from Kennedy's farm of the hay, and delivered by him, which is reasonably stated at £15 sterling; (9) that there remained the sum of £38 sterling due by the defenders to the pursuer as the balance of the price of said hay; (10) that at the date of his sequestration the said William Kennedy was resting-owing to the defenders in the sum of £50, being the amount contained in a bill drawn by the defenders upon and accepted by the said William Kennedy, dated 4th September 1896 and payable one month after date: Find in law (1) that the said contract of sale is not liable to reduction either under the Bankruptcy Statutes nor at common law, and (2) that the defenders are entitled to compensate or set off the amount due to them under said bill against the balance of the price of the hay due by them to the pursuer: therefore assoilzie the defenders from the conclusions of the action, and decern: Find the pursuer liable to the defenders in the expenses incurred in this and in the inferior Court, and remit," &c.

Counsel for the Pursuer—Shaw, Q.C.—Findlay. Agents—J. & J. Galletly, S.S.C.

Counsel for the Defenders—Salvesen—A. S. D. Thomson. Agent—J. Stewart Gellatly, S.S.C.

Tuesday, December 7.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

SANDYS *v.* BAIN'S TRUSTEES.

Entail—Trust — Whether Trustees Vested with Discretionary Power to Execute Effective Entail—Specific Directions Inconsistent with Entail — Substitute or Conditional Institute.

A had two daughters, Mrs G. and Mrs S. The latter predeceased him leaving a daughter, F., and three sons, W., H., and E. F. died unmarried before attaining twenty-five years; H. attained the age of twenty-five in 1896.

A. by his trust-disposition and settlement conveyed the lands of L. to trustees, whom he directed (1) to hold the said estate subject to certain liferents for his granddaughter F. and the heirs of her body until F. should attain the age of twenty-five, and then to convey the estates, subject to the same burdens, to F. and the heirs of her body; . . . (3) In the event (which happened) of F. dying before twenty-five without issue, to hold the estate "for behoof of the younger sons" of Mrs S. respectively and successively in the order of seniority, and to the heirs of their bodies respectively," and to dispone the subjects "to the person who in the event foresaid may succeed thereto, and who shall attain the age of twenty-five years, on him or her attaining said age." The deed then provided (4) that in case none of the younger children of Mrs S. shall attain the age of twenty-five or have issue who shall attain that age, the estate was to be conveyed to his daughter Mrs G. "and the heirs of" her body, whom all failing to W., eldest son of Mrs S., "on his attaining the age of twenty-five years complete, and the heirs of his body, and whom all failing to my own heirs whomsoever." After these destinations the deed contained this provision — "It shall not be in the power of the said F. or her foresaids or any of the other children of my said daughter (Mrs S.) or their issue, who may succeed under these presents to my said estates, to sell or dispose of the same . . . or to contract debt whereby the same may be affected, or to alter the order of succession herein prescribed, and for the purpose of rendering these prohibitions effectual I direct my said trustees to cause these presents (or so much thereof as it may be necessary to record for that purpose), to be registered in the Register of Tailzies, it being my express desire that" the said lands "shall remain in perpetuity in the family of my said deceased daughter in terms of the foregoing destination.

In an action raised by H., Mrs S.'s second son, after attaining the age of twenty-five, the question submitted was, whether H. was entitled, under clause (3) above referred to, to a conveyance of the lands in fee-simple, or subject to the fetters of an entail.

Held (*rev.* the judgment of Lord Kincairney) that H was entitled to a conveyance in fee-simple, the trust-deed not containing any express direction (1) to make an entail, (2) to insert fettering clauses applicable to the prohibitions, (3) to register the conveyance to H. in the Register of Tailzies.

Per Lord Kinnear — "An express trust to make a valid entail will not be impaired by a specific direction to insert clauses which, taken alone, would be inadequate for that purpose, but I can find no authority in any of the cases for holding that where the testator has defined the manner in which his intention is to be carried into effect, and has given no discretion to his trustees, his explicit directions may be disregarded, and a different way of executing his intention adopted in preference to his own way, because his trustees, for sufficient reasons, consider it more effectual. On the other hand, it is established by a series of decisions that where no power to make an entail is conferred upon trustees, and they are directed to carry out the intention of the truster by a certain method, they must conform their action exactly to the directions so given, even although

it may be apparent that the truster had some object in view which cannot be effectually attained by the methods prescribed."

Opinion (by Lord Kinnear) that the destination, in the event which happened, was equivalent to a destination to H. absolutely, and that the persons subsequently called were conditional institutes, whose rights were evacuated on H.'s succeeding to the estate.

Entail—Moveables—Pictures.

Held that *pictures* cannot be submitted to the fettering clauses of an entail.

Kinnear v. *Kinnear*, March 20, 1877, 4 R. 705, *approved.*

Mr Serjeant Bain died on 30th December 1874 leaving a trust-disposition and settlement dated 24th October 1874. He was survived by his widow, who died in 1893, and by a daughter, Miss Charlotte Bain, who in 1876 married Major William Geddes. Mr and Mrs Bain had another daughter, Miss Frances Anne, who married Captain Sandys, and predeceased her father leaving one daughter Frances Catherine, and three sons, William, Henry, and Edwin. Of these the daughter died in 1878 unmarried, and without having attained the age of twenty-five. Serjeant Bain left a considerable amount of property, including the lands of Easter Livelands and others.

By his trust-disposition he conveyed his whole estate to trustees, and directed them to allow to his widow and surviving daughter the liferent use of the mansion-house of Easter Livelands, furniture, pictures, &c. After dealing with part of his property in the earlier clauses, he provided as follows—"*Eleventh.* I direct and appoint my trustees, but that with and under the express burdens of the foresaid liferent rights and annuities in favour of the said Mary Ann Horsman or Bain, and Charlotte Elizabeth Sandys Bain, to hold and stand possessed of my estates of Easter Livelands, Broadleys, Queenshaugh, and Lochend and Bents, all situated in the parish of Saint Ninians and county of Stirling as aforesaid, together with all my pictures painted in oil which may be in Easter Livelands mansion-house at my death, in trust for behoof of Frances Catherine Mary Sandys, sole surviving daughter of the marriage betwixt my deceased daughter Frances Ann Sandys Bain and Edwin William Sandys, captain in the Royal Artillery, and the heirs of the body of the said Frances Catherine Mary Sandys, aye and until the said Frances Catherine Mary Sandys shall have attained the age of twenty-five years complete, at which period I direct and appoint my trustees to convey, dispone, and make over my said estates of Easter Livelands, Broadleys, Queenshaugh, and Lochend and Bents, situated as aforesaid, and the said paintings in oil, to the said Frances Catherine Mary Sandys and her foresaids, but expressly under burden of the foresaid liferent rights and annuities, and exclusive of the *jus mariti*, right of administration, and courtesy, and all other title of any husband whom my said granddaughter may marry; and in case the said Frances Catherine Mary Sandys shall die before attaining the age of twenty-five years, leaving issue, my trustees shall convey the said estates, under burden as aforesaid, to and in favour of the nearest heir of the body of the said Frances Catherine Mary Sandys who shall attain the age of twenty-five, and the heirs of his or her body, whom failing, to the other heirs of the body of the said Francis Catherine Mary Sandys: But in case the said Frances Catherine Mary Sandys shall predecease me or shall die before attaining the said age of twenty-five years without leaving issue, then my trustees shall hold, in like manner and under burden of said liferent rights and annuities, my said estates of Easter Livelands, Broadleys, Queenshaugh, and Lochend and Bents, and also my said paintings in oil, in trust as aforesaid for behoof of the younger sons procreated of the marriage betwixt my daughter and the said Edwin William Sandys respectively and successively in the order of seniority, and to the heirs of their bodies respectively, and shall dispone, convey, and make over, but that under burden of the foresaid liferent rights and annuities, my said estates of Easter Livelands, Broadleys, Queenshaugh, and Lochend and Bents, and my said paintings in oil, to the person who, in the event foresaid, may succeed thereto, and who shall attain the age of twenty-five years, on him or her attaining said age, and in case none of my younger grandchildren shall attain the age of twenty-five years or leave issue who shall attain that age, then to my said daughter Charlotte Elizabeth Sandys Bain and the heirs of her body, whom all failing, to William Bain Richardson Sandys, eldest son of my said deceased daughter, on his attaining the age of twenty-five years complete, and the heirs of his body, and whom all failing, to my own heirs whomsoever: Declaring that any child or children of my said daughter, or the issue of such child or children, who may succeed to the heritable property in Yorkshire which belonged to the late William Richardson, Esquire, of Fulford House, near York, formerly Lieutenant-Colonel of the Royal Horse Guards, and uncle of the said Edwin William Sandys, shall be and hereby is and are excluded from succeeding to my said estates of Easter Livelands, Broadleys, Queenshaugh, and Lochend and Bents, in virtue of these presents, and shall be bound to cede and renounce possession of my said last-mentioned estates and said paintings in oil on so succeeding to said property in Yorkshire, in favour of the other children above mentioned, or their issue, so long as any other child or issue of any child of my said deceased daugher exists: Declaring, as it is hereby specially provided and declared, that it shall not be in the power of the said Frances Catherine Mary Sandys or her foresaids, or any of the other children of my said daughter or their issue, who may succeed under these presents to my said estates in the parish of Saint Ninians and

county of Stirling, to sell or dispose of the same, or of my said paintings in oil, or to contract debt whereby the same may be affected, or to alter the order of succession herein prescribed: And for the purpose of rendering these prohibitions effectual, I direct my said trustees to cause these presents (or so much thereof as it may be necessary to record for that purpose) to be registered in the Register of Tailzies, it being my express desire that Easter Livelands, Broadleys, Queenshaugh, and Lochend and Bents, all situated as aforesaid, and said paintings in oil, shall remain in perpetuity in the family of my said deceased daughter, in terms of the foregoing destination, and failing all such children, that it shall revert to and become the property of my own heirs whomsoever; also declaring that the said Edwin William Sandys is strictly debarred, as I do hereby now and forever debar him from having management or control in any manner of way whatever with or over my said estates of Easter Livelands, Broadleys, Queenshaugh, and Lochend and Bents, or with my said paintings, notwithstanding any of his children succeeding thereto under these presents: Further declaring that it is my wish (and which I trust my descendants will respect) that every decendant of mine succeeding to my said last-mentioned estates shall use the additional surname of 'Bain.'"

Mr Henry Sandys, the second son of the truster's daughter Mrs Sandys, reached the age of twenty-five on 30th March 1896, and did not succeed to the estates in Yorkshire mentioned in the trust-deed.

He raised an action against the trustees acting under the trust-disposition, against Mrs Geddes, and against his two brothers William and Edward Sandys, concluding for declarator that the trustees were bound to "execute and grant a disposition, containing all usual and necessary clauses, of All and Whole the lands and estates of Easter Livelands, Broadleys, Queenshaugh, and Lochend and Bents, all situated in the parish of St Ninians and county of Stirling, all as the same may be more fully described in the respective title-deeds thereof, and that to and in favour of the pursuer, but with and under any debts or other burdens lawfully affecting the same, and in particular under burden of all right over the same or any part thereof by way of liferent, annuity, or otherwise, conferred upon the said Mrs Charlotte Elizabeth Sandys Bain or Geddes by the said trust-disposition and settlement, and also to convey, make over, or deliver to the pursuer the paintings in oil specially referred to in and bequeathed by the said trust-disposition and settlement."

The pursuer pleaded—"(2) The defenders, Serjeant Bain's trustees, are not bound nor entitled to execute an entail of the lands and paintings in question, in respect that the trust-disposition and settlement contains no effectual limitation of the destination of the property applicable to the circumstances which have occurred, and no irritant or resolutive clauses, nor any effectual provision for registration of a deed of entail, such as might be equivalent thereto. (3) *Separatim*—In any case, the said paintings fall to be delivered to the pursuer, in respect that it is incompetent to subject them to the fetters of an entail."

Answers were lodged by the defenders Bain's trustees.

They averred "that in virtue of the directions contained in the said trust-disposition and settlement they are entitled and bound to execute and see duly recorded a valid disposition and deed of entail of said lands and oil paintings in favour of the pursuer as institute of entail, and the other heirs-substitute specified in the said trust-disposition and settlement in their order of succession. They propose to insert in said deed all clauses necessary to carry out the trust purposes connected with the subjects of conveyance, so far as unfulfilled, and in particular all clauses usual and necessary for placing and preserving the said lands and oil paintings under the fetters of a strict entail. Such a deed they are and always have been ready and willing to grant, under burden of the rights of Mrs Geddes, and to give possession to the pursuer in terms thereof. In any event, they are entitled and bound to execute such a conveyance of the lands, and if it be held that said deed ought not to comprise the paintings in oil they are not bound to deliver the same to the pursuer during the lifetime of Mrs Geddes, the liferentrix. The paintings in oil are family portraits."

The Lord Ordinary (KINCAIRNEY) on 27th January 1897 pronounced the following interlocutor:—"Finds that the eleventh clause of the trust-disposition and settlement of the deceased Edwin Sandys Bain of Easter Livelands, Serjeant-at-law, imports a direction to his trustees to convey the lands therein mentioned to the pursuer, and a series of heirs-substitute, under the fetters of entail: Therefore assoilzies the defenders from the conclusion of the summons, and decerns," &c.

Opinion.—"The pursuer when he attained the age of twenty-five became entitled to a disposition from Serjeant Bain's trustees of the lands of Livelands, and other lands specified, and also of certain pictures, under burden of the liferent conferred on the truster's daughter Mrs Geddes. The question is, whether he is entitled to a disposition in fee-simple in favour of himself alone, or, as Serjeant Bain's trustees maintain, only to a deed of entail in favour of himself, and a series of substitute-heirs of entail. This action concludes for declarator that the pursuer is entitled to a disposition in fee-simple. The defenders have not lodged any deed in the terms which are in their opinion authorised by the trust-deed; and I am not asked to consider the terms of the deed to be granted if it be a deed of entail. What the pursuer contends is (*first*) that the truster has directed his trustees to convey the subjects to him alone without any ulterior destination, and (*second*) that he only directs the trustees to dispone the subjects to him, and does not instruct or

empower them to insert in the disposition the clauses of an entail. The defenders maintain that they are bound and empowered to execute an effectual entail, although not in the manner directed, and that the truster has adequately indicated the persons in whose favour the entail should be granted.

"Serjeant Bain had two daughters, Charlotte, now Mrs Geddes, a defender, and Frances Anne, who married Captain Sandys, and predeceased her father. She left one daughter, Frances Catherine, and three sons, William, the eldest, who is a defender; Henry, the second son, who is pursuer; and Edwin, the third son, called as a defender.

"Serjeant Bain died in 1874. His granddaughter Frances Catherine died in 1878, unmarried, and without having attained the age of twenty-five. The pursuer attained that age in March 1896, and thereupon became entitled to a disposition of the subjects in question.

"Serjeant Bain seems to have left a considerable amount of property, and gives directions as to part of it in the earlier clauses of his trust-deed, which are not now in question. The present question depends solely on the eleventh clause, which deals with the lands of Liveland and others, and with the paintings, under burden of the rights of liferent conferred by an earlier part of the deed on the truster's widow (now dead), and on Mrs Geddes, his daughter.

"The clause is singularly expressed, and it is necessary to examine it somewhat narrowly. The trustees are directed to hold the subjects in trust for the truster's granddaughter Frances Catherine until she should attain the age of twenty-five, and then to dispone the lands and paintings to her and her foresaids—*i.e.*, the heirs of her body; and in the event of her death before twenty-five, the truster directs his trustees to dispone the estate to the nearest heir of her body who should attain the age of twenty-five, and the heirs of his or her body. It is not necessary to consider the precise nature and effect of these two destinations, because they have failed in consequence of the death of Frances Catherine unmarried without having attained the age of twenty-five. The deed then provides for the case of Frances Catherine dying before twenty-five without issue, and that is the event which has happened. The trustees are directed in that event to hold the subjects in trust "for behoof of the younger sons" of Frances Anne (Mrs Sandys), "respectively and successively in the order of seniority, and to the heirs of their bodies respectively," and to dispone the subjects "to the person who in the event foresaid may succeed thereto, and who shall attain the age of twenty-five years, on him or her attaining said age." That is the clause on which the pursuer's case is founded. The deed then proceeds—"and in case none of my younger grandchildren shall attain the age of twenty-five years, or leave issue who shall attain that age, then to my said daughter Charlotte" (Mrs Geddes), "and the heirs of her body, whom all failing, to William Bain Richardson Sandys, eldest son of my said deceased daughter, on his attaining the age of twenty-five years complete, and the heirs of his body, and whom all failing, to my own heirs whomsoever."

"That is the clause of destination. Then follows a clause of devolution to take place in the event of any child of the truster's daughter Frances Catherine, or her issue, succeeding to estates in Yorkshire, which it is not necessary at present to quote.

"Then follow the clauses on which the defenders found. [*His Lordship read the declaration.*].

"As the case regards primarily a trust-deed, not a deed of entail, there is no room for the rules of strict construction applicable to entails, and the first point to be considered necessarily is the intention of the truster. I think it very clear that the truster's desire and intention was that his estates should be conveyed under the fetters of an entail. His deed expresses all the essential prohibitions against contracting debt, alienation, or altering the order of succession. The strictest deed of entail need contain no more; and he expresses his desire to make the prohibitions effectual, which could only be insured by irritant and resolutive clauses. He indeed has another method for making these prohibitions effectual. He directs the registration of his own trust-deed in the register of tailzies. Both parties were agreed that that direction was a somewhat gross blunder, and that compliance with it would have no effect. Still the direction indicates unmistakeably the truster's desire that his lands should be entailed—I think just as unmistakeably as if he had directed an entail expressly. No other object for these provisions was suggested. In some cases the question has been which of two inconsistent objects the truster preferred, as in the case of *Graham* v. *Lyndoch's Trustees*, March 15, 1852, 15 D. 558, *aff.* 2 Macq. 295, 27 Scot. Jur. 473, where it was a debateable question whether the truster desired that his lands should descend to the same heirs as certain other lands, the succession to which had been appointed by a deed of entail found to be ineffectual, or whether he desired that the lands should in any case be effectually entailed. But here no motive for the prohibitory clauses and the direction to record in the Register of Tailzies can be suggested except to secure the destination of the lands by force of an entail.

"Further, it seems clear that the truster desired that the lands should go in a particular order of succession, and at least thought that he had directed a definite destination. He states expressly that his object was that the lands and paintings 'shall remain in perpetuity in the family of my said deceased daughter, in terms of the foregoing destination.' It is true, and somewhat embarrassing, that one of the destinations—that in favour of Mrs Geddes—is inconsistent with this object; that discrepancy is not easily explained, but still I think that it does not affect the conclusion

that the truster's desire and intention was that his estates should be entailed on the children of his daughter Frances Catherine in the order pointed out, except perhaps so far as that design might be interfered with by the succession of Mrs Geddes.

"The next question is, whether the truster's object can receive effect consistently with the terms of the trust-deed. If it can, then the trustees are bound to make a deed of entail; if it cannot, then they are bound to dispone the lands in fee simple to the pursuer.

"There are two questions, both of them difficult—(1) whether he has directed a destination capable of being protected by tailzied clauses, and (2) whether the insertion of such clauses in the disposition to the pursuer is in the power of the trustees.

"The first, and I think the more difficult question, is as to the destination. A number of persons are mentioned in a certain order; but the peculiarity and difficulty of the clause seems to lie in this, that it is so expressed as to seem to call some of the persons mentioned as conditional institutes and not as substitutes; and the pursuer, as I understand, contends that the destination consists of a series of conditional institutions, and that, if that be its character, it is clearly impossible that it can be entailed, for in that view, whenever any member in the destination succeeded, all who came after him would be necessarily excluded. The pursuer, I understand, contends that he is called as a conditional institute, and I think that a somewhat doubtful point. But I do not see how it can be disputed that Mrs Geddes is called as a conditional institute, and not as a substitute, for she is called only in the event of none of the younger sons attaining twenty-five years of age, and she is not called if either of them does attain that age and thereupon succeeds to the estates. So far as I see at present, she stands excluded from the destination. There is nothing, however, in the words of the clause which makes it necessary to hold that the youngest son Edwin and the heirs of his body (for I think that the heirs of his body are called, although through oversight omitted) are called as conditional institutes, and not as substitutes, or to hold that the eldest son and the heirs of his body are called as conditional institutes. They are called in the ordinary way in which heirs-substitute are called. It may be very unusual and very embarrassing that some members in a destination are called as conditional institutes and some as substitutes, but it does not seem impossible; and, if the language of the clause of destination makes it possible to hold that some of the persons called are called as substitutes, and if it be the intention of the truster that they should be so called, and if the whole intention of the truster would be defeated were they regarded as conditional institutes, I think the construction which does not defeat the truster's intention may legitimately be preferred.

"I therefore hold that there is here a destination expressed which is susceptible of being protected by the fetters of an entail, and that enables me to repel the contention of the pursuer that there is no true destination without deciding what the destination should be, a matter which this action does not submit for decision.

"The next question is, whether the trust-deed authorises the execution of an entail. If the truster has made his intention clear that there should be an entail, then I think that the case is the same as if he had expressly directed the execution of an entail. Although it be clear that the truster desired an entail, it is far from clear how he intended that his object should be effected, but it is quite clear that it could not be effected by following his directions.

"I am inclined to think that the trust-deed directs the trustees to do nothing but make a disposition, and gives them no instruction whatever about its clauses. I incline to the opinion that the truster does not direct the insertion of a clause of devolution or of prohibitory clauses in the disposition which the trustees are to execute. He expresses the condition of devolution and the prohibitory clauses in his own deed, and his idea seems to have been to effect an entail not by means of the disposition to be executed by his trustees, but by the combined effect of that deed and his own trust-deed and the registration of that trust-deed in the Register of Tailzies. It appears clear that, if that was his view, he was under a complete delusion, and that an entail could not be effected in that manner. It was decided in the case of *Munro* v. *Johnstone*, December 18, 1868, 7 Macph. 250, that an entail could not be effected by means of a disposition without fettering clauses and a relative explanatory deed with fettering clauses but without dispositive words. I suppose that, in directing the registration of the trust-deed in the Register of Tailzies, the truster imagined that such registration would of itself effect an entail under the provisions of section 39 of the Entail Amendment Act (11 and 12 Vict. cap. 35). But that was not maintained by the defenders. Section 39 authorises the registration of a deed of entail, and provides that such registration shall have the same effect as if the proper clauses were inserted in the deed registered. But the trust-deed does not purport to be a deed of entail. It is a disposition to the trustees in fee-simple, and the insertion of the statutory clauses in the trust-conveyance would be a mere absurdity.

"But if it were held that there is a direction, express or implied, to insert the prohibitory clauses in the disposition, to be executed by the trustees, the disposition would still be ineffectual as an entail because of the want of irritant and resolutive clauses. In short, it is clear that an effectual entail could not be made by following the directions of the truster.

"But the defenders maintained that when a truster directs his trustees to make an entail of his estates, or clearly expresses his desire that such an entail should be made, a power is thereby conferred to execute an

effectual and statutory entail, although the truster should give faulty instructions as to the manner in which the entail was to be made, which, if followed, would not result in the execution of a good entail. Thus it has been held that trustees are entitled to insert a clause excluding heirs-portioners, where the destination would not otherwise be protected—*Sprot*, May 22, 1828, 6 S. 833; *Forrest's Trustees* v. *Martine*, December 14, 1845, 8 D. 304; and in other cases trustees were held entitled to insert clauses which were omitted in the truster's instructions, as in *Campbell's Trustees* v. *Campbell*, May 17, 1836, 14 S. 770; *Stirling* v. *Stirling's Trustees*, November 30, 1838, 1 D. 130; *Seton* v. *Seton*, March 1, 1854, 16 D. 658; and *Graham* v. *Lyndoch*, March 15, 1852, 15 D. 558, affirmed 2 Macq. 295, 27 Scot. Jur. 473. In *Moubray's Trustees* v. *Moubray*, June 26, 1895, 22 R. 801, materials were found for a deed of entail in certain testamentary jottings of an extremely imperfect kind. It is true that in all these cases there was an express direction to execute a deed of entail, and I think that in all of them the Court construed the directions as meaning that all clauses necessary to make a valid entail should be inserted in the deed to be granted. In order to reach a judgment for the defenders in this case, it is necessary to go a point beyond them, and to proceed on an authority implied, and not on the construction of an authority or direction expressed. Still they seem to proceed on the principle that when entail is directed, the deed necessary for making the entail is also by implication directed, and that mistaken instructions by the truster will be disregarded.

"In *Leny* v. *Leny*, June 28, 1860, 22 D. 1272, where the truster directed his trustees to make an entail in favour of the institute and his lawful heirs for ever in regular succession, it was held that no effectual entail could be made in such terms, and that the trustees were not entitled to insert a clause excluding heirs-portioners, because such a clause was inconsistent with a destination to heirs in regular succession, but the other case in which the insertion of that clause was authorised was not questioned.

"The pursuer quoted *Cuming's Trustees* v. *Cuming*, July 10, 1832, 19 S. 804, but I do not think it favours his case. In that case there was no direction to execute an entail, but a truster directed his trustees to denude of the residue, 'with such conditions that the heirs shall not dispose of the same nor alter the succession thereof either gratuitously or onerously.' Here it will be observed that prohibitions against alienation and alteration of the order of succession were directed, but not a clause prohibiting contraction of debt, and the Court refused to authorise the addition of a prohibitory clause to that effect; but it is to be observed that they authorised irritant and resolutive clauses applicable to the prohibitory clauses directed. Now, in the present case, the prohibitory clauses are complete, and if irritant and resolutive clauses were added in the disposition, as in the case of *Cuming*, the result would be an unchallengeable entail.

"The pursuer not unnaturally placed much reliance on the case of *Cameron's Trustees* v. *Cameron*, December 14, 1860, 23 D. 167, which certainly resembles the present case in several particulars. The case regarded a trust-deed, whereby the truster directed his whole estate, heritable and moveable, to be conveyed in favour of a certain series of heirs with such restrictions and limitations as should effectually prevent the order of succession from being altered. It was contended that clauses prohibiting sales and contraction of debt should also be inserted, and that the estate should be conveyed under the fetters of a strict entail. But that contention was rejected. Lord Curriehill, who delivered the judgment of the Court, gives three reasons for his judgment. The first was that there was no direction to entail. But his Lordship stated that he did not lay much stress on that circumstance. The second reason, described as more important, was that the direction of one prohibitory clause and not of the others brought into operation the principle of construction *enumeratio unius est exclusio alterius;* and the third reason was that the direction in the trust-deed related to English moveable estate as well as to Scotch heritage. It is thus clear that this case differs from the case of *Cameron* in essential particulars, and chiefly in these, that in this case the intention of the truster that his estates should be entailed is clear, which it was not in the case of *Cameron*, and that in this case the prohibitory clauses are complete.

"On a careful consideration of these cases I hold that they warrant the conclusion that when a truster directs an entail to be executed he is held *in dubio* to direct his trustees to execute a statutory entail, his own mistaken instructions as to details notwithstanding, and that no sound distinction can be taken between a trust-deed in which the truster expressly directs the execution of an entail and a trust-deed in which an intention to that effect is plainly indicated.

"For these reasons I hold that the defenders would not be truly fulfilling the directions of the truster if they granted a disposition in fee-simple in the pursuer's favour. If that be so, the result is that I must pronounce decree of absolvitor.

"I am not in a position to decide what the terms of the disposition should be which the trustees are bound to grant. That question is not in this action.

"The question was discussed, whether the clause of devolution should be inserted in the deed. But that was only questioned, as I understood, in the event of the decision being that the pursuer was entitled to a disposition in fee-simple. The question which would have arisen in that case would have been one of difficulty, my present impression being that I should have followed the precedent in the case of *Munro* v. *Johnstone*, where a clause of that kind was held to be ancillary to the entail and not to be binding when it was found that the entail was ineffectual.

"It is further pleaded by the pursuer

that in any case the paintings fall to be delivered to him because they could not be entailed, as was decided by Lord Shand in *Kinnear* v. *Kinnear*, March 20, 1875, 4 R. 705. If it were necessary to do so, I should, as at present advised, follow that decision. But there is no reason for deciding that point. The pictures must be disponed to the pursuer in the deed disponing the lands, for that is clearly in accordance with the directions and intention of the truster. Probably no attempt to apply the fetters of an entail to them would be effectual. But the terms in which they ought to be disponed will arise for consideration if it ever should be necessary to adjust the disposition at the sight of the Court. But the plea of the pursuer is that the pictures fall to be delivered to him. But that cannot be while Mrs Geddes has a right to liferent them."

The pursuer reclaimed.

The arguments of the parties appear fully in the opinion of the Lord Ordinary and Lord Kinnear.

In the course of the argument the Court directed the defenders to execute a disposition and deed of entail in favour of the pursuer, in accordance with their contentions, and this was accordingly done. The judgment of the Court, however, was not affected thereby, and it is accordingly unnecessary to refer to its terms.

At advising—

LORD KINNEAR—I think the question in this case is one of difficulty, and my own sense of that difficulty is increased by my inability to reach the same conclusion as the Lord Ordinary, notwithstanding the force of the reasoning by which his Lordship's judgment is supported.

The question is whether the pursuer is entitled under the will of Serjeant Bain to a conveyance in fee-simple of certain lands, or to a conveyance in favour of himself and a certain series of heirs under the fetters of a strict entail. A similar question is raised as to his right to certain paintings, but that may depend upon somewhat different considerations, and may be conveniently postponed until we have ascertained in the first place the nature of the pursuer's right to the lands.

The Lord Ordinary says that he inclines "to the opinion that the truster does not direct the insertion of prohibitory clauses in the disposition which the trustees are to execute," and he holds it to be "clear that an effectual entail could not be made by following the directions of the truster." But, nevertheless, he finds in the interlocutor under review "that the eleventh clause of the trust-disposition and settlement of the deceased imports a direction to his trustees to convey the lands therein mentioned to the pursuer and a series of heirs-substitute under the fetters of an entail." This is a very anomalous result, because, *prima facie*, it would appear to mean that the trustees are to depart from the directions given to them by the truster.

But it is said that Serjeant Bain's will created what is called an executory trust for entailing the lands of Livelands and others in the county of Stirling, and that in carrying out a trust of this kind, the rule is that trustees are to follow the general intention of the testator according to the true meaning rather than the literal construction of the will, and therefore that the Courts have assumed a greater freedom to subordinate the expression to the apparent intention than in the construction of trust-deeds in a different description. I am not satisfied by the authorities cited that even in executory trusts an intention may be imputed by mere conjecture, which is not consistent with the express words of the truster. But the first question seems to be whether this is a trust which gives any freedom or discretion whatever to the trustees, or whether it does not bind them by perfectly explicit directions.

An executory trust is defined by Lord St Leonards in *Graham* v. *Stewart* (*Lyndoch's Trustee*), 2 Macq. 295, to mean—"not simply a trust under which an act has to be done, which applies to every case, but one in which there is something to be performed *which is not defined by* the original settler, where he has expressed an intention, in general words, which is to be carried out in a complete and legal form by the persons who are entrusted with the estate." A similar definition is given by Lord Cairns in the case of *Sackville-West* v. *Viscount Holmesdale*, 1870, L.R., 4 E. & I. App. 543, where his Lordship says that—"an executory trust is not a trust which remains to be executed, for in this sense all trusts are executory at their creation, but a trust which is to be executed by the preparation of a complete and formal settlement carrying into effect, through the operation of an apt and detailed legal phraseology, the general intention compendiously indicated by the testator." It is of the essence of these definitions that the testator should not himself have expressed fully and completely the terms of the deed which he intends to be framed, but indicating, as Lord Cairns says, "compendiously" his general intention, should have entrusted his trustees with the duty of framing the formal instrument which may be required in order to give legal effect to his intentions. Lord Westbury says in the last cited case—"The subject of an executory trust properly so called is the particular deed or instrument which is to be made, and not the property which is comprised in it." It appears to me to follow that where the testator has not confined himself to a compendious indication of his general intention, but has fully expressed and defined the manner in which it is to be carried out, his trustees cannot have the freedom which is allowed to them in the performance of executory trusts, but have no other duty than that of carrying the directions given to them into effect, even although they may be ineffective to obtain the object which the testator may be supposed to have had in view. Lord St Leonards puts the question thus in *Egerton* v. *Earl of Brownlow*, 1853, 4 Clarke, H. of L., p. 1—"Has the testator been what

s called, and very properly called, his own conveyancer? Has he left it to the Court to make out, from general expressions, what his intention is, or has he so defined that intention that you have nothing to do but to take the limitations which he has given to you, and convert them into legal estates?" As I understand, this passage, a testator becomes "his own conveyancer" to the extent to which he defines the events for which he means to provide, and explicitly declares an intention applicable to those events. He is not "his own conveyancer" when he expresses a general intention as to the kind of settlement which his trustees are to frame, but leaves them to put it into such complete and legal form as they may be advised will be most effectual.

The decisions on the construction of trusts for creating entails are in my judgment entirely in accordance with the doctrines to which I have referred. When trustees are directed to settle an estate by deed of entail, or in strict entail on a specified series of heirs, that appears to me to be a normal instance of executory trust as defined by Lord St Leonards and Lord Cairns, because the testator, having intimated his intention in general terms, commits to his trustees the duty of framing such an instrument as they may be advised will be proper for carrying it into legal effect, and, accordingly, it has been repeatedly decided that such directions will enable trustees to make a good entail under the Act 1685, although the fetters which are to be imposed upon the heirs are not fully or correctly set forth in the deed of trust. None of the cases cited by the Lord Ordinary goes further than this. The decisions in *Sprot* v. *Sprot*, 6 S. 832, and *Forrest's Trustees* v. *Martine*, 8 D. 304, may appear to authorise a departure from the clear directions of the truster, because the Court authorised the insertion of a clause excluding heirs-portioners where the truster had directed a destination in favour of "heirs of the body" or "heirs whatsoever of the body." But the ground of judgment was that he had directed the execution of a deed of strict entail, and therefore must have intended the exclusion of heirs-portioners, because otherwise it was thought that a strict entail could not be executed upon each of the parties called *seriatim* and *successive*. These were cases of executory trust in the strict sense, but the question in each was treated as a mere question of construction; and of two possible constructions of a subordinate clause, the Court adopted that which they considered in accordance with the avowed intention, in preference to that which they thought repugnant to that intention. In *Campbell's Trustees* v. *Campbell*, 14 S. 770, the only question was whether a deed of entail should be so conceived as to impose the fetters upon the institute. It was not considered to be a question of any difficulty; and the decision is not an authority for any general rule except that trustees must carry out the clearly expressed intention of the maker of the trust. In *Stirling* v. *Stirling's Trustees*, 1 D. 130, it was held that trustees must insert a clause prohibiting alterations of the order of succession in a deed of entail to be executed by them, although such a clause was not expressly directed by the truster; but the trustees were directed to make a deed of entail with certain conditions "and also all other conditions, limitations, and clauses which my trustees shall consider necessary and proper for carrying my views out into full effect. There could not be a better example of an executory trust as defined by the authorities I have quoted. *Seton* v. *Seton*, 16 D. 658, decides nothing more than *Stirling* v. *Stirling's Trustees*. Trustees were directed to execute a deed of entail which "shall contain all the usual and necessary irritant and resolutive clauses which they may think proper and necessary." It was held that this discretion was not restricted by the trusters proceeding to specify certain particular prohibitions which he desired to be inserted, and among which a specification of alterations of the order of succession was not mentioned. *Graham* v. *Stewart* (*supra*) raised questions of greater difficulty, as is manifest from the difference of opinion within this Court, and in the House of Lords. But there is nothing in the decision to give countenance to the doctrine that trustees, to whom no discretionary power has been expressly committed, will be warranted in departing from the directions given to them by their testator, if they consider that his object may be attained more effectually by some other way. The testator had directed an entail to be made under all the conditions of a former deed of 1726, and to his direction he added the words "and so as to form a valid and effectual entail according to the law of Scotland." The point of difference was whether the words superadded authorised the trustees, in executing the new deed, to add to the conditions expressed in the deed of 1726 an irritant clause which had been omitted in that deed so as to render it invalid as an entail. It was held by the majority in this Court and in the House of Lords that they had no more right to strike out the latter words than the words that preceded them; that the two were perfectly consistent; and therefore that both directions must be followed, that all the conditions of the deed of 1726 must be inserted, and then that there must be added the clause which was still required in order to make a valid and effectual entail. I desire to add, since I have cited the opinion of Lord St Leonards, that I do not think the authority of his Lordship's exposition of the general rule of construction in such cases is in any way impaired by reason of his dissent from the judgment of the House of Lords, inasmuch as there is nothing that is not consistent with it in the opinions of the Lords in the majority. I see no reason to doubt that if the will had directed nothing more than that the deed to be framed by the trustees should be in the

same terms as the deed of 1726, all the law Lords would have agreed that the manner of executing the trust being thus defined by the testator, the trustees would have no other duty than that of carrying his direction into effect. Indeed, the Lord Chancellor says expressly that, if the direction had stopped after the reference to the deed of 1726, and had not contained the superadded words on which his judgment is founded, there could be "no doubt that, inasmuch as that former deed of entail had the omission of an irritant clause, whereas it was necessary that there should be an irritant clause in order to make the deed valid, the contention of the pursuer would have been right and he would have been entitled to the fee-simple." *Moubray's Trustees* v. *Moubray*, 22 R. 301, which is the last of the cases cited by the Lord Ordinary was also one of some difficulty, but it seems to me to have no bearing upon any question we are required to consider. The only question was whether a destination directed by the truster was coincident with the legal order of succession, or whether it effected such a change in the legal order that it might be made the subject of a valid entail.

After considering all these cases to the best of my ability, I have come to be of opinion that they establish nothing more than that where trustees are directed to make an entail, it is their duty to make a valid and effectual entail. If there are any more specific rules to be deduced from the decisions they seem to be these—First, that in construing testamentary directions for making an entail the Court is not tied down to the strict or malignant rules of construction by which we are fettered in interpreting deeds of entail which have been actually executed; and secondly, that an express trust to make a valid entail will not be impaired by a specific direction to insert clauses, which, taken alone, would be inadequate for that purpose. But I can find no authority in any of the cases for holding that where the testator has defined the manner in which his intention is to be carried into effect, and has given no discretion to his trustees, his explicit directions may be disregarded, and a different way of executing his intention adopted in preference to his own way, because his trustees for sufficient reasons consider it more effectual. On the other hand, it is established by a series of decisions that where no power to make an entail is conferred upon trustees, and they are directed to carry out the intention of the truster by a definite method, they must conform their action exactly to the directions so given, even although it may be apparent that the testator had some object in view which cannot be effectually attained by the methods prescribed. Without examining these cases in detail, I may refer to *Cuming* v. *Cuming*, 10 S. 804; *Duthie* v. *Duthie*, 3 D. 616; *Cameron's Trustees* v. *Cameron*, 23 D. 167; *Leny* v. *Leny*, 22 D. 1272; and *M'Gregor* v. *Gordon*, 3 Macph. 148. Of course, I do not cite these as precedents for the construction of the deed now in question, which must be interpreted according to its own language. But I refer to them as illustrations of what I conceive to be the sound rule for the execution of testamentary trusts. I may observe, however, with reference to *Cuming* v. *Cuming*, since the Lord Ordinary thinks that case unfavourable to the pursuer, that in Lord Cuninghame's opinion in *Stirling* v. *Stirling's Trustees* (*supra*), the case of *Cuming* is distinguished on the precise ground which appears to me to distinguish the class of cases in which trustees have the discretion implied in an executry trust properly so called, from those in which they have no discretion, but must follow the instructions which have been given to them.

The first question, therefore, in considering the trust-deed before us seems to be whether the trustees have been directed to make an entail, or whether a discretion as to the method of carrying out the testator's intention has been conferred upon them, and I am of opinion that they have no discretion whatever, and no authority to make an entail. To construe the deed correctly for the purpose of answering this question, it is necessary to keep in view certain facts with reference to the position of the testator and his family, which are very clearly stated in the opinion of the Lord Ordinary. Serjeant Bain had two daughters, Charlotte, now Mrs Geddes, a defender, and Frances Anne, who married Captain Sandys and predeceased her father. Frances Anne left one daughter, Frances Catherine, and three sons, William, the eldest, who is one of the defenders, Henry, the second, who is the pursuer, and Edwin who is a defender. Serjeant Bain died in 1874. His granddaughter Frances Catherine died in 1878 unmarried, and without having attained the age of twenty-five. The pursuer attained twenty-five in March 1896, and it is common ground that he then became entitled to a disposition of the lands in question either in fee-simple or under the fetters of an entail. The clause of the will which is applicable to the event which has happened is the 11th, and it is necessary to examine its provisions in detail. The trustees are directed, in the first place, under burden of certain liferents, to hold the estates of Easter Livelands and others, together with all pictures painted in oil which may be in the mansion-house at the death of the testator, in trust for behoof of his granddaughter Frances Catherine and the heirs of her body "aye and until the said Frances shall have attained the age of twenty-five years complete," at which period the trustees are directed to convey and make over the said estates and paintings in oil to the said Frances Catherine and her foresaids, "but expressly under burden of the foresaid liferent rights and annuities." If Frances had attained twenty-five, therefore, the conveyance must have been to her and the heirs of her body. The clause goes on to provide for the case of her death before attaining twenty-five leaving issue, and in that event the trustees are directed

to convey the estates "to and in favour of the nearest heir of the body of the said Frances Catherine, who shall attain the age of twenty-five, and the heirs of his or her body, whom failing to the other heirs of the body of the said Frances Catherine." If this event had happened, therefore, there would have been a conveyance to the nearest heir of the body of Frances, with a destination in favour of the heirs of his or her body, and failing them in favour of the other heirs of the body of the said Francis Catherine.

Both of those destinations have failed by the death of Frances Catherine Sandys without issue; but it is useful to read the earlier part of the clause for the aid which it may afford in construing the latter part. It goes on to provide for the event which has happened of Frances Catherine dying before attaining the age of twenty-five without leaving issue, and in that case it provides that—"The trustees shall hold in like manner and under burden of said liferent rights my said estates of Easter Livelands, &c., as also my said paintings in oil, in trust as aforesaid for behoof of the younger sons procreated of the marriage betwixt my daughter and the said Edwin William Sandys, respectively and successively in the order of seniority, and the heirs of their bodies respectively, and shall dispone, convey, and make over" the said estates and paintings "to the person who in the event foresaid may succeed thereto, and who shall attain the age of twenty-five years, on him or her attaining said age." These last words contain the executory trust, if there be any executory trust, for they contain the only direction for the conveyance, and in these words there is no direction either for any entail, or even for a destination which could be made the subject of an entail. The direction is to convey to a specified person, without any attempt to prescribe any order of succession to him.

It is not disputed that the pursuer is the person who answers the description of the disponee to whom the lands are to be conveyed, and the meaning and effect of the direction is exactly the same as if the trustees had been told to dispone and convey to the pursuer Henry Sandys by name, without any mention of the heirs who were to take in succession to him. It is true that during the interval, until the arrival of the event on which the pursuer becomes entitled, the trustees are to hold, not for him alone, but for him and the other younger sons of Mr and Mrs Sandys in order of seniority, and the heirs of their bodies. But, according to the literal construction of the words, that is nothing more than a conditional institution of all the younger sons and their heirs in their order, which is sopited by the arrival of the event which ultimately fixes the right in the person of the pursuer.

I do not think it doubtful that when a testator directs his trustees to hold for behoof of a series of persons until the arrival of a certain event, and upon that event to convey to that one of the series who shall satisfy a certain condition, the vesting of the right in one absolutely extinguishes the contingent interest of all the others, and entitles him to a conveyance in favour of himself alone, or what is the same thing, in favour of himself and his heirs whomsoever. This is the ordinary and natural meaning of the clause as it stands, and I think this construction is confirmed by a comparison between the direction for the event which happened, of Frances Catherine dying without issue, and the directions in the earlier part of the clause for the events of her attaining the age of twenty-five years or dying and leaving issue.

In either of these events the trustees are expressly directed to convey to the same series of heirs for whom in the meantime they are directed to hold, and this shows that when the testator intended that the conveyance to be executed by his trustees should be in favour of a series of persons, according to a prescribed order of succession, he knew perfectly well how that intention should be expressed.

If, therefore, this was the only clause to be considered, it would appear that the deed to be executed by the trustees could contain no destination which can be made the subject of an entail. But then the testator goes on to provide for a different event which has not happened, and which is now effectually excluded by the vesting of the right in the pursuer. "And in case none of my younger grandchildren shall attain the age of twenty-five years or leave issue who shall obtain that age, then to my said daughter Charlotte Elizabeth and the heirs of her body, whom all failing, to William Bain Sandys, eldest son of my deceased daughter, on his attaining the age of twenty-five years complete, and the heirs of his body, and whom all failing, to my own heirs whomsoever."

The Lord Ordinary says "That is the clause of destination," and there can be no doubt that it provides a perfectly good destination for the event in which it is to come into force. But I am with great respect altogether unable to agree with his Lordship that it is a destination applicable to the conveyance in favour of the pursuer. The whole clause is governed by the introductory words "and in case none of my grandchildren shall attain twenty-five," and so on, "then to my daughter Charlotte Elizabeth and the heirs of her body, whom all failing"—which means, and failing all the heirs of her body — "to William Sandys and the heirs of his body," and so on. Charlotte Elizabeth, who is the defender Mrs Geddes, is quite clearly a conditional institute, and the condition upon which her right is to arise is the death of all the younger children of Frances Anne before attaining twenty-five. All the heirs following her are substitutes to her, or as in the case of all substitutions, conditionally instituted in her place, and therefore none of them can take either as substitutes or conditional institutes except on the same contingency as brings into force the right of the first

institute of the series. Their interests are merely contingent, and as the contingency has happened adversely to their claim, they can never take the estate, or have any right to have their names included in the conveyance. The Lord Ordinary appears to have felt this difficulty, because he says that Mrs Geddes is called as a conditional institute and not as a substitute, but then his Lordship says that "there is nothing in the words of the clause which makes it necessary to hold that the eldest son, that is William, and the heirs of his body are called as conditional institutes; they are called in the ordinary way in which heirs-substitute are called." No doubt they are called as heirs-substitute, but then they are heirs substituted to Mrs Geddes, and not to the pursuer, and the right of the whole series of heirs among whom they are included is made to depend on the same event as the right of Mrs Geddes, who stands towards them in the position of the institute to whom they are substituted. I am quite unable therefore to see how they can be brought in as heirs substitute to the pursuer, so as to make a tailzied destination, if the plain words of the trust-deed are to receive effect.

But then it is said that a destination ought to be framed by reading into the direction to convey to the pursuer, a direction to include in the conveyance the same series of heirs, that is, the younger children of Frances Anne, and the heirs of their bodies, for whom the trustees are to hold until the conveyance comes to be made, and I think there might be great force in this view were it not for the contrast between the various branches of the eleventh clause, which shows that when the testator meant a conveyance of this kind to be made he expressed his meaning in plain words. It is argued, however, that such a direction is necessarily implied in the terms of a declaration which follows all the clauses for the disposal of the estate, by which the testator provides and declares "that it shall not be in the power of the said Frances Catherine Sandys or her foresaids, or any of the other children of my said daughter or their issue, who may succeed under these presents to my said estates, to sell or dispose of the same, or of my said paintings in oil, or to contract debts whereby the same may be affected, or to alter the order of succession herein prescribed." It is said that this shows that the testator had intended to prescribe an order of succession, and then to protect it by the prohibitions in question, and therefore that his direction to convey "to the person who in the events foresaid may succeed, and who shall attain the age of 25 years," is merely a shorthand method of directing a conveyance to such person and the heirs of his body, whom failing to the other younger sons of his daughter and Edwin William Sandys, respectively and successively in the order of seniority, and to the heirs of their bodies respectively. But if the words of the executory clause are not ambiguous, I should not think it a legitimate construction to read into a clause prescribing a conveyance a destination which is not expressed, because of any implication to be derived from a different part of the deed. The argument really comes to this, that in the clause directing a conveyance there is no destination capable of supporting the fetters of an entail, but in another part of the deed there are provisions which must be ineffectual unless there is a destination which is susceptible of fetters, and therefore we must insert a destination which the deed does not express, so as to prevent the failure of the prohibitions. This is not construction, but making a new will for the testator. I have the more difficulty in importing into the clause directing a conveyance any provision borrowed from the declarations in the latter part of the will, because it does not appear to me that these declarations are intended as instructions to the trustees. The scheme of the will seems to be this; it sets out with a series of instructions to the trustees as to the persons for whom they are to hold, and to whom they are to convey the lands in certain events. And then the testator, having concluded his directions to his trustees, proceeds to make certain declarations which he assumes will be effectual by force of his own deed, for he goes on—"and for the purpose of rendering these prohibitions effectual I direct my trustees to cause these presents to be registered in the Register of Tailzies." It is no part of his intention therefore that the prohibitions shall be made effectual by being inserted in a conveyance to be executed by the trustees. All that is to be done for that purpose is to record his own deed, and therefore it seems to me difficult to hold that the declarations in question are directed to the trustees at all. I do not, however, desire to say more on this point than that I think there are serious difficulties in the way of the construction proposed. On the other hand, there are considerations of some weight in its favour. I do not think it necessary to decide the question, because even if it should be held, when the will is construed as a whole, that the trustees are to limit the conveyance to the pursuer in terms of the destination which has been suggested, and also to insert the prohibitions against selling, contracting debt, and altering the order of succession, a deed in these terms would not be an effectual deed of entail, and therefore the pursuer would still be entitled to a conveyance in fee-simple. It is settled law that a disponee is not bound to accept a disposition with a destination or burdened with conditions which he may defeat at pleasure, because it is futile to impose conditions in form which are not binding in law. It is equally clear that a conveyance containing prohibitions is of no force as an entail unless the prohibitions are fenced with irritant and resolutive clauses. Now, no authority is given to the trustees to insert such fettering clauses in their conveyance, and since they are not entrusted with the duty of making an entail, they have no

authority to depart from the express directions of the testator. I think the rule by which they must be governed is expressed by Lord Cuninghame in *Duthie* v. *Duthie* (*supra*), where his Lordship says that "It would be contrary to the ordinary rules of law to impose the severe restraints of an entail by implication." And after pointing out that in the trust-deed, then under consideration, the truster had expressly prohibited the borrowing of money on the security of the property, his Lordship goes on—"but as the truster did not add that these provisions were to be enforced by such severe penal conditions as are constituted by irritant and resolutive clauses," it must be held that "such conditions were not truly contemplated by the truster." The Lord Ordinary thinks that the case of *Cuming* v. *Cuming*, July 10, 1832, 10 S. 804, established a doctrine contrary to this, because in that case prohibitions "against alienation and alteration of the order of succession were directed, but not a clause prohibiting contraction of debt, and the Court refused to authorise the addition of a prohibitory clause to that effect. But it is to be observed that they authorised irritant and resolutive clauses applicable to the prohibitory clause directed." And accordingly his Lordship takes the case as an authority for holding that wherever a prohibitory clause is directed, the appropriate irritant and resolutive clauses are implied; and therefore that since the three cardinal prohibitions are directed in the present case, the trustees may make a good deed of entail, because on the authority of *Cuming* v. *Cuming* they may fence each of the prohibitions with irritant and resolutive clauses. But then his Lordship has failed to observe that the direction in *Cuming* v. *Cuming* was not to insert certain prohibitions in specific terms, but to denude "with such conditions that the heirs shall not dispose of the same, nor alter the succession thereof, gratuitously or onerously." There was therefore a proper executory trust to make a deed which would be effectual to prevent the heirs disposing of the estate or altering the succession, and the legal form in which this should be done was a question for the trustees. Lord Cuninghame points out this distinction in *Duthie* v. *Duthie*, and observes that the trustees in the case of *Cuming* had selected a form of deed which was within their power; and then his Lordship distinguishes the case of *Duthie* upon this ground—"But here the truster made his own condition in simple terms, and left nothing to the discretion of the trustees. The deed contained no authority for the addition or insertion of any irritant or resolutive clauses in the conveyance, and therefore the rights which the institutes were to take were dispositions with a destination only in favour of the postponed substitutes, unfenced." For the same reason I am of opinion that if the deed now in question must be considered as directing a disposition with a destination, and with the three cardinal prohibitions, there is no authority to protect the succession or to fence the prohibitions with the clauses necessary to make a complete tailzie. Nor is there any authority to the trustees to attain this result by the method allowed by more recent statutes, and to insert a clause of registration in the conveyance as an equivalent for the expression of the conditions and irritancies of an entail.

The truster goes on to direct that his trust-deed shall be registered in the Register of Tailzies—"it being my express desire that Easter Livelands, &c., and said paintings in oil, shall remain in perpetuity in the family of my said deceased daughter, in terms of the foregoing destination, and failing all such children, that it shall revert to and become the property of my own heirs whomsoever." Now, this makes it clear enough that he desired that his estate should be put *extra commercium* for the benefit of his own family, but it does not follow that he intended this to be done by the execution of a deed of strict entail, and the plain words of his will show that he did not so intend. What he has directed to be done for that purpose is simply to record his own trust-deed in the Register of Tailzies. All the parties are agreed that this would be quite ineffectual, even assuming that it would be competent to record such an instrument in that register.

The argument then comes back to the true question which I think we have to determine. Have the trustees or have the Court power to depart from the method prescribed in clear terms by the testator for carrying out his intentions, and to follow an entirely different method of their own invention? I am of opinion that neither we nor the trustees have any such power. We cannot make a new will for the testator, but must execute the will he has made. The Lord Ordinary seems to hold it clear that Serjeant Bain "desired an entail," and therefore that there is an implied authority to the trustees to make an entail. Even on his Lordship's assumption as to the desire, I think, for reasons I have given, that to hold such authority to be implied would be inconsistent with sound rules for the construction of wills. But it appears to me with great respect that to say that the testator desired an entail is a manifest fallacy. That he desired that his grandchildren should be prohibited from alienating the lands, from contracting debt, and from altering the law of succession, may be probable enough. But these prohibitions will not make an entail. They must further be enforced by severe penal conditions; and there is no indication in the trust-deed that the testator intended these conditions to be imposed upon his grandchildren. It is conceded that his own method of enforcing his prohibitions will not operate so as to subject his heirs to the irritancies of an entail; and it seems to me to be false reasoning to say that because he has directed something to be done which will not make an effectual entail, therefore he must have intended an effectual entail to be made. I do not think it is for us to speculate as to his reason for

directing the registration of his own deed and not of the deed to be executed by the trustees, or as to the precise nature of his mistake, if mistake there were, in reading the entail statutes. It may very well be that he did not know that in order to make a good entail the restrictions and irritancies must enter the infeftment, and that the deed creating the investiture must be recorded in the Register of Tailzies. But all we know is that he has not directed these things or anything equivalent to them to be done, but has on the contrary directed something which is inconsistent with their being done. It seems to me of no consequence whether this was because he did not understand the Scots law of entail, or because he did understand it and did not intend to follow it. In either case, he cannot have formed the intention of imposing the fetters of a strict entail on his grandchildren, and our duty is to suppress our own speculations and give effect to his expressed intention according to the plain meaning of his language.

The precise terms of the conveyance to be executed will remain for adjustment, and some questions, and one no doubt of difficulty, will arise on the adjustment of the terms. The question whether a clause of devolution should be inserted is one which, it appears, may be raised. I do not think that we are in a position to decide that question at present, both because the Lord Ordinary, although he has indicated an opinion, has not given any very decisive judgment upon it, and indeed could not do so, for in the view which he took of the case the question did not arise, and also and still more so because counsel were not in a position to argue the question satisfactorily as long as it was not decided whether or not an entail should be executed. I think the hypothetical argument on the question of devolution was extremely embarrassing to counsel, especially to counsel for the defenders, and therefore that it is proper to let that as well as other questions be determined in the course of future proceedings.

With reference to the subordinate question of the pursuer's right to the oil paintings, I think that the terms of the conveyance with reference to the paintings should also be considered when the terms of the conveyance to the pursuer are being adjusted in other respects, but I am very clearly of opinion with the Lord Ordinary that an entail of the oil paintings would be ineffectual, and therefore that so far as they are concerned the pursuer is not bound to submit to the fettering clauses of an entail. I think the case of *Kinnear* v. *Kinnear*, 4 R. 705, would be decisive on the point if it were binding on us, but as that was a judgment in the Outer House it is not technically binding. But I am of opinion that it was rightly decided, and I concur in the grounds of Lord Shand's judgment.

I propose, therefore, that your Lordships should recal the interlocutor of the Lord Ordinary, find that the pursuer is entitled to a conveyance in fee-simple of the lands mentioned in the summons, subject, of course, to the liferents and annuities provided in the trust-disposition and settlement, and remit to the Lord Ordinary to proceed.

LORD ADAM—I concur fully in the opinion of Lord Kinnear, which I have had an opportunity of reading.

The LORD PRESIDENT concurred.

LORD M'LAREN was absent.

The Court pronounced the following interlocutor:—

"The Lords having considered the reclaiming-note for the pursuer against the interlocutor of Lord Kincairney, Recal the said interlocutor: Find that, in terms of the trust-disposition and settlement of the deceased Edwin Sandys Bain, of Easter Livelands, the trustees are bound to convey the lands therein mentioned to the pursuer alone, under the burden of the liferent conferred on the truster's daughter Mrs Geddes, and under such other conditions as may be adjusted at the sight of the Court, and decern: Find the said trustees compearing defenders liable to the pursuer in expenses out of the residue of the trust-estate, and remit the account thereof to the Auditor to tax and to report to the Lord Ordinary, and remit to his Lordship to proceed, with power to decern for the taxed amount of said expenses."

Counsel for the Pursuer — Balfour, Q.C. — Dundas, Q.C. — Constable. Agents — Dundas & Wilson, C.S.

Counsel for the Defenders—A. Jameson, Q.C — Cook. Agents — Fyfe, Ireland, & Dangerfield, W.S.

Thursday, December 9.

SECOND DIVISION.

[Sheriff of Lanarkshire.

WILSON *v.* LOVE.

Reparation — Negligence — Master and Servant — Defective Scaffolding — Employers Liability Act 1880 (43 *and* 44 *Vict. cap.* 42), *secs.* 1 (1) *and* 2 (1).

A workman was injured by the fall of a scaffold on which he was working. The scaffold had been erected for the purpose of pointing the wall of a building. It rested upon the outer ends of planks which projected from the windows (between one-third and one-fourth of their length being outside the window-sills on which they lay), and consisted of a lower staging of two planks lying upon and at right angles to the projecting planks, and of an upper staging of two planks which were supported at one end by a hewer's bench resting upon the planks of the lower