the liferenter is to get the whole profits that are to come in from the business.

Upon these general views I concur with your Lordship in thinking that the Lord Ordinary's interlocutor should be recalled, and that this lady should be found entitled, not to the profits of the minerals, but to the interest of the residue, including in that residue the profits which have been realised upon those leases since her husband's death.

The Court pronounced this interlocutor:—

"The Lords having heard counsel on the reclaiming note for the defenders against Lord Rutherfurd Clark's interlocutor of 30th May 1876, Recall the said interlocutor so far as it finds that 'on a sound construction of the trust-deed libelled the pursuer is entitled to the profits derived from the leases mentioned in the record since the date of the death of the truster': Find that the pursuer is not entitled to the profits derived from the mineral leases mentioned in the record as being part of the free annual income of the residue of her deceased husband's estate provided to her during her viduity by his trust-settlement: Find that the said profits form part of the residue of the trust-estate realised by the defenders as trustees under the powers and directions of the trust-settlement: *Quoad ultra* adhere to the interlocutor complained of: Remit to the Lord Ordinary to proceed further as shall be just, and consistent with the above finding; and find neither party entitled to expenses incurred since the date of the Lord Ordinary's interlocutor."

Counsel for the Pursuer—Asher—Pearson. Agents—Webster & Will, S.S.C.

Counsel for the Defenders—Lord-Advocate (Watson)—Balfour—R. V. Campbell. Agents—Hamilton, Kinnear, & Beatson, W.S.

Saturday, February 24.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

OCHTERLONY *v.* OCHTERLONY, *et e con.*

Entail—Entail Amendment Act 1848 (11 *and* 12 *Vict. c.* 36), *sec.* 43—*Trust—Erasure* in essentialibus.

A truster directed his trustees to purchase lands and convey them under the fetters of a strict entail in favour of a certain series of heirs. The trustees purchased lands, and executed in 1840 an entail in the terms directed, but defective in the prohibition against alienation. The entail therefore became invalid and ineffectual as regarded all the prohibitions on the passing of the Rutherfurd Act in 1848. The institute, after possessing the estates on this entail for thirty-seven years, brought a declarator to have it found that he was entitled to possess them in fee-simple in terms of the 43d section of the said Act.—*Held* that he was not entitled to decree, having no right to possess the estates otherwise than under the conditions of the trust-deed, and the invalid entail being *ultra vires* of the trustees, who had no power to convey the estates otherwise than under conditions of strict entail.

The first of these actions was at the instance of Sir Charles Ochterlony of Ochterlony, Baronet, the heir of entail in possession of the estates of Ochterlony, against his eldest son David Ferguson Ochterlony and the other heirs of entail, for declarator that the entail under which the pursuer held the estates was not valid and effectual in terms of the Act 1685, cap. 22, and that the pursuer was entitled to the lands in fee-simple in terms of the 43d section of the Entail Amendment Act 1848. The pursuer founded upon a defect in the clause of the deed prohibiting alienation, the word "irredeemably" in that clause (which was in the form usual in entails) being written upon an erasion or otherwise vitiated. It was not ultimately disputed that the word "irredeemably" was erased, and that the deed was therefore invalid as a strict entail.

The said deed of entail had been executed in the following circumstances:—In 1824 Sir David Ochterlony, Baronet, a Major-General in the East Indian Army, and residing at Delhi, executed a trust-deed of settlement and commission, whereby he empowered his trustees and commissioners therein named to purchase lands in Scotland, and gave the following directions to them as to the settlement thereof—"And which lands when so purchased, whether taken in my name directly or in their own in the first instance but for my behoof, as may be thought most advisable, I farther hereby direct and appoint and authorise and empower my said trustees and commissioners foresaid to settle by strict entail on myself and the heirs hereinafter pointed out, and to execute such deed or deeds of entail with all prohibitory, irritant, and resolutive clauses, conditions, and provisions required and usually inserted in the strictest entails, and all other deed and deeds, instrument and instruments (with liberty to me to revoke or alter the same by any writing signed by me or by my authority), as shall or may be necessary by the law of Scotland." The destination in the deed of entail to be executed by the trustees was to be in favour of the truster and the heirs-male of his body, whom failing to the heirs-female of his body, whom failing to the eldest lawful son of the body of Roderick Peregrine Ochterlony, then deceased, the truster's natural son, and to the heirs-male of the body of such eldest son of the said Roderick Peregrine Ochterlony, whom failing to various other substitutes.

Sir David Ochterlony died in 1825, leaving no lawful issue, and before his trustees had purchased lands in Scotland in terms of the trust. The pursuer, Sir Charles Metcalfe Ochterlony, was the eldest lawful son of the said Roderick Peregrine Ochterlony.

The trustees having purchased certain lands in Scotland (now called Ochterlony), and Sir Charles Ochterlony having come of age, the lands were conveyed to him as directed by the trust-deed, by disposition and deed of entail dated 28th March 1840. Under this deed of entail Sir Charles Ochterlony possessed the estates until 1876, when the defect in the clause prohibiting

alienation was discovered, and this action was brought.

Mr David Ferguson Ochterlony was the only person called as defender who entered appearance, and the second action was a counter action at his instance against Sir Charles Ochterlony. The summons in this second action concluded (1) for declarator that the defender Sir Charles had no right to the estates except under conditions of strict entail, as directed in Sir David's trust-deed, and that any disposition of the lands which might be found invalid as a strict entail was *ultra vires* of the trustees; and (2) in event of its being found that the deed was invalid as a strict entail, for declarator that Sir Charles was bound to execute a strict entail of the lands in favour of himself and the series of heirs specified in the trust-deed, and for reduction of the said deed of entail.

Mr D. F. Ochterlony pleaded—"(1) The truster having directed a strict entail to be made, the defender has no right to the lands as fee-simple proprietor, or otherwise than under the conditions of a strict entail. (2) The trustees having had no power to convey the lands except under the conditions of a strict entail, the disposition and deed of entail executed by them, in the event that it shall be found invalid as a strict entail, is *ultra vires* and reducible. (3) The defender having had no right to obtain a conveyance of the lands except as under strict entail, in terms of the truster's directions, is bound to execute and record a valid disposition and deed of strict entail as concluded for."

Sir Charles Ochterlony pleaded—"(2) The said disposition and deed of entail being invalid and ineffectual as regards the prohibition against alienation of the said lands and estate, is invalid and ineffectual as regards all the prohibitions, and the defender is entitled to hold the said lands and estate in fee-simple, and to exercise at pleasure all the powers of the proprietor of a fee-simple estate in respect thereto, in terms of the Act 11 and 12 Vict. cap. 86, sect. 43. (3) The said disposition and deed of entail having been executed by the mandatories of the said Sir David Ochterlony in the *bona fide* execution of the trust, is in the same position in all respects, and in regard to all rights which may be claimed in virtue of it, as if it had been executed by the said Sir David Ochterlony himself. (4) The said disposition and deed of entail being a good and valid disposition of the said lands, the defender having been duly infeft thereon and in possession of the said lands under the same since 29th April 1840, and not having been one of the said deceased Sir David Ochterlony's trustees, nor a party to the said trust-deed, nor under any obligation in reference thereto, is entitled to absolvitor from the whole conclusions of the summons, with expenses."

The Lord Ordinary pronounced the following interlocutors and notes in the two actions respectively:—

"*Edinburgh, 24th October* 1876.—The Lord Ordinary having considered the cause, assoilzies the defenders from the conclusions of the action, and decerns: Finds them entitled to expenses; allows an account thereof to be lodged, and remits the same to the Auditor to tax and report.

"*Note.*—By a trust-deed of settlement and commission, dated 10th March 1824, Sir David Ochterlony directed his trustees and commissioners to purchase lands in Scotland, and to settle them on himself and a series of heirs under a deed of strict entail.

"Sir David died before the execution of the trust, and the trustees having purchased the lands, disponed them under what was intended to be a settlement of strict entail in favour of the pursuer and the heirs of his body and the series of heirs therein mentioned. The deed of entail was executed in March and April 1840, and infeftment in favour of the pursuer followed thereon in November 1840.

"The pursuer has discovered that the word 'irredeemably' occurring in the prohibitory clause is written on an erasure or is vitiated. He has accordingly raised this action against his son and the other heirs-substitute of entail in order to have it found and declared that the entail is defective, and that by virtue of the 43d section of the Entail Act of 1848 he is entitled to possess the lands in absolute property.

"The Lord Ordinary is satisfied that the word 'irredeemably' is vitiated, and that it cannot be read as part of the deed. He accordingly pronounced an interlocutor to that effect dated 13th June 1876.

"The action is defended by Mr David F. Ochterlony, as the next heir-substitute of entail. He has also raised an action of declarator and reduction against the pursuer, to have it found that the pursuer is not entitled to possess the lands except in conformity with the trust-deed, and to set aside the deed of entail which was executed by Sir D. Ochterlony's trustees.

"The Lord Ordinary entertains no doubt that if the pursuer is entitled to possess the lands under the deed of entail of 1840, he is by virtue of the 43d section of the Entail Amendment Act entitled to hold them in absolute property. For if the entail is defective in so material a part as the prohibition against irredeemable sales it is by the Act ineffectual in all respects.

"But the defender maintains that the pursuer is not entitled to possess the estate under this deed, and that it must be set aside as disconform to the directions of the trust-settlement of Sir D. Ochterlony.

"The pursuer does not dispute that by the trust-deed the trustees were directed to dispone the lands under a settlement of strict entail. But he maintains that as the deed of entail was delivered and received in good faith, and as the error was one which might have escaped notice without any imputation of negligence, the trustees have executed their office, and that his rights must be determined by reference to the deed of entail as the only legitimate title under which the lands can be held. He urged that if Sir David had himself made the entail the right of the heir in possession must be determined by the deed of entail as he made it, and that the same rule must apply to a deed executed by trustees who are the mere mandatories of the truster.

"The Lord Ordinary is unable to sustain this argument. It is not disputed that the trustees had no power to execute any other deed than one of strict entail. The pursuer as beneficiary under the deed is not entitled to avail himself of a mistake to the prejudice of the other beneficiaries, and as the Court could themselves have executed the trust, they can, it is thought, correct any error which has been committed by the trustees.

"The analogy which the pursuer attempts to draw between the present case and that of a deed executed by the proprietor himself is fallacious. If the latter deed is not properly framed the Court cannot reform it. The rights of the persons who take benefit by it must be determined by its condition as it left the hands of the maker. But where the trustees have a duty to perform, the Court are bound to see that they duly perform it, and to set aside any deed which is inconsistent with the instructions under which they act.

"The pursuer further maintains that by reason of the long period for which he has possessed the lands under the existing title his right to possess under that title cannot now be questioned. If prescription had run, the argument of the pursuer would have been sound. But the Lord Ordinary is of opinion that no length of time short of the prescriptive period will exclude the right of the beneficiaries to have the estate settled in conformity with the instructions contained in the trust-deed.

"The Lord Ordinary has therefore assoilzied the defenders, and has given decree in favour of Mr Ochterlony in the action at his instance."

"*Edinburgh, 24th October* 1876.—The Lord Ordinary having considered the cause, finds and declares that the defender has no right to the lands of Balmadies and others mentioned in the summons, except under conditions of strict entail, and other conditions contained or referred to in a trust-deed of settlement and commission executed in duplicate, the one duplicate dated 10th March, and recorded in the Books of Council and Session 15th November 1824, and the other dated 15th April 1824, granted by the deceased Sir David Ochterlony, Baronet, a Major-General in Her Majesty's army in the East Indies, and letter of instructions by him relative to the said trust-deed, dated 25th June 1825, and recorded in the Books of Council and Session as a probative writ on 3d December 1830; that the defender never had, and has not now, any right to hold or possess the said lands and others as fee-simple proprietor thereof, or otherwise than subject to the said conditions; that the trustees under the said trust-deed were not entitled to convey the said lands and others to the defender and the series of heirs therein specified except under conditions of strict entail, and that any disposition or deed conveying the said lands and others to the defender which may be found to be invalid as a deed of strict entail was and is *ultra vires* of the said trustees: Further finds, reduces and declares in terms of the reductive conclusions of the summons, and decerns: Finds the pursuer entitled to expenses; allows an account thereof to be lodged, and remits the same to the Auditor to tax and report.

"*Note.*—The Lord Ordinary refers to the note to his interlocutor of this date (24th October 1876), pronounced in the action of declarator at the instance of the present defender against the pursuer."

Sir Charles Ochterlony reclaimed in both actions.

Argued for him—(1) The deed of entail in question having been executed by the mandatories of Sir David Ochterlony, was to all effects in the same position as if it had been executed by Sir David himself, in accordance with the maxim *qui facit per alium facit per se*, and it could not be disputed that if Sir David had himself executed the deed, Sir Charles would have been entitled to hold the lands in fee-simple, in terms of the 43d section of the Rutherfurd Act. (2) That section of the Act contemplated an existing state of matters—given a deed of entail defective in one of the cardinal prohibitions, and an heir possessing the estate under that entail, the provisions of the section applied. The heir possessing under the defective entail had an absolute right to take advantage of the defect and to acquire the estate in fee-simple. If the statute had contemplated that the provisions of the section should not apply to an entail made by trustees, it would have said so. If the contention on the other side were sound, the provisions of the section might be rendered null, and an absolutely unchallengeable entail executed by the intervention of trustees. (3) The argument that the provisions of the Act did not apply to this deed because it was not only invalid as an entail but invalid as a deed, was unsound. The deed was not invalid to all effects. It was a deed which had been granted and accepted in good faith, and which had given a valid title to Sir Charles, under which he had possessed the estates for 37 years.

Argued for Mr D. F. Ochterlony—The measure of Sir Charles' right was Sir David's trust-deed, and under that deed he was entitled to the estates only under the fetters of a strict entail. The entail which the trustees had executed was a deed which they had no power to grant, and which was therefore bad *ab initio*. The trust had never been executed, and Mr Ochterlony as beneficiary under that trust was entitled to demand that it should now be carried into effect.

At advising—

Lord Ormidale—By the trust-deed of the late Sir David Ochterlony he directed and appointed, authorised and empowered, a deed of strict entail to be executed, recorded, and feudalised by his trustees and his commissioners, so as to be "effectual in terms of law." But, it having been now found and determined by final interlocutor that the entail which was executed is not a strict one or effectual in terms of law, the question is, Whether, notwithstanding, it forms a good right and title in the reclaimer to the lands and estates referred to, free from the fetters of a strict entail. He maintains that it does, in respect that the trustees, although the entail which they executed cannot be said to be valid and effectual as they were directed to make it, having acted in *bona fide*, and in ignorance of the erasure in the word irredeemably, or of any other flaw in the deed, it must be held to be good and sufficient in terms of the 43d section of the Entail Amendment Act (11 and 12 Vict. cap. 36), and independently of that Act.

I have come to be satisfied that this contention on the part of the reclaimer cannot be sustained.

The *bona fides* of the late Sir David Ochterlony's trustees can be of no moment if they exceeded or violated, as they undoubtedly did, the powers and directions under which alone they were entitled to act. I am not aware of any law or authority to the contrary, and assuredly the case of the *Union Bank of Scotland* v. *Makin & Sons*, March 7 1873, 11 Macph. 499, cited at the debate for the pursuer, is not so. In that case the question was whether the power with which Makin & Sons had invested their manda-

tory Dempster was so ample and comprehensive as to entitle the Bank as a *bona fide* third party to rely on it. Accordingly, the Lord President in concluding his remarks when giving judgment observed, the only question was, "whether Dempster, the mandatory, did not deal with the Bank in that department of business in which he was specially authorised to deal? I am clearly of opinion he did." And Lord Ardmillan, the only other Judge who appears to have expressed an opinion, said—"We have no case here of implied authority. We have very clear and ample authority expressly conferred. On that authority given by the defenders to their manager, their general representative and agent in Scotland, the Bank were entitled to rely." But in the present case Sir David Ochterlony gave no general powers to his trustees and commissioners. On the contrary, the powers and directions he gave were so plain and explicit as to render it impossible to mistake or misunderstand them.

Independently, however, of the question of *bona fides* on the part either of Sir David Ochterlony's trustees or of Sir Charles Ochterlony, it was argued for the pursuer,—and this was the plea chiefly relied on by him,—that the 43d section of the Entail Amendment Act applies, and enacts that where an entail is invalid under the Act of 1685 in any of its essential prohibitions it is to be held invalid in all respects, and the estate shall be subject to the acts of the person in possession at the time as if it belonged to him in fee-simple. But this argument proceeds, I think, upon an entire fallacy. The Entail Amendment Act, in the section referred to, has no relation to a deed of entail like that in question, which is absolutely and was from the beginning null and inept, just as if it had never existed, for I take it that such is truly its nature, seeing that it was executed not only without authority but in violation of the powers and directions under and in terms of which alone it could have, or ever ought to have, been executed. And it is made all the clearer that such an authorised deed cannot be upheld as good to any effect when it is considered that there is no reason, as remarked by the Lord Ordinary, why another unobjectionable one should not now be executed and the purposes of the trust be thus carried into effect. It is not suggested that the existing deed has been by prescription or otherwise so fortified as to render it impossible now to put matters right.

I am therefore of opinion that the Lord Ordinary's interlocutors reclaimed against ought to be adhered to. What steps will require to be taken in order now to put matters right is a question which has not been brought under our consideration by either of the parties, and therefore I offer no opinion regarding it.

Lord Gifford—I concur. Sir David Ochterlony directed his trustees to execute in favour of the heirs mentioned a deed containing all the clauses required and usually inserted in the strictest entails. The duty of the trustees was therefore to make a strict entail. They purchased lands as directed by the truster, and executed a disposition of these lands which professed to be a strict entail, and under which the pursuer has possessed for many years, but not for the prescriptive period. It now appears that this disposition was in an essential part written on an erasure. This was a failure of duty on the part of the trustees, in whose *hæreditas jacens* the estate still is; and I think every one of the substitute heirs is now entitled, as he would have been entitled immediately on the execution of the defective deed, to call for the execution of a new deed of strict entail in terms of the trust-directions. No doubt possession for the prescriptive period might have fortified the title. It is quite clear that the Entail Amendment Act does not apply to invalid deeds. I had some doubts as to the manner in which the correction of the faulty title should take place, but I agree with the Lord Ordinary that the existing deed must be reduced.

Lord Justice-Clerk—I concur in thinking that the case is a very clear one. The entail is manifestly defective, and so not what the trustees were directed to execute, and the Rutherfurd Act in sec. 43 does not apply to cases of breach or non-execution of trust. There may be ulterior questions as to how far the acts of the heir in possession are to be cut down, but I agree that the faulty title must be reduced.

The Court adhered.

Counsel for Sir Charles Ochterlony—Balfour—Low. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for Respondents—Asher—Keir. Agents—Dalgleish & Bell, W.S.

Saturday, February 24.

FIRST DIVISION.

[Lord Adam, Ordinary.

PETITION—SIR. W. EDMONSTONE.

Improvement of Land Act 1864 (27 *and* 28 *Vict. cap.* 114)—*Entail—Minor—Railway.*

In an application to the Court by an heir in possession of an entailed estate, for an order authorising and requiring the Inclosure Commissioners for England and Wales to sanction his charging the estate with a sum of money which he was desirous of subscribing to a proposed railway to pass through the estate, in terms of the Improvement of Land Act 1864—*held* that it was not necessary to show that without the applicant's subscription the railway would not be made.

This was a petition presented under the Improvement of Land Act (27 and 28 Vict. cap. 114) by Sir William Edmonstone, heir of entail in possession of the estate of Kilsyth, for the purpose of charging the estate with the sum of £5000, which the petitioner was desirous of subscribing for shares of the Kelvin Valley Railway Company and its proposed extension betwixt Kilsyth and Falkirk. The next heir of entail was the petitioner's son, who was a minor, which under the 21st section of the Act rendered it necessary that this application should be made to the Court.

The 78th and 80th sections of the statute, under which this application fell, were as follows—(78) "In case any landowner shall be desirous of subscribing for any shares or stock in the capital, whether original or additional, of