Stewart should come to this country, qualify as a British subject in manner required by law, and permanently reside at Cleat in Westray. Then only his issue male and female born in this country are to succeed to the entailed estate. Farther, the trustees were directed to allow Mr Stewart to occupy the Mansion House of Cleat during his lifetime, with the furniture and manor farm; and the heir to whom the succession shall open is declared entitled to occupy the mansion house at Cleat during minority; and the mansion house and manor farm are directed to be free for occupation of such heir on attaining majority.

Again, the deed contains power to the trustees to expend from time to time such sums of money from the capital of the trust as may be thought proper in maintaining the mansion house and others, in building farm-houses, or other buildings, or otherwise for the permanent improvement of the trust property. And there occurs this marked expression of his intention, "And it is my special wish, to which I beg my trustees will have regard, that the new mansion house which I am about to erect on my estate in Westray, and the garden and offices connected therewith, shall be kept in a thorough state of repair at the expense of the trust during the subsistence thereof."

Such being the terms of the deed, the special case explains as matter of fact that, the mansion house of Cleat having become dilapidated, the testator had ceased to live in it before his death, and had obtained plans and entered into contracts for the erection of a new mansion house at a cost of £1500 or thereby. And it is farther stated that the erection of the new mansion house was begun and was proceeding at the date of his death, the walls having actually been erected to the height of a few feet. On his death the surviving trustee, Mr Brotchie, in 1858 did not continue the erection, Mr Bruce Stewart being then only about 10 years of age, and not in a situation to comply with the condition annexed to his children's (if he has any) right to succeed.

It is in these circumstances that Mr Bruce Stewart has called upon the trustees to proceed with the erection of the mansion house, and to complete the same for his occupation, being within a few weeks of majority, and desirous to fulfil the stipulations as to residence imposed on him by the truster: and that the trustee and Mr Bruce Stewart concur in requiring the opinion and judgment of the court whether the capital of the trust estate ought to be expended in the completion of the mansion house.

I am of opinion that, having regard to the provisions of the trust deed, and to the facts set forth in the case, the question before the Court should be answered in the affirmative.

There is a plainly indicated intention on the part of the truster that the persons who were called to the succession should reside in the mansion house at Cleat, whether called as liferenters or as fiars. There is a clear indication of the truster's conviction that the old house on the property had become so delapidated as to be unfit for a family residence—shown by his acts no less than by the terms of his settlement. There is further express mention made by him of the "*new* mansion house" he was about to erect, and which his trustees are expressly directed to keep in a thorough state of repair "at the expense of the trust while it subsisted." And this direction must be held to have been repeated by him after the erection was so far proceeded with, for his codicil is dated only in June 1858. Between that date and the date of the deed of settlement the contracts for the erection had been entered into and been begun to be executed,—so that we have to deal not with intention only, but with that expressed intention carried into actual execution. The house is acually in course of building under contract when the testator dies; and had his succession fallen to be regulated not by deed but as intestacy, there would have been room for the heir asserting that so much of the executry as was required for the completion of the mansion house under the contract should be devoted for that purpose, having become heritable in succession *destinatione*. The cases of *Denny*, 23 D. 429, and of *Crighton*, 13 Feb. 1857, may be referred to in support of this proposition. I think this principle fairly applicable to the case, although the succession to be dealt with is an entailed destination,—there being in the directions of the trust-deed a plain indication of the truster's wish that the new mansion-house he had himself begun should be completed and kept in thorough repair at the expense of the trust-estate until the fiar first called become *major*, when the trust will cease. But, meanwhile, Mr Bruce Stewart is to have the house to reside in it, and it is no other than the fair import of the trust-deed, taken along with the act of the truster, that the erection should be proceeded with now, and not delayed till the entail is about to be executed.

The case of *Sprot's Trustees*, 11th March 1830, Fac. Coll., appears to me to afford strong corroboration of the views now explained. In that case, as in this, there was held to be plainly enough indicated an intention by the testator that there should be a mansion house for the residence of the heir of entail. This was inferred to be the entailer's design and purpose. Here, not by inference, but by direct declaration, not in intention only but in acts, that purpose has been very clearly expressed and indicated.

The other Judges concurred.

Agents for Trustee—Skene & Peacock, W.S.
Agent for Mr Stewart—John Walker, W.S.

Tuesday, July 13.

FIRST DIVISION.

TOSH (ANDERSON'S FACTOR), PETITIONER.

Judicial Factor—Pupils Protection Act—Cautioner—Clerk of Court—Accountant of Court. Held that the Principal Clerk of Court, in receiving caution for a judicial factor as sufficient under the "Pupils Protection Act," 12 & 13 Vict. c. 51, was entitled to require that the agent in the cause should certify the caution to be sufficient.

In 1854 Thomas Cook was appointed factor *loco absentis* to David Anderson, and found caution in common form. In May 1863 he intimated to the Accountant of Court that his cautioner was dead; and accordingly, on 12th May 1863, Cook was appointed to find new caution within one month. That order was twice renewed; and on 26th June 1863 a bond of caution by Cook and James Rodger as cautioner was lodged with the late Mr Currie, P.C.S. That bond had the usual attestation of a Justice of the Peace, but was not accompanied by a certificate by the agent in the cause as to the cautioner's sufficiency. Mr Currie therefore re-

fused to mark the bond as received, or to transmit it to the Accountant of Court. In the meantime the Accountant of Court continued to receive the factorial accounts of Cook until February 1869, when Cook was removed from the office of factor, and the present factor (Mr Tosh) appointed. It was found that Cook was indebted to the estate in upwards of £93; and the fact of the bond of caution not having been transmitted was discovered when the present factor wished to extract the bond, and charge the cautioner for the sum due by Cook. He now applied to the Court to ordain the Clerk of Court (the successor of Mr Currie) to mark the said bond as received, and transmit the same to the Accountant of Court.

TRAYNER for factor.

H. J. MONCREIFF for Accountant of Court.

At advising—

LORD PRESIDENT—In the ordinary case of finding caution by a judicial factor, the second section of the Pupils Protection Act enacts that "every judicial factor shall, within such time after his appointment as the Court shall direct, find caution for his duly accounting for his intromissions and management, and observing and performing every duty incumbent upon him as factor, in terms of the rules prescribed, or to be prescribed, for the discharge of his office, and in case of his failure to do so, his appointment shall fall; and no factor shall enter upon the duties of his office, nor shall an extract of his appointment be issued, until after such caution is found and received as sufficient; and the factor shall extract his appointment without delay." In the case of an original appointment the check and security is (1) that if the factor does not find caution within the set time his appointment falls, and he cannot extract his appointment until caution is received as sufficient, that is, by the Principal Clerk of Court. Then the 11th section provides that, "on the factor's bond of caution being received as sufficient, it shall be transmitted by the clerk to the process to the accountant, who shall forthwith give a written intimation, dated and signed, to the factor or his agent, stating that the bond has been received, and assigning the day on which the factor is to close his first account, being not less than six nor more than eighteen months from the date of such intimation; and on the death or insolvency of the cautioner of any factor, such factor shall forthwith give notice in writing to the accountant of such death or insolvency; and the accountant shall, as soon as the fact shall come to his knowledge, by means of such notice or otherwise, require new caution to be found." That is all the guidance we have in the Act of Parliament. In the case contemplated by the last paragraph of the 11th section, the factor intimated that his cautioner was dead, whereupon the Accountant of Court appointed new caution to be found on 12th May 1863. This order was renewed in June and again in July 1863. Now the factor provided and put in a new bond of caution, which was lodged with the Principal Clerk in common form, with this exception, that it did not contain a certificate by the agent in the form required by the clerk as one of the securities for the sufficiency of the caution. Now, this certificate does not stand on any formal order, but we must have some regard to the peculiar position of the Principal Clerk, who must satisfy himself of the sufficiency of the cautioner, and in the performance of that duty he has considerable responsibility. He is entitled to establish as matter of practice that such a thing shall be done in order to satisfy him; and we hear that it is matter of invariable practice to require that the agent in the cause shall certify that to his own knowledge the caution is sufficient. It would be out of the question to say that the Principal Clerk is not entitled to require that such certificate shall be given, and I cannot therefore say that Mr Currie, when he refused to mark this as sufficient, did anything he was not entitled to do for his own protection, as well as for the protection of the estate, for this certificate was not that of the agent in this Court, but of some agent in the country, about whom Mr Currie probably knew nothing. Mr Currie did not mark this as sufficient, and the bond was not transmitted to the Accountant of Court. I cannot hold that this caution was accepted, and, not having been accepted, there was not thereby constituted a subsisting cautionary obligation. It appears to me that the Act contemplates that the proper check is that, till new caution is found, the factorial management shall not proceed. There is thus a check on the office of the Accountant of Court; and whether the last accountant should not have taken more vigorous measures I do not now say, for there is no sufficient information before us, but it is there that the check has failed, and certainly there was no failure on the part of the Principal Clerk, who appears to have been pursuing his ordinary line of duty in refusing to mark this as sufficient. My opinion is that this note must be refused.

The other Judges concurred.

Agent for Factor—D. Milne, S.S.C.

Wednesday, July 14.

MACALLUM *v.* HAY AND OTHERS.

Agreement—Employment. Held, on a proof, that a civil engineer had been employed by the promoters of a gas company to prepare plans of a new work, and that he was entitled to the remuneration of 2½ per cent.

Peter Macallum, C.E. and architect, Dunfermline, sued John Hay and others, residing in Inverkeithing, for £36, which he claimed for work in connection with the preparation of plans for a gas work at Inverkeithing. The defence in substance amounted to this, that the defenders had not employed the pursuer to prepare a new plan, but merely to supply a piece that was wanting in some old plans which had been prepared twenty years before, and therefore they were not liable. The Sheriff-substitute (BELL), after a proof, decerned against Thomson, one of the defenders, but assoilzied the others, holding that they had only instructed Thomson to employ the pursuer to supply a portion of the old plan, and had not authorised the employment on which the pursuer sued. The Sheriff (MACKENZIE) recalled and assoilzied the whole defenders. Macallum appealed, and additional proof was taken.

SCOTT and RHIND for appellants.

CLARK and GIFFORD for respondent.

The Court recalled. They held unanimously that the pursuer had been employed by the defenders, and was entitled to remuneration. There was apparently some confusion about the matter, and the defenders, who seemed not to know very much about business of that kind, appeared not to be positive of anything but that they had not employed the pursuer; but that defence was plainly