wards approved by the First Division), but this decree Whyte failed to implement, and on 26th June 1891 a petition was presented to the First Division by his three sisters, with the concurrence of the said David Hill Murray and certain heritable creditors upon the trust-estate, to have him removed from the office of trustee and a judicial factor appointed.

Answers were lodged by the trustee.

In support of the petition it was argued—(1) The trustee had failed to implement the provisions of the trust-deed. (2) All the parties beneficially interested in the trust-estate were parties to this petition for his removal. (3) The factory had been recalled upon a misrepresentation of facts on the part of the trustee. (4) He had no longer any beneficial interest in the estate. (5) He had impoverished the estate by a course of protracted and unnecessary litigation. (6) He was again a notour bankrupt. (7) He was now resident in London and unable to look after the estate.

Argued by the respondent—(1) He had not maladministered the estate. (2) He was still willing to constitute his sisters' provisions real burdens on the estate. (3) He had abstained from doing so in their own interests. (4) They were tools in the hands of others against whom he was protecting them. (5) They were not the true petitioners, but had been got to lend their names to this petition in order to benefit others.

At advising—

LORD PRESIDENT — The respondent's father left three daughters who were each to get £1000 under his trust-disposition and settlement. He directed his trustees to pay these provisions on the death or second marriage of his wife, or to secure them by constituting them real burdens upon his heritable estate. Now, it does not admit of dispute that the respondent—the sole surviving and accepting trustee—has done neither of these things. He has suggested that the second course may yet be adopted, and he submits that if the provisions are constituted real burdens, the grounds for this petition will be removed. I do not follow that reasoning. The testator died in 1869 and his widow in 1887, and the offer now made certainly does not embrace the payment of byegone interest, of which not one penny has been paid. Putting aside the utter failure of the respondent as trustee to follow out the directions of the truster—which is a grave offence on the part of the respondent quite sufficient to justify his removal, especially as we know that his affairs are not in a satisfactory condition, and he would for his own sake, I imagine, be better out of it, although that perhaps is irrelevant—we have this important consideration, that the whole parties interested, namely, his sisters and the assignee to the residue of the estate which was originally left to the respondent himself, petition for his removal. That I consider a sufficient reason for removing him without imputing blame on his part. When all the parties interested combine in asking to get rid of a trustee, we have a strong case for his removal. I do not say that in all circumstances that would hold as a good ground for such a petition being granted. There might be cases where a family compact might be formed in order to compel a trustee to resign, and if there were any suggestion of such a combination here I should refuse the petition. But here a grave offence is alleged, all the parties interested combine to petition for the trustee's removal, and I see no reason as the case stands why we should not sequestrate the estate, remove the trustee, and appoint the gentleman suggested judicial factor *ad interim*. It will remain open to the Junior Lord Ordinary or the Lord Ordinary on the Bills to appoint him permanently, or to supersede his appointment by that of anyone he may consider more suitable.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

Counsel for the Petitioners—C. K. Mackenzie. Agents—Welsh & Forbes, S.S.C.

Counsel for the Respondent—Party.

Saturday, July 18.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

THAIN *v.* THAIN.

Title—Trust—Heritable or Moveable—Spes successionis — Deathbed — Adverse Title Made up by Accepting Trustee.

In 1846, T. T., being heir-presumptive to his brother, who was under curatory, in the estate of Arthurbank, disponed his *spes successionis* in that estate to his cousin D. T. and his heirs and assignees whomsoever. D. T. died in 1850, having executed a trust-disposition the day before his death, by which he conveyed his whole estate, heritable and moveable, including Arthurbank, to trustees, of whom his brother A. T. was one, under a declaration that Arthurbank was to go to his brother A. T. in liferent and to his natural son D. in fee. A. T. accepted the trusteeship and carried out its duties in other respects, but having been advised that the disposition of Arthurbank was ineffectual as having been executed on deathbed, he proceeded to make up his title to that estate as D. T.'s heir-at-law without bringing any action of reduction of the deed *ex capite lecti*. He obtained in 1852 from T. T., whose brother had died intestate, a disposition of Arthurbank which recited the previous disposition of 1846, he duly completed his title to that estate, and he possessed it as fee-simple proprietor until his death in 1890. At the time of his death he was the sole surviving trustee of his brother D. T.

In an action at the instance of D. T.'s son against A. T.'s gratuitous disponee, to have it found and declared that A. T. had held Arthurbank in trust for his liferent use allenarly and for the pursuer in fee, that that estate now belonged to him, and that A. T.'s disponee was bound to remove therefrom, it was *held*, after a proof, that the trust-disposition had been executed upon deathbed, that the conveyance of the right to Arthurbank might have been reduced upon that ground, but that such a reduction was in the circumstances unnecessary; that A. T. had acted openly and in good faith throughout; that his acceptance of the trusteeship did not involve homologation of the disposition of Arthurbank; that his title to that estate was valid from the first; and that his disponee fell to be assoilzied.

In 1841 James Matthew Thain became heritably vested and seised in the estate of Arthurbank in the parish of Coupar-Angus and county of Perth. In the same year he became insane, and died in the Royal Asylum at Dundee 18th February 1852 unmarried and intestate, survived by his only brother Thomas Thain. In the year 1846 their cousin David Thain (*primus*) had made large advances to and for behoof of James Matthew Thain and Thomas Thain, and it was agreed by and betwixt David Thain (*primus*) and Thomas Thain that in consideration of these advances, and in consideration of an annuity of £20 to be payable to Thomas Thain for his life, and to be charged upon the estate, Thomas Thain should convey the estate and his hope of succeeding thereto to David Thain (*primus*). In pursuance of the agreement, and by a deed of disposition and assignation dated the 28th day of January 1846, in consideration of the said advances and annuity, Thomas Thain sold and disponed from him, his heirs and successors, to and in favour of David Thain (*primus*), his heirs and assignees whomsoever, heritably and irredeemably, the estate of Arthurbank, and all right, title, and interest which he Thomas Thain then had or at any time thereafter might acquire in and to the same or any part thereof under the real burden of the annuity. And further, Thomas Thain bound himself, upon the death of James Matthew Thain, to procure himself duly and lawfully served and retoured heir to him, and infeft and seised in due and competent form in the said estate, and being thus invested, he obliged himself to infeft and seise David Thain (*primus*) and his foresaids in the same, under burden of the said annuity; and further, he bound himself, in the event of the said disposition and assignation being considered by David Thain (*primus*) or his foresaids to be insufficient for completing the title in his or their persons to the subjects thereby disponed, to execute another disposition thereof in favour of him and his foresaids as soon as he should succeed to the same as heir foresaid.

David Thain (*primus*) died upon 9th November 1850, leaving a trust-disposition dated the day before his death (8th November) while he was suffering from the disease from which he died. By that trust-disposition he assigned and disponed his whole estate and effects, heritable and moveable, to his brother Alexander Thain (*primus*) and others as trustees, with a declaration that the deed was granted in trust for the uses and purposes following, viz.—(1) "For the payment of all my just and lawful debts, deathbed and funeral expenses, and of the following sums (being legacies). . . . (2) I appoint my said trustees to convey and dispone my property of Arthurbank, all as acquired by me from Thomas Thain formerly residing there, to and in favour of my brother the said Alexander Thain, in liferent for his liferent use allenarly, and to and in favour of David Thain, my natural son, and the lawful heirs of his body in fee, whom failing, to my own nearest heirs in fee: In the third place, I appoint my said trustees to hold the residue of my estate, both heritable and moveable, for behoof of my son the said David Thain, until he shall arrive at the age of thirty years, when they shall pay over and assign the same to him, my said trustees allowing my said son such an allowance for his support and education until he shall attain said age as they shall consider proper and beneficial for him, and they being empowered whenever they may deem it advisable, to allow him to take such management of any part of the estate falling to him as they may consider him fit for, but always under the controul and directions of my said trustees: Declaring always that in the event of the succession to Arthurbank opening to my son before attaining thirty years, the property shall till then be under the controul and management of my said trustees, and in the event of my son dying before attaining said age, my said trustees shall in that case convey the property of Arthurbank to my heir-at-law at the time being."

Alexander Thain (*primus*) acted as one of his deceased brother's trustees, so far as the payment of his debts and legacies was concerned. With regard to Arthurbank, he consulted lawyers, by whom he was advised that the disposition by his brother, so far as the heritage was concerned, was ineffectual, having been granted upon deathbed. He accordingly, without bringing any action of reduction, proceeded to make up a title to Arthurbank in his own person. He obtained from his cousin Thomas Thain a disposition of Arthurbank dated 9th March 1852, which, after narrating the previous disposition of 28th June 1846, in favour of David Thain (*primus*) proceeded as follows—"And further, considering that the said David Thain died on or about the ninth day of November Eighteen hundred and fifty without lawful issue, and without having executed any legal disposition or conveyance of his right to the said lands and others disponed by me as aforesaid, and that the right to the same contained in the said disposition and assigna-

tion by me devolved in consequence upon and now belongs to Alexander Thain, residing at Arthurbank, as his only surviving brother-german, and nearest and lawful heir both of line and conquest to him; and further, considering that the said James Matthew Thain, my brother, died on the eighteen day of February last, in the present year, unmarried and intestate, and that I am now his nearest and lawful apparent heir in the said lands and others; and now seeing that the said Alexander Thain, as heir foresaid of the said David Thain, has required me, in implement of the obligations undertaken by me in the said disposition and assignation before narrated, to grant the disposition underwritten, and that he has also agreed of his own proper motive that the same shall be made under burden of an annuity to me of forty pounds sterling per annum, payable as after mentioned, and under the further burdens hereinafter specified, which annuity and other burdens hereon are to include and be in lieu of the said annuity of twenty pounds sterling per annum contained in the said disposition and assignation before narrated. Therefore I, the said Thomas Thain, as nearest and lawful apparent heir foresaid of the said deceased James Matthew Thain, my brother-german, have sold and disponed, as I do hereby sell, alienate, and dispone to the said Alexander Thain and his heirs and assignees whomsoever, but subject to the real burden of the annuity and other provisions in my favour hereinafter inserted, heritably and irredeemably, "All and whole "[*here follows description of Arthurbank, &c.*]

Thomas Thain completed a feudal title to Arthurbank, and thereafter Alexander Thain duly completed his title to that estate and possessed it as fee-simple proprietor until his death on 7th July 1890. He left a disposition conveying Arthurbank to his natural son Alexander Thain (*secundus*), who had been born in 1840.

In October 1890 David Thain (*secundus*) brought an action against Alexander Thain (*secundus*) to have it found and declared that Alexander Thain (*primus*) and the other trustees of David Thain (*primus*), were upon the death of David Thain (*primus*) and Alexander Thain (*primus*) after the death of the other trustees, lawfully vest, possessed, and seised of and in the lands and estate of Arthurbank, or of and in the *spes successionis* thereto acquired by David Thain (*primus*) from Thomas Thain upon trust to dispone and convey the same in the manner intended in the trust-disposition and settlement; that at the time of his death Alexander Thain (*primus*) having acquired a feudal title to the estate of Arthurbank, was so vest and seised upon trust, and was bound and obliged to dispone and convey the said lands and estate, subject to his own liferent, to and in favour of the pursuer in terms of the trust-disposition and settlement; that as he he had failed to do so, and his son refused to implement his obligation, Arthurbank should be adjudged to belong to the pursuer, and that the defender should be ordained to remove therefrom.

The pursuer averred that Alexander Thain (*primus*) had acted in pursuance of a fraudulent scheme and in breach of his duty as a trustee, in obtaining the disposition in 1852 from Thomas Thain which he had got by increasing the amount of annuity payable to the said Thomas Thain in making up his title as fee-simple proprietor and in keeping the pursuer in ignorance of his rights as beneficiary under the trust-deed.

He pleaded—"(1) The defender's predecessor having, from the date of his acceptance of the office of trustee under the trust-disposition and settlement condescended on, been under an obligation to convey the said lands and estate to the pursuers, or one or other of them, and having through the execution of the fraudulent scheme condescended on, acquired a title to the fee-simple of the said lands and estate, decree of declarator and adjudication should be pronounced as concluded for, with expenses. (2) The defender's predecessor having, from the date of his acceptance of the office of trustee aforesaid, been under an obligation to convey the said lands and estate to the pursuers, or one or other of them, and having, contrary to his trust duty, acquired a title to the fee-simple of the said lands and estate, decree of declarator and adjudication shall be pronounced as concluded for."

The defender pleaded—"(4) The present action is excluded by the said warrants and infeftments in favour of the said Thomas Thain and the said Alexander Thain (*primus*), and the disposition and deed of settlement of the said Alexander Thain (*primus*). (5) The said trust-disposition and settlement of David Thain (*primus*) having been executed on deathbed is not a habile title to heritage, and the pursuer cannot found thereon. (6) In any event, the defender and his authors having possessed said estate of Arthurbank on an *ex facie* valid irredeemable title recorded in the appropriate register of sasines for more than the space of twenty years continually and together, peaceably and without any lawful interruption, the defender is entitled to decree of absolvitor, with expenses."

The Lord Ordinary (KYLLACHY), after a proof, the result of which sufficiently appears from the foregoing narrative and his Lordship's opinion, assoilzied the defender.

"*Opinion.*—The defender here has *prima facie* a good prescriptive title to the small estate in Perthshire which is the subject of the action. That is to say, his father, who died last year, and whose general disponee he is, made up a title to and was infeft in the estate so far back as the year 1852, and on this infeftment, which was an infeftment in fee and in all respects regular, he possessed until his death last year, when the defender succeeded and continued his possession. The question at issue is whether the pursuer is entitled to get

behind this prescriptive title and to claim the estate in virtue of a certain trust-disposition left by David Thain, to whom the property belonged at the time of his death in 1850, and who by the trust-disposition in question left it, or attempted to leave it, to the defender's father in liferent, and to the present pursuer (his own natural son) in fee.

"The first ground on which the pursuer relies is that the possession of the defender's father up to his death in 1890, falls to be ascribed not to his infeftment in fee, but to the personal title which he held to the liferent of the estate under the trust-disposition and settlement of David Thain. I am unable to sustain this contention. The pursuer's possession must, I think, be ascribed to the title which he made up and published—which was a title inconsistent with the trust-disposition and settlement—and which was made up on the footing that the trust-disposition and settlement was reducible *ex capite lecti*. Moreover, the proof appears to me to establish that the possession had by the defender's father exhibited all the marks and qualities of possession by a liar. I refer particularly to the leases which he granted and to the large sums spent by him on the improvement of the property and the erection of buildings upon it. The pursuer might, it will be observed, have raised the present question at any time during the period of prescription. He had always a sufficient title and interest to reduce the infeftment as an infeftment in fee, if he saw his way to do so.

"The other ground on which the pursuer relies is at first sight more formidable. It appears that the defender's father was himself a trustee under the trust-disposition and settlement of his brother David Thain, and there is no doubt that he acted in the trust as regards the administration of the moveable estate, and also in carrying on for the benefit of the legatees a certain farm of which the truster had a lease current at the time of his death. It is said that in these circumstances the title which he made up to the lands now in dispute constituted a breach of trust, that it was his duty to possess under the trust, and that consequently he cannot prescribe against the trust.

"I allowed before answer a proof of the facts bearing on this question. And I am now satisfied of the relevancy and also of the conclusiveness of the facts which that proof establishes. It is clearly proved that the trust-settlement in question was executed by David Thain on the day before he died, and while he was labouring under the disease of which he died. In short, it is quite clear that it was open to the defender's father, as David's brother and heir-at-law, to reduce the deed *ex capite lecti*. It is also clear that the only reason why this was not done was that the heir was advised that it was not necessary, and that there being no question as to his right to succeed he might make up his title in the most convenient form without reference to the abortive conveyance in the trust-disposition and settlement. In these circumstances I cannot hold that the heir, although a trustee, violated any duty to the trust in taking the course he did. The substance of the matter must, I think, here be looked to; and it being clear that the lands in question formed truly no part of the trust-estate, I see no interest which was prejudiced by the course which the heir took, and which, it will be observed, he took openly and under competent legal advice.

"It is true that the present defender (being, as it appears, illegitimate) cannot now bring a reduction *ex capite lecti*, but that does not, in my opinion, prevent his proving as part of the history of the trust, and as an answer to the suggestion of breach of trust, that the trust settlement was ineffectual to convey the lands, and was recognised and dealt with as being so.

"It might have been a different matter if the defender's father could be shown to have homologated the trust-deed prior to his taking the step of making up his adverse title. But I find no evidence, and indeed no averment of anything from which such homologation could be inferred. With respect to acts subsequent to the assertion of his adverse title, I do not think that they can count. But they only at best come to this—that the heir-at-law, while repudiating the trust-deed as a conveyance of the lands, yet acted in the management of the trust as a trust, embracing the moveable estate. It is quite certain that he never intended to ratify the trust-deed as containing a conveyance of the lands in question.

"Some doubt was suggested as to whether the law of deathbed applied, looking to the peculiarity of David Thain's title. It appears that although in possession, he at the time of his death had no feudal title to the property, but only a *jus crediti* under a contract with a person who had a conveyance to what was then only a *spes successionis*. The right, however, such as it was, was a heritable right, and one which ultimately became available to David Thain's heir. And no authority was quoted to me for the proposition that the law of deathbed was confined to feudal or proper personal rights to land, and did not include rights of the nature of *jura crediti*.

"Altogether, I see no reason why I should not assoilzie the defender from the action of declarator and adjudication, being the only action which is at present before me."

The pursuer reclaimed, and argued—(1) It was not sufficiently established that the deed of David Thain was granted on deathbed. In any case, it was good until reduced. It was voidable, not void. It had never been reduced. It was at least doubtful whether it could be reduced *ex capite lecti*. The right assigned was a *spes succesurus*, which had never been held to be a heritable right. It was rather a moveable right—*Beaton & M'Andrew* v. *M'Donald*, June 7, 1821, 1 Sh. 48; *Trappes* v. *Meredith*, November 3, 1871, 10 Macph. 38. Further, Alexander Thain had no title to reduce the

deed. He was not the heir *alioquin successurus* (Bell's Comm. i. 92) to the *spes*, which was in Thomas Thain, but only the heir of Thomas' assignee, and therefore two removes away. (2) Again, Alexander was one of David's trustees under a trust which he had accepted. Accordingly he was disqualified from acquiring any personal right to the prejudice of the beneficiary under the trust, and no possession, even for the prescriptive period, would be valid adverse possession against the trust—*University of Aberdeen* v. *Magistrates of Aberdeen*, July 18, 1876, 3 R. 1087, and March 23, 1877, 4 R. (H. of L.) 48. It was said he had only accepted the trust partially, but a trust was indivisible—*Aberdeen Railway Company* v. *Blakie*, 1854, 1 Macq. 461; *Wyse* v. *Abbott*, July 19, 1881, 8 R. 983. By acting as trustee he had homologated the deed, even if held to have been granted on deathbed — *Erskine*, January 1682, M. 5703; *Anderson*, July 15, 1760, M. 5701.

Argued for the respondent—His father had acted openly from the first. He had only accepted the trusteeship after being advised that the trust-deed, so far as it concerned the heritage, was ineffectual. The right conveyed was clearly a heritable right—Ersk. Prin. iii. 8, 49. He had not brought an action of reduction with the view of saving expense to the trust. He might no doubt have denuded himself of the trust, and then have made up his title, but the trust was divisible into two distinct parts, and he was entitled to act as he had done—Bell's Comm. i. 141; *Crichton* v. *Crichton's Trustees*, 1826, 4 Sh. 553; *Duncan and Others (Hewit's Trustees)* v. *Lawson*, March 20, 1891, 28 S.L.R. 528. He had openly possessed against the trust-deed for more than the prescriptive period. The evidence had conclusively disposed of the allegation of fraudulent dealing. There had been nothing approaching breach of trust. It was said that the pursuer was ignorant of his rights. This was exceedingly doubtful. He had not gone into the witness-box and said so, and in any case, the defender's title was on record for the pursuer's inspection.

At advising—

LORD KINNEAR — The pursuer in this action claims right to certain lands called Arthurbank in Perthshire, in which the defender now stands infeft under a disposition in his favour granted by the late Alexander Thain, the late proprietor, who died in 1890, and had been infeft in the lands in dispute since 1852. There is no question that his title is *ex facie* perfectly valid and regular, being a conveyance by Thomas Thain to him as nearest and lawful heir both of line and conquest to the deceased David Thain, who died on 9th November 1850. The lands in question had belonged to James Matthew Thain, who was under curatory as being incapable of managing his own affairs. Thomas Thain was brother and heir-at-law of James Matthew Thain, and in 1846, while James Thain was still alive, had conveyed his right of succession and all right, title, and interest which he had in the estate, for onerous causes, to David Thain. David Thain died before James, and therefore he never acquired any real right in the lands, but it is not disputed that by virtue of Thomas' conveyance he had a perfectly good personal right, contingent only on the succession opening to Thomas, and it is clear in law that this was a right which he might validly assign to others, and which, if not so assigned, might be transmissible to his heir. David Thain, who died, as I have said, on 9th November 1850, left a trust-disposition dated 8th November, the day before his death, and by this deed he directed his trustees, of whom Alexander Thain was one, to convey his estate of Arthurbank to Alexander in liferent, for his liferent use allenarly, and to the pursuer in fee.

The pursuer maintains that Alexander Thain, who accepted the trust and acted as a trustee, committed a breach of trust in making up the title in his own person as fiar instead of to himself in liferent only and to the pursuer in fee, and afterwards, in conveying the fee to the defender, that it was his duty as trustee to denude the fee in favour of the pursuer, and that as the defender is a gratuitous disponee he can take no benefit from his author's breach of trust, and must now denude, as the latter would have been compelled to do had the defender not been kept in ignorance of the way in which he had made up his title. The answer is that there was no breach of trust, because the conveyance to Alexander Thain by David Thain was executed upon deathbed, and therefore was ineffectual to prejudice the right of Alexander, his heir-at-law. I do not think it doubtful that that is a perfectly good answer if the facts on which it rests can be established. Alexander Thain could acquire no right in any part of the trust-estate contrary to the terms of the trust, but he was not bound by acceptance of the trust to abandon an estate which belonged to himself, and which the truster had no power to convey. The question between the parties appears to me to be a question of fact. If Alexander Thain made up his title in breach of the trust, the pursuer, whose interest he was bound to protect, will be entitled to vindicate his right to the estate notwithstanding the gratuitous conveyance to the defender. If there was no breach of trust, the pursuer has no right, and the defender must be allowed to retain his own estate.

A good deal of confusion and apparent difficulty was introduced into the argument by the defender's contention that he had acquired a prescriptive right. If there was no breach of trust, defender had no need to plead prescription, and if there was breach of trust prescription will be of no avail to him. It is settled law, to state the doctrine in the language which was used by your Lordship in the chair in one of the cases cited to us, that no trustee can acquire by prescription a right to perpetuate a breach of trust, and since the defender is a gratuitous disponee

in possession of the truster from whom he derives his title, he can be in no more favourable position than the defaulting trustee himself. It is perfectly true that Alexander Thain, who is said to have committed this breach of trust, made up the title in his own person *ex facie* absolute to the fee of the estate, and possessed after once making up that title for his own behoof. But though that was a perfectly good absolute right as against all the world, still if it were the case that he had made up his title as heir to David Thain alone, and if David Thain had effectively conveyed the estate to Alexander in trust for the pursuer, then, as between Alexander Thain and the beneficiary under the trust, the absolute title would have been qualified by the trust obligation, and no prescriptive possession would have enabled the trustee to have got rid of this trust obligation so long as he continued to hold the property, for it is quite obvious that the positive prescription would have no effect on the personal claims affecting the trust, and it is well-settled law that the negative prescription would not extinguish this claim by long possession alone unaided by anything like repudiation or discharge. Therefore I must say for myself that during the argument I was a good deal impressed by the difficulty which the defender seemed to create for himself by this contention that he had made up a prescriptive right.

But then I think it is only necessary to state the facts of the case in order to show what the real question between the parties is; and when it is rightly understood it seems to me to be very obvious that we have no concern in this case with any plea of prescription at all. If the defence is well founded that David Thain's deed was invalid and ineffectual to convey his right to Alexander, and thus that Alexander Thain had a perfect right to complete his title as he did at the time, it is obvious that would have been just as good a defence for Alexander Thain if the action had been brought against him in the year he made up his title as it is to the defender now; and if it could not have been a good defence to Alexander Thain I think it can be no better for the defender as his gratuitous disponee. It appears to me therefore that the question is really one of fact.

It is said that the defence is bad in law, because the law of deathbed while it subsisted had no application to the kind of right which was vested in David Thain. I agree with the Lord Ordinary that this argument is not well founded, and for the reason which his Lordship gives, that the right even as it was was an heritable right, and one which ultimately became available to David Thain's heirs. The law as it stood at the time of David Thain's death was this—that all gratuitous deeds making over or burdening subjects which the heir would have succeeded to had they not been so conveyed, or from which he would have derived any benefit, or which tended in any degree to prejudice the heir, might be reduced on the head of deathbed. The law is so stated by Erskine, and as thus stated it appears to me to apply directly to the case in hand. The question therefore appears to me to be merely whether there was or was not any breach of trust in fact on the part of Alexander Thain; and I agree so entirely with the Lord Ordinary as to the result of the proof that I think it unnecessary to do more than repeat what his Lordship says as to the effect of the evidence. The Lord Ordinary says—"It is clearly proved that the trust-settlement in question was executed by David Thain on the day before he died, and while he was labouring under the disease of which he died. In short, it is quite clear that it was open to the defender's father, as David's brother and heir-at-law, to reduce the deed *ex capite lecti*. It is also clear that the only reason why this was not done was that the heir was advised that it was not necessary, and that there being no question as to his right to succeed, he might make up his title in the most convenient form without reference to the abortive conveyance in the trust-disposition and settlement. In these circumstances I cannot hold that the heir, although a trustee, violated any duty to the trust in taking the course he did. The substance of the matter must, I think, here be looked to; and it being clear that the lands in question formed truly no part of the trust estate, I see no interest which was prejudiced by the course which the heir took, and which, it will be observed, he took openly and under competent legal advice."

The only observation that occurs to me to add to what the Lord Ordinary has here said is with reference to his statement that this course was taken openly. I think it very clearly proved that it was known to everybody concerned. The pursuer, however, alleges on record that he was kept in ignorance of the facts of the case, and of the method in which Alexander Thain made up his title. But then he has not gone into the box to prove that he was ignorant of these facts, and therefore I think it cannot be assumed that the pursuer was really kept in ignorance of what it was important for him to know any more than any of the other persons interested in the estate of David Thain.

Now, if the facts are as the Lord Ordinary has stated them, and I think accurately, there remains only one point to be considered. It is said the defender has no right to reduce the deed *ex capite lecti*, because he is not the heir-at-law either of David Thain or of Alexander Thain, and if it were necessary for him to reduce David's trust conveyance, that would, I think, be a very formidable plea. But then he is under no necessity to reduce the deed. He has no title to set aside any conveyance by David Thain in respect of a right of succession to him, but he has an undeniable right to maintain the right which has been granted to him by Alexander Thain, and for that purpose to prove that his author's title was not founded on breach of trust. The material consideration is that there is no competing title which requires to be set

aside, because the defender has the only title to the lands. If David Thain had been infeft in the lands, and had conveyed them *mortis causa*, then it would have been absolutely necessary that his conveyance should have been set aside *ex capite lecti*, and there can be no doubt at all that Alexander Thain would have been so advised. It is quite clear on the correspondence that the reason why he took the course he did take was, that as David Thain's deed was quite invalid and ineffectual to convey the lands, and valid only to create an obligation on him as heir, which might have been made good against him if the deed had not been executed on deathbed, he was advised that it was unnecessary for him to set aside the deed at all, as it created no effectual obstacle to completing a title in his own person, and accordingly he made up a title which is perfectly good. The only risk to which he was exposed in following this advice was that he might by death and lapse of time lose the benefit of evidence which was necessary in order to prove the fact which lies at the base of his right, that the deed in question was executed on deathbed, but fortunately for the defender, though a good many persons who were likely to be called to speak to these transactions are dead, there still remains evidence enough to establish the case. Now, that being so, I think the defender has a perfectly good answer to the action brought against him, and is not required to resort to any process of reduction whatever. The pursuer has nothing but a personal claim to compel the defender to denude of the estate in his favour, and all the defender requires to do is to show that that would not have been a good personal claim against his author Alexander Thain, and therefore that it is not a good claim against himself. I therefore agree with the decision at which the Lord Ordinary has arrived.

LORD ADAM—I concur with Lord Kinnear, and on the same grounds. The facts of this case are a little complicated-looking at first, but they appear to be as follows—There was a certain James Matthew Thain infeft in the lands of Arthurbank. This James Matthew Thain was a lunatic confined in an asylum. His curator was his brother Thomas, and Thomas's cautioner was David Thain. Now, it appears that this David Thain, who was a cousin of Thomas and James, had made large advances to Thomas in respect of some transaction arising out of the caution, and in respect of these advances, Thomas, who besides being judicial factor was at the time heir-presumptive to James, while still presumptive heir, granted to David a disposition of the lands of Arthurbank, and he also at the same time granted an obligation that he, Thomas, on the death of James, would make up a title and convey these lands to David and his heirs and successors. That was the beginning of the matter. The disposition and the obligation which Thomas gave to David were both in the year 1846. It appears that James died in 1852. He was predeceased by David, who died in 1850, and Alexander, the defender's father, was David's heir. Then Alexander, David's heir, called upon Thomas to implement that obligation and Thomas implemented it by disponing the lands of Arthurbank on 9th March 1852, to Alexander absolutely. Alexander made up his title and possessed on that disposition until 7th July 1890, when he died. By disposition dated 21st November 1872, Alexander conveyed to his son, the present defender, these lands of Arthurbank. Accordingly the father and son had possessed ever since 1852 these lands on an *ex facie* absolute title in their own person.

I agree with Lord Kinnear that if the defender is in possession on such a title he requires no assistance from prescription or any such subordinate right. That is the position of the defender here. He holds these lands on an absolute disposition derived from his father. Nobody seeks to reduce that title, and there is no competing title. But the only case made on record is this—that the defender's father Alexander during all that time from 1852 was under an obligation to convey these lands to David's trustees, and accordingly the manner in which this action was brought was to have it found and declared that Alexander, the defender, was under this obligation, and on his failing to implement that obligation to have the lands adjudged. Accordingly, it humbly appears to me along with Lord Kinnear, that the only question we have to decide is whether or not Alexander Thain, in the year 1852 and downwards, was under an obligation to convey these lands, to which he had made up a fee-simple title, to the trustees under David's trust-deed. That depends upon the disposition granted by David Thain, and it is this—David died in 1850, predeceasing, as I have said, Thomas Thain, but he left a trust-disposition and settlement dated 8th November 1850 in favour of the elder Alexander and three other trustees, by which he conveyed to them his whole estate, and he directed them to dispone Arthurbank to Alexander Thain in liferent and to the pursuer David, his natural son, in fee. It is said that that is and was a binding obligation upon Alexander, and that is the obligation which Alexander's son, the defender, is now called upon to fulfil.

Now, it appears to me that if David's trust conveyance was then and is now to be treated as a valid and unreducible conveyance, the pursuer possibly might be enabled to come in. But that is not distinctly averred nor proved, because I agree with Lord Kinnear and the Lord Ordinary that the circumstances in which this trust-disposition of Arthurbank was executed were these—that it was executed on 8th November 1850, and that the granter of it, David, died the next day, 9th November 1850, and that when he executed it he was ill of the disease of which he died. Now, I think that is on the evidence clear beyond any doubt, and this therefore was

a disposition of these lands which was reducible at any moment by Alexander Thain. I think the result of that is that these lands of Arthurbank were *de facto* held by Alexander Thain, and that the trust conveyance was invalid and reducible at any moment by Alexander. That is my humble opinion. The question comes to be—if these lands were *de facto* the property of Alexander, whether or not he is under any obligation to convey them to the trustees? I think that is the question, and that he is under no obligation to convey them, and has committed no breach of trust. I concur with Lord Kinnear. I see no reason why Alexander Thain should have been under any obligation to convey these lands. They were owned by him, and were his own property. That humbly appears to me to be a question of fact, and the question is, whether in point of fact, in not so conveying the estate, Alexander committed a breach of trust. If the facts are as I have stated them, I see no breach of trust, for I cannot see an obligation on Alexander, simply because he happened to be a trustee under David's trust, to convey his own property to the trustees.

That is the view I take of this case. I quite agree with Lord Kinnear that there might have arisen certain circumstances in which it might have been necessary to reduce this deed. If, for example, David had been in point of fact infeft in these lands of Arthurbank and had conveyed them under a disposition under which the trustees might have completed a title to them and possessed them, in that case it would have been quite necessary for Alexander to come forward and reduce that disposition if he desired the property. But that was not the position of matters here at all. It is quite obvious that the trustees could make up no title to these lands without the assistance of Alexander, who was the heir, or by bringing an action of adjudication against him. If Alexander chose to make up a title, the only other course was just what has been raised here—an action of implement and adjudication. It is perfectly obvious that all the time during Alexander's life he had complete possession, for this is a reducible deed, and no doubt if he had been challenged at any time during Alexander's life the answer would have been complete. He would have said as the defender says now—"This is a deed reducible *ex capite lecti*." He consulted his advisers, and they took that view. His agent told him that he need not reduce this deed unless a challenge was brought. No such challenge was ever brought during all his life. I agree with the Lord Ordinary that perhaps that was not very prudent advice, for he exposed himself to the risk of losing evidence. It is fortunate for him that there is preserved evidence to my mind conclusive that this deed was reducible *ex capite lecti*, but if the facts had been otherwise even at this late date, and Alexander had been unable to prove that the deed was reducible *ex capite lecti*, I do not see very well what answer the defender would have had. But that is not the state of facts, for fortunately Alexander Thain, the defender, has been able to show the true state of matters, and that in point of fact this deed was a deed reducible *ex capite lecti*. It may be not wholly so, but the deed was only valid to convey the lands, and only conferred on the pursuer a personal claim on Alexander to convey. Now, I think with Lord Kinnear that that being the nature of the case it is an answer to this personal claim that Alexander could and would have shown at any time during his life that no such personal claim existed against him. I think with Lord Kinnear that no claim existed against the defender's author, and certainly no claim exists against the present defender. I think the defender, who has possessed this estate on an absolute title for the last forty years, requires no prescription to strengthen his case. That appears to me with Lord Kinnear to be the true state of the facts. I only wish to say it is averred on record, and is a ground of this action, that this is a case of fraud, and it is said that all this title was made up in pursuance of a fraudulent scheme to defeat the pursuer's right under the trust-disposition. I think it right to say that I see no trace whatever of fraud on the face of these proceedings. I think that everything was done by Alexander Thain in the most open way possible. There was no concealment. I think with Lord Kinnear that these three remaining trustees and everybody else knew perfectly well the state of the title and the facts in this case; and I agree with Lord Kinnear that we are entitled to conclude from the non-appearance of the pursuer in the witness-box that he knew as well as other people the true state of the facts in this matter. These are the facts, and I concur with Lord Kinnear.

Lord M'Laren—I had not intended to express any separate opinion in this case, because I concur in great part with the complete and lucid exposition of this case which has been given by Lord Kinnear; but after hearing his Lordship's opinion there is one point not affecting the result of the case, but one on which I think there is a slight divergence of view, and perhaps it is right I should state what that is. In my view, I am not able altogether to disregard the element of prescription or assertion of prescriptive right on the part of the defender. The case arises in this way, if I may summarise so much of the facts as is necessary to bring out my view:—The defender, or rather the immediate author of the defender, was in a position to make up a title to this little property as heir-at-law, and he was also one of three trust disponees under a conveyance of the same property. He made up his title as heir-at-law, and in so doing he acted quite legally, but having made up that title he was but for a plea of deathbed under an obligation to give the benefit of this title to the trust—to grant a deed in implement of the trust which he had accepted. Now, he did not do that, for reasons which are probably

quite satisfactory, but supposing that prescription had not run upon the title of heir-at-law which was made up by the defender here, then it appears to me the defender would have had no answer to the present action, because he would have been in the position of a person sued on the obligation which lies upon every heir to implement his ancestor's trust-deed, and on the other hand he would not have been in a position to reduce that deed *ex capite lecti* founding on his individual right, because it was quite settled in the law of Scotland that no one but the heir can bring an action of reduction *ex capite lecti*. It appears to me that the defender takes benefit by prescription in this way—that he has a good title by prescription against any adverse claim excepting one founded on breach of trust, and if it can be shown that he has committed a breach of trust his prescriptive title would be of no avail. But then on the question of breach of trust it appears to me, in accordance with a rule of wide application, that the strict rules of evidence and rules of law are to a certain extent broken down, so that anyone who is charged with breach of trust may show by all competent evidence that he has acted honestly. And therefore though the defender is not in the position of bringing a reduction *ex capite lecti*, yet he is obliged to defend his author against a charge of breach of trust, and to show in point of fact that the deed was executed on deathbed, and that therefore his author committed no fraud in making up his title and neglecting to convey to the trust. Having established that point, he then falls back on his prescriptive title, which is a perfectly good title against any other competing right except one founded on the trust-deed. The view I take has only a theoretical difference from that suggested by Lord Kinnear and as I understand concurred in by Lord Adam, but they both lead to the same result—that both in law and substantial justice the claim of the defender is well founded.

LORD PRESIDENT—I concur in the opinion of Lord Kinnear.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Dickson—Law. Agents—Reid & Guild, W.S.

Counsel for the Defender and Respondent—Ure—Craigie. Agents—Gordon, Petrie, & Shand, S.S.C.

Saturday, July 18.

FIRST DIVISION.

SIMPSON, PETITIONER.

Curator Bonis—Brieve for Cognition—Court of Session Act 1868, *sec.* 101—*Interim Appointment of Nearest Agnate.*

The wife of an inmate of a lunatic asylum presented a petition for the appointment of a *curator bonis* to her husband and suggested the name of a chartered accountant. The husband's eldest brother being his nearest agnate of full age opposed the petition as unnecessary on the ground that he had obtained a brieve for cognition with the view of having himself appointed his brother's tutor-at-law. The Lord Ordinary reported the case. The Court, pending the result of the cognition, *appointed* the said nearest agnate *curator bonis*.

Mrs Barbara Macdougall or Simpson, wife of Donald Simpson, formerly wine and spirit merchant, Lochalsh Road, Inverness, now an inmate of Saughtonhall Asylum, Edinburgh, presented a petition to have a *curator bonis* appointed to her husband, and suggested the name of Mr Robert Falconer Cameron, C.A., Inverness. There was one child of the marriage alive, a son only a year old. After him the nearest male relations of Donald Simpson were his two brothers Thomas and John, who lodged answers in which they averred that it was for the interest of their brother and his family that the business should be kept up, that the elder of them had hitherto attended to it, and further, had obtained a brieve from Chancery ordering a cognition with a view to his being appointed tutor-at-law to their brother, that in these circumstances the appointment of a *curator bonis* was unnecessary, and that in any case a chartered accountant was not a suitable person to manage such a business.

The Lord Ordinary (LOW) reported the case to the First Division.

"*Note.*—This is a petition for the appointment of a *curator bonis* to Mr Donald Simpson, wine and spirit merchant, Inverness, presented by his wife on the ground of his insanity.

"Answers have been lodged for Thomas Simpson and J. A. Simpson, brothers of Donald Simpson. The respondents admit the insanity of their brother, but aver that his business is a 'counter' business, and could not be carried on successfully by a chartered accountant—which the curator suggested by the petitioner is—or by any person not practically acquainted with the trade. The respondents then say that they have come to the conclusion that 'Thomas Simpson should, in the interest of his brother and his family, exercise his right as legal guardian of the ward, and assume the management of the estate.'

"Thomas Simpson is the nearest agnate of Donald Simpson of full age, and he has obtained a brieve from Chancery under