was evidence before the jury on which they were entitled to consider that the pursuer had been permanently injured and in a very painful manner. The questions were argued on the motion for a new trial, but I observe that the strongest points argued were not raised by any cross-examination of witnesses for the pursuer, and if these witnesses are contradicted by medical witnesses for the defenders, there are reasons, to which your Lordship referred, why the jury should regard the one side and disregard the other. I therefore agree that the rule should be discharged.

LORD PEARSON—We are asked here to set aside a verdict on the plea that the damages awarded are excessive. The grounds on which, and on which alone, the Court will interfere in a matter of this kind were explained long ago in the cases of *Landell* (1841, 3 D. 819) and *Adamson* (1849, 11 D. 680). Taking our volumes of reports as the test, one finds that such applications are rarely made, and still more rarely granted. I doubt if there are as many as half-a-dozen reported instances of a new trial being granted on this ground since the re-introduction of civil jury trial into Scotland in 1815. In the present case, while the amount awarded by the jury is larger than I should myself have given, I am quite unable to reach the conclusion that we ought to disturb the verdict. It is perhaps not very profitable to examine the various items of which the claim is composed, for we have no means of knowing what view the jury entertained upon any of them. But I may mention one consideration of importance, namely, that on the medical evidence I think it clear that this must be taken as a case of permanent total incapacity caused by the injury complained of. The evidence would amply justify the jury in holding that pursuer will never be able to work as a miner again, and that he will not be fit for any manual labour which involves stooping and rising, nor even for using a hammer or sawing wood. For a working miner of the age of fifty that is a serious outlook. Now, his wages amounted to about £80 a year. He had lost one year's wages at the date of the trial, and if the jury added four years' wages this brings the figure up to considerably more than one-half of the amount awarded, leaving *solatium* out of account; and certainly the jury would be warranted in adding a very substantial sum in name of *solatium*. Now, Lord President Inglis in the case of *Young* v. *The Glasgow Tramways Company* (1882, 10 R. 242) said—"In order to justify a new trial being granted I think we must be satisfied that the sum is altogether so extravagant that no other jury would repeat it. It seems to me that unless it can be said that the verdict ought not to have been for more than one-half of the sum awarded, there is not, according to our practice, any room for interference." Applying these tests, it follows that in the present case we should not be justified in allowing a new trial.

LORD JOHNSTON—When I received the verdict in this case I was so struck with the amount of damages found by the jury that I came at once to the conclusion that if a new trial were applied for it should be granted. I have reconsidered the subject and cannot say that my views personally have in any way changed, and they were views adopted when the matter was fresh in my mind. I, however, do not think I should be justified in formally dissenting from your Lordships' unanimous judgment. And I am the more reconciled to this course by the fact that the conclusion I came to with regard to the medical evidence was somewhat different from that which your Lordships have taken. I did not consider that the jury weighed the medical evidence on the one side against that on the other, but that they were annoyed or irritated by the way in which the defenders' evidence had been prepared, and the circumstances under which it was given, and I was and am satisfied that this was the determining matter which influenced their verdict. Now that does not indeed justify their giving, in consequence, excessive damages, but the fault of leading their medical evidence in such a way rests with the defenders themselves, and this somewhat reconciles me to the refusing them a new trial, because parties who have carelessly conducted their case are not readily to be allowed another opportunity of laying their evidence in a better form before a new jury.

The Court discharged the rule, of consent applied the verdict, and decerned for payment to the pursuer of £750.

Counsel for the Pursuer—Crabb Watt, K.C.—J. H. T. Robertson. Agent—Alexander Wylie, S.S.C.

Counsel for the Defenders—Watt, K.C.—R. S. Horne. Agents—W. & J. Burness, W.S.

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*Tuesday, March* 12.

## FIRST DIVISION.

[Lord Ardwall, Ordinary.

## SCARLETT *v.* LORD ABINGER'S TRUSTEES AND OTHERS.

*Succession—Vesting—Acceleration—Trust—Direction to Entail Heritage when Disencumbered of Debts—Offer by the then Prospective Institute of Entail to Pay off Debts.*

Testamentary trustees were, *inter alia*, directed to hold estates and to pay off the debts thereon, and when the estates were disencumbered to execute a deed of entail thereof in favour of a series of heirs, the institute being, subject to an exclusion on a particular ground, the then possessor of a certain peerage.

*Held* that the then prospective institute of entail, *i.e.*, were the lands to be

at once disencumbered and entailed, was not entitled to insist, on offering to pay the debts, that the trustees should at once execute the deed of entail and denude.

*Provisions of a trust-settlement held* to contemplate a continuance of the trust and to debar acceleration.

*Process—Declarator ab ante—Competency.*

Where testamentary trustees were directed, when certain estates held by them were disencumbered of debt, to execute an entail thereof in favour of a series of heirs, the institute being, subject to exclusion on a particular ground, the then possessor of a certain peerage, the party who would have been the institute of entail were the lands then and there disencumbered and the deed of entail executed, brought a declarator against them and the beneficiaries under the trust, to have it declared that the trustees were bound on his paying the debts to execute the deed of entail and denude.

*Question* (*per* Lord Pearson, referring to *Cattanach* v. *Thom's Executors*, July 2, 1858, 20 D. 1206), if the action was competent, being a declarator *ab ante*.

On 1st August 1905 the Honourable Robert Brooke Campbell Scarlett, Boscombe Place, Bournemouth, raised an action against, *inter alios*, the Marquess of Tullibardine and others, the trustees acting under the trust-disposition and settlement of James Yorke M'Gregor Scarlett, fourth Baron Abinger, dated 27th November 1899, and the Right Honourable Helen Lady Abinger, widow of the third Lord Abinger, as an individual. (A supplementary summons was subsequently served to bring in additional defenders.)

The conclusions of the summons were—*First*, declarator "that on the pursuer paying off and discharging or putting the defenders first called in funds to pay off and discharge the whole heritable debts and mortgages secured over and presently affecting and all other debts which might be due by the said James Yorke M'Gregor Scarlett, Baron Abinger, at his death, or which should then affect or be capable of affecting the said lands and estates of Inverlochy and Inverlair and others, which belonged to the said James Yorke M'Gregor Scarlett, fourth Baron Abinger, presently in the possession and management of his trustees as the defenders first called, the defenders first called are bound to convey and make over to the pursuer or the person who shall then be entitled to succeed under the destination contained in the disposition and deed of entail after mentioned the said lands and estates . . . but subject always to any annuities or liferents created by the said trust-disposition and settlement which may be subsisting and be enforceable at the date when the said conveyance is granted, and subject to the directions mentioned in said trust-disposition and settlement as to the exclusion of Roman Catholics from succeeding to the same, and that by granting a formal and valid disposition and deed of entail to and in favour of the pursuer, or the person who shall at the time when such debts shall be finally discharged and extinguished be the institute or heir of entail entitled to succeed, or be in right of the dignity and peerage of Baron Abinger of Abinger . . . (excluding always and debarring the Right Honourable Shelley Leopold Laurence Scarlett, now Baron Abinger of Abinger), whom failing to the persons respectively entitled for the time to the said dignity and peerage in their order successively, whom all failing then to the nearest heirs and assignees whomsoever of the said deceased James Yorke M'Gregor Scarlett, Baron Abinger, the eldest daughter or heir-female excluding heirs-portioners and succeeding without division." *Second*, declarator that on the same condition being fulfilled the trustees were bound to grant an assignation of certain heirlooms. *Third*, that following the declarators the trustees should be ordained to execute the necessary deeds. *Fourth*, declarator "that on the said disposition and deed of entail being executed and duly recorded in the Register of Entails and also in the appropriate divisions of the General Register of Sasines at the sight of the said first-called defenders, and on the said assignation being executed, and on their *simul ac semel* with the execution of these deeds receiving from the pursuer a full discharge and receipt of their intromissions, all as provided by the said trust-disposition and settlement, the trust created by the said trust-disposition and settlement shall cease and determine." And *fifth*, that the trustees be ordained to denude of the trust.

The pursuer was the brother of the fifth and present Lord Abinger, who had succeeded in the title his cousin the fourth Lord Abinger, the testator. He was, if it were held that the trust could and was to be ended at once, the person who would be institute of the entail of the Scottish estates provided for in the trust settlement.

The compearing defenders, the trustees and Helen Lady Abinger, both pleaded, *inter alia*—"(1) No title to sue. (2) The action is incompetent, or otherwise premature. (3) All parties not called. (4) The pursuer's averments are irrelevant, and insufficient to support the conclusions of the summons. (5) On a sound construction of the said trust-disposition and settlement and relative codicil, the pursuer is not entitled to decree of declarator and denuding as concluded for. (6) The continuance of the trust being necessary to give effect to the testator's intentions, and to secure the interests of the beneficiaries under the trust-disposition and settlement, these defenders should be assoilzied from the conclusions of the summons."

The *facts* of the case and the *provisions* of the *trust settlement* are given in the opinion of the Lord Ordinary (ARDWALL), who, on April 3 1906, repelled the first, second, and third, and sustained the fourth, fifth, and sixth pleas-in-law for each set of compearing defenders, and assoilzied them with expenses.

*Opinion*—"The deceased Right Honourable James Yorke M'Gregor Scarlett, Fourth Baron Abinger, died on or about 12th December 1903, unmarried.

"He left a trust-disposition and settlement and codicil, both dated in November 1899, in which, *inter alia*, he directed his trustees, after all debt on his Scotch estates should be finally discharged, to convey by a disposition and deed of entail his landed estates of Inverlochy and others in Scotland, and certain heirlooms and other moveables, to the person in right of the dignity and peerage of Baron Abinger, subject to the provision that in case the present peer, the Fifth Baron Abinger, or any Roman Catholic, should be the person in right of the said peerage and dignity at the time when the said disposition and deed of entail fell to be executed by his trustees, then the next person entitled to succeed to the said dignity at the time, and not being a Roman Catholic, should succeed to the said landed estates in Scotland.

"The pursuer, who, if the trust were to be brought to an end and the disposition and deed of entail thereby directed to be executed were to be executed now, would be the person first entitled to succeed to the said landed estates in Scotland, being desirous of accelerating the date when the disposition and deed of entail should be granted, has offered the late Lord Abinger's trustees, who are the defenders first called, to pay off or put them in funds to pay off the whole debt on the estate amounting to £56,500, and has brought this action to have it declared that on his paying off and discharging, or putting the trustees in funds to pay off and discharge the whole heritable debts and mortgages secured over the said lands, the said trustees are bound to convey and make over to him by a disposition and deed of entail the whole of the said lands and estates.

"I am of opinion that the pursuer is not entitled to the decree of declarator and denuding that he concludes for, and that to pronounce such decree would have the effect of frustrating the intentions of the testator as expressed in his trust deed. I think that to accelerate the conclusion of the trust and to convey the said lands and estate to the pursuer at present would be contrary to the general scheme of the trust deed, would render some important purposes thereof impossible of fulfilment, and would frustrate several of the clearly expressed wishes of the testator.

"On turning to the trust deed it appears that the paying off of the debt upon the Scotch heritage, and the conveyance of it by a disposition and deed of entail to the persons therein mentioned, is not one of the primary purposes of the trust, but comes in only in a subsidiary place and order, for the whole directions regarding the conveyance of the Scotch landed estate are declared to be 'subject to the foregoing purposes,' which would thus appear to be the primary and more important purposes of the trust so far as the arrangement of the deed is concerned. These purposes are—(*First*) the payment of deathbed, funeral, and trust expenses; (*Second*) payment of certain legacies and provisions free of Government duties. Among these provisions is an annuity of £150 to the testator's eldest sister Mrs Synge until six months after her mother's death. The said annuity is declared to be an alimentary provision. Further, there is a provision for the payment to the testator's mother the Dowager Lady Abinger during her life of such a sum as, with the interest of a sum of £9500 drawn by her, shall make up a clear annual sum of £500, and also payment to the said Lady Abinger of a further sum not exceeding £250 in any and every year in which she may notify to the trustees that she desires such sum. Further, the trustees are empowered, in case the revenues from the testator's Scotch landed estates shall yield a surplus, however small, and if it shall appear to the trustees expedient, to allow the said Lady Abinger, during her life or during such period as the trustees may think fit, the use and enjoyment of the castle of Inverlochy and furniture, and the shooting which is attached to the castle, and also the salmon fishing beat No. 5 on the Lochy, but in certain circumstances the trustees are to let the said beat, and also the shooting, and if there should still not be a surplus then the trustees are to let the castle also. When Lady Abinger shall not be in possession of Inverlochy Castle the trustees are to give her the liferent use and enjoyment of Camesky House and the furniture therein. Then there follow various minute directions providing for what the trustees are to do in various events. In the said second purpose, in the fifth place, his housekeeper Mrs Aitken was left an annuity of £25, and then there is a general direction to make payment of any other legacies he might leave.

"After setting forth these primary purposes, the testator, in the third place, directs his trustees on his death to realise and convert into money his estate, property, and effects, with the exception of (*First*) his landed estates in Scotland; (*Second*) the whole furniture and plenishing in the castle of Inverlochy 'hereinafter referred to as "the said heirlooms";' and (*Third*) any other corporeal moveables belonging to him or which may be hereafter acquired by his trustees as after mentioned, all of which are to be assigned by the trustees to the person next entitled to succeed to his lands and estate in Scotland as institute or heir of entail as thereinafter mentioned. The trust deed then enters on the directions regarding the Scotch landed estates, and the first purpose includes power to the trustees to expend what sums they shall see fit not only in keeping up the estate but in making any improvements they may consider proper for the development or letting of the same. In the second place, they are directed to pay the capital of the debts or mortgages secured over the Scotch landed estate in such order and by such payments as they should think proper, and power is given to them to apply the whole free income of his estates in Scotland towards payment of the said debts, and

then follows this very plain statement of his intention:—'My intention being that my trustees shall continue to hold and administer my said landed estates in Scotland, and apply the free income thereof in or towards payment of the debts affecting the same until the whole of the said debts shall be absolutely discharged and extinguished;' and then the deed proceeds:—'And lastly, whereas, after the whole of the said debts have been paid and discharged, I am desirous that my trustees should pay and make over my said landed estate in Scotland to the persons entitled to succeed to the peerage and dignity of Baron Abinger for the time being, subject to the exclusion after specified. . . . Therefore, after the whole of the said debts have been paid and discharged as aforesaid, I direct and appoint my trustees to convey and make over my said landed estates in Scotland, but subject always to any annuities or liferents which may be then subsisting, and subject to the directions hereinafter contained as to the exclusion of Roman Catholics from succeeding to the same, by a formal and valid deed of entail to and in favour of the person who shall, at the time when such debt shall be finally discharged and extinguished, be in right of the dignity and peerage of Baron Abinger of Abinger in the county of Surrey and of the city of Norwich,' and so on, the destination winding up with his own nearest heirs and assignees whomsoever. There are one or two other clauses of the deed which may with advantage be referred to. After providing for the deed of entail being executed and recorded at the sight of the trustees, the deed proceeds—'Whereupon the trust hereby created shall cease and determine, provided always that before the trust hereby created shall be so terminated and my trustees denuded of the trust estate, the whole of the said debts directed to be paid by them as aforesaid, and all obligations and liabilities for the same which might affect my said landed estates, shall be absolutely discharged and extinguished.' Further on in the deed power is given to the trustees to purchase the neighbouring farm of Achantee, and for that purpose to employ any surplus revenues which may be in their hands at the time in paying the price of the farm and expenses of purchase, in place of paying off debt therewith, and it is provided that, to the extent of the amount so applied, the directions for payment of debt shall be suspended; and the deed goes on to declare that the said farm of Achantee, when so purchased, shall be held as part of the testator's landed estates in Scotland, and treated as if it had originally been part thereof. Further, the trustees are given power to purchase such pictures, furniture, or other articles which belonged to the testator's father, the late Baron Abinger, as his trustees might think would form suitable additions to the heirlooms above referred to, and that to such an amount and extent, and at such prices, as they might think proper. The trust deed then gives a discretionary power of sale to the trustees, in very guarded terms, and, in particular, he desires them not to exercise this power of sale merely for the sake of obtaining what they might consider to be an advantageous price from a purchaser, or 'for the sake of shortening the period of time during which the trust must subsist.'

"I am of opinion that from the provisions of the trust deed above recited it is obvious that when the testator declared his intention to be that his trustees should 'hold and administer' his Scotch landed estates, and apply the free income thereof in payment of the debts affecting the same till the whole of the said debts should be absolutely discharged and extinguished, he intended that the debts should be discharged by the trustees in no other way than by payments of surplus income, and that until the debts were discharged in that way the trustees should not execute an entail of these estates. It is noticeable in this connection that, after he provides for the deed of entail being executed and recorded, the testator reverts to the 'said debts directed to be paid by them' (the trustees) as aforesaid, which, without straining the expression, may, I think, be taken to include 'the manner' aforesaid. The contention of the pursuer that it is no concern of the trustees by what means the debt is discharged, seems to me untenable, to illustrate what I mean, *non constat*, for all that is said in the pursuer's condescendence, that the pursuer does not propose to raise the money to pay the present debt by some method which will result in the whole debt being practically reimposed on or paid out of the estate as soon as he gets it into his possession. Now I hold it clear that the testator's intention, as appearing from the deed, was that a wholly unencumbered estate should be handed over to one of his successors in the title of Baron Abinger, and that it was his intention in framing the deed in the terms he did to provide so far as possible for that being done. Then, as it is not determined by the deed who will be the individual entitled to get the estate at the date when the debt is thus paid off, the testator thus provided as far as he could against any pecuniary engagements being entered into *ab ante* by any person who might possibly be called as institute of entail to his estates. If the declarator which the pursuer seeks were to be granted there is no guarantee that the leading ultimate purpose of the trust, viz., the handing over of an unencumbered estate to accompany the title of Baron Abinger, would not be frustrated.

"But there are several other and important purposes of the trust which show that it was the testator's intention that the trust should last till the debts were paid off out of the income of the estate, which process, I was informed at the debate, would take from eighteen to twenty-four years.

"These purposes are well summarised in the latter part of answer 12 for the defenders Lord Abinger's trustees, and I have already recited most of them in the enumeration of what I have termed the primary purposes of the trust.

"I desire to note some points which arise in

consideration of these primary purposes of the trust: (*First*) that these purposes include three annuities, one of which is declared to be alimentary, in the next place (*Second*) that they contain anxious provision for a comfortable country residence for the testator's mother Lady Abinger 'during her life.' The question as to what residence she shall inhabit, and what shooting and fishing she shall enjoy along with the castle of Inverlochy, if she inhabit it, being left to the discretion of the trustees, to be exercised by them according to the condition of the estate revenues from time to time; (*Third*) that careful provision is made for the trustees exercising their discretion on the foregoing matters, and also for seeing to it that the buildings and furniture of Inverlochy Castle and Camesky House are properly attended to; (*Fourth*) that it was in contemplation of the testator that the trust would last during the life of the Dowager Lady Abinger; and (*Fifth*) it is evident that the provision regarding the liferent use of Inverlochy Castle and shootings and fishings thereto attached and Camesky House could not be carried out if the trustees were now to denude of the trust in favour of the pursuer.

"It seems further to have been the anxious wish and intention of the testator that his trustees should purchase the farm of Achantee. He reverts to this subject in his codicil, and gives directions to his trustees about applying a sum of £5000 to the purchase of it if they can possibly get it to buy. The defenders allege that the testator was aware that the circumstances under which they could purchase Achantee could not immediately emerge, and certainly his repeated directions regarding this purchase, coupled with the powers given for the development of the estate otherwise, all go to show that the testator wished and intended that the trust should last till the debts were paid off in the manner provided for by him, and that the estates should meantime be enhanced in value by the purchase above alluded to, and any improvements made by the trustees, before being handed over along with the family heirlooms to the institute of the entail by the disposition and deed of entail which he directed should be made.

"With regard to the pleas which I have repelled, dealing first with the plea of incompetency, I may say that I do not think this action falls under the objection which proved fatal to the case of *Galloway* v. *Garlies*, 16 S. 1212. I think it more resembles the case of *Chaplin*, 18 R. 27, and I think should be held competent. I further think that the plea of 'all parties not called' has been sufficiently obviated by the supplementary summons. With regard to the plea of 'no title to sue,' while I repel it as a preliminary plea, I think the question of the pursuer's title to insist in this action enters materially into the consideration of the case on its merits. I am not aware of any case in which the Court has recognised the title of a person to have the period of vesting or payment under a trust deed accelerated unless such person had an absolute or unqualified right of fee. In the case of *Muirhead* v. *Muirhead*, May 12, 1890, 17 R. (H.L.) 45, the House of Lords refused to permit of acceleration in the distribution of an estate because, even though an intervening liferent had been put an end to by the liferenting widow electing to take her legal rights, the testator had declared that there should be no vesting till the widow's death, and that was coupled with a gift over and a survivorship clause, so that it was uncertain as to who might ultimately succeed to the estate. Now in the present case it is also left uncertain by the testator who is ultimately to succeed to the fee of the Scotch estates. If I am right in the construction of the trust deed it is the person who, after all debts have been paid out of the surplus income of the estate, shall *then* be in right of the peerage of Baron Abinger, or if the person in right thereof at that time be a Roman Catholic then the persons next entitled thereto in their order. Accordingly, if my view is correct, the right to the fee of the estate has vested in no one, and I do not think that the person who is entitled to succeed to the barony of Abinger at present, failing the present peer, is entitled to come forward now and demand that the date of vesting should be accelerated in consequence of his own act in paying off or giving the trustees money to pay off the debts affecting the estate. This would appear to be contrary to the dictum of Lord Watson in *Muirhead's* case, where he says that 'it is impossible to hold as matter of principle that the act of any person outside of and hostile to the trust can *per se* effect an alteration of the truster's disposition with regard to the vesting of interests in his estate.'

"The pursuer would have had a stronger case if the one and only purpose of the trust deed was to have the debts paid off, and if the testator intended that as soon as that was done, *quocunque modo*, the trustees should be thereupon *functi*, and should denude of the estate, but, as has been already pointed out, there were several other purposes of the trust beside payment of debt. To enumerate them shortly once more, these were—(1) The various provisions both as regards annuities and residences in favour of the testator's mother Lady Abinger; (2) the development of the estate; (3) the purchase of the farm of Achantee; (4) the purchase of various heirlooms, several of which are liferented by Lady Abinger and cannot be bought till her death. These provisions seem to me sufficient to prevent a court of law from acceding to the pursuer's proposals for accelerating the vesting in this case. That to pronounce decree in terms of the conclusions of the summons would be to accelerate vesting as compared with the period at which the testator contemplated it should take place, I think there can be no doubt. The pursuer himself quite distinctly says that he is desirous of 'accelerating' the date when the disposition and deed of entail should be granted, and as this acceleration, if carried out, might have the

effect of defeating the rights of persons who might otherwise succeed to the estate, and in the meantime would have the effect of frustrating some of the most important wishes of the testator as expressed in the trust deed, I am of opinion that the pursuer's demand should be refused, and I am disposed to adopt an observation made by Lord Deas in the case of *Colt*, 5 S.L.R. 660, to the effect that if decree were to be granted in this case nobody need be at the trouble of making a trust-deed."

The pursuers reclaimed, and argued—If the lands were presently disencumbered the pursuer would be the person entitled to the conveyance thereof as institute of entail. That was admitted. He was therefore in a position to bring the action. There was prescribed in the trust deed no precise method of disencumbering the lands, nor was the pursuer prohibited from paying the debt. As to the annuities said to stand in the way, that to Mrs Synge declared alimentary in the trust deed had been superseded by a provision to her in her marriage contract, and the remaining annuities with the rights of use provided to Lady Abinger of houses, shootings, and fishings, as to which latter the trustees might exercise their discretion once and for all, might remain as burdens under the proposed entail. That had been contemplated by the truster, for it was clearly in his mind that the trust might end during Lady Abinger's life, though he had not considered the machinery in that event. The real intention of the testator had been to convey the lands when disencumbered to a series of Protestant heirs of entail, and that was what was now contemplated. A sudden windfall to the trust, *e.g.*, the passage of a line of railway through the lands, might have shortened the duration of the trust, or even ended it altogether. In *Colt* v. *Colt's Trustees*, July 16, 1868, 5 S.L.R. 660, v. Lord President Inglis, at p. 662, there was no vested interest in the pursuer, yet the Outer House decree in his favour had only been reversed on the ground of the pursuers' inability to pay the debts, an element not present in this case. *Muirhead* v. *Muirhead*, May 12, 1890, 17 R. (H.L.) 45, 27 S.L.R. 917, was distinguishable, for there the proposed anticipation would have altered the date of division of the estate, and consequently the division.

Argued for the defenders and respondents (Lord Abinger's trustees)—The pursuer was not in a position to ask declarator that the trustees should denude, for he had no vested interest and was merely a contingent heir. Whenever acceleration had been allowed it had been in favour of one having a vested interest. Here it was necessary, in order to give pursuer such interest, to change the dates of vesting and of payment, and that was what the action proposed. The trust was intended to be a continuing one, and the time for the conveyance of the lands was not to be anticipated to the prejudice of those who might at the natural time be heirs entitled to take—*Scott* v. *Scott*, June 18, 1847, 9 D. 1265; August 14, 1850, 7 Bell's App. 143; *Hughes* v. *Edwardes*, July 25, 1892, 19 R. (H.L.) 33, 29 S.L.R. 911. The testator had designed the machinery of the trust not merely to disencumber and entail the estate but also for the upkeep and development. That showed an intention the trust should continue. The length of time contemplated, twenty or thirty years, was so great as necessarily to include Lady Abinger's death, and this was why no machinery was provided on the supposition it would not. Her interests and those of the other beneficiaries were in the view of the testator and were to be protected, and that by the trust he had provided. Here, if declarator were granted the interests of parties would be impaired in the sense of *Colt* v. *Colt's Trustees*, *ut supra*, Lord Ardmillan, at p. 662.

Argued for the defender and respondent (Lady Abinger)—The whole scheme of the provisions in favour of Lady Abinger was regulated by a reference to the discretion of the trustees, and the trust was as much for the purpose of preserving these interests and for the upkeep and development of the estate consistently therewith as for the payment of debt. Lady Abinger had right under the deed to this protection by the trust, and a declarator which would deprive her of it should not be granted.

At advising—

LORD M'LAREN—The fourth Lord Abinger by his will, which came into operation at his death in December 1903, after making provision by way of annuities to his mother and sister, and subject to certain smaller bequests, directed his trustees to apply the surplus income of his estates in Scotland and certain other funds towards the payment of "the capital of the debts and mortgages" secured over his said landed estates in Scotland, and all other debt capable of affecting the said estates (excluding debts secured over his estates in Surrey or elsewhere).

The free income of his Scottish estates is to be applied "year by year, or at such other times as the trustees may find expedient," towards payment of the said debts, "my intention being," he adds, "that my trustees shall continue to hold and administer my said landed estates in Scotland, and apply the free income thereof in or towards payment of the debts affecting the same until the whole of the said debts shall be absolutely discharged and extinguished." The will then proceeds—"After the whole of the said debts have been paid and discharged as aforesaid" the trustees shall convey and make over the estates in Scotland by deed of entail to "the person who shall at the time when such debt shall be finally discharged and extinguished be in right of the dignity and peerage of Baron Abinger." This destination is made subject to an exception or exclusion of persons professing the Roman Catholic religion, which it is not necessary to consider more particularly. Upon the deed of entail being executed and recorded it is provided that "the trust hereby

created shall cease and determine," and the testator again repeats that before such termination of the trust the whole of the debts directed to be paid by the trustees, and all consequential obligations and liabilities shall be "absolutely discharged and extinguished."

On a careful consideration of the language of the will I do not see how the testator could have more clearly and emphatically expressed his intention to transmit an unencumbered estate to the institute and heirs of entail. The testator was no doubt aware (at least in a general way) of the powers of heirs in possession under the Entail Amendment Acts, and in making the anxious and minute provisions which I have summarised for clearing the estate of debt I can hardly doubt that, so far as depending on himself, he wished to keep the estate in his family, and to leave it to his heirs in such a form that they should not be under pressure to make use of their disentailing powers for the purpose of freeing the estate of debt.

In these circumstances—and the present Lord Abinger being excluded from the succession—his brother (who claims to be institute of entail) has brought this action, concluding, first, to have it found and declared that on the pursuer paying off the whole heritable debts and mortgages secured over the estates of Inverlochy and Inverlair and others the defenders are bound to execute a deed of entail in terms of the will. The other conclusions are consequential on the first, and I shall only refer particularly to the fourth conclusion, the substance of which is that on the deed of entail being executed and recorded and certain other property being transferred, and on the trustees receiving from the pursuer a discharge of their intromissions, "the trust created by the said trust-disposition and settlement shall cease and determine."

The Lord Ordinary has assoilzied the defenders from the action, on the ground, in which I concur, that the trustees are charged with the duty of standing possessed of the estates in Scotland until the estate debt is paid off out of the revenue and funds of the trust in the due course of administration. But as this is a case of much importance to the parties, it is desirable that I should further develop the grounds of judgment according to my own view of the rights of parties under the will.

The first and most obvious objection to the pursuer's proposition is that the payment of the estate debt in the way that he proposes does not necessarily affect the testator's purpose of leaving an unencumbered estate to his heirs. It is easy to see that by an arrangement with a bank or other party willing to give financial assistance, the pursuer might be able to go through the form of paying off the estate debt, and then, as soon as he was put into possession of the estate under a good deed of entail, it would be in his power to disentail by purchasing the rights of the three nearest heirs and then to reimpose the debt upon the heritable estate. As the pursuer does not say that he has £56,000 of his own money wherewith to pay the estate debts, it is at least possible that this might be the result. Such an arrangement is quite legal. The only objections to it are that it is not the scheme of administration prescribed by the testator, and that it is not calculated to effectuate his intention of leaving an unencumbered estate to his successors.

My next observation is, that the testator's scheme of administration is one which is not unusual, and which does not transgress any rule of law or public policy. That being so, I do not see why it should not be carried out in its integrity by his trustees. The Lord Ordinary was informed that the estimated time required for paying off the £56,500 of estate debt is from eighteen to twenty-four years, the mean of which is twenty-one years. If the testator had directed the accumulation of the rents for this period the trust would be lawful, and the trustees would be entitled to maintain their administration against all comers. The trust is not the less lawful that the trustees are not required to accumulate the rents, but are directed to apply them year by year, or at other convenient periods, to the redemption of debt.

The pursuer seems to have overlooked the point that there are other purposes for which the trust has to be kept up besides the payment of debt. The testator's mother Lady Abinger is to receive out of the rents an annuity of £500 a-year, or £750 if she desires it and the income of the trust is sufficient to pay it. There is also an annuity of £150 a-year to the testator's sister. Now, if the pursuer were to get a decree in terms of the fourth conclusion, viz., that on his providing money for the payment of estate debt and getting an entail (subject to payment of these annuities) the trust should cease and determine, the ladies would not have the benefit of a trust for the protection of their life interests, but would at best be only in the position of creditors of the entailed estate. Now, as it clearly would not be in the power of Lord Abinger's trustees voluntarily to bring the trust purposes in question to an end and to put the ladies into the position of heritable creditors for their annuities, it follows, in my opinion, that they ought not to be compelled by decree to do what would amount to a breach of trust if done voluntarily.

But further, the pursuer's proposition is contrary to the provisions of the will or trust settlement, because it assumes that the pursuer has an unqualified right to the fee of the Inverlochy estates. Now, the testator's direction is that after the debts have been paid off out of the trust funds (a process which could only be completed within a period estimated at from eighteen to twenty-four years), the estate is to be conveyed to "the person who shall at the time when such debt shall be finally discharged and extinguished" be in right of the Abinger peerage. If the debts are to be paid in the manner prescribed by the will that person would not necessarily be the pursuer. His right is contingent on his survival of a period defined by reference to the time required for payment of debt out

of the trust funds, because it is perfectly clear that the payment referred to is the payment under the course of administration which the testator has himself prescribed. The proposition which we are invited to affirm in effect involves an anticipation of the period of vesting of the fee by an arbitrary interference with the prescribed administration, and such an anticipation is, I think, contrary to settled principles of vesting, as these are expounded in the decision of the House of Lords in the case of *Muirhead* (17 R. (H.L.) 45). The testator was under no disability as to the disposal of his estate, and it is quite within the limits of the testamentary power that he should make the vesting of his estate in an institute of entail contingent on the survivance of an event which might either be a time certain or a time defined by reference to financial possibilities. The right is plainly expressed to be contingent, because the disponee is to be the person for the time being entitled to the dignity of the Abinger peerage (subject to the exception referred to) and the pursuer can only satisfy this condition by surviving the period prescribed.

The fallacy of the pursuer's case is in the assumption that the trusts of Lord Abinger's will had no other object than that of the payment of debts. If that had been the case, Lord Abinger might have directed the immediate execution of an entail in favour of the pursuer by name and the other heirs in their order, but subject to the burden of a trust for payment of debts. If this had been the direction I do not say that the pursuer would have been entitled to the decree which he asks, but he would have been in a more favourable position for demanding that he should be put into possession of the estate upon making provision for the fulfilment of the other trust purposes. He would in the case supposed be able to say that his proposal did not involve any very substantial interference with the contingent rights of the other parties. But I do not consider further a case which is very different from the real case and which I only put by way of contrast to it.

There are other provisions in Lord Abinger's will of a discretionary nature, for the performance of which a continuing trust appears to be necessary. These are considered in the Lord Ordinary's opinion. In what I have said I have endeavoured to confine my observations to the main lines of the argument. In the result I have come without difficulty to the conclusion that the Lord Ordinary's judgment should be affirmed.

LORD PEARSON—I think that the Lord Ordinary has rightly decided this case, and that the pursuer's proposal to accelerate the closing of the trust must fail; and I agree in all that has been said by Lord M'Laren. I would only add a word as to the form of the pursuer's claim. It is not necessary to consider what the result might be if the debts were actually paid off otherwise than in the normal course of the trust administration. They have not been paid, nor does anyone offer to pay them; but the pursuer asks the Court to supply him with an opinion that if he does certain things, which he makes no offer to do, certain other things will follow and certain rights will emerge. I doubt whether according to our practice the Court could be asked to solve questions so hypothetical, even in a special case to which the trustees and the beneficiaries were parties. But this action is raised against the trustees and beneficiaries by one who in this matter is really an outsider, and whose purpose plainly is to bring the trust to an end for his own advantage, if he can get the Court to aid him by furnishing him with an opinion on a hypothetical case. When so regarded, the position is very similar to that which was presented in the case of *Cattanach* v. *Thom's Executors* (1858, 20 D. 1206, 2nd point) where the Court declined to pronounce a hypothetical and prospective declarator as to the legal effect of an annuitant and a liferentrix renouncing the annuity and the liferent, which it was averred by the pursuer they were willing to do. I content myself with referring to the opinions in that case, which seem to me to apply here.

The LORD PRESIDENT and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuer (Reclaimer)—The Dean of Faculty (Campbell, K.C.)—Spens. Agents—Murray, Beith, & Murray, W.S.

Counsel for the Defenders (Respondents) (Lord Abinger's Trustees)—Blackburn, K.C.—C. D. Murray. Agents—Dundas & Wilson, W.S.

Counsel for the Defenders (Respondent) (Helen Lady Abinger)—M'Clure, K.C.—Lord Kinross. Agents—Mackenzie & Black, W.S.

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*Wednesday, March* 13.

## SECOND DIVISION.

[Sheriff Court at Glasgow.

## VALENTI *v.* WILLIAM DIXON, LIMITED.

*Reparation—Master and Servant—Damages for Personal Injury—Bar to Action—Acceptance of Compensation—Receipt—Election—Foreigner—Workmen's Compensation Act* 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 1 (2) (*b*).

An Italian workman, who spoke little English and could not read it, having lost two fingers in the course of his employment, and knowing that a fellow Italian workman had, in consequence of injuries sustained, received half wages, went to his employers and asked for "money for fingers." He received on two occasions sums for