in that matter—a matter left to their judgment by the statute, and one which they are better able to determine from local knowledge than the Court could be. But from explanations given at the bar it appears that the class represented by the third party actually pays (on the reduced assessment) about two-thirds of the whole assessment, while the second parties burdened with the whole rate only pay the remaining third. On the whole matter, therefore, it appears to me that the proceedings of the first party have been quite regular and within their competency, and that both questions put to us should be answered in the affirmative.

The other Judges concurred.

Counsel for the First Party—Salvesen. Counsel for the Second Party — Shaw. Counsel for the Third Party—C. N. Johnston. Agent—Marcus J. Brown, S.S.C.

Wednesday, March 16.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

FALCONAR STEWART *v.* WILKIES.

Succession—Disposition of Property under Conditions—Real Burden—Obligation.

A person disponed heritable estate to persons in a certain order of succession "under this declaration, burden, and condition, that in the event of any part of the said lands and estate . . . that may remain unsold at my death being thereafter sold or disposed of or excambed by any proprietor or possessor of the same, or adjudged or attempted to be adjudged or carried away in any manner of way for his or her debt, that then and in any of these events there shall be paid out of the price of the lands . . . if and when sold, or created a real lien and burden upon the same if they shall remain unsold, to and in favour of such of the children of G. F. as may then be in existence, or to their heirs equally to and among them, the sum of £10,000." . . . One of the proprietors of the estate under this disposition gratuitously disponed it to a line of heirs so that shortly the estate would be given to a person not within the line originally pointed out.

Held that there was an obligation upon such person on succeeding to the estate to create a real burden over it for the sum of £10,000 in favour of the children of G. F. or their heirs.

Miss Elizabeth Dalyell died unmarried upon 18th April 1861. She was proprietrix of one-half of the estate of Binns in Linlithgowshire, her brother Sir William Cunningham Dalyell having acquired right to the other half. After her death, however, it was agreed between her trustees and Sir Willian Cunningham Dalyell, with concurrence of all concerned, that the whole estate should be settled in the manner directed by her trust-disposition and settlement dated 21st November 1855, and with codicils dated respectively 12th March 1860 and 3rd May 1860 registered 26th April 1861. That trust-disposition and settlement, by which after satisfying certain other purposes the liferent of the free residue of the estate was given to Sir William Cunningham Dalyell, contained the following clause — "And upon the death of the said Sir William Cunningham Dalyell I direct and appoint my said trustees to dispone, convey, and make over the lands and estate, and others before described, or such parts and portions thereof as may now or then remain unsold, and shall be adjudged and belong to or be vested in them or their foresaids as trustees foresaid, or to which they shall have acquired right as aforesaid, to and in favour of Robert Dalyell [Sir William's son] and his heirs, whom failing to and in favour of Osborn Dalyell [another son of Sir William] and his heirs, but with and under this declaration, burden, and condition, that in the event of any part of the said lands and estate of Binns and others that may remain unsold at the time of my death being thereafter sold or disposed of or excambed by any proprietor or possessor of the same, or adjudged or attempted to be adjudged or carried away in any manner of way for his or her debt, that then and in any of these events there shall be paid out of the price of the lands adjudged, and to be conveyed by my trustees in manner aforesaid, if and when sold, or created a real lien and burden upon the same if they shall remain unsold, to and in favour of such of the children of George Falconer as may then be in existence, or to their heirs, equally to and among them, the sum of £10,000 sterling. . . . And with this declaration, that in the event of a sale or excambion of any part of the said lands and estate of Binns and others that may remain unsold at the time of my death, or of the same being adjudged or attempted to be adjudged as aforesaid, the said two bequests to the children of the said George Falconer, and their heirs, and [another bequest] shall then be real preferable liens and burdens upon such parts and portions of the said lands and estate as are now directed to be adjudged and conveyed, and are to be adjudged and conveyed by my said trustees in manner foresaid, or upon the price thereof, if sold: And all these burdens, conditions, and declarations shall be inserted in any conveyance whatever of the same to be made and granted by my said trustees or their foresaids, as above directed, and shall be appointed by them to be inserted in all future transmissions and investitures of the said lands and estate for ever, and shall be inserted in the instrument of sasine to follow upon said conveyance by my said trustees or their foresaids, which instrument of sasine shall forthwith be expede, completed, and recorded by and at the sight of my said trustees or their

foresaids, it being my most earnest wish and desire that the said lands and estate of Binns shall be preserved and maintained whole and entire in lineal descent in my family in all time to come, and my full intention to do all in my power to effect that object."

The effect of the codicils was to alter the destination by striking out the name of Osborn Dalyell and by calling after Sir Robert Dalyell, and the heirs of his body, his sister Mrs Maria Christina Dalyell or Du Plat and the heirs of her body, whom failing Mrs Elizabeth Grace Dalyell or Cornwall and the heirs of her body, whom failing George Falconar of Carlowrie, and the heirs of his body. In all other respects the codicils ratified the trust-settlement.

Sir William Cunningham Dalyell died upon 16th February 1865, and by disposition dated 10th and 12th and recorded 16th April 1872 (Mrs Du Plat having died without issue, and George Falconar being also dead), Mr John Wilkie and Sir Robert Dalyell, Miss Dalyell's surviving trustees, disponed the estate of Binns to and in favour of Sir Robert Dalyell and the heirs of his body, whom failing to and in favour of Mrs Elizabeth Grace Dalyell or Cornwall and the heirs of her body, whom failing to and in favour of the heirs of the body of George Falconar: "But declaring always that these presents are granted with and under the real burdens, conditions, provisions, and declarations which are specified and contained in the foresaid trust-disposition and settlement of the said deceased Elizabeth Dalyell, and hereinbefore fully specified, in so far as these or any of them may now or for the time be consistent and applicable, and capable of being made legally effectual against the said lands and others or the heir in possession thereof for the time; and which burdens, conditions, provisions, and declarations are thus expressed in the said trust-disposition and settlement of the said Elizabeth Dalyell, viz." . . . [as above].

By disposition dated 17th April and recorded 18th April 1872, Sir Robert Dalyell disponed the estate of Binns to and in favour of himself and the heirs of his body, whom failing his sister Mrs Elizabeth Grace Dalyell or Cornwall and the heirs of her body, whom failing the heirs of the body of George Falconar, but he omitted the whole burdens and conditions of Miss Dalyell's trust-disposition and settlement, and by another disposition dated 17th April 1872 and recorded 23rd June 1886, Sir Robert Dalyell disponed the property of Binns to himself and the heirs of his body, whom failing to Mrs Elizabeth Grace Dalyell or Cornwall in liferent, and the heirs of her body in fee, whom failing to John Wilkie and the heirs of his body. John Wilkie was Sir Robert's cousin and a nephew of Miss Elizabeth Dalyell, his mother being her sister. George Falconar was more distantly related to the Dalyell family, his mother being Miss Dalyell's cousin.

Sir Robert Dalyell died unmarried in January 1886, and his sister Mrs Elizabeth Grace Dalyell or Cornwall succeeded to the liferent of the estate of Binns and assumed the name of Cornwall Dalyell. She was born in 1829 and had no issue. John Wilkie died in 1884. In June 1891 George Mercer Falconar Stewart, Esq., of Binny, Linlithgowshire, brought an action against Mrs Elizabeth Grace Dalyell or Cornwall Dalyell and her husband Gustavus Charles Cornwall Dalyell, as administrator-in-law for his said wife, and for all right and interest he might have in the premises, James Wilkie, of Foulden, in the county of Berwick, John Dalyell Wilkie, his younger brother, Miss Henrietta Eleanor Marie Wilkie, Miss Harriet Charlotte Wilkie, and Miss Eleanor Bruce Wilkie (children of the late John Wilkie), Edinburgh; Admiral Sir Alexander Milne, Bart., G.C.B., K.C.B., and Sir Alexander Kinlock of Gilmerton, Bart., as curators of the said John Dalyell Wilkie and Eleanor Bruce Wilkie; Miss Frances Henrietta Falconar, presently residing in Edinburgh, and Mrs Helen Jane Falconar or Collyer, wife of John Mounsey Collyer, barrister-at-law, London (his sisters), and the said John Mounsey Collyer for all right and interest he might have in the premises, "to have it found and declared by decree of the Lords of our Council and Session that the disposition, dated the 10th and 12th, and with warrant of registration thereon, recorded in the Division of the General Register of Sasines applicable to the county of Linlithgow the 16th, all days of April 1872, granted by John Wilkie, Esquire of Foulden, and Sir Robert Alexander Osborne Dalyell of Binns, Bart., both now deceased, the surviving trustees of the deceased Miss Elizabeth Dalyell, daughter of the late Sir Robert Dalyell, of Binns, Bart.—acting under her trust-disposition and deed of settlement and codicils thereto therein mentioned—in favour of the said Sir Robert Alexander Osborne Dalyell and the heirs of his body, whom failing as therein mentioned, was granted, and that All and Whole the lands and estate of Binns and others in the county of Linlithgow, being the lands and others particularly described in the said disposition, dated and recorded as aforesaid, were thereby disponed, with and under the real burden, condition, and provision, *inter alia*, that in the event of any part of the said lands and estate of Binns and others being thereafter sold or disposed of or excambed by any proprietor or possessor of the same, or adjudged, or attempted to be adjudged or carried away in any manner of way for his or her debt, that then and in any of these events there should be paid out of the price of the said lands, if and when sold, or created a real lien and burden upon the same if they should remain unsold, to and in favour of such of the children of George Falconar, Esquire of Carlowrie, now deceased, as might then be in existence, or to their heirs, equally to and among them, the sum of £10,000 sterling: And that the said late Sir Robert Alexander Osborne Dalyell held, and the defender Mrs Elizabeth Grace

Dalyell or Cornwall Dalyell now holds, the said lands and estate of Binns and others subject to the said real burden, condition, and provision: And the same being so found and declared, it ought and should be found and declared, by decree foresaid, that by disposition and settlement, dated the 17th day of April 1872, and with warrant of registration thereon, recorded in the said Division of the General Register of Sasines applicable to the county of Linlithgow the 23rd day of June 1886, the said Sir Robert Alexander Osborne Dalyell disposed of the said lands and estate of Binns and others within the meaning and intent of the said real burden, condition, and provision: And further it ought and should be found and declared, by decree foresaid, that the said sum of £10,000 sterling formed from and after the said 23rd day of June 1886, and is now, a real lien and burden upon All and Whole the said lands and estate of Binns and others in the county of Linlithgow, being the lands and others particularly described in the foresaid disposition recorded in the said Division of the General Register of Sasines on the 16th day of April 1872, and that in favour of the pursuer and of the defenders Miss Frances Henrietta Falconar and Mrs Helen Jane Falconar or Collyer equally, and their heirs, and aye and until the said sum shall be fully paid and satisfied, subject always to the declaration that the same shall not be exigible, and shall not bear interest, during the lifetime of the defender Mrs Elizabeth Grace Dalyell or Cornwall Dalyell: Or otherwise, it ought and should be found and declared, by decree foresaid, that the defenders the said James Wilkie, John Dalyell Wilkie, Henrietta Eleanor Marie Wilkie, Harriet Charlotte Wilkie, and Eleanor Bruce Wilkie, or their heirs, are not, nor any of them, entitled to take possession of the said lands and estate of Binns and others, or any part thereof, or in any way to dispose thereof, or to burden the same, or take benefit under the said last-mentioned disposition and settlement, without making payment to the children of the said deceased George Falconar or to their heirs of the sum of £10,000 sterling."

The pursuer, the only son of George Falconar of Carlowrie, averred that "the disposition recorded on 23rd June 1886 dispones the said lands and estate of Binns to the said John Wilkie, to the prejudice of the heirs of the body of the said George Falconar. This disposition is a disposal of the said estate within the meaning of Miss Dalyell's settlement and the disposition by her trustees before mentioned, whereby the said sum of £10,000 has become exigible, and will be payable on the death, without issue, of the defender Mrs Cornwall Dalyell." In consequence of the omission of the real burden from the disposition by Sir Robert Dalyell, recorded 18th April 1872, he averred that it was necessary for his protection that the said buren should be of new declared a real burden upon the said lands as concluded for.

He pleaded—"(1) The pursuer, as one of the heirs of the body of George Falconar, is, in virtue of the disposition of 1872 granted by Miss Dalyell's trustees, entitled to decree of declarator in terms of the first conclusion of the summons. (2) Prescription not having run on the disposition granted by Sir Robert Dalyell, recorded in 1872, the estate of Binns is still held subject to the burden of £10,000 contained in the said disposition by Miss Dalyell's trustees, and decree of declarator should be pronounced accordingly. (3) Sir Robert Dalyell having by the said disposition granted by him, recorded in 1886, disposed of the estate of Binns within the meaning of the said disposition by Miss Dalyell's trustees, the pursuer is entitled to decree in terms of the remaining declaratory conclusions of the summons, or one or more of them. (4) The defenders, the children of the deceased John Wilkie, are not entitled to take benefit under the said disposition by the said Sir Robert Dalyell without making payment of the sum of £10,000."

The defenders — the Wilkie family — pleaded—"(1) The pursuer has no right, title, or interest to sue the present action. (3) The pursuer is not entitled to decree in terms of any of the conclusions of the summons, in respect—1st, that Miss Dalyell was not entitled to burden her estate with the provisions in favour of the children of George Falconar founded on by the pursuer; 2nd, *esto* that Miss Dalyell was entitled to burden her estate with the said provisions, they are not so expressed as effectually to burden the estate; 3rd, that Sir Robert Dalyell was entitled to re-settle the estate free from the burden of the said provisions, and that he effectually did so by the dispositions, dated 17th April 1872, and recorded respectively 18th April 1872 and 23rd June 1886; and 4th, that in any event the disposition, recorded on 23rd June 1886, did not constitute a disposal of the estate of Binns within the meaning of Miss Dalyell's settlement and the disposition by her trustees dated 10th and 12th April 1872."

Mrs Cornwall Dalyell and the pursuer's sisters although called as defenders did not appear.

Upon 5th December 1891 the Lord Ordinary (KYLLACHY) pronounced the following interlocutor:—"Finds that on the just construction of the trust-disposition and settlement and codicils of the deceased Miss Elizabeth Dalyell, and of the disposition by the trustees of the said deceased Miss Elizabeth Dalyell, both mentioned on record, the defenders James Wilkie, John Dalyell Wilkie, Henrietta Eleanor Marie Wilkie, Harriet Charlotte Wilkie, and Eleanor Bruce Wilkie, and each of them, and their respective heirs, are bound, on succeeding to the estate of Binns under the disposition and settlement of the late Sir Robert Alexander Osborne Dalyell, mentioned in the summons, to make payment to the pursuer, and the other children of the deceased George Falconar of Carlowrie, or to their heirs, of the sum of £10,000 sterling, or otherwise, in the defender's option, to create over the said estate a valid real

burden for that amount in favour of the said children of the said deceased George Falconar and their heirs: Therefore finds, declares, and decerns in terms of the alternative conclusion of the summons, subject to the qualification that the defenders' obligation will be satisfied by their creating a valid real burden upon the estate in favour of the pursuer and the other children of the said deceased George Falconar for the said sum of £10,000: *Quoad ultra* assoilzies the defenders from the conclusions of the summons, and decerns, &c.

"*Opinion.*—The pursuer in this case was, along with his sisters, entitled under the former destination of the estate of Binns to succeed to that estate on the death without issue of the present liferentrix Mrs Cornwall Dalyell. By a *mortis causa* disposition executed by the late proprietor Sir Robert Dalyell, the estate was disponed, on Mrs Cornwall Dalyell's death without issue, to the defenders, the children of the late Mr Wilkie of Foulden.

"The pursuer seeks in the present action to have it declared (1) that under the titles to the estate a real burden exists in favour of himself and his sisters, whereby they became entitled on the disposition to the Wilkie family taking effect to payment of a sum of £10,000; or alternatively, (2) that the Wilkie family, as gratuitous disponees of Sir Robert Dalyell, are bound personally, on the disposition in their favour taking effect, to pay to the pursuer and his sisters the said sum of £10,000, or to create a real burden in their favour over the estate for that amount. These are not in words the conclusions of the summons, but such appears to be the substance of the pursuer's demand. If the conclusions of the summons should be thought to go further and to be expressed too broadly, that is a matter which can be rectified.

"The question arises in this way—The late Miss Elizabeth Dalyell was proprietrix of one-half of the estate of Binns, and her brother Sir William Dalyell possessed or had acquired right to the other half. After Miss Elizabeth's death it was agreed between her trustees and Sir William Dalyell, with concurrence of all concerned, that the whole estate should be settled in the manner directed by Miss Elizabeth's trust-disposition and codicils dated in 1855 and 1860. Accordingly in 1872, after Sir William Dalyell's death, a disposition was obtained from the trustees of Sir James Dalyell (a previous Baronet, in whom the feudal estate had for a long time been allowed to stand), whereby, with consent of all concerned, the estate was disponed to Sir Robert Dalyell and the heirs of his body, whom failing, in the events which happened, to his sister Mrs Cornwall Dalyell and the heirs of her body, whom failing to the pursuer and his sisters. It was, however, declared that the conveyance was made under certain burdens and conditions (repeated from Miss Elizabeth's settlement), the general purpose of these being, not to constitute an entail—for the power of disposition was left unfettered—but to secure that in the event of any sale or excambion, or alteration of the order of succession by Sir Robert Dalyell, or by any of the heirs called after him, there should, *inter alia*, become payable to the pursuer and his sisters the sum of £10,000. It is on the language by which this general intention was sought to be carried out that the question which I have to decide arises.

"I do not propose to quote the various clauses on which the question turns. They will be found at length in Miss Elizabeth's deed, and in the ultimate disposition by her trustees. I shall only state the conclusions at which I have arrived, which I hope will be intelligible upon reference to the deeds.

"In the first place, I do not consider that the pursuer has succeeded in showing either that any real burden exists in his favour, or that there was any intention on the part of Miss Elizabeth that such real burden should be created. Miss Elizabeth does appear to have intended that in certain events the disponee or heirs-substitute succeeding to the estate should be bound to create certain real burdens over it, and particularly one in favour of the pursuer and his sisters. She appears also to have contemplated that her trustees should in some way make provision for certain real burdens emerging so as to affect the estate in certain events—not including, however, any event which has yet occurred. But it is, I think, quite impossible to hold that any real burden was in fact constituted, or that Miss Elizabeth's trustees would have been justified in constituting any real burden operative in the pursuer's favour, in the event which has happened, of a gratuitous disposition of the estate to a stranger to the destination.

"Taking this view, I do not find it necessary to consider how far there is anything in the defenders' point that a real burden cannot competently be constituted in connection with a contingent debt. Neither do I think it necessary to decide—what might be a question of more difficulty—how far it would be competent to dispone an estate under a real burden which was not to be a real burden from the first, but only to come into existence on such a contingency as a sale or alienation of the estate. These are points more difficult than any with which I have to deal. Real burdens have, as we know, rules of their own. They require to be not only definite, but to be expressed in the most clear and perspicuous language; and while it may be, as the pursuer argues, that in a question *inter hæredes* the intention of the truster, and not the language which her trustees have used, must form the rule, still I cannot but feel, that even assuming the intention here to be in the pursuer's favour, there would have been grave difficulties in his way if his case depended on establishing the existence of a real burden such as would affect the estate on the defenders' succession, and be good, *e.g.*, in bankruptcy, and in a question with the defenders' creditors or onerous disponees.

"But while against the pursuer on this

part of his case, I have not been able to see a good answer to his second and alternative contention, viz., that the defenders, as gratuitous disponees of Sir Robert Dalyell, must take the estate subject to the conditions and obligations to which he was subject, and are therefore bound, so soon as his disposition in their favour becomes operative, either to pay the pursuer and his sisters the £10,000 in question, or to execute such deeds as will constitute over the estate a real burden for that amount in their favour. That contention is quite apart from that with which I have been dealing. It is one thing to create a real burden; it is another thing to impose on the heirs of a gratuitous investiture a personal obligation to create such a burden, or pay a sum of money as the alternative of not doing so. There are here (I mean in the latter case) no technical difficulties. There is, so far as I know, no difficulty in imposing on a gratuitous disponee or his gratuitous successors any obligation which the granter may think fit to impose. Nor can it make any difference whether such an obligation is absolute or contingent, or whether the contingency is a certain or uncertain event, or whether it depends on some act of the granter or on some outside occurrence. The obligation may of course become valueless. It may become so by the grantee's bankruptcy. But it cannot be defeated otherwise by any act of the grantee; and if well imposed, I know no principle on which it should be denied effect according to its terms. The only question is, whether on the just construction of the grant it was intended to be imposed.

"Now, I do not think there is much room for doubt that, according to the just construction of Miss Elizabeth Dalyell's trust-deed, her brother (the disponee) and his heirs-substitute after him were, in the event of their disposing of the estate, put under the obligation to pay £10,000 to the pursuer's family, or what comes practically to the same thing, to create a real burden for that amount over the estate in their favour. It was not indeed suggested that the deed could bear any other construction. The only points made by the defenders on this part of the case were two; and I am not sure that they were pressed with much confidence.

"It was said, in the first place, that the word 'disposed,' occurring in connection with the words 'sold and excambed,' must be read as applying only to sales and excambions, and not as applying to gratuitous dispositions. I confess I see no reason for this restriction, which would plainly be inconsistent with and indeed destructive of the whole scheme and object of the truster. The word 'disposed' is, I think, really used as in contrast to 'sale,' and I see no meaning it could have except as applying to gratuitous dispositions. Moreover, the obligation which follows, viz., that £10,000 'shall be paid out of the lands if sold, or created a real burden on the lands if they should remain unsold,' while quite appropriate if directed against a gratuitous disponee representing the supposed disponer, would be quite meaningless if the only thing in view was sale or excambion.' I put it to the defenders' counsel if they could suggest any meaning in that view, and they could suggest none.

"It was, however, said further—and this was really the defenders' main contention—that it being the truster's declared object, as expressed in her trust-disposition, 'that the said lands and estate of Binns shall be preserved and maintained whole and entire in lineal descent in my family in all time to come,' and the defenders' family being nearer in the legal order of succession than the pursuer's family, and being excluded from the succession, not by Miss Dalyell's trust-deed, but only by her second codicil—the disposition to the defenders by Sir Robert Dalyell was not a 'disposition' in the sense of Miss Dalyell's trust-deed, and did not carry with it the obligation to provide £10,000 to the pursuer's family.

"In my opinion, this is not a sound view of the truster's settlement. The trust-disposition and codicils must, I think, be read together; and being so read, they prescribe a certain order of succession, which must be held to be the order of succession which it was the truster's ultimate intention to maintain. That being so, I do not think it possible to treat a disposition which carries the estate to persons outside that order of succession as being at all different in the sense of the settlement from a disposition in favour of a stranger.

"Altogether, I think the pursuer may obtain decree substantially in the terms of his second and alternative conclusion. But I shall so express the interlocutor that the defenders' obligation will be satisfied either by payment of the money or by the creation of an effectual real burden over the estate for the amount.

"I should perhaps add that no objection was taken to the—in some views—hypothetical character of the declarator which the pursuer asks. Both parties concurred in asking a judgment defining their rights; and in the view that the defenders are probably at present fiars of the estate, subject merely to defeasance of their title on a practically impossible event, I see on the whole no sufficient reason why I should refuse to deal with the question which they have submitted for decision."

The defenders reclaimed, and argued—1. Whatever was Miss Dalyell's intention, the law would not recognise any such fettering burden as the pursuer contended for. It was repugnant to the grant of the fee—an attempt to give a fee but withhold the full rights of a fiar. It was also a novel attempt to create an entail without complying with the Entail Acts. The burden sought to be enforced might be as large as the value of the whole estate—Rutherfurd Act 1858 (11 and 12 Vict. cap. 36), secs. 43, 47, and 48; *Dempster*, 1857, 3 Macq. 62; *Munro* v. *Butler Johnstone*, December 18, 1868, 7 Macph. 250; *Chaplin's Trustees* v. *Hoile*, October 30, 1890, 18 R. 27. 2. Sir Robert's disposition did not involve the penalty contemplated by Miss Dalyell. He had neither

sold nor excambed the estate. The words "disposed of" only occurred once, and were (*a*) superfluous, or (*b*) redundant, or (*c*) explanatory of sale, or (*d*) applicable to the case of part of the estate being sold, or (*e*) applicable to the case of bringing in Osborn Dalyell contrary to Miss Dalyell's wishes. If they pointed to the case of gratuitous disponing, that must be such as defeated Miss Dalyell's clearly expressed wish that the estate should be kept in the direct lineal line. This line had been observed more closely by Sir Robert than by Miss Dalyell. To give effect to the pursuer's contention would be to defeat Miss Dalyell's intention by dispersing the estate. 3. No real burden had been created. The Lord Ordinary's judgment was right on that matter. The words were not sufficiently definite, the persons in whose favour it was to be created were uncertain, and the time was indefinite, for it was only to be created upon a contingency which was far from clear. A real burden was one which affected the lands from the date of the deed creating it, no matter who took them, and whether gratuitously or onerously—Ersk. ii. 3, 50; *Forbes* v. *Gordon*, December 14, 1833, 12 Sh. 219. 4. There was no obligation upon the Wilkies to pay £10,000, or create a real burden for that amount before taking the estate. This was not a question of faculty to burden, but of obligation to burden, and accordingly was to be very critically considered. The obligation was not so clearly and unambiguously expressed as to affect the defenders.

Argued for the respondent—1. There was no question of repugnancy here, and the provisions of the Entail Acts had no bearing upon the question. The sum of £10,000 was far within the value of the estate. 2. The defenders wished to strike out the words "disposed of," but they had an intelligible meaning. They applied to cases of gratuitous alienation, and of altering the line of succession laid down by Miss Dalyell—in fact to the case which had occurred. Had Sir Robert sold the lands, the heirs of George Falconar would undoubtedly have got £10,000 out of the price, but Miss Dalyell had provided for their getting that, or the creation of a real burden to that amount if there was disposal although no sale. 3. The trustees of Miss Dalyell were bound to create a real burden upon the lands, and had done so. The contingency did not prevent a real burden being created—*Erskine* v. *Wright*, March 1, 1843, 8 D, 683; *Stewart* v. *Gibson's Trustee*, December 10, 1880, 8 R. 270. 4. Miss Dalyell had laid upon any gratuitous disponer—here Sir Robert—the obligation to create a real burden, which obligation passed with the lands as a "reserved faculty" would have done. Or at all events, there was a personal obligation upon gratuitous disponees — here the Wilkies—to pay £10,000, or create a real burden upon the lands as a condition of taking the lands—Bell's Prin., secs. 915, 916; *Wyllie* v. *Ross*, November 12, 1825, 4 S. 174; *Magistrates of Arbroath* v. *Dickson*, March 19, 1872, 10 Macph. 630; *Storeys* v. *Paxton*, December 7, 1878, 6 R. 293 (Lord Ormidale, 297).

At advising—

LORD PRESIDENT—It is implied in the Lord Ordinary's interlocutor, and it is fully expressed in his Lordship's opinion that, in his judgment, no real burden at present exists in favour of the pursuer over the estate of Binns. The contention that Miss Elizabeth Dalyell by her trust-disposition and settlement either created such a real burden or intended that her trustees in their conveyance to Sir Robert Dalyell should create such a real burden seems to me to be hopeless. I mention it now because this argument was revived in the debate before us; but the observations of the Lord Ordinary are very adequate for its disposal.

The Lord Ordinary has decided the case in favour of the pursuer upon his second or alternative contention, and I substantially agree in that conclusion. I think that under Miss Dalyell's settlement and her trustees' conveyance Sir Robert Dalyell took the estate subject to the condition that in a certain event he should create a real burden for £10,000 in favour of the children of George Falconer. The title and interest to insist for fulfilment of that condition was conferred on those children; it was enforceable primarily against Sir Robert, but equally against his gratuitous disponees. The plain reading of Miss Dalyell's settlement is that in the event of Sir Robert disposing of the lands (in the sense of the deed) he shall, at the same time that he disposes, burden them. Such an obligation, if incumbent on him, is prestable by his gratuitous disponees. No adequate objection was stated to the legal efficacy of such an obligation so imposed and when enforced by the persons in whose favour it is imposed.

The question remains, whether the event has occurred in which Sir Robert became bound to create the real burden. Have the lands been "disposed of?" Here I entirely adopt the reasoning of the Lord Ordinary. The learned counsel for the defenders suggested several constructions of the words "disposed of" as satisfying them. But even assuming what, in at least some instances, is doubtful, that the cases so put may fall under the words, that by no means supplies good ground for refusing to apply them also to a case to which they are applicable in their natural sense.

The conclusion therefore to which I come is that the event did occur of Sir Robert Dalyell disposing of the lands; that he was bound, in disposing of them, to create this real burden upon them; and that the obligation to create such burden is incumbent on the defenders as Sir Robert's gratuitous disponees, if and when they are vested in the lands.

The Lord Ordinary's interlocutor, however, does not seem to me precisely to meet this result; nor do I find in the summons as it stands any conclusion which accurately asserts this right of the pursuer.

The summons (and of course I refer to the alternative conclusion) proceeds on the theory that the obligation incumbent on the defenders is to make payment of £10,000, instead of what it truly is to create a real burden for that sum; and the Lord Ordinary has given a declaratory decree in terms of that conclusion, only qualifying it by declaring that the defenders may, if they like, create a real burden. In the finding in the Lord Ordinary's note, which precedes this decree, his Lordship makes the primary obligation to pay, and the optional alternative to create a burden. But the only obligation stated in the deeds mentioned in the interlocutor is to create a real burden, and although it is true that a solution of the obligation may be found in payment, that does not make payment the right of the creditor in the obligation. I do not think it is necessary to express this mode of solution in the declarator, and certainly not so the primary obligation declared.

I am afraid, therefore, that unless the pursuer amends his summons so as to ask a declarator that in the event stated the defenders are bound to create a real burden we cannot give him a decree. But probably a proposal to amend will readily be made.

LORD ADAM—I concur with your Lordships. The deeds here are very voluminous, but I do not think that, except in regard to two of them, they require any particular examination. The first of these is the trust-disposition and settlement of Miss Elizabeth Dalyell of Binns. Miss Dalyell at the time of making this settlement was entitled to one-half of the estate of Binns, the title to the whole of which at that time stood in the trustees of her predecessor. Now, Miss Dalyell directed her trustees to dispone and convey the lands and estate of Binns, so far as she had right to them, in favour of Sir Robert Dalyell and his heirs, and to a number of others. That destination I understand, according to the pedigree, was a destination in favour of the nearest heirs of Miss Dalyell and also of her brother. The conditions under which that conveyance was to be made were that in the event of the lands being sold or disposed of, or excambed or adjudged, or attempted to be adjudged or carried away, then they should create "a real lien and burden upon the same if they shall remain unsold, to and in favour of such of the children of the said George Falconer as may then be in existence, or to their heirs equally to and among them for the sum of £10,000 sterling." It is that clause which raises the question between the parties. The children now in existence of George Falconer claim in the circumstances either payment of £10,000 or that a real burden shall be created upon the estate by those who have succeeded to it or who will be entitled to succeed to it.

I concur with your Lordship that the meaning of that is that if the estates are sold, or if not sold, disposed of or excambed, that the seller, if they are sold, shall pay the sum of £10,000 to the children in existence of Mr George Falconer, but if they are not sold and remain unsold then the condition is that in that case the disponer who personally disposes of them shall create a real burden to that extent over the estates. I concur with your Lordship that that is the true construction of Miss Dalyell's settlement. Then she goes on to say that these conditions are to be inserted in all the conveyances; and then she gives her reason why she made that provision—"it being my most earnest wish and desire that the said lands and estate of Binns shall be preserved and maintained whole and entire in lineal descent in my family." Her intention therefore was to prevent if possible the estates being sold or disposed of and taken out of the family, by laying that burden upon the party who should either sell or dispose of them. Now she altered that destination by a codicil. The destination had been, as I have said, to the nearest heirs who would have taken by law, but then she makes this change. She desires her trustees to convey the estate in favour of Robert Dalyell—that was her eldest nephew—whom failing, to his sister Mrs Du Plat and the heirs of her body, whom failing to Elizabeth Dalyell, afterwards Mrs Cornwall, and the heirs of her body, and then comes "whom failing to and in favour of the within designed George Falconer of Carlowrie and the heirs of his body." The alteration of the destination was this, that there was an exclusion of the immediate younger brother of Robert and his heirs, viz., Osborne, and there was an exclusion of Mr Wilkie of Foulden, although not by name. Mr Wilkie of Foulden happened to be the next heir after those named, and the effect of this was to bring in George Falconer of Carlowrie and the heirs of his body before Mr Wilkie and the heirs of his body. That was the change operated by that destination, and the reason why the lady had done that was this, as she tells us in the end of her will, that she evidently thought that if the estate came to Mr Osborne Dalyell it would have been immediately dissipated. That was her reason for excluding Mr Wilkie, and not from any dislike or anything of that sort to Mr Wilkie himself, but because Mr Wilkie had intimated to her that if ever the estate came to him under the original destination he would take care that Mr Osborne's children should get it. Therefore, to secure her intention of preserving the estate she displaces the heir who she thought would in point of fact have dissipated it, and the heir who in point of fact she thought would have enabled that heir to have dissipated it if he had come into it. I revert to that in respect of the argument which was urged against it. It was said that Miss Dalyell had expressed in her original settlement her reason for making the conditions that she did in the settlement of creating a real burden of £10,000. That was to preserve the lineal descent in the family. It was said that the subsequent alteration which was made, and which one has to consider,

had not the effect of defeating that intention, but of fulfilling that intention, because the effect of the subsequent change was to replace Mr Wilkie where he was before, and so to that extent to carry out Miss Dalyell's intention by restoring the succession to the estate more in the line of lineal descent. I shall deal with that matter afterwards.

Now, what followed upon that was, that Miss Dalyell's trustees made up a conveyance to the estate by arrangement with Sir William, who was entitled to the other half. They got a conveyance from Sir James' trustees, in whom the title was to the whole estate, and having got that conveyance they disponed the whole estate to Sir Robert in 1872 in terms of the destination. The destination which they inserted in that deed was entirely in terms of that which they were directed to insert, with this exception only, that there is omitted one of those names, Mrs Du Plat, who by this time had died leaving no heirs. That was in exact concurrence with the destination which Miss Dalyell desired to make. Sir Robert had thus become vested in the estate of Binns—and I may say that the conveyance to him was made subject to those conditions which were attached to the conveyance by Miss Dalyell in her settlement. Those conditions were repeated and inserted, and very properly inserted, in the conveyance to Sir Robert.

Now, what Sir Robert did, and what raises this question, was this—By disposition and settlement dated in 1872 he conveyed the estate with a destination in these terms—"I dispone to myself and the heirs of my body"—[so far that was quite right]—"whom failing to my sister Elizabeth Grace Dalyell, wife of Gustavus Charles Cornwall, Secretary to the General Post Office, Dublin, in liferent for her liferent alimentary use only, and to the heirs of the body of the said Elizabeth Grace Dalyell or Cornwall in fee, whom failing to and in favour of my cousin John Wilkie of Foulden, in the county of Berwick, Esquire, and the heirs of his body."

Now, the alteration upon that destination under which Sir Robert himself held the estate was that he deprived his sister Mrs Cornwall of the fee which was given to her, leaving her only a liferent, and he introduced Mr Wilkie into the destination, thereby cutting out Mr Falconar and his heirs from the succession. That accordingly was a destination not in terms of the destination which Miss Dalyell had provided by her trust-disposition and settlement and codicil. Now, the question is—was that or was it not a disposition by Sir Robert of that estate contrary to the directions of Miss Dalyell? I cannot think that it was anything but in the words of Miss Dalyell's settlement. It was a disposition not in terms of the disposition in her deed, and therefore it was a disposition with reference to which the condition was attached of paying £10,000, or creating a real burden upon the property therefor. The deed being a gratuitous disposition, which it was, it humbly appears to me that the event which Miss Dalyell had provided for arose. That is my view of the case, and I think that is the only point in the case. I am accordingly of opinion that the event has occurred, that Sir Robert did dispone the estate gratuitously, and that having done so he is bound to have created a real lien upon the estate. And I think it necessarily follows that Mr Wilkie and his children, if they shall ever succeed to this estate, which is not quite certain yet, the gratuitous disponees are bound to fulfil the obligation which was imposed upon the party who disponed to them. It was said that this was not a violation of Miss Dalyell's directions and intentions, because it was not a violation of the destination in the lineal descent. That is quite true, but I do not think that is the proper construction of the deed notwithstanding that the disposition of the estate was made to parties who were perhaps nearer in lineal descent. The question is, whether it was a disposition against the destination which Miss Dalyell had herself prescribed by the deed. I need not point out that Miss Dalyell was herself the first party to call Mr Falconar's heirs before Mr Wilkie, and so was the first party who violated her own wish and intention.

Upon these grounds I think the interlocutor of the Lord Ordinary is right.

LORD KINNEAR—I agree with your Lordship. I do not think it at all doubtful that Sir Robert Dalyell has disposed of the estate by his conveyance to the defenders in a different way from that in which Miss Elizabeth Dalyell's trust-deed disposed of it; and I think it follows that the provision for that contingency which is contained in the latter deed has taken effect. I quite agree with your Lordship as to the meaning and legal effect of that provision. If the estate had been sold either by Sir Robert Dalyell or by any gratuitous disponee of his, the pursuer and the other children of Mr George Falconer would have been entitled to £10,000 of the price. So long as it remains unsold they have no immediate claim for payment of the money, but they have a right to require that so soon as the estate comes into the hands of a disponee other than the heir who would have taken under Miss Dalyell's destination, the sum of £10,000 shall be created a real burden upon the lands in their favour. I think a good deal of apparent difficulty which was introduced into the argument, and probably also the error which your Lordship has pointed out in the construction of the summons, has arisen from a failure to advert to the distinction between those two entirely different rights which the children of Mr Falconer are to acquire in different circumstances. The Lord Ordinary has observed that the obligation to pay £10,000, and also the obligation to create a real burden upon the lands to that amount come practically to the same thing. It may be that the distinction is of no practical importance so long as the lands on the one hand, and the debtor on the other, are equally good for the

money, but the legal character and consequences of the two obligations are altogether different. There can be no doubt that personal obligations may be made real burdens, because all the conditions of a feudal grant which are so conceived as to affect not only the original grantee and his heirs, but also all singular successors into whose hands accordingly the lands may come, are quite properly called here, inasmuch as they are carried with the conveyance of the lands themselves whether voluntary or judicial, so that no purchaser or creditor could take the lands except under burden of the conditions. Thus a real burden does not of itself import any personal obligation whatever, although it may be combined with a personal obligation if the granter so intends to secure it. The law is very clearly stated and laid down by Lord Stair, and has been illustrated by a series of very familiar decisions. Therefore when we find that under a *mortis causa* testament the disponee is directed in a certain event to make a real burden on the lands, we have to look to the terms in which that obligation is laid upon him in order to see whether they impose a condition and any personal obligation upon him or upon his successors. It appears to me quite impossible to read the clause without seeing that there are no words that possibly can be construed into such an obligation in this case. On the contrary, there is to be a distinction very clearly indeed between the two different rights which are to arise to Mr Falconer's children in two different events. In the one case they are to have right to payment of the money, in the other case they are to have a security created in their favour over the lands. Now, if Sir Robert Dalyell had created such a burden upon the lands, or if his disponees, when they come into their hands create it, the effect will be that their infeftment will be so burdened that no voluntary deed granted by the proprietor so infeft, and no real diligence by any creditors could possibly come into competition with the claim of the creditors in the real burden, but such will merely have a personal action for payment of money against the proprietor of the lands.

I therefore agree with your Lordship that it is impossible to give effect to the conclusion of the summons as it now stands. I think that the Lord Ordinary's judgment is substantially sound, and that if the pursuers are able to frame a conclusion which will give effect to the legal rights as we have now found them to be, they ought to have an opportunity of doing so.

I have only to add, with reference to an observation of the Lord Ordinary at the conclusion of his opinion, that I entirely agree with it, as I understand your Lordships also do, that there is nothing in what the Lord Ordinary describes as being the hypothetical character of the declarator which the pursuer asks, which ought to prevent the Court determining the rights in the present action. So long as the estate remains in the possession of Mrs Cornwall, no right can arise to the pursuer, because she takes the right which Miss Dalyell intended for her, subject only to that limitation against her which the pursuer of course does not complain of. Until her death it cannot be known whether the destination of which they do complain, and of which under Miss Dalyell's deed I think they are entitled to complain, will take effect or not. But we are told that although that presents a difficulty, still practically the event upon which they will be excluded from the succession under Miss Dalyell's deed is not likely to occur. If that be so, and if it appears upon the death of Mrs Cornwall that there are no heirs of her body to take the lands, and that no such persons have ever existed, then it will appear also that there has never been anything to stand between the estate and Mr Wilkie and his heirs, and therefore it will follow that they are now in the position in which the deed of Sir Robert Dalyell placed them, although we cannot tell at this moment whether they are so or not. Therefore, as pointed out by your Lordship, there is a difficulty in giving the pursuer decree of declarator as craved. If he can frame the conclusion in such a way as to square with his legal right, then decree may be given.

The following amendment was thereafter allowed to be made, and was inserted as the first alternative conclusion of the summons, viz.—"Or otherwise, it ought and should be found and declared by decree foresaid, that on a just construction of the trust-disposition and settlement and codicils by the said Miss Elizabeth Dalyell, dated respectively 21st November 1855, 12th March 1860, and 3rd May 1860, and all recorded in the Books of our Council and Session 26th April 1861, and of the said disposition by the said John Wilkie and Sir Robert Alexander Osborne Dalyell, as trustees foresaid, the defenders the said James Wilkie, John Dalyell Wilkie, Henrietta Eleanor Marie Wilkie, Harriet Charlotte Wilkie, and Eleanor Bruce Wilkie, and each of them and their respective heirs on succeeding to the said lands and estate of Binns and others under the said disposition and settlement by the said Sir Robert Alexander Osborne Dalyell, or such one or more of them as shall so succeed, are bound to create as at and from the date of such succession over the said lands and estate a valid real burden for the sum of £10,000 sterling in favour of the pursuer and the defenders Miss Frances Henrietta Falconer and Mrs Helen Jane Falconar or Collyer, equally, and their heirs."

The Court pronounced this judgment:—

"The Lords having resumed consideration of the reclaiming-note for the defenders against the interlocutor of Lord Kyllachy dated 5th December 1891, and heard counsel for the parties, Recal the said interlocutor: Find that on a just construction of the trust-disposition and settlement and codicils of the deceased Mrs Elizabeth Dalyell, and of the disposition by the trustees of

the said Miss Elizabeth Dalyell both mentioned upon record, the defenders James Wilkie, John Dalyell Wilkie, Henrietta Eleanor Marie Wilkie, Harriet Charlotte Wilkie, and Eleanor Bruce Wilkie, and each of them and their respective heirs on succeeding to the said lands and estate of Binns and others under the disposition and settlement of Sir Robert Osborne Dalyell, recorded 23rd June 1886, or such one or more of them as shall so succeed, are bound to create as at and from the date of such succession over the said lands and estate a valid real burden for the sum of £10,000 sterling in favour of the pursuer and the defenders Miss Frances Henrietta Falconar and Mrs Helen Jane Falconar or Collyer, children of the deceased George Falconar of Carlowrie, equally, and their heirs: Therefore find, declare, and decern, in terms of the first alternative conclusion of the summons as amended: *Quoad ultra* assoilzie the defenders from the conclusions of the summons as amended, and decern: Find the pursuer entitled to expenses to the date of the Lord Ordinary's said interlocutor, and to three-fourths of the expenses incurred by him since the said date." . . .

Counsel for the Pursuer and Respondent—Dundas—Blackburn. Agents—Russell & Dunlop, C.S.

Counsel for the Defenders and Reclaimers—Mackay—Guthrie—Kinloch. Agents—J. A. Campbell & Lamond, C.S.

Friday, March 18.

WHOLE COURT.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

ORR *v.* MITCHELL AND OTHERS (MOIR'S TRUSTEES).

Property—Sale of Superiority—Conveyance "of Lands" without Reservation—Construction—Coal Included in Disposition.

Hillfoot, part of the Campbell estate, was feued out, and in 1796 the superior granted to Moir a charter of confirmation, reserving the coal to himself. In 1808 the superior conveyed the coal so reserved with the rest of the estate to Crawfurd Tait, who obtained a charter of resignation and confirmation in 1811. Tait's estates were sequestrated in 1828 and a trustee appointed. Neither Tait nor his trustee was infeft in the property. In 1837 the trustee, on the narrative that he had exposed to public roup "the superiority and feu-duty of the lands of Hillfoot," disponed to Moir "all and whole the town and lands of Hillfoot . . . with mosses, muirs, and all and singular pertinents used and wont pertaining and belonging thereto, all as at present possessed" by Moir. The warrandice clause excepted "the feu rights or infeftments of property of the said lands granted by my predecessors and authors to the feuars and vassals thereof;" there was an assignation of the Crown charter of 1811 with its unexecuted precept of sasine, but there was no exception of coal under the lands. In 1838, by procuratory of resignation and instrument of resignation, J. M. Moir consolidated the lands and superiority of Hillfoot.

In 1860 the trustee disponed to Orr "all and whole those parts and portions of the lordship, barony, lands and estate of Campbell acquired by the said Crawfurd Tait as aforesaid, including the lands of Hillfoot, . . . with *inter alia* the coals, coalheughs, and others, with the whole parts and pertinents, including the said burgh or barony created as aforesaid, together with the coal in any other lands to which the said Crawfurd Tait had right at the date of his sequestration, and not since sold to any other party prior to the said contract of sale." The feu-rights were excepted from the warrandice, and also "the superiority and feu-duties of the said lands of Hillfoot sold to the said John M'Arthur Moir in in 1837." The said disposition was duly confirmed by the Crown.

In an action of declarator by Orr's representative against Moir's trustees the pursuer maintained that the disposition of 1837 conveyed only the *dominium directum* of Hillfoot, and that the disposition of 1860 truly conveyed the coal under Hillfoot to the pursuer's author.

Held, by a majority of the whole Court, that the deed of 1837 contained a clear and unambiguous disposition of lands without exception or reservation, and therefore included the coal under the lands.

The Lord Justice-Clerk, Lord Young, Lord Rutherfurd Clark, Lord Wellwood, Lord Kyllachy, and Lord Low *dissented* on the ground that the transaction on which the deed of 1837 proceeded was a sale of the superiority of the lands alone, and that reading the narrative and operative clauses together the intention and result of the deed was to convey the bare superiority of the lands and not the coal.

By charter under the Great Seal granted by Queen Anne, dated 12th May 1702, certain lands in Clackmannan, the property of the Duke of Argyll, were erected into the lordship, barony, and regality of Campbell. By feu charter the Duke of Argyll disponed certain lands, part of the barony of Campbell, including the lands of Hillfoot and Lochyfaulds, and others to John Drysdale of Townhead. The late John Moir of Hillfoot became proprietor of the lands of Hillfoot, and in 1790 obtained a charter of confirmation from the Duke of Argyll