the application of the sum of £250,000 to be borrowed by the trustees, though in the second part of it it also includes the application of other funds which may be in the hands of the trustees. It consists of two distinct parts, the first containing directions solely for the application of £10,000 of the £250,000. The trustees are to apply that 'sum of £10,000, or any part or parts thereof, in their discretion, in insuring the payment of a sum of money in the event of the said John Bowes leaving issue at his death, which sum so to be insured, if the same shall become payable, shall be applied by the trustees in or towards payment of the said sum of £250,000, and in case the insurances to be effected for that purpose shall not exhaust the whole foresaid sum of £10,000, then the surplus shall be applied in keeping up, in such way as they may think proper, some one or more of the now existing policies of assurance on my life, other than and in addition to the policies amounting to £30,000 (besides bonuses) which are to be kept up from the rents of the said estates, as hereinafter provided, or otherwise as they shall think best for the immediate or ultimate reduction of the debt of £250,000 to be contracted as aforesaid.'

"The object of the first of these directions was to insure against the prospect of succession by the Earl and the heirs of entail to estates held by John Bowes for his life, being disappointed by his leaving issue. Owing to the high terms demanded by the offices for such an insurance, the trustees only applied £1650 to that object. It is averred by Lord Glamis and his brother that the trustees applied £4133, 5s. 2d. of the issue policy fund of £10,000, in paying premiums for keeping up the policies amounting to £130,289, 16s. 8d., now under consideration as the subject of the first branch of the competition. In this view, there still remains in the hands of the trustees a balance of the £10,000, amounting to £4216, 14s. 10d.

"It is not admitted by the other claimants that the premiums for keeping up the policies of £130,289, 16s. 8d. were paid specially out of the issue policy fund. A proof in regard to that and other matters was allowed to the whole claimants, and the first question for consideration is, whether Lord Glamis and his brother have established their averments upon that point? The only witnesses examined were the three trustees themselves. The proof establishes that, in the course of their management, and before the death of the late Earl, the trustees resolved not to invest more than the sum of £1650 in effecting policies against issue of Mr John Bowes, and also resolved to keep up all the policies which were still in subsistence in October 1864. The precise dates on which these two resolutions were taken do not clearly appear. Indeed, it would rather appear that they were gradually, though ultimately quite distinctly come to, and that no very precise date can be assigned to them. The original ground of the former resolution was, that issue policies for the purpose required could not be effected except on very disadvantageous terms. The resolution to surrender no more policies was taken in consequence of information received by the trustees in regard to the health of the late Earl. That information was received on 27th October 1864, and led to a meeting on the subject, attended by the trustees, who were then the late Earl and Mr Dundas, and by Mr Jamieson, who was then factor for the trust. On that day, a premium was paid to keep up a policy for £7000, and no policy was afterwards surrendered. The Lord Ordinary thinks it is also proved that, in the course of their management, and before the death of the late Earl, the trustees resolved to use the balance of the issue policy fund for keeping up the policies which they thus determined not to surrender. These were altogether distinct from the policies to the amount of £30,000 at least, which they were directed to keep up out of the rents of the estates, and which, in the exercise of that special power, they did keep up to the amount of £40,000, or with bonus additions, £45,406, 19s. 4d. The only free fund which they had power to apply according to their discretion was such part of the issue policy fund as they might not, in their discretion, think it expedient to invest on issue policies.

"The Lord Ordinary does not think it is of any consequence when, or in what order, each of these several resolutions were arrived at, provided they were adopted in the course of trust-management, and while things still remained entire, during the life of the late Earl. Neither does he think it of importance upon which of the several bank accounts kept by the trustees the drafts were made for paying the premiums to keep up the policies. These accounts were only kept separate as matter of convenient business arrangement, and not as the separate stocking out of the interests of different beneficiaries. Any excess of drafts upon one account, whether made inadvertently or not, would properly be replaced by money drawn from the account on which they should have been originally made. If such drafts were not made inadvertently, but the trustees afterwards came to the conclusion that they had been made erroneously upon a particular account, the Lord Ordinary thinks it was their duty, and in their power, to put the matter right. The question in any such case could only be, what, according to the directions of the trust-deed, was the proper mode of administering the trust, and stating the trust-accounts?

"On these grounds, the Lord Ordinary comes to the conclusion that the trustees resolved, timeously, and in a competent manner, in so far as such a resolution was within their powers, to keep up the policies in question, amounting to £130,289, 16s. 8d., out of the issue policy fund. The question is, What was the legal effect of their forming and acting on this resolution?

"In considering this question it is necessary to have regard to the concluding portion of the second trust-purpose. It directs the application of the residue of the £250,000, after providing for the £10,000 issue policy fund, and also of any sums that might be received from Messrs Lindsay and Jamieson as the balance of their intromissions under a former trust executed by the late Earl, or from any assurance or assurances on his life, 'either by the sums assured becoming payable, or by the surrender or sale of the policy or policies, and any other funds to be received or realised by the Glamis trustees from the trust-estate, other than the rents and profits of the Glamis estates, and of any other lands to be held by them under the trust.' All

these funds are directed to be applied in payment of the expenses of constituting and carrying out the trust, 'and in or towards payment or satisfaction of my present debts and liabilities.' The objects to which the funds dealt with in the two branches of the second trust-purpose are to be applied are thus in direct contrast. The sum of £10,000, and the policies to be effected or maintained by it, which are the subjects of the first part of the clause, are to be applied to reducing the burden of £250,000 upon the estate, for the benefit of the heirs of entail. The remaining £240,000, and the other funds dealt with in the second part of the clause, are to be applied, after defraying expenses, towards payment or satisfaction of the late Earl's then subsisting debts. That is an application mainly and primarily for his benefit.

"The important part of the second branch of the clause, in relation to the present question, is that which includes assurances on the Earl's life among the funds to be applied to the latter purpose. At the date of the agreement and trust-deed the Earl had insurances on his life for the purpose of effecting securities for debt on his life interest in the entailed estate, to the extent, including bonus additions, of £225,156, 17s. Under the disentail arrangement it was not necessary to keep up any of these policies, except to the extent to which they might be made available for carrying out the directions already mentioned—1st, to keep up policies to the amount of £30,000, or such further amount as the trustees might think advisable; 2d, to keep up policies, out of the Earl's allowance, for the additional £10,000 to be borrowed over and above the £250,000; and 3d, at the discretion of the trustees, to keep up one or more policies out of the surplus of the £10,000 not employed in insuring against issue of John Bowes. It must therefore have been in the contemplation of all parties that much the larger portion of the subsisting policies would not be kept up under the trust. But they all formed a portion of the trust-estate expressly conveyed to the trustees; and, in so far as they were not to be kept up, they would of course be surrendered or sold by the trustees. Accordingly the direction, in the concluding part of the second trust-purpose, as to applying the proceeds of assurances to expenses and to the payment of the Earl's debts, relates both to sums assured becoming payable, and to sums received by the surrender or sale of policies.

"The present Earl claims the proceeds of the policies thus kept up, as being estate of the late Earl undisposed of by the trust-deed. But to found such a claim to any extent, it appears to the Lord Ordinary that he must, in the first place, show that the fund is within the direction in the second part of the second trust-purpose, under which the various trust-funds there mentioned are to be applied in payment of the truster's debts. If it can be shown that that direction applies to the fund in question, there may be room to contend that any balance of that fund remaining after payment of the debts due by the late Earl at the date of the trust, is not disposed of by the deed. But the Lord Ordinary thinks it clear that every portion of the estate conveyed in trust, of which these policies and their proceeds are undoubtedly part, is made the subject of positive direction in regard to its application; though the purposes to which the different portions of the estate were made applicable are of such a kind that they may not exhaust the funds directed to be expended upon them. He therefore thinks that the competition for the proceeds of these policies must depend upon whether it is to be held that, in the circumstances under which they have accrued to the trust-estate, they fall under the direction of the first or of the second part of the second trust-purpose. He has felt this to be a question of considerable difficulty.

"If it were to be held that the policies were not kept up out of the issue policy fund, or that the trustees were not entitled so to apply that, or any other part of the trust-funds, the Lord Ordinary would be of opinion that the proceeds of the policies would fall to be applied under the second part of the trust purpose, subject to the claim of the trustees to retain the amount of the premiums by which they were kept up; which, in that view of the case, must have been advanced by them from their own funds, or from trust-funds not applicable to that purpose, and therefore requiring to be replaced. But he thinks that the trustees did hold trust-funds out of which they had power to keep up these policies, and that, in the circumstances, it was their duty to do so. The trust-deed distinctly contemplates the existence of a balance of the issue policy fund. The first direction as to that balance is, that it shall be applied in keeping up, in such way as the trustees may think proper, some one or more of the existing policies. This is a very wide direction, and probably its words are such as to cover the course adopted by the trustees. But the Lord Ordinary feels that there is force in the objection that it contemplated the selection by the trustees of one or more particular policies to be kept up permanently out of that special fund; and that that was not what the trustees did, when from October 1864, until the death of the Earl in September 1865, they acted upon the general resolution not to surrender any of the policies in the then existing state of his Lordship's health. The resolution to which they came was not to keep up out of the issue policy fund the whole policies for the lifetime of the Earl, whether that might be longer or shorter. The amount of the fund would not have admitted of any such resolution. They only resolved, for the time, and with reference to the existing state of the Earl's health, to keep up the policies in the meantime. If his health had been restored, they must have surrendered the policies, which they had not the means to keep up, and in doing so they would not have acted inconsistently with any resolution which they had formed. But the immediately succeeding context gives much greater latitude to the power of the trustees in applying the balance of the £10,000. They are to apply it in keeping up one or more of the existing policies, 'or otherwise, as they shall think best for the immediate or ultimate reduction of the debt of £250,000.' They had thus unlimited latitude as to the mode in which they might apply the fund for that purpose; and it was their duty, as well as within their power, to apply it in any way most calculated to accomplish the object of disburdening the estate. Looking to the whole facts of the case, the Lord Ordinary thinks it must be held that the trustees did keep up the policies out of the issue policy fund, and that they were warranted in doing so, unless the parties interested under the second part of the second trust purpose had such an interest in the policies as entitled them to object to their being so dealt with.

"In considering whether these parties,—that is, the creditors and the present Earl,—had such an

interest, it must be kept in view that if the policies had not been kept up by payment of the premiums, but had been surrendered or sold, the surrender value or price would, under the direction in the second part of the clause, have fallen to be applied to payment of debts due at the date of the trust, and beyond what was required for that purpose, would have constituted undisposed-of estate of the late Earl. That did not prevent the trustees keeping up policies in implement of the express direction to keep up one or more policies out of the issue policy fund. But, as the Lord Ordinary thinks, that was not what they did. He thinks they must be held to have made the policies the subject of a speculative, but in the event highly profitable, investment, for reduction of the debt of £250,000. That was a proceeding not expressly directed or contemplated by the trust-deed; but the Lord Ordinary thinks that under the direction to apply the surplus of the issue policy fund 'otherwise as they shall think best' for reduction of that debt, it was an act of management within the power of the trustees, except in so far as it might disappoint interests conferred by the trust-deed upon other parties. Taking this view of the relative rights of parties, he is of opinion that the surrender value of the policies, as at the dates when they would respectively have been surrendered, if no premiums had been paid upon them by the trustees, falls to be applied under the direction in the second part of the second trust-purpose; and that the surplus proceeds of the policies, after deducting the surrender value, falls to be applied, under the direction of the first part of that clause, to disburdening the estate of the debt of £250,000.

"The present Earl and the creditors maintain that, if they cannot claim the whole proceeds of these policies, they are at least entitled not merely to their surrender value, but to the full price for which they could have been sold, in the then existing state of the Earl's health. The Lord Ordinary does not think that this claim can be sustained. There are no elements for fixing its amount, which must be entirely conjectural. But independently of that, he is of opinion that, although the trustees were warranted in acting as they did upon the information which had reached them in regard to the Earl's health, they were not bound to divulge that information, and make use of it for the purpose of effecting an advantageous sale of the policies. The mere fact that they had not done so, and had surrendered the policies as contemplated by the trust-deed, at the ordinary rate, could not, he thinks, have founded any claim against them at the instance of the parties beneficially interested; and he is of opinion that as little can these parties now insist that the proceeds of the policies shall be accounted for upon the footing of their having any such claim.

"2. The view now taken precludes any claim by any party for the sum expended by the trustees in keeping up these policies. The Lord Ordinary holds that the expenditure of that sum, as well as of the sum of £1650 for an issue policy, was properly made by the trustees out of the issue policy fund. As regards the balance of the £10,000 remaining undisposed of in the hands of the trustees, there does not seem to be room for doubt as to the mode in which it must be applied. The whole purposes for which the £10,000 is directed to be applied, are purposes for the benefit of the heirs of entail. The trustees might at any time have applied any part of the unused balance of that sum to reducing the debt of £250,000; and at all events they must do so now, when no other mode remains of applying it consistently with the directions in regard to it.

"3. The question as to the application of the policies, amounting with bonus additions to £45,406, 19s. 4d., is not free from difficulty. They were kept up by the trustees out of the rents, under a special direction contained in the sixth purpose of the trust, which regulates the application of the rents. But these policies are first mentioned, parenthetically, in the second trust-purpose, in connection with the direction as to the application of the surplus of the issue policy fund. In the sixth purpose, where the direction is given to keep up these policies, nothing is said as to the purpose to which their proceeds are to be applied; and the Lord Ordinary does not think that any indication of intention on that subject is to be got from the context in that trust-purpose. But it appears to him, that the way in which the mention of these policies is introduced in the second trust-purpose, strongly indicates that they were to be kept up for reduction of the debt of £250,000; and he is of opinion that, as matter of construction, that must be held to be the meaning of the deed. After directing that £10,000, of the £250,000 to be borrowed by the trustees, or any part thereof, in the discretion of the trustees, shall be applied to ensuring payment of a sum of money in the event of John Bowes leaving issue, to be applied towards payment of the £250,000, the deed goes on to direct that any surplus of the £10,000 not used by the trustees for that purpose, 'shall be applied in keeping up, in such way as they may think proper, some one or more of the now existing policies of assurance on my life, other than and in addition to the policies amounting to £30,000 (besides bonuses), which are to be kept up from the rents of the said estates, as hereinafter provided, or otherwise as they shall think best for the immediate or ultimate reduction of the debt of £250,000 to be contracted as aforesaid.' In the absence of any contrary indication in other parts of the deed, the Lord Ordinary thinks that the manner in which the keeping up of these policies is thus mentioned in immediate connection with the surplus of the issue policy fund, and the purpose to which it was to be applied, must be taken as indicating the intended application of these policies also.

"4. There is no room for question as to the application of the policies kept up out of the rents, under the direction in the third trust-purpose, to payment of the additional sum of £10,000, which the trustees were by that clause empowered to borrow. But the proceeds of these policies amount to £10,460, 1s., and the Lord Ordinary does not think that he can at present pronounce any finding as to the application of the balance of £460, 1s. That may depend upon whether the rents applied to paying premiums on these policies, beyond what would have been necessary to effect policies for the precise sum of £10,000, are, on a correct view of the trust accounts, to be held to have been 'surplus rents' in the sense of the sixth trust-purpose, or were taken from the fund for the Earl's allowance. The point was hardly adverted to in the argument, and is of comparatively small importance.

"5. In regard to the questions raised as to the division of the rents, the Lord Ordinary is of opinion that the Apportionment Act applies to the

case. The right of the trustees, and the rights and interests of all the beneficiaries in the Glamis estates, were terminable, and were in fact terminated, by the death of the late Earl, except the right of the present Earl and the future heirs of entail to demand a conveyance of the estates in their favour. Whether the interest in the estates is held to have been in the late Earl as truster, or in the trustees, or in the whole parties for whose benefit they held, it was equally an interest which was determined by the death of the Earl. This is the description of case to which the Lord Ordinary understands the statute to apply. It expressly refers to the determination of the interest, not only by the death of the party holding it, but by 'any other means whatsoever.' On this point the Lord Ordinary would refer to the exposition of the statute, which is framed in the language of English law, given by Sir James Wigram, Vice-Chancellor, in *Browne* v. *Amyot*, 3 Hare 173, and 13 L. J. Ch. 232, where the case being in that respect the converse of the present one, it was held that the Act does not apply to the case of succession to a tenant in fee, whose interest is not terminated by his death.

"The Lord Ordinary only pronounces findings at present upon those points which, having been fully argued, admit of being now determined. There are other questions remaining over, which will be more conveniently disposed of when the contested rights of parties now in discussion shall have been finally determined."

This interlocutor having been reclaimed against on 17th July 1868, the First Division pronounced this interlocutor:—"The Lords having heard counsel for the parties upon the questions raised by the various reclaiming notes, and made avizandum, and considered the closed record in the competition, productions, proof, and whole process,—Recal the interlocutor of the Lord Ordinary of 20th July 1867, and in lieu thereof, Find, 1st, that the proceeds of the policies specified in branch 2d of the list of policies referred to in the condescendence of the fund *in medio*, amounting, with bonus additions, to £10,460, 1s., fall to be, *pro tanto*, applied in paying off the sum of £10,000, with which the raisers of the multiplepoinding were empowered, by the trust-deed in their favour, and relative deed of agreement, to burden the entailed estate of Glamis, in the event of the debts of the late Earl of Strathmore being found to exceed £270,000; 2d, That the proceeds of the policies specified in branch 1st of the said list, amounting, with bonus additions, to £45,406, 19s. 4d., fall to be applied, subject to any security or securities which may affect the same, in paying off and extinguishing, *pro tanto*, the sum of £250,000, with which the said raisers were empowered to burden and did burden the said entailed estate of Glamis; 3d, That the balance in the hands of the said raisers of the sum of £10,000, which they were empowered by the said trust-deed and relative deed of agreement to apply, wholly or partially, in their discretion, in insuring payment of a sum of money in the event of Mr John Bowes dying and leaving issue, as mentioned in the said deeds, falls to be applied in further paying off and extinguishing, *pro tanto*, the said burden of £250,000 affecting the said entailed estate; 4th, That after the appropriations foresaid have been made, it was and is incumbent on the said raisers to set aside or appropriate a sum of £270,000 to meet debts due by the late Earl of Strathmore at the date of the said trust-deed and relative deed of agreement, and the expenses of the trust, before any further sum is appropriated or applied towards paying off and extinguishing, *pro tanto*, the said burden of £250,000 affecting the said entailed estate, with the exception of sums specially directed to be so appropriated or applied by the said trust-deed and relative deed of agreement; 5th, That, subject to the effect of the foregoing findings, and to the reservation after mentioned, the balance of the capital of the trust-estate which will then remain in the hands of the raisers, including the proceeds of the policies, specified in branch third of the foresaid list, amounting, with bonus additions, to £130,289, 16s. 8d., fall to be applied, subject to any security or securities which may affect the same, in further paying off and extinguishing, *pro tanto*, the said burden of £250,000 affecting the said entailed estate, before any farther sum can be claimed from the raisers, either by creditors of the late Earl of Strathmore, or by the present Earl as the late Earl's general disponee: but reserving all questions as to the surplus which may remain of the proceeds of the £10,460, 1s., mentioned in the first finding, after paying off the sum of £10,000, therein also mentioned, as to which surplus no judgment has been pronounced by the Lord Ordinary, and decern: Reserve all questions of expenses, and remit to the Lord Ordinary to proceed further in the cause as shall be just."

The present appeals were presented against this interlocutor by the Strathmore trustees and by the present Earl of Strathmore and his sons, and also by certain creditors of the late Earl. The appellant and the creditors maintained that the proceeds of the policies comprised in the first and third classes fell to be applied primarily in payment of debts; and secondly, that any balance which remained after such payment fell to be made over to the appellant as executor and general disponee of his brother the late Earl, on the ground—(1) That the trust was truly a trust for payment of the late Earl's debts, and that the trust-estate, in so far as not specially appropriated to other purposes, fell to be applied primarily in payments of such debt; (2) that the contents of the policies in question were not specially appropriated to the reduction of the debt of £250,000 authorised to be charged upon the Glamis estates, or to any purpose other than the payment of debts, but that they were by the trust-deed (in the events which have occurred) expressly appropriated to such payment; and (3) that the balance of the proceeds of the policies which remained after paying the late Earl's debts, not being otherwise appropriated or destined by the trust-deed, must be held to have belonged to the truster, the late Earl, from whom the entire trust-estate flowed, and who had the radical interest under the trust, and must consequently fall to the appellant as his representative.

The respondents, the heirs of entail, on the other hand, maintained that the policies in the two classes in question had been kept up by the trustees in virtue of powers contained in the trust-deed to keep up policies for the reduction of the debt charged upon the Glamis estates, and that their contents were thus by the trust-deed appropriated to the reduction of that debt. They did not dispute that, if the policies in the third class had been surrendered or sold, the surrender value or price would have gone to the creditors.

PEARSON, Q.C., and RUTHERFORD for appellants, the Strathmore Trustees.

LORD ADVOCATE and BALFOUR for appellant, the Earl of Strathmore.

SIR ROUNDELL PALMER, Q.C., and ADAM for James Haldane.

DEAN OF FACULTY and MACKAY for Lord Glamis and Others.

At advising—

LORD CHANCELLOR—My Lords, the questions in this case occur in an action of multiplepoinding and exoneration raised in Scotland by the holders of a very considerable fund. The whole case is determined by the construction of a deed, or rather I may say of three deeds, which have been executed by the Earl of Strathmore and the heirs of tailzie for the purpose of paying off the debts of the Earl. The Earl seems to have been extremely heavily indebted, and accordingly the three instruments that I refer to are these—an instrument of agreement, in the first instance, with reference to what was to be done; a more formal deed, carrying into effect that which was so agreed to be done; and thirdly, a subsequent deed, which particularly deals with certain insurances of £30,000, afterwards raised to £40,000, which are mentioned in the original agreement.

My Lords, I confess it appears to me that the construction of this deed is not, upon the whole, so difficult as perhaps one ought in humility to feel it to be, since there appears to have been some variety of construction on the part of the Lord Ordinary on the one hand, and on the part of the Court of Session on the other part, and I cannot myself wholly and entirely agree with the conclusion either of the one or of the other. But I think—looking to the whole scope of the deed, and seeing what was done—this really seems to be the true intent and meaning of it. The Earl was very heavily indebted; it was supposed at the date of the deed that his indebtedness might be about £270,000; but it was thought that it might be more, as appears also on the face of the deed. It is quite clear that when a person is indebted to that extent he is not likely to be extremely accurate, especially if he is not a man of business, with reference to the precise amount of the debt. The Earl had previously made some vain efforts to extricate himself from debt, handing over a portion of his property to trustees for that purpose. And now this deed, the effect of which may be stated shortly, though I must refer to a few passages afterwards, merely comes to this. The Earl having provided, as well as he could for the time, by passing certain property to trustees, for the payment of his debts, having provided a certain fund hereafter for the payment of them (a very unsatisfactory fund at all times) by means of policies of insurance to a very large amount indeed which had been effected upon his life, it now seems to have been resolved that the entailed estates must be dealt with, and that they must be dealt with under the provisions of the Acts of Parliament which are specially provided for that purpose by recent legislation relating to Scotland; that the instrument dealing with them would require the concurrence of the two next heirs of tailzie, who were his brother's two infant sons (his elder and his second son); that all the formality must be gone through which would be necessary for that purpose; that the bulk of his estates of which he was in possession—the Glamis estates—should be subjected to a charge of £250,000, to be raised in the first instance, but whereof £10,000 was not to be applied in immediate payment of his debts, but for another purpose, which I shall have occasion to mention; and that in the event of more being wanted, in case of his debts exceeding the sum of £270,000, which they were then calculated to amount to, the Glamis estates should still furnish an additional sum of £10,000, which would make £260,000 in the whole; but that that additional sum of £10,000 should be specially provided for out of an alimentary annuity which was to be allowed in the course of this arrangement to the Earl.

This being so, on the other hand, the Earl seems to have felt, and it seems to have been conceived by all the persons concerned, that it was right and just that he should then throw into this cauldron, if I may so call it, from which all was to result that could result from the payment and clearance of his debts—that he should throw into this bank (for that would be a more correct expression) everything that he had. He had some property in Hertfordshire; he had a property of more importance, called the Bowes Estates, which, however, he only held in reversion, subject to the contingency of the life of Mr Bowes (who we have been told is still living), and to the possible contingency of Mr Bowes having issue; and then he had all these policies of insurance which had been effected upon his life. He had also certain chattels, all of which, down to the plate, were to be thrown into the mass for the payment of his debts. And all that having been done, he was to have secured to him out of the estates a sum of £2500 a-year, by way of alimentary allowance. In consideration of this, provisions were made, which I need not enter into in detail, for the heirs of entail.

The agreement therefore which was come to was in every sense an onerous agreement. It was onerous on all parties. It was onerous on the Earl to a very great extent no doubt, considering all that was being done for him; and it was onerous upon the heirs of entail, considering that they were getting property out of the estate.

We have now therefore only to look at and to construe the agreement, and it becomes necessary to construe it, owing to events which have unexpectedly taken place. At the time of making this agreement the Earl seems to have been in the ordinary state of health in which he was at the time when he was insured. And although some of the policies were of great value, because they had been effected a considerable time before the period in question and had acquired an increased value by the addition of bonuses, yet they were then of insignificant value compared to that which afterwards proved to be their real value; because soon after the execution of this deed, without its being at all in contemplation at the time of its execution, the Earl fell into such a state of health that his death was shortly anticipated, and he did in fact die in about a year after the date of the execution of the deed. Thereupon there fell in very large sums, amounting I think to about £130,000 upon one set of policies, and some other sums upon other policies; which sums having so fallen in, in truth occasioned the present proceedings. For at the date of the deed it was conceived (and this is all I have to add by way of preliminary statement) that, whatever the trustees might do, they would scarcely be able to provide for the whole of the Earl's debts, and they would certainly not be able to do so if they sold off everything of which he was then possessed, at its existing value. The only mode therefore of having a chance of redeeming him from his difficulties was to make this

large charge upon the Glamis estates, and to make some sort of arrangement, as is done in the deed with regard to the securities.

Now, going slightly over the deed, which does not require any great enlargement upon its details, I wish to say simply that my view of it as a whole is this—that it was primarily the only object of the whole deed to clear the Earl's debts, and that that was intended to be completely achieved. Secondly, as regards the Glamis estates, it was intended that those estates should only come in as surety for raising the sum required for completely paying off the debts as far as might be necessary, but with a limit, namely of £250,000, and a certain additional sum of £10,000 in an event which was likely to happen, and which did in effect happen.

The recitals of the deed appear to me to show this plainly. They recite in the first place the Earl's property, which I need not go into in detail as I have already mentioned briefly what it was. Then they recite (at page 254) that he had "contracted large debts on the security of his interest as heir of entail in the Glamis estates, and of policies of insurance on his life,"—which are all referred to. Then they recite the previous conveyance to the two trustees which I mentioned of "his whole estate, property and effects, heritable and moveable, and particularly the Glamis estates," to Lindsay and Jamieson; and then they recite, at page 255—"And whereas the debts, liabilities, and encumbrances of the said Earl have now increased to such an amount that even if his interests in the Glamis, Bowes, and Paulswalden estates, and the policies of insurance on his life, and all other his property, heritable and moveable, real and personal, were at once to be disposed of and converted into money, the proceeds would be wholly insufficient for satisfying the claims of the creditors; and not only is he without the means of support and maintenance from the Glamis estates, but the said estates are liable to the diligence of his creditors, who may enter into possession thereof, and waste and dilapidate the same, to the great injury of the succeeding heirs of entail."

The next recital refers to his brother, that is the present Earl, who, having two infant sons, was minded to relieve the late Earl from his debts, and therefore concurred in the arrangement by which the provisions were made which I have described. The recital says, that in order to relieve his brother from all such debts, liabilities, and embarrassments, he is willing that the statutes I have referred to should be put into operation for the purpose of charging the Glamis estates with a sum not exceeding £250,000, and that the Earl should receive an alimentary allowance of £2500 a-year, "provided always the said allowance be strictly alimentary," "and that such alimentary allowance shall be increased to the extent and in the manner after-mentioned, as the debt affecting the estate shall be diminished" (of course that could not be done until all the debts were got rid of); "and that the fee-simple of the said estates may be charged with a sum not exceeding £250,000 for payment of the said Earl's debts, and for the other purposes after-mentioned, on condition of the said Earl relinquishing all right and title to the estates, and on the other conditions hereinafter written."

In substance, what the Earl does is this—he gives up his life estates; he gives up his plate; he gives up all he has in Hertfordshire; he gives up the Bowes estates; he gives up everything he possesses in the world,—taking but this annuity, and taking this arrangement as to the £250,000. Then there is a recital of the conveyance to be made to the trustees, who I believe are the persons now proceeding in this cause, of course wishing to be directed as to what they are to do with reference to the arrangements necessary in regard to the property under all the circumstances of the case. The deed recites certain encumbrances upon the estate, which it is not necessary to mention particularly, and then it says that the trustees shall hold the remainder of the Glamis estates, and all other estates to be conveyed to them as aforesaid, during the life of the said Earl; and after his death, in case he shall leave issue-male, until the failure of such issue, or till payment of the whole sums to be borrowed by the said trustees on the security of the said estates, as after provided, whichever of these events shall first happen, in trust to and for the ends, uses, and purposes after-written." Therefore there are two things—first, you find that he is to have all his debts paid; secondly, the trustees are to take care to have all those debts paid, and they are to hold the remainder of the estates until the payment of the whole sums which are to be borrowed upon the security of the estates as afterwards prescribed for the purpose of paying those debts.

Then it is provided, secondly, that out of the sum of £250,000 the sum of £10,000 shall be appropriated (I am stating it in short language) for the purpose of insuring against John Bowes leaving issue at his death; and that sum to be so insured, if it shall become payable, shall be applied towards paying off the £250,000—thereby indicating, as I said before, that the Glamis Estate was to be surety for the debt only—and every provision in the deed shows the same thing. It was to be applied as far as possible in clearing off the burden of debt to be raised upon the Glamis Estates, those estates coming in only as surety. Then, "in case the insurances to be effected for that purpose shall not exhaust the whole aforesaid sum of £10,000, then the surplus shall be applied in keeping up in such way as they may think proper" (this is an important part of the case) "some one or more of the now existing policies of insurance on the life of the said Earl other than and in addition to the policies amounting to £30,000 (besides bonuses), which are to be kept up from the rents of the said estates as hereinafter provided, or otherwise as they shall think best" (your Lordships will observe this again) "for the immediate or ultimate reduction of the debt of £250,000 so to be contracted as aforesaid." From the £250,000 there was to be at once taken out £10,000, leaving £240,000 to go to the payment of the debts, and the £10,000 was to be immediately applied in keeping up what are called the issue policies (I will continue to call them "the issue policies"); and if the issue policies are not kept up, or if they are not kept up in sufficient amounts to exhaust the whole funds, then the trustees may apply this money, if they think proper, towards keeping up one or more of the existing policies on the life of the Earl. And that is to be applied again in paying off the £250,000 in a similar manner as it is said to the £30,000 policies, besides bonuses which are afterwards directed to be applied for that purpose.

Then comes a very important part of the deed. It speaks of the ultimate reduction of the debt of £250,000; and then it says further, that "the balance of their intromissions as trustees foresaid" (that is, as trustees under this deed) "or from any

policy or policies on the life of the said Earl, either by the sums assured becoming payable, or by the surrender or sale of the policy or policies, and any other funds to be received or realised by the Glamis trustees from the trust-estate other than the rents and profits of the Glamis estates, and of any other lands to be held by them under the trust accruing from and after the said term of Whitsunday 1863, shall be applied in paying first the expenses of the disentail, and of the agreement, and of some resettlement which was connected with the deed (that I need not enter into); and then after paying the costs "in or towards the payment and satisfaction of the present debts and liabilities of the said Earl, among which are to be included any outstanding debts and liabilities of the trusts under the trust-deeds now held" by Lindsay and Jamieson. Therefore nothing can be clearer than that—subject to the direction as to the application of part of the surplus money for the issue policies which should not be wanted for the issue policies, or which should not be used for that purpose towards keeping up certain other policies, and subject to the £30,000 policies which are afterwards referred to—the whole of the policy money, whether the policies are paid, and whether the money be acquired by surrender, is to go towards the payment of the Earl's debts.

Then comes the third direction—"in case it shall be found that the Earl's debts, along with the expenses attending the transactions under this agreement, exceed the sum of £270,000, being the maximum amount contemplated by the parties, the said trustees may and shall raise a further sum, not exceeding £10,000 over and above the foresaid sum of £250,000, and postponed thereto on the security of the said Glamis Estates other than the estate of Invereighty; but for such further sum of £10,000 they shall effect other policies out of his £2500 a-year. This is, I think, a good place to pause. We have got all the policies described, which I will clearly state—first, the issue policies, that is to say, the policies to secure against Mr Bowes having issue. Secondly, any policies that may be selected out of the policies on the Earl's life, and kept up by the trustees by means of the surplus of the £10,000 a-year, which was in the first instance to deal with the issue policies. Thirdly, we have had referred to, by anticipation, what is afterwards mentioned more particularly in the deed, namely, the £30,000 policies, or £40,000, which the amount was subsequently increased to. And fourthly, we have the general mass of the policies, amounting to some £130,000, insured on the life of the Earl. Those are the several classes of policies with which the interlocutor has now to deal.

Then having said that, there comes a clause which says that the trustees may sell parts of the estates to pay off the charges; they are to apply the rents and profits also in paying the Earl's annuity. And then comes this clause with regard to the £30,000 policies, which is the sixth direction as to what is to be done with the rents and profits of the Glamis estates. The rents and profits of those estates are carefully left out of the whole trust up to the point at which I ceased enumerating the policies, and then there are directions as to the manner in which the rents and profits are to be applied in paying the annuity to the Earl and other matters. And at page 262 we find this direction—they are to be applied in paying "the premiums requisite for keeping in force policies of insurance on the life of the said Earl to the amount of £30,000, independently of bonuses that may have accrued or may accrue thereon, or to such further amount as may be thought advisable by the said trustees." But nothing is there specifically said as to what is to be done with that £30,000, the policies for which are so to be kept up. In the Court below the Lord Ordinary has turned back for an interpretation of the clause as to what is to become of the £30,000 policies to that which has reference to a surplus of the fund of £10,000 provided for the issue policies on page 259, which I have already read, where it is said that the trustees may apply the whole surplus of the foresaid sum of £10,000 in such way as they may think proper in keeping up the existing policies "in addition to the £30,000 policies, besides bonuses," which are to be kept up from the rents of the said estates as hereinafter provided, or otherwise as they shall think best, for the immediate or ultimate reduction of the debt of £250,000. So that, although nothing is said there in express terms as to what was to be done with the £30,000, yet it was urged that as the direction, with regard to the £10,000 referred you afterwards to the £30,000, saying that the money to be kept up by the £10,000 was to go towards the reduction of the £250,000, therefore the clause with reference to the disposal of the £30,000 had a similar purpose.

I am not inclined to think that that would be otherwise than a just argument if it were necessary to resort to it. But it really is not necessary to have recourse to that argument, as it seems to me in the present case, and for this reason. There was a subsequent deed which, so far as the present Earl himself is concerned, must, I think, be conclusive of the matter. It was an argument entered into subsequently to the date I have before mentioned. It is called "heads and minute of agreement between" the late Earl of Strathmore, the present Earl of Strathmore, and Richard James Webb, and it recited the deed of agreement. I ought to have mentioned, but it is unnecessary for me to go back to that, that the deed which was executed in pursuance of what I have been reading (which is only an agreement) corresponded so entirely with the agreement in all material points that I have not thought it necessary to enter at large into the contents of the deed. If it contained anything substantially different from the agreement it would probably have been wrong in that respect. But there was nothing in it substantially different from the agreement. Now, the subsequent document to which I have referred recites this. By this time it had been discovered that the debts of the Earl exceeded by a very large sum the £260,000 which had been provided, and therefore this deed was executed (it is to be found at page 294), reciting that in the first deed it had been provided that the Glamis trustees should "keep up at least £30,000 of insurances on the life" of the Earl; but in respect of full payment of all his debts "having been provided for, no express provision is made for the application of these policies towards reduction of the debt to be created by the said trustees, as was the intention and is the obvious meaning of the said deeds of agreement and trust."

The agreement goes on to say, by the fifth article at page 296, "in regard to the policies of insurance on the life of the said Earl, it is declared and hereby provided th at the trustees may keep up if possible £40,000 (instead of the £30,000), and for that purpose or for other purposes, *in rem versum*

of the trust, they may borrow from the offices the amount they will lend on the security of the policies, and that the sums payable under the policies when they emerge (that is, when they fall in), after meeting the advances from the offices, is to be applied as agreed on towards the reduction of the debt of £250,000."

Now, my Lords, having thus briefly gone through the documents, it appears to me that the whole result of the deeds is as plain as possible. The whole result is this. The estates of Glamis are to contribute £250,000, but £240,000 only is to go towards the payment of the debts in the first instance; then £10,000 is to be set apart out of this £250,000 raised, and it is to be applied to the issue policies. But if it does not seem to be desirable to apply it in that way, as in effect it did not seem to be desirable after a certain sum, amounting to about £1600, had been so applied, which was then thought to be thrown away, and they did not spend any more in that way, then the sum is to sink into the estate, to go back to the £250,000, or it may be applied, if the trustees think fit, in keeping up any policies besides the £30,000, or for the paying off of the debts upon the estate. Then as to the £30,000, which was afterwards made £40,000, that is, clearly not by the original agreement but by the subsequent agreement, made applicable to paying off £250,000. That disposes of two sets of policies.

Then there is a third set of policies, which I will call the £10,000 excess fund, by which I mean that if the Earl's debts should be found to exceed £270,000, £10,000 more was to be raised upon the estates, but it was to be secured by policies, which the trustees were to effect for the purpose, they taking out of the Earl's £2500 a-year the sum necessary for keeping up that fund, and for effecting policies to that amount. They have got the £10,000 and £460 surplus as the result of that investment. The interlocutor appealed from deals with that £10,000 by saying that it is clearly applicable to the payment off of the £250,000. It reserves the question as to the £460 surplus. And there is no need for us to deal with that. We may leave it as it was reserved in the Court below. In truth, although we shall differ on one important point, we shall not differ in many particulars from the interlocutor of the Court below.

The Lord Ordinary, in the first place, conceived, but in that the Court of Session does not seem to have agreed with him, that with regard to the portion of the £10,000 over and above the £1600 which had been laid out upon the issue policies, which, when the issue policies were abandoned, was applicable, if the trustees thought fit, to keeping up and selecting out of the various policies on the Earl's life policies which should be applicable when they fell in, to clearing off of the debt of £250,000 upon the estates, that they had deemed fit so to apply it. He came to the conclusion that they had so done upon the evidence which was before him; with which conclusion I confess I cannot agree.

I do not intend, my Lords, to go through the evidence, because it is clear to my mind what happened would have made it so improper a thing on the part of the trustees to treat certain policies, the premiums on which they did *de facto* pay as being acquired under that particular trust, and as being diverted therefore from the general trust which makes these policy monies applicable to the payment of the Earl's debts, that I should have required the strongest evidence to show that they had really so done, and that they had exercised their judgment in that way. For the facts were briefly these—they had surrendered several policies, and were about to surrender several more when they heard most fortunately of the Earl's state of health. I say most fortunately "for the property," I do not mean that his death was fortunate, but that their hearing of the probability of it was most fortunate under the circumstances. They fortunately heard that the Earl was in a state of health which would have made it most improper for them to surrender the policies. They heard that he was not likely to survive beyond the year. I believe he did only survive until September 1865. Thereupon they immediately made up their minds that from any monies that they could lay their hands upon these policies ought to be kept up. The Lord Ordinary treats the transaction as a kind of purchase from the creditors' fund to which the policies were originally applicable, by paying the creditors the surrender price of these policies, and as they had become more valuable since they were first effected there would be an additional surrender price, which would amount, I think, to £11,000. But instead of having any such idea in their minds of paying £11,000 out of that fund, and taking the policies on the chance of what they might produce, it seems to me to be plain upon the evidence that the trustees simply took this fund as being a fund in hand when no other fund was in hand, and applied it towards a purpose which they thought nobody could find fault with them for applying it to. There is not the slightest indication of their having at this time a knowledge of the fact that these policies were of an enormous value beyond £11,000, in consequence of their having heard of the Earl's state of health. They did not dream or conceive of taking this immense property from one class of cestarigne trusts and transferring it to another. No such idea entered their minds upon the matter. They simply took the fund, it appears to me, to secure the policies, finding how valuable they had now become, and trusting to events to shew what should next be done. There was no setting apart of any policies for this fund, which I may call the Issue Policy Fund, or the credit of that fund as the proper appropriation in payment of it. It was simply done in the way and for the purpose I have described.

The Lord Ordinary therefore erred, as I think, in finding that, subject to paying the surrender price of the policies, namely, the £11,000, the estate was to get the benefit of the actual value of the policies, as the money was received upon the death of the Earl. The Court of Session has rectified that, and I agree with the Court of Session in saying that the balance of the £10,000 set apart for the issue policies, after allowing the £1600 or any other amount that is proper to be allowed out of it, the balance of that sum, but not any policies, the premiums of which were paid out of it, will go towards reducing the £250,000 and nothing else.

Then comes the question as to the £40,000 policies which the Court of Session, and I think the Lord Ordinary (I entirely concur with both), have handed over to the fund which is to be applied in reducing the charge of £250,000. For the reasons I have already assigned, I agree that for that purpose the £10,000, subject to the question as to the £460 surplus, is clearly applicable

for the purpose of paying off the debt of £250,000. It has been so held by the Court of Session, and there again I entirely agree with them.

Then comes an important point which relates to a very great amount in point of value, and it is this—the Court of Session have come to the conclusion, in which I confess I cannot agree with them, that it was not the purpose of this deed to pay any debts of the Earl beyond £270,000. This part of the interlocutor is somewhat singular, but I think it is a mere slip. The Lord Advocate called attention to this—they hardly give the Earl's creditors the full benefit of what they said was to be paid. I think they have given them only the benefit of the £260,000. But that is immaterial and I pass it by. Then they say that it was "contemplated" (that is the expression used) that the Earl's debts amounted to £270,000. But it is contemplated in the very deed itself that there may be more, and not one word is said about how much more or how little more they may be. If they exceed £270,000, and the trustees think fit, they are to raise £10,000 extra from the Glamis estates. There is nothing said to the effect that they are not to do that if the debts amount to £300,000 or £350,000, or any other given sum.

The only way I apprehend in which the argument could be put is this, and so Lord Deas seems to me to put it. It was a species of contract on the part of the Earl, and as the parties had it in contemplation that his debts amounted to £270,000, that formed the basis of the contract and the whole engagement, and the whole £250,000 was raised upon that footing. If that be the true construction of it, what would be the important result? The result would be, that the whole contract, being founded upon misrepresentation, should be avoided, and that the deed should be reduced. But there is really nothing of that kind in fact, and I apprehend that no reason or foundation can be shown for such a contention. There is a manifest recital that all his debts were to be paid—there are manifest recitals of the steps taken, though saving the Glamis estate, for achieving that object as far as possible. The only thing to be done as regards the Glamis estates is to take care that there shall not be an excess raised, and that in their suretyship they will not contribute more than their given proportion, namely, the £250,000, and a possible raising of £10,000 more, to be recouped as I have described. But in all the other parts of the deed it seems to be plain that the Earl's whole debts are to be provided for and, subject to that, the estate is to be recouped.

A very slight alteration in the words that are used in the interlocutor of the Court of Session will in fact meet this view. Turning to page 175, where your Lordships will find that interlocutor, no alteration appears to me to be needed until we get to the last line above letter B on page 176, where the words "subject to any security or securities which may affect the same" occur. We are told that there are no such securities, and it would seem to be agreed on all hands that those words should be struck out. That appears to be done by arrangement. Then all that applies to the £10,000 seems to me to be right. And then comes this sentence,—"4th, That after the appropriations foresaid have been made" (that is to say, as to the £45,000 policies, as to the £10,000 policies, and as to the bonuses and issue policies), "it was and is encumbent on the said raisers to set aside or appropriate a sum of £270,000 to meet debts due by the late Earl of Strathmore at the date of the said trust-deed and relative deed of agreement, and the expenses of the trust before any further sum is appropriated or applied towards paying off and extinguishing *pro tanto* the said burden of £250,000." Now, for the reasons I have given, I think that those few words "of £270,000 to meet" must be struck out, and in lieu of them there must be substituted these words—"sufficient to pay and satisfy all the." It will then run thus:—"It was and is incumbent on the said raisers to set aside and appropriate a sum sufficient to pay and satisfy all the debts due by the late Earl of Strathmore at the date of the said trust-deed." Then we come down to the application of the £130,000 "subject to any security or securities which may affect the same," which words again will be struck out for the reasons I have already given, and then the sentence will run thus,—the surplus of the £130,000 odd will "fall to be applied in further paying off and extinguishing *pro tanto* the said burden of £250,000." We shall reserve the question as to the £460 surplus, as it was reserved by the Court of Session.

We shall not need, my Lords, to reverse the interlocutor of the Lord Ordinary, as that is done by the Court of Session. Therefore all that it will be necessary for us to do will be to vary the interlocutor of the Court of Session, saying that such interlocutor, when varied, shall be as follows, and remit. There will be no costs of the appeal.

Lord Colonsay—My Lords, this case relates to sums of very considerable magnitude and to transactions of considerable complication. It is not surprising that, in the endeavour to work out a system for paying off the debts of the late Earl of Strathmore, difficulties and questions have arisen, more especially when an unexpected occurrence took place which disturbed the calculations upon which the trustees were proceeding.

It appears to me that we are to regard as the inductive cause of the whole of this matter the intention to pay off the debts of the Earl of Strathmore as they existed in July 1864, and to relieve him from his then embarrassments; and that all that is done under these deeds is the machinery by which that object is to be worked out. That being so, I have no difficulty in setting aside the claim which is made through Mr Haldane for persons who became creditors of the Earl of Strathmore after the date of the deed. I think that the trust is for the benefit of the creditors who were creditors at the date of the deed.

Then again, the question will arise as to what is to be done with the surplus which exists, as in a competition between the heirs of entail who claim that the whole of it shall be applied to the extinction of the sum borrowed on the security of the Glamis estates, and on the other hand the Earl of Strathmore and the creditors whom he represents, who claim that it shall be applied to the payment of their debts, and further, on the part of the Earl of Strathmore, that whatever is over after paying these debts belongs to him, inasmuch as it is not appropriated specially to any particular purpose, but must remain a matter which belongs to him as representing the late Earl of Strathmore. I cannot look upon it in the light in which the present Earl of Strathmore regards it. It appears to me that the scheme of this trust-deed was, that all the property belonging to the Earl of Strathmore at

that time, including policies and otherwise, was to be handed over to trustees, that the estates were to be disentailed, and that a sum of £250,000, or it might be £260,000, was to be borrowed on the Glamis estate as a contribution towards the payment of the debts. But I think it is clear from the narrative of these deeds that part of the property which was supposed to exist, and which turned out to exist—I mean certain of the policies that are mentioned there—was intended to be applied for the purpose of redeeming the sum that was to be borrowed upon the entailed estates when they were disentailed; I refer to the £10,000 policies alluded to by my noble and learned friend, and the £30,000 policies. I think that the language of the deed of agreement at pages 259 and 262, and the corresponding passages in the trust-deed at pages 270 and 282, would lead me to this conclusion in regard to the £30,000 policies. But if any doubt existed I think it is removed by the passage on page 294 of the subsequent deed.

That being so, I think that the mode of dealing with this case, the course to be followed, and the construction to be put on the whole proceedings, is simple and clear. I think that these two classes of funds now existing arose out of policies—that these two classes of policies are appropriated to the redemption of the debt to be raised upon the entailed estate. I think that the others are not appropriated specially, but that they must be applied in the first place to the payment of the debts that existed at the date of the deed, and whatever remains beyond that is to be applied to the redemption of the debt on the estates which were formerly entailed. In order to borrow money, the estates were pledged as security, and the borrowing on them was a contribution more or less to be drawn upon, according as the necessities of the case required. The trustees were to borrow a sum not exceeding £250,000, and if the £250,000 was not all required for the paying off of the debts, if there were means of paying off the debts otherwise than by exhausting the £250,000, although it was borrowed according to the trust, it was to be recouped.

The view which has been taken by the Lord Ordinary, has certain principles in it which deserve consideration. He was of opinion that the object and intention of the trust was that those policies of insurance, being too expensive to be kept up, ought to be surrendered as soon as it was convenient to do so. It was estimated that the value of them in surrender would amount to a certain sum. And he thinks that the trustees came to the resolution to surrender them; and apparently that was at one time their intention. The value at that date was £17,000, and he was of opinion that the creditors were entitled to that £17,000 because of the trustees' intention to surrender them, and because the value obtained for the policies was to go to the payment of the debt. Then he thinks that that was the whole interest of the creditors, inasmuch as if that intention had been followed out they would have got no more. What was done by the trustees was to apply certain funds that stood in a particular position towards keeping up the policies whereby the whole sums contained in the policies eventually accrued to the trust estate. But I think it is quite clear that there was no purchase of these policies for the benefit of the heirs of entail. I think it is quite clear that what was done was this, that seeing these policies were about to be very valuable, and that there was every prospect that they would be so within a very short time, it was for the benefit of all concerned in the trust, that, in the honest and proper administration of the trust, the trustees should take what funds were available for the payment of the premiums upon those policies in order that the sums contained in them might not be lost. I think there is no evidence to show that it was otherwise. On the contrary, the evidence of Mr Dundas, one of the trustees, who appears to have been the person under whose guidance, these deeds were framed, tells us expressly that this was done for the benefit of those whom it might concern. He does not think that it was considered at that time at all who these persons might be. That being so, I do not think that the view of the Lord Ordinary can be sustained.

Then as to the view taken by the Inner House, that the whole scheme of this trust was to satisfy debts to the amount of £270,000, and no more than £270,000,—in that view I cannot coincide. The words of the original deed are "all the debts," that is, all the debts at that date. And though it was "contemplated" that the debts did not exceed £270,000, that very expression implies a doubt as to what they might amount to. And we find in the course of a month afterwards, in August, that that happened which was not unlikely to be the case. It turned out that there were debts which had been omitted to be given up by the Earl to a greater amount than was contemplated. But still that was an addition to the debts that was intended to be provided for, though provided for inadequately by the deed. And nothing is said in the subsequent deed repudiating these debts as debts that were to come under the benefit of the trust. I therefore think that it is not consistent with the true meaning of these transactions, that the amount of the debts to be paid should be limited to £270,000. I think all the debts which the trustees appear to have paid, were debts within the scope of the trust—all the debts of the Earl at the date of the deed are debts within the scope of the trust. But I think that the debts contracted afterwards are not debts within the scope of the trust. I think that the policies of £30,000 amounting, to £45,000 with the bonuses, are appropriated by the terms of the deed to the redemption of the debt on the Glamis estates; and I think that the surplus, after satisfying the debts that existed at the date of the trust-deed, is also to be applied to the redemption of that debt.

There are other questions of importance raised in this multiplepoinding with regard to the claims of the Earl of Strathmore and the heirs of entail; but I do not think it necessary for us to say anything about them, because the Court below has not disposed of them. This is merely an interim judgment, leave being given to appeal in order that this important matter might be settled before the other portion of the case is gone into. Of course, when the case is remitted back to the Court of Session, those other questions will be considered and dealt with. I concur in the judgment proposed to be pronounced.

Lord O'Hagan—My Lords, concurring as I do in the view which has been taken of this case by my noble and learned friends, I do not feel it necessary for me to go into any detailed exposition of the case, which they have presented very fully and very exhaustively. I will only say a single word upon two or three of the main points in the case; because upon one of those points at least we differ

from the Court of Session, and upon another from the Lord Ordinary, and therefore it is necessary and proper that we should show what are the grounds upon which we venture so to differ.

As to the first matter I should say certainly, but with great deference to the Court of Session, that the sum of £270,000 is clearly not the maximum contemplated by the parties. The true view of the case appears to me to be this—The motive of this whole proceeding, the preparation and the execution of this trust, was the embarrassment of Lord Strathmore, and his hopeless indebtedness at that time. The object was undoubtedly to meet the debts which he had incurred, and to relieve him, and to relieve the creditors from the operation of those debts. It appears to me that nothing can be plainer, upon the reading of the trust-deed itself, than that the purpose and object of it regarded the whole of the debts, and not only a portion of the debts; for I find on page 254 of the case that the whole of his property was given "for behoof of all his just and lawful creditors;" and on page 255 the object is stated to be "to relieve" him "from all such debts, liabilities, and embarrassment;" and on page 260 in the operative part of the deed it is said that the monies are to be paid in or towards the "satisfaction of the present debts and liabilities of the Earl. Words cannot be larger, words cannot be clearer it appears to me than those to indicate that the entire of the liabilities were in the contemplation of the parties. Then how was the object so indicated to be carried out? It was to be carried out by the Earl abandoning the whole of his property—all his real estate, all his moveable estate, and especially these policies of insurance. All went into one fund for the purpose of meeting his liabilities.

Then, that being so, he did make an onerous agreement no doubt; and £100,000 was the consideration, for which the heirs of entail burdened the estate with £250,000, or so much of the £250,000 as might be necessary to carry out the purposes of the parties. And then that was given, as I shall show upon the second point in the case, only in aid of the other funds which were to be applicable, so far as they would go, to the extinction of all his debts and liabilities.

As against that clear and plain indication of the intention, about which I think there can be no controversy, having regard to the ordinary meaning of words, what have we in the deed? We have nothing but these words—"£270,000 being the maximum amount contemplated by the parties." Are these words sufficiently clear, decisive, and coercive to overbear the plain meaning of all the rest of the words in the deed? It appears to me that they are not. It appears to me that those words are perfectly satisfied if we construe the word "contemplated" as meaning "conceived." If instead of the word "contemplated" we put the word "calculated," that appears to me to be what the parties meant. They declared—We wish to wipe away all the liabilities existing at this moment; and so far as we have an opportunity of judging, we think those liabilities amount to so much. Is there anything more than that? It appears to me that there is not. And not only do the recitals lead me to that conclusion, but in the operative part of the deed itself you find that they themselves contemplate that this contemplation of theirs may be erroneous, because they say the £270,000 may not be enough; and if it be not enough, you can raise £10,000 in addition. We know perfectly well that it was immediately afterwards discovered that they were right in supposing that that sum would not be enough, and that their contemplation might be wrong. Therefore, but for the judgment of the Court below, I should be of opinion, beyond all manner of doubt, that the £270,000 did not limit the operation of the deed for the purpose of relieving the liabilities of the Earl.

The second point which appeared to me important, and perhaps a little difficult, in the course of argument, was with reference to the application of the surplus which is admitted to exist under the circumstances of the case. It appears that the £130,000 which the trustees wisely and equitably saved for this estate would exceed the whole amount of the liabilities, and the question is, shall all the excess go to the representative of Lord Strathmore, or shall it go in exoneration of the estate. It appears to me to be tolerably plain that it must go to the exoneration of the estate, and not to the representatives of Lord Strathmore. For, in the first place, as I have said, Lord Strathmore parted absolutely with all his interest in all his estates, fully and deliberately, for the purpose of meeting all his liabilities. And, on the other side, we find in this deed, not by any means a declaration that £250,000 shall be raised out of the estate, but that a sum not exceeding £250,000 shall be raised out of the estate. The meaning of that appears to me to be perfectly plain and simple, and it is this—there are other large funds in existence and in contemplation,—the value of the estates, the value of the policies, and so forth. If all those sums do not reach the liabilities, then so much of the £250,000 as may be necessary shall come in aid of the funds so existing, in order to discharge the whole of the liabilities—and so far, and so far only, shall the estate be burdened. It appears to me that that is the plain meaning of the words of the deed; and if it be, the result is as plain, namely, that the surplus ought not to go to Lord Strathmore, but should go in exoneration of the estate to that extent.

My Lords, I will only say one word with reference to the opinion of the Lord Ordinary. Undoubtedly, as my noble and learned friend has indicated, there is a colour of ground for that opinion. But I think, upon the whole, if you consider the matter carefully, this is plain, that the trustees in dealing with this gift of £10,000, or the balance of it, for, as I said before, the wise and equitable purpose of retaining for the trust-estate the value of these great policies did not contemplate in the least degree a change in the ultimate destination of the fund which might be so secured. But whether they contemplated it, or whether they did not contemplate it, I should be inclined to think that the operation would not have that effect at all. No matter how these policies, to the extent of £130,000 in the result, were secured for the trust-estate, they were secured for the benefit of the trust-estate, and according to the trust; and the securing of them in that way cannot be affected in its operation by the mere *modus operandi* through which they were so secured. As I remember the evidence, the trustees said—If we had not happened to have this £10,000 in our hands at the time, we would have put our hands into our pockets and paid the premiums and maintained the policies. Supposing they had done so, is it possible to conceive any legal principle upon which their paying money out of their own pockets would have affected the destination of the money when the policies

were secured. It appears to me that these policies having been secured *coute qui coute*, the principle of *jus habentis* comes in, and they must go in accordance with the true meaning and effect of the trust. And the case cited by Sir Roundell Palmer from Younge and Collyer appeared to me to corroborate the assertion of that very plain, very equitable, and very well understood principle.

As to the £10,000 and the £30,000 policies, I entirely concur with my noble and learned friends that those policies were to be maintained out of the rents and profits of the estate, and that they ought to go in exoneration of the estate. I therefore entirely concur in the judgment which is proposed to be pronounced.

SIR ROUNDELL PALMER—Before the question is put, perhaps your Lordships will allow me to say one word on behalf of all parties. I wish just to call your Lordships' attention to the position of the matter of expenses. By the trust-deed there is a provision for the payment of the expenses "of this agreement and of the transaction under the same," "and all other proceedings and arrangements that may be necessary for carrying this agreement into effect." I will not enter into the question of the interpretation of that provision. All these proceedings are in an action of multiplepoinding by the trustees for in substance executing the trusts of the deed. All the parties have claimed something more than your Lordships have given them a right to, one of those parties being the infant children of Lord Glamis, who have no funds whatever. The Court below has reserved in both interlocutors all the expenses with which they had to deal; and I venture to submit to your Lordships whether, under these circumstances, it would not be consistent with your Lordships' view either to treat the expenses of the appeal as a matter to be dealt with by the Court of Session like the other expenses, or to allow them out of the estate which is under administration.

LORD CHANCELLOR—We had some difficulty in coming to a conclusion about the expenses; but as the Court below has reserved the question of expenses, I think it would be better for us to reserve the costs of the appeal in the same manner, to be dealt with by the Court below.

Interlocutor of the First Division of the Court of Session varied.

Agents for the Earl of Strathmore—Gibson-Craig, Dalziel, & Brodies, W.S., and Grahames & Wardlaw, London.

Agents for the Strathmore Trustees—Dundas & Wilson, C.S., and Loch & Maclaurin, London.

Agents for James Haldane — George Wilson, S.S.C., and Connell & Hope, London.

Agents for Lord Glamis and Others—Alexander Horn, W.S., and Martin & Leslie, London.

Tuesday, July 26.

MINISTERS OF OLD MACHAR *v.* HERITORS.

(*Ante*, vol. v, p. 335.)

Teinds — Valuation—Minister—Stipendiary. Held (reversing judgment of the Court of Session) that it was not a valid objection to a decree of valuation by the Commissioners of Teinds under the statute of 1663, that the minister of the parish, being a stipendiary, and not having a direct beneficial interest in the teinds, had not been called.

These were appeals from a judgment of the First Division of the Court of Session. The respondents, Dr Robert Smith and the Rev. George Jamieson, ministers of the parish of Old Machar, in the county of Aberdeen, in 1861 raised a summons of augmentation, modification, and locality before the Commissioners of Teinds, to grant augmentation of ministers' stipends. The whole of the heritors of Old Machar were called as defenders in the action. In 1862 the Lords, by interlocutor granted an augmentation of stipend, and remitted to the Lord Ordinary to prepare localities. Thereafter, a report on the state of the teinds of Old Machar was lodged in process by the common agent appointed by the heritors. This report, *inter alia*, bore that decrees of valuation of the teinds had been produced by the heritors, to which the common agent had given effect, and that as the valued teind was exhausted by the old stipends paid to the minister, there was, in the opinion of the common agent, no free teind in the parish out of which the proposed augmentation could be provided. The respondents gave in answers or objections to this report, and averred that the decrees of valuation relied upon by the appellants, who were heritors, were not effectual and binding on the respondents. The decree referred to was a decree of valuation of the teinds of the lands of Balgownie and others, dated 1697, the tenor of which was proved by decree of 1727. The respondents contended that the alleged decree of 1697 was ineffectual—1st, Because neither the minister of Old Machar, nor any person representing the cure of the parish, was cited as a party; 2d, because the decree was not a decree of valuation by the Teind Commissioners, but a ratification of an extra-judicial arrangement as to the teinds of the appellants' lands, to which the minister was no party.

The objections to the other decrees were of the same nature.

The Lord Ordinary held that the decree of valuation was ineffectual, and decided in favour of the respondents. The First Division, consisting of Lord President Inglis, Lords Deas and Ardmillan, agreed with the Lord Ordinary, Lord Currichill dissenting. The present appeals were then brought.

The cases were argued in May last, when the judgment was postponed.

The LORD ADVOCATE, Sir R. PALMER, Q.C., Mr ANDERSON, Q.C., Mr J. T. ANDERSON, SOLICITOR-GENERAL (COLERIDGE), Mr ASHER, Mr H. SMITH, and Mr SHIRESS WILL were heard for the various parties.

At advising—

LORD CHANCELLOR—My Lords, the three cases now under your Lordships' consideration relate to a matter which has occasioned a good deal of discussion of late, namely the question of how far the teinds of certain property can be said to have been effectually valued by proceedings before a body of Commissioners appointed under certain Acts of Parliament, which originated in the reign of Charles the First; and whether or not a decree which those Commissioners were authorised to pronounce can be considered to be valid and effectual in the absence of the stipendiary minister, as a party before the tribunal at the time of the decree being so pronounced?